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I. PRETRIAL ISSUES

DEVELOPMENTS IN FEDERAL SEARCH AND SEIZURE LAW

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The revolution of the Warren Court, especially in the area of search and seizure under the Fourth Amendment, was largely an expansion of federal constitutional rights in the face of state practices that limited the protection of individual rights embodied in the Bill of Rights. The following outline of federal cases construing the protections of the Fourth Amendment reflects a dynamic tension between the need to secure evidence to convict law-breakers and the protection of citizens' reasonable expectations of privacy. The result has been an overall contraction of protection of the right to privacy. From the basic principles and counterpoints, criminal defense lawyers fashion arguments for a more expansive view of the Fourth Amendment's protections.

In federal court, in most cases, federal law provides the relevant authority in assessing the legality of the search. In federal prosecutions, even searches solely by state officers are judged only against federal standards. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1372-74 (9th Cir. 1987). There are exceptions regarding the standard for arrest and detention where, in the absence of an applicable federal statute, the law of the state where the warrantless arrest takes place determines its validity. *United States v. Shephard*, 21 F.3d 933, 936 (9th Cir. 1994); *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993). Favorable state court precedents construing the Fourth Amendment provide persuasive authority equal to federal interpretations. See *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

In order to most effectively serve clients, recent developments in Supreme Court construction of the Fourth Amendment must be followed. Rather than dwelling on the negative aspects of the recent trends, the purpose of this article is to trace recent developments in selected areas and juxtapose the lead cases with lower federal court cases in which the defendant prevailed. The counterpoints are not intended to be exhaustive, but are provided to encourage creative use of the available precedents that may make a decisive difference for clients in state or federal court.

I. WHAT CONSTITUTES A SEARCH?

The definition of a search has, with one major exception, been contracted by an increasingly narrow view of expectations of privacy that will be deemed reasonable. The first requirement for a search is government action, because private intrusions, no matter how invasive, do not implicate the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The products of private searches are not covered by the exclusionary rule. *Walter v. United States*, 447 U.S. 649 (1980).

COUNTERPOINT -- In determining whether the actions of a private person working with the police are attributable to the government, the Ninth Circuit set out a two-part test in holding that an airport employee's examination of luggage constituted a Fourth Amendment search: 1) whether the government knew of and acquiesced in the conduct; and 2) whether the party performing the search intended to assist law enforcement or to further his or her own ends. *United States v. Walther*, 652 F.2d 788, 791-92 (9th Cir. 1981). This test was applied to invalidate a warrantless search of a hotel guest's room conducted by the hotel manager in the presence of police officers. *United States v. Reed*, 15 F.3d 928, 130-33 (9th Cir. 1994).

The Warren Court freed the scope of the Fourth Amendment from the constraints of property rights by focusing on whether government action infringed upon a reasonable expectation of privacy in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The Court in recent years has imposed a restrictive reading of what expectations of privacy are reasonable. For example, in *California v. Greenwood*, 486 U.S. 35 (1988), the Court approved warrantless police searches of trash left in garbage bags at the curb in front of the defendant's house. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court found unreasonable the defendant's expectation of privacy from surveillance by airplane 1,000 feet over his fenced backyard. See also *Florida v. Riley*, 488 U.S. 445 (1989) (surveillance of backyard by helicopter hovering at 400 feet not a search).

This restrictive view of privacy rights is also reflected in the Court's limitation of Fourth Amendment protections to the curtilage of the dwelling, not the open fields surrounding it. *Oliver v. United States*, 466 U.S. 170 (1984) (officers not limited by Fourth Amendment from invading open fields surrounding dwelling despite fences and no trespassing signs). Further, the Court found in *United States v. Dunn*, 480 U.S. 294 (1987), that a barn was not within the curtilage because, in that case, the defendant had not manifested an expectation of privacy in the interior of the barn, even presuming society was prepared to accept such an expectation as legitimate.

COUNTERPOINT -- In *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968), the Court found that a woodpile 20-35 feet from the house was within the curtilage. Similarly, in *United States v. Depew*, 8 F.3d 1424, 1426-28 (9th Cir. 1993), the curtilage included a driveway area 50-60 feet from the house because of the defendant's efforts to maintain privacy. A person has a reasonable expectation of privacy in a tent, whether in a public campground, *United States v. Gooch*, 6 F.3d 673, 676-79 (9th Cir. 1993), or on land where camping is not authorized, *United States v. Sandoval*, 200 F.3d 659, 660-61 (9th Cir. 2000). A homeless person had a reasonable expectation of privacy in a closed container permissively stored in another's garage. *United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998). A government employee can have a reasonable expectation of privacy in an office desk. *United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991); see *Ortega v. O'Connor*, 146 F.3d 1149, 1157-59 (9th Cir. 1998). An attached garage receives the full degree of Fourth Amendment protection afforded to the rest of the home. *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000).

The Court has also narrowly defined "search" in the context of technologically assisted intrusions. The Court approved the installation and subsequent surveillance by electronic beepers as implicating no Fourth Amendment interests, except when used in private residences. *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). In *Ciraolo*, the Court applied a two-part test to determine whether aerial photography constituted a Fourth Amendment search: 1) Has the individual manifested a subjective expectation of privacy in the object of the challenged search? and 2) Is society willing to recognize that expectation as reasonable? 476 U.S. at 211; see also *Smith v. Maryland*, 442 U.S. 735 (1979). In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the

Court approved aerial surveillance of commercial property with cameras that magnified sufficiently to see objects one-half inch in diameter. The Court found the 2,000- acre industrial complex more comparable to an open field than curtilage and, as such, held that "it is open to the view and observation of persons in aircraft lawfully above or sufficiently near the area for the reach of cameras." 476 U.S. at 239. As to the use of an aerial mapping camera, "[t]he mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems." 476 U.S. at 238.

COUNTERPOINT -- The Supreme Court will decide this Term whether the use of infra-red thermal imaging devices on homes to assist in detecting marijuana grow operations constitutes a search. *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), *pet. for cert. granted*, 121 S. Ct. 29 (2000). A flashlight-assisted search in a residence may constitute a search. *LaDuke v. Castillo*, 455 F. Supp. 209, 210 (E.D.Wash. 1978). Where informants rented a hotel room for a drug transaction, video surveillance of the defendants in the room after the informants left violated the Fourth Amendment given that "[h]idden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement." *United States v. Nerber*, 222 F.3d 597, 603-06 (9th Cir. 2000).

Dog sniff presents a sui generis search problem. In *United States v. Place*, 462 U.S. 696, 707 (1983), the Court upheld the use of dogs to sniff luggage to detect narcotics because the intrusion was sufficiently limited that it did not constitute a search within the meaning of the Fourth Amendment.

COUNTERPOINT -- The 90 minute detention of the luggage for the sniff test in *Place* was unreasonable. *Place*, 462 U.S. at 707-10; *see United States v. \$191,910.00*, 16 F.3d 1051, 1058 (9th Cir. 1994). In *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985), the court held that the use of a marijuana-sniffing dog outside an apartment constitutes a search. But in *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993), the Ninth Circuit rejected the *Thomas* position, permitting a dog sniff of contraband in package located in a sealed commercial warehouse because there could be no legitimate expectation of privacy in contraband. A dog sniff that results in "casting" rather than an "alert" is insufficient to justify a search. *United States v. Rivas*, 157 F.3d 364, 367-68 (5th Cir. 1998).

Relying on *Place*, in *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1984), the Court found that, by field testing white powder obtained from a private Federal Express examination of a package, federal officers did not engage in an additional intrusion sufficient to implicate the Fourth Amendment.

COUNTERPOINT -- In *United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987), the Court held that, despite *Jacobsen*, a Fourth Amendment search occurred where pills seized by a private individual were subjected to government chemical test several days after the pills were seized to reveal the substance's molecular structure and identity. By analogy to closed container cases, courts have recognized a reasonable expectation of privacy in the memory of phone numbers in a defendant's electronic pager. *United States v. Lynch*, 908 F.Supp. 284, 287 (D.V.I. 1995); *United States v. Chan*, 830 F.Supp. 531, 533-35 (N.D. Cal. 1993). The removal of a car cover to reveal the VIN constitutes a search. *United States v. \$277,000.00*, 941 F.2d 898, 902 (9th Cir. 1991).

The Supreme Court delivered a singularly favorable decision on the definition of a search in *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the police were lawfully present in the defendant's apartment and saw electronic equipment that the officer suspected was stolen. The officer moved a turntable to read and record serial numbers that established that the equipment was stolen. Justice Scalia wrote for the majority that even the minimal movement of the equipment constituted a search beyond plain view and, in the absence of probable cause, the evidence must be suppressed. In rejecting the dissent's claim that cursory inspections were generally approved and do not constitute a "search," the majority stated:

Justice Powell's dissent reasonably asks what it is we would have had Officer Nelson do in these circumstances. The answer depends, of course, upon whether he had probable cause to conduct a search, a question that was not preserved in this case. If he had, then he should have done precisely what he did. If not, then he should have followed up his suspicions, if possible, by means other than a search -- just as he would have had to do if, while walking along the street, he had noticed the same suspicious stereo equipment sitting inside a house a few feet away from him, beneath an open window. It may well be that, in such circumstances, no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all. Our disagreement with the dissenters pertains to where the proper balance should be struck; we choose to adhere to the textual and traditional standards of probable cause.

Hicks, 480 U.S. at 329 (citations omitted).

COUNTERPOINT -- The Ninth Circuit relied on *Hicks* in rejecting the government's contention that a limited intrusion at the threshold of a dwelling could be justified by less than probable cause in *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988); see *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997).

Recently, in *Bond v. United States*, 120 S.Ct. 1462 (2000), the Court held that an officer's physical manipulation of the outside of stowed luggage on a bus was a search that violated the Fourth Amendment.

II. WHAT CONSTITUTES A SEIZURE?

An increasingly restrictive definition of what constitutes a seizure has provided law enforcement with an expanded range of intrusions free from Fourth Amendment limitations. A "seizure" of an item occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Karo*, 468 U.S. at 712 (1984) (citing *Jacobsen*, 466 U.S. at 113). A person is seized within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (examination and retention of driver's license and ticket rendered airport request by federal officers to accompany them a seizure); *United States v. Mendenhall*, 446 U.S. 544 (1980) (no seizure in airport of passenger who was approached, questioned and asked for ticket and identification).

COUNTERPOINT -- Fourth Amendment seizures include official action assisting in legal, forceful eviction of mobile home park tenants and their mobile home from the park even though no privacy interests were implicated by the seizure. *Soldal v. Cook County*, 506 U.S. 56 (1992). By blocking the defendant's driveway, the sheriff went beyond a voluntary encounter between officer and citizen -- a seizure occurred. *United States v. Kerr*, 817 F.2d 1384, 1386-87 (9th Cir. 1987). A seizure occurs when, with his hand on his gun, a police officer retains a motorist's license while continuing with other investigation. *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997). In *United States v. Jordan*, 951 F.2d 1278, 1283 (D.C. Cir. 1991), the court indicated that if the district court found, on remand, that the police retained defendant's driver's license during questioning, a seizure occurred.

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court rejected the Florida Supreme Court's finding that the general policy of questioning bus passengers and requesting consents to search violated the Fourth Amendment. The Court noted that each case must be examined on its individual facts to determine whether the degree of intrusion constituted a seizure.

COUNTERPOINT -- In *United States v. Cuevas-Ceja*, 58 F.Supp.3d (D.Or. 1999), the court held that police seized bus passengers when the officers boarded at a scheduled stop and requested consents to search the passengers. Repeated questioning of ex-pro baseball player Joe Morgan, while he was using a public telephone in an airport, was held to be a seizure in *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1993). The focus is on the mental state of the suspect; even if the officer knows the person stopped has a right to walk away, the totality of the circumstances can establish an arrest as a matter of law. *Allen v. City of Portland*, 73 F.3d 232, 235-36 (9th Cir. 1995).

The definition of the seizure of an individual underwent a dramatic restriction in *California v. Hodari D.*, 499 U.S. 621 (1991). Previously, the Court had left open the question of whether a person who flees after an officer communicates that the suspect is not free to leave has a Fourth Amendment interest to assert. *Michigan v. Chesternut*, 486 U.S. 567, 575 n.9 (1988). In *Hodari*, Justice Scalia, referring to common law standards, wrote that no seizure occurred unless the officer physically touched the suspect or the suspect submitted to the show of authority. The effect of flight after initial submission to authority appears to be unresolved.

COUNTERPOINT -- In *United States v. Coggins*, 986 F.2d 651, 653-54 (3d Cir. 1993), a suspect who briefly submitted to an order to stay put, reconsidered almost immediately, and ran off, was held to have been seized under *Hodari*.

The balance between consensual conversations and temporary seizures tilted against the individual in *INS v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, the INS surrounded a factory and began approaching workers at work stations and exits regarding their immigration status. The Court held that, because there was insufficient evidence that workers did not feel free to leave, no seizures occurred. 466 U.S. at 220-21.

COUNTERPOINT -- In *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986), the Court distinguished *Delgado* in holding that INS officers seized residents of labor camps when they "cordoned off migrant housing during early morning or late evening hours, surrounded the residences in emergency vehicles with flashing lights, approached the homes with flashlights, and stationed officers at all doors and windows." In *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987), the Court held that temporary detentions of an employee by INS agents during a factory sweep "exceeded any detention approved in *Delgado*." A home visit by INS officers was a seizure without a sufficient articulable basis in *Orhorhaghe v. INS*, 38 F.3d 488, 494-99 (9th Cir. 1994). A late-night knock and talk at a motel room was deemed to be a seizure in *United States v. Jerez*, 108 F.3d 684, 689-93 (7th Cir. 1997). See also *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999) (detention during "knock and talk" violated Fourth Amendment).

III. STANDING

Proof that a defendant had "standing" was once a cornerstone of any Fourth Amendment challenge. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (under totality of circumstances, petitioner lacked standing to challenge search of friend's purse in which he placed drugs he claimed); *United States v. Salvucci*, 448 U.S. 83 (1980) (individuals charged with possession of stolen mail did not have standing to challenge search of mother's apartment where incriminating checks were found); *Rakas v. Illinois*, 439 U.S. 128 (1978) (passenger who failed to claim interest in weaponry seized from car lacked standing); *Jones v. United States*, 362 U.S. 257 (1960); see also *United States v. Padilla*, 508 U.S. 77 (1993) (participation in a conspiracy gave co-conspirators no special standing to challenge

a search of their co-conspirator's car unless they demonstrate a reasonable expectation of privacy under the usual standing rules); *Simmons v. United States*, 390 U.S. 377 (1968) (defendant has a limited immunity to claim standing for the purposes of the motion to suppress; incriminating statements may not be used against the defendant at trial on the issue of guilt unless no objection is made). Recently, however, the Court emphasized that it has rejected the standing doctrine as a method of analyzing Fourth Amendment violations. *Minnesota v. Carter*, 525 U.S. 83 (1998). Instead, the relevant question is simply whether the defendant personally has an expectation of privacy in the place searched, and whether that expectation is reasonable based on concepts of real or personal property or on "understandings that are recognized and permitted by society." In *Carter*, the defendants, who were in another person's apartment for a short time to package cocaine, had no legitimate expectation of privacy.

COUNTERPOINT -- Overnight visitors have a reasonable expectation of privacy in their temporary shelter because "staying overnight in another's house is a long-standing social custom that serves functions recognized as valuable by society. . . . We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990). The *Olson* phrasing may provide expanded protection for some defendants. *See, e.g., United States v. Gamez-Orduno*, 235 F.3d 453, 458-61 (9th Cir. 2000) (marijuana smugglers who stayed overnight in trailer had expectation of privacy); *United States v. Fultz*, 146 F.3d 1102 (9th Cir. 1998) (homeless person had reasonable expectation of privacy in the contents of cardboard boxes stored in acquaintance's garage). The judiciary has been somewhat hostile to the government's adoption of inconsistent positions by challenging standing at the same time as claiming at trial that items belong to the defendant. *United States v. Bagley*, 772 F.2d 482, 489 (9th Cir. 1985); *United States v. Issacs*, 708 F.2d 1365, 1367-68 (9th Cir. 1983); *but see United States v. Singleton*, 987 F.2d 1444, 1447-50 (9th Cir. 1993). The necessary interest may be established by the joint interest with a co-defendant or a coconspirator. *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982); *United States v. Broadhurst*, 805 F.2d 849, 852 (9th Cir. 1986); *see also United States v. Taketa*, 923 F.2d 665, 671-72 (9th Cir. 1991); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984). An uncontroverted affidavit claiming residence establishes the requisite expectation of privacy. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987). Although a defendant has no expectation of privacy in abandoned property, the government bears the burden of proving abandonment. *United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000) (outlining forms of abandonment).

IV. PROBABLE CAUSE

The major change in the area of probable cause to issue a search warrant has come through the abandonment of the *Aguilar-Spinelli* requirement (*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964)) that probable cause from an informant must include the basis for the informant's knowledge and a basis for finding the informant to be reliable. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court rejected reliance on the "two-pronged test" and adopted the flexible standard of whether, given the totality of the circumstances, there is a fair probability that contraband, evidence, or an individual will be found in a particular place. The Court reiterated the "totality of the circumstances" test in *Massachusetts v. Upton*, 466 U.S. 727 (1984). In *Upton*, the Court emphasized deference for the magistrate's determination of probable cause, the availability of corroboration by innocent facts to save an otherwise invalid warrant, the preference accorded to warrants, and the need for common-sense review of warrant affidavits.

COUNTERPOINT -- Even under the looser *Gates* standard, the government has fallen short of probable cause. See, e.g., *United States v. Huguez-Ibarra*, 954 F.2d 546, 551-52 (9th Cir. 1992) (association with persons involved with drugs and unusual vehicle traffic insufficient); *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991) (allegation of corruption and large amounts of money insufficient); *United States v. Ramos*, 923 F.2d 1346, 1352-53 (9th Cir. 1991) (no nexus between place to be searched and criminal activity); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988) (missing page of affidavit eliminated nexus to location); *United States v. Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990) (youth crouching behind tree did not amount to probable cause). The Ninth Circuit has held that a dog sniff of supposed drug money was insufficient to establish probable cause based on expert evidence that 75% of money in circulation in the area was tainted. *United States v. \$30,060.00*, 39 F.3d 1039, 1041-44 (9th Cir. 1994). Mere presence in a car in which the driver possessed marijuana and reeked of chemicals did not establish probable cause to search the passenger. *United States v. Soyland*, 3 F.3d 1312, 1313 (9th Cir. 1993). Corroboration of an anonymous tip by static, innocent details is insufficient to establish probable cause. *United States v. Mendonsa*, 989 F.2d 366, 368-69 (9th Cir. 1993). A civil contract dispute does not give rise to probable cause. *Allen v. City of Portland*, 73 F.3d 232, 236-38 (9th Cir. 1995).

V. SEARCHES PURSUANT TO A WARRANT

An important limitation on the scope of the exclusionary rule is the good faith exception carved out in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In *Leon* and *Sheppard*, the Court held that evidence derived from the execution of an invalid search warrant was admissible as long as the officers were acting in good faith. The good faith exception to the exclusionary rule has also been applied indirectly to reasonable errors in the description of the place

searched (*Maryland v. Garrison*, 480 U.S. 79 (1987)) and directly to warrantless searches based on a statute subsequently held to be unconstitutional (*Illinois v. Krull*, 480 U.S. 340 (1987)). The court has also found the arrest of a suspect based on a quashed warrant that remained outstanding due to a clerical error to be within the good faith exception to the exclusionary rule. *Arizona v. Evans*, 514 U.S. 1 (1995).

COUNTERPOINT -- The officer's use of a search warrant does not mean suppression is unavailable. There are at least six areas that can develop a basis for suppression, notwithstanding *Leon*.

1. Controverted warrant affidavit -- *Leon* expressly excepts from the scope of its holding warrants that are challenged under *Franks v. Delaware*, 438 U.S. 154 (1978). 468 U.S. at 923. In *Franks*, the Court held that warrant affidavits containing reckless or intentional false statements by the affiant are subject to challenge by a motion to controvert. If the affidavit, cleansed of the challenged statements, does not establish probable cause, the defendant is entitled to suppression of the derivative evidence. *Franks*, 438 U.S. at 171-72. Material omissions as well as false statements are subject to challenge. *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993); *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *amended*, 769 F.2d 1410 (9th Cir. 1985). Misstatements or omissions of government officials in an affidavit for a search warrant are grounds for a *Franks* hearing even if the official at fault is not the affiant. *United States v. DeLeon*, 979 F.2d 761, 763-64 (9th Cir. 1992). The deliberately false or reckless inclusion of perceptions of sight, smell, and sound -- given the court's reliance on officers' experience -- is "unforgiveable." *Hervey v. Esho*, 65 F.3d 784, 789-91 (9th Cir. 1995) (applying *Franks* to false statements regarding officers' experience and the smell of a meth lab). The due process principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny concerning the destruction of exculpatory or potentially exculpatory evidence is applicable to suppression hearings involving a challenge to the truthfulness of allegations in the affidavit for a search warrant. *United States v. Barton*, 995 F.2d 931, 934-36 (9th Cir. 1992).

2. Overbreadth and particularity -- Where the warrant is facially overbroad, the officer cannot reasonably rely on its validity. *United States v. Kow*, 58 F.3d 423, 426-30 (9th Cir. 1995); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 751-54 (9th Cir. 1989); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *United States v. Dozier*, 844 F.2d 701, 707-08 (9th Cir. 1988), *cert. denied*, 488 U.S. 927 (1988); *United States v. Spilotro*, 800 F.2d 959, 964, 968 (9th Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1463 (9th Cir. 1986); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982). The warrant may also be seen to lack particularity. *Leon*, 468 U.S. at 923; *United States v. Collins*, 830 F.2d 145, 146 (9th Cir. 1987). The Tenth Circuit approves blanket suppression where the search had an improper ulterior motive. *United States v. Foster*, 100 F.3d 846, 849-53 (10th

Cir. 1996). Warrants to search individuals present at the place to be searched must be particularized and supported by probable cause. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Marks v. Clarke*, 102 F.3d 1012, 1027-29 (9th Cir. 1996). An anticipatory warrant must identify the triggering event on which the warrant was conditioned within the warrant itself. *United States v. Hotal*, 143 F.3d 1223, 1226-28 (9th Cir. 1998).

3. Obvious lack of probable cause -- The level of probable cause may be insufficient for a reasonable officer to rely on the warrant affidavit. *Leon*, 468 U.S. at 923; *United States v. Weaver*, 99 F.3d 1372, 1377-81 (6th Cir. 1996); *Greenstreet v. County of San Bernadino*, 41 F.3d 1306, 1309-10 (9th Cir. 1994); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988). "[A] warrant cannot be based on the claim of an untrained or inexperienced person to have smelled growing plants which have no commonly recognized odor." *United States v. DeLeon*, 979 F.2d 761, 765 (9th Cir. 1992).

4. Product of prior illegality -- The government cannot insulate an illegal warrantless search by including the product of that search in a warrant affidavit. *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987); *United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989); *United States v. Vasey*, 834 F.2d 782, 789-90 (9th Cir. 1987).

5. Manner of execution -- The manner in which the warrant is executed may render the search unreasonable. *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (*en banc*); *United States v. Warner*, 843 F.2d 401, 405 (9th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271, 1279 n.4 (9th Cir. 1986). Violation of the knock-and-announce requirements of 18 U.S.C. 3109 require suppression. *United States v. Zermeno*, 66 F.3d 1058, 1062-63 (9th Cir. 1995). The Supreme Court has recognized knock and announce as a component of the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927 (1995); see *Richards v. Wisconsin*, 520 U.S. 385 (1997). The Supreme Court recently rejected the Ninth Circuit's knock-and-announce test, allowing no-knock entry upon "reasonable suspicion" of officer danger, with some unspecified level of balancing for unnecessary destruction of property in making the entry. *United States v. Ramirez*, 523 U.S. 65 (1998). Suppression may be required when the police fail to provide a complete copy of the warrant before beginning a search to a person on the premises who requests a copy. *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999).

6. Role of Magistrate -- The good faith exception does not apply where the issuing judge was not operating as a neutral magistrate. *Leon*, 468 U.S. at 923; *United States v. Decker*, 956 F.2d 773, 778 (8th Cir. 1992); see also *Connally v. Georgia*, 429 U.S. 245 (1977).

VI. WARRANTLESS SEARCHES AND SEIZURES

The traditional rule is that warrantless searches are per se unreasonable and that the burden is on the government to establish that a search or seizure falls within a well-established exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Stoner v. California*, 376 U.S. 483, 486 (1964). However, the government argument that the warrant requirement only applies to dwellings -- unanimously rejected by the Burger Court in *United States v. Chadwick*, 433 U.S. 1, 7 (1977) -- has been well received by Justices Scalia and Thomas. See *California v. Acevedo*, 500 U.S. 565 (1991) (Scalia, J., concurring). The exceptions to the warrant requirement have generally been given increasingly broad readings. Determinations of probable cause and reasonable suspicion are given *de novo* review by the appellate courts. *Ornelas v. United States*, 517 U.S. 690 (1996).

A. Consent -- A search without a warrant or any level of suspicion can be conducted if, under the totality of the circumstances, the officers have obtained a voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The government bears the burden of establishing a voluntary consent, and this "burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

COUNTERPOINT -- The absence of clear words of consent undercuts a government claim of permissive entry. *United States v. Shaibu*, 920 F.2d 1423, 1426-28 (9th Cir. 1990)("[W]e interpret failure to object to the police officer's thrusting himself into Shaibu's apartment as more likely suggesting submission to authority than implied or voluntary consent"). Where INS agents made misleading statements implying they did not need a warrant to enter an apartment and talk, the court found no voluntary consent. *Orhorhaghe v. INS*, 38 F.3d 488, 500-01 (9th Cir. 1994). Expert testimony regarding a defendant's rudimentary grasp of English can establish lack of a voluntary consent. *United States v. Higareda-Santa Cruz*, 826 F.Supp. 355, 359 (D.Or. 1993); see *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998) (invalid *Miranda* waiver). The officer's hand on his gun, on a deserted stretch of highway, with no advice of the right to refuse consent, rendered the purported consent involuntary in *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326-28 (9th Cir. 1997). Police officers' show of authority and failure to inform bus passengers of the right to refuse consent rendered consents involuntary in *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998), and *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). Consent was involuntary after police ordered person against a wall in spread eagle position, frisked him, handcuffed him, and told him he was going to jail. *United States v. Reid*, 226 F.3d 1020, 1026-27 (9th Cir. 2000).

The scope of a consent is generally determined objectively by the expressed object of the search. *Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to search car for narcotics included search of paper bag in car); *United States v. Reeves*, 6 F.3d 660 (9th Cir. 1993) (consent to "complete search" of car

included search of briefcase in trunk of car).

COUNTERPOINT -- Intrusions that exceed the reasonable scope of the consent violate the Fourth Amendment. *United States v. Blake*, 888 F.2d 795 (11th Cir. 1989) (consent to search "person" in airport did not include "frontal touching" of genitals to locate drugs); *United States v. Washington*, 739 F.Supp. 546, 550-51 (D.Or. 1990) (permission to open locked trunk did not include consent to pull seats out of car, without causing damage, to look in trunk).

Consent to search may be given by a third party who has common authority over the place to be searched. *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). Such third parties do not include hotel managers, landlords, and similar non-resident persons with a property interest. *Stoner v. California*, 376 U.S. 483, 488-89 (1964) (hotel clerk); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlord). In a major expansion of the consent exception to the warrant requirement, the apparent authority of a third party consenter is sufficient to make the search lawful as long as the mistake is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (approving search based on woman friend's consent even though, unknown to the police, she had moved out a month before and retained a key without permission).

COUNTERPOINT -- In *United States v. Welch*, 4 F.3d 761, 765 (9th Cir. 1993), *overruled in part on other grounds by United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997), the court held the consent given by the defendant's boyfriend to search the defendant's purse, which was located in a car they had joint control over, was invalid because the information known at the time did not support a reasonable belief in the boyfriend's authority to consent. In *United States v. Dearing*, 9 F.3d 1428, 1430 (9th Cir. 1993), *overruled in part on other grounds by United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997), the court held that an ATF agent's reliance on consent from a caretaker was unreasonable, even though the agent knew that the caretaker had been in the bedroom on prior occasions, because there was nothing to indicate that the prior access was authorized, the bedroom door was closed at the time of the search, and the agent knew that the caretaker's relationship with the homeowner was nearing an end. In *United States v. Salinas-Cano*, 959 F.2d 861, 865 (10th Cir. 1992), the court held the consent given by the defendant's girlfriend to open the defendant's closed suitcase, which was located in the girlfriend's house, was invalid because the information known at the time did not support a reasonable belief in the girlfriend's authority to consent.

The police have a duty of inquiry when relying on a third party's apparent authority. *United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000). Third party consent that stems from prior government illegality is not valid. *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000). In *United States v. Fultz*, 146 F.3d 1102, 1105-06 (9th Cir. 1998), the court held that a homeowner had neither actual nor apparent

authority to consent to the search of cardboard boxes stored in her garage by a homeless person.

B. Plain View-- In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the plurality opinion articulated the plain view doctrine as allowing a warrantless seizure where the officers observe an item inadvertently in a place where they have a right to be, and probable cause to believe the item is subject to seizure is readily apparent. In *Horton v. California*, 496 U.S. 128 (1990), the Court shaved back the test to eliminate the requirement of inadvertence. In *Horton*, the Court approved the seizure of weapons not named in the search warrant for rings that were the proceeds of an armed robbery; the incriminating nature of the guns was readily apparent to the searching officer, and the officer was lawfully present on the premises deliberately to search for evidence.

COUNTERPOINT -- After ATF agents had fully executed their search warrant, the plain view doctrine was no longer applicable because they were no longer lawfully on the premises when they saw the rifle that was seized. *United States v. Limatoc*, 807 F.2d 792, 795 (9th Cir. 1987); *see also Spilotro*, 800 F.2d at 968 (plain view seizure of jewelry during execution of general warrant held invalid); *United States v. Miller*, 769 F.2d 554, 560 (9th Cir. 1985) (after field test of bag's contents revealed innocuous white powder, further probing and puncturing of bag's contents held invalid.) Where the warrant failed to particularly describe the items to be seized, material that is not contraband in plain view is suppressed. *United States v. Van Damme*, 48 F.3d 461, 465-67 (9th Cir. 1995).

C. Investigative Stops Less Intrusive Than Arrest-- In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that a limited stop and frisk of an individual could be conducted without a warrant based on less than probable cause. The stop must be based on a reasonable suspicion based on articulable facts, and the frisk is limited to a patdown for weapons. An anonymous tip that a person is carrying a gun is not, by itself, sufficient to justify a stop and frisk. *Florida v. J.L.*, 529 U.S. 266 (2000). A refusal to cooperate does not furnish the objective justification required for a stop. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). On the other hand, a person's unprovoked flight in a high crime area when an officer approaches provides reasonable suspicion for a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000). The Court has also upheld an airport stop based in part on a drug courier profile. *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989). After a *Terry* stop, the police officers may seize non-threatening contraband detected through the sense of touch during a protective patdown search. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

COUNTERPOINT -- The need to rigorously apply *Terry* to outlaw race-based stops is strongly supported in *Washington v. Lambert*, 98 F.3d 1181, 1185-92 (9th Cir. 1996). The concurrence in *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000), also highlights racial issues in stops. In *United States v. Montero-Camargo*, 208 F.3d 1122, 1134-35 (9th Cir. 2000) (en banc), the court rejected reliance on the racial or ethnic appearance of the driver as the basis for a stop.

The same requirement of founded suspicion for a stop applies to stops of individual vehicles. *United States v. Cortez*, 449 U.S. 411 (1981); *Delaware v. Prouse*, 440 U.S. 648 (1979). The scope of the "frisk" for weapons during a vehicle stop may include areas of the vehicle in which a weapon may be placed or hidden. *Michigan v. Long*, 463 U.S. 1032 (1983). The police may order passengers and the driver out of the vehicle pending completion of the stop. *Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The suspicion to justify a stop may relate to crimes already committed. *United States v. Hensley*, 469 U.S. 221 (1985) (permissible to stop vehicle for further investigation based on "wanted flyer").

Suspicionless stops of all vehicles are permitted at police checkpoints to check for sobriety, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990), citizenship at the border, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and perhaps valid vehicle licensing, *Delaware v. Prouse*, 440 U.S. 648 (1979). When the primary purpose of the checkpoint is to detect evidence of criminal wrongdoing, however, the suspicionless stop violates the Fourth Amendment. *City of Indianapolis v. Edmond*, 121 S. Ct. 447, 453-54 (2000).

COUNTERPOINT -- In the following cases, the Ninth Circuit rejected a claim that founded suspicion justified a stop: *United States v. Salinas*, 940 F.2d 392, 394-95 (9th Cir. 1991); *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418-19 (9th Cir. 1989); *United States v. Robert L.*, 874 F.2d 701, 703-05 (9th Cir. 1989); and *United States v. Thomas*, 863 F.2d 622, 628-29 (9th Cir. 1988). The court assessed the ten factors proffered by the government in *United States v. Arvizu*, 232 F.3d 1241 (9th Cir. 2000), to support the stop of a minivan near the border, including driver's failure to make eye contact, slowing of van when law enforcement seen, reactions of children, and fact that van was not local and was registered to address in high crime area, and found each factor of such low probative value that no officer could reasonably rely on them. In *United States v. Garcia-Camacho*, 53 F.3d 244, 246-49 (9th Cir. 1995), the court noted the problems with profile-based traffic stops and deconstructed the "heads I win, tails you lose" justifications for a stop. The court rejected a car stop in *United States v. Thomas*, 211 F.3d 1186, 1191 (9th Cir. 2000), that was based in part on the purported "distinctive sound" of marijuana bales being loaded into the back of an El Camino.

"[E]ven if police officers have legitimately stopped a vehicle, . . . the officers may search the vehicle only if they have probable cause to do so." *United States v. Parr*, 843 F.2d 1228, 1232 (9th Cir. 1988). The level of intrusion during a stop may also trigger the probable cause requirement. *United States v. Rodriguez*, 869 F.2d 479, 483 (9th Cir. 1989); *United States v. Strickler*, 490 F.2d 378, 380-81 (9th Cir. 1974). Once the reason for the stop dissipates, continued detention becomes unlawful. *United States v.*

Higareda Santa-Cruz, 826 F.Supp. 355, 358-59 (D.Or. 1993). The Tenth Circuit has held that officer's questions concerning drugs and guns exceeded the scope of the traffic stop for failure to wear seat belts. *United States v. Holt*, 229 F.3d 931, 935-36 (10th Cir. 2000). A mistake of law – in this case an erroneous belief that a registration sticker was required – cannot justify a stop, and there is no good faith exception for officers who rely on erroneous training. *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000).

D. Incident To Arrest -- An arrest must be supported by probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). As an incident to a lawful arrest, officers may conduct a detailed search of the person arrested, regardless of whether specific danger to the officer or of destruction of evidence is shown to exist. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). The officers must actually arrest the person -- not simply have the right to arrest -- before a search is justified. *Knowles v. Iowa*, 525 U.S. 113 (1998) (full search of car pursuant to issuance of speeding citation violated the Fourth Amendment even though authorized by state statute).

COUNTERPOINT -- In the absence of a specific justification, body cavity searches as an incident to arrest are unreasonable. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991).

When no vehicle is involved, the area that may be searched pursuant to this exception is limited to the reaching distance, or area in the immediate control, of the suspect. *Chimel v. California*, 395 U.S. 752 (1969). When an officer makes a lawful arrest of the occupants of an automobile in the immediate vicinity of the vehicle, the officers may contemporaneously search the passenger compartment, but not the trunk, for weapons. *New York v. Belton*, 453 U.S. 454, 460-61 (1981).

COUNTERPOINT -- The search must be contemporaneous with the arrest; a search of the defendant's car after he had been arrested, handcuffed, and placed in the rear of a police car could not be justified as incident to the arrest. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1036 (9th Cir. 1997); *United States v. Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987). The defendant must also be under arrest; where a suspect was detained in the back of a patrol car on suspicion of driving with a suspended license, the search incident to arrest exception did not justify the search of the vehicle because he was not under arrest. *United States v. Parr*, 843 F.2d 1228, 1230-31 (9th Cir. 1988).

Incident to a lawful arrest of a person in his or her home, officers may conduct a warrantless sweep of places in the house where a person could hide if they reasonably believe that the area to be swept harbors someone posing a danger to the officer or others. *Maryland v. Buie*, 494 U.S. 325 (1990).

COUNTERPOINT – If the police detain rather than arrest the resident, no protective sweep is allowed. *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000). The purpose of the sweep is to protect officers against surprise attack by unknown co-conspirators and is narrowly confined to a cursory visual inspection of potential hiding places. *United States v. Furrow*, 229 F.3d 805, 811-12 (9th Cir. 2000). Even items in plain view must be suppressed where the evidence was located after the purposes of a protected sweep had been accomplished. *United States v. Noushfar*, 78 F.3d 1442, 1447-48 (9th Cir. 1996).

For vehicle stops and for arrests, a preliminary question has been whether the detention is a pretext. The Supreme Court radically cut back on judicial review of pretext traffic stops in *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, the court largely removed the subjective intent of the officer from the determination of the basis for a stop. The Ninth Circuit, with a dissent from Judge Reinhardt, extended *Whren* to use of pretextual warrant to enter a home. *United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996).

COUNTERPOINT --Little is probably left of the cases on pretext traffic stops, even where an objective test finds a purpose for investigating a crime other than the traffic infraction. See *United States v. Millan*, 36 F.3d 886 (9th Cir. 1994); but see *United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (police use of pretextual DUI roadblock aimed at drug interdiction unconstitutional). Despite *Hudson*, there still should be some room under pretext precedent for challenging the timing of the execution of a warrant in order to search a location otherwise protected by the Fourth Amendment. See *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932); *Williams v. United States*, 418 F.2d 159, 161 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971); *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961). The pretextual use of an administrative warrant to arrest an individual in the home may still violate the Fourth Amendment even after *Whren*. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1360-63 (9th Cir. 1996).

The existence of probable cause to arrest is not sufficient to allow a warrantless entry into a residence to arrest, in the absence of exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980). The existence of an arrest warrant allows entry into a dwelling in which the defendant lives, but in the absence of exigent circumstances, entry into the home of a third party must be supported by a search warrant. *Steagald v. United States*, 451 U.S. 204, 211-22 (1981). A non-exigent entry to effect an arrest of an overnight guest of a third party requires at least an arrest warrant to comply with the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91 (1990).

COUNTERPOINT -- Refusal to grant consent is inadmissible as evidence of guilt because "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). Mere presence in a house being searched based

on probable cause is insufficient to justify an arrest. *United States v. Robertson*, 833 F.2d 777, 782-83 (9th Cir. 1987). A misdemeanor arrest warrant executed on a person standing in his doorway did not authorize a non-consensual entry into the dwelling in *United States v. Albrechtsen*, 151 F.3d 951, 953-54 (9th Cir. 1998).

In *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984), the Court rejected the argument that a suspected drunk driver's entry into his home justified a warrantless entry, narrowly construing the claim of exigency, especially when "the underlying offense for which there is probable cause to arrest is relatively minor." See *United States v. Johnson*, 207 F.3d 538, 547-50 (9th Cir. 2000) (arrest warrants for misdemeanor offenses allowed a home entry under hot pursuit exigency exception), *reh'g granted*, 227 F.3d 1169 (9th Cir. 2000); *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) (exigency related to misdemeanor will seldom if ever justify warrantless entry into home).

E. Exigent Circumstances -- The Court has traditionally allowed an exception for warrantless searches based on exigent circumstances under the rationales for warrantless arrests in residences (*Payton v. New York*, 445 U.S. 573 (1980)), "hot pursuit" (*Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967)), imminent fire safety needs in the aftermath of a blaze (compare *Michigan v. Tyler*, 436 U.S. 499 (1978), with *Michigan v. Clifford*, 464 U.S. 287 (1984)), or an emergency such as a report of shots fired (*Arizona v. Hicks*, 480 U.S. 321, 326 (1989)). However, the warrantless search must be strictly circumscribed by the emergency that justified its initiation. *Minnesota v. Olson*, 495 U.S. 91, 101 (1990); *Mincey v. Arizona*, 437 U.S. 385 (1978) (rejecting murder scene exception to warrant requirement). Once entry is made, the premises may be secured while a warrant is obtained. *Segura v. United States*, 468 U.S. 796, 811 (1984). A warrantless detention of a resident outside a home does not violate the Fourth Amendment when the police have probable cause to believe the home contains evidence of a "jailable offense" and the seizure is temporary and for the purpose of preventing the resident from entering the home and destroying evidence before a warrant is obtained. *Illinois v. McArthur*, 121 S.Ct. 946 (2001).

COUNTERPOINT -- The Ninth Circuit has placed a number of narrow restrictions on the exigent circumstances justification for warrantless searches and seizures.

1. **Telephonic warrants** -- The availability of telephonic warrants for a period of time prior to the search severely undercuts a government claim of exigent circumstances. Surveillance of a hotel room for 90 to 120 minutes without seeking a search warrant by telephone required suppression of the products of the ensuing search in *United States v. Alvarez*, 810 F.2d 879, 881-83 (9th Cir. 1987). Further, the unavailability of the equipment needed for telephonic warrants does not excuse failure to seek such a warrant where it is provided for by law. *Alvarez*, 810 F.2d at 882-83 n. 4.

2. Knowledge of suspect -- Even a suspect who is dangerous and possesses evidence capable of destruction does not justify warrantless entry where the officers lacked reasonable belief that the suspect knew of, or was about to learn of, his imminent capture. *United States v. George*, 883 F.2d 1407, 1412-15 (9th Cir. 1989).

3. Imminence of exigency -- The Ninth Circuit has found no sufficient emergency where a landlord informed officers of methamphetamine chemicals' presence in hot weather because the chemical had been in the location for over two weeks without incident. *United States v. Warner*, 843 F.2d 401, 404 (9th Cir. 1988). The products of the warrantless search of a backpack seized at the time of arrest were suppressed because there was no danger that the defendant could have removed the contents, destroyed the contents, or threatened the officers' safety. *United States v. Robertson*, 833 F.2d 777, 785-86 (9th Cir. 1987). A police officer's claim he was performing a community caretaking function by investigating a potential burglary was insufficient to justify a warrantless search of a private residence, in this case pulling back plastic from a window that exposed a marijuana grow. *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993). Nonspecific noise from within the house which was more consistent with someone coming to answer the door than resistance or destruction of evidence does not establish exigency. *United States v. Mendonsa*, 989 F.2d 366, 370-71 (9th Cir. 1992). In a drunk-driving case, the need for evidence preservation does not justify a non-consensual blood sample where the arrestee has agreed to take a breath or urine test. *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998).

4. Pretext -- The police cannot create the exigency by which they seek to justify the intrusion. *United States v. Allard*, 600 F.2d 1301, 1304 n.2 (9th Cir. 1979). Pretext is a relevant inquiry post-*Whren* in the context of a search based on the emergency exception, which must not be primarily motivated by an intent to arrest and seize evidence. *United States v. Cervantes*, 219 F.3d 882, 890 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1242 (2001).

5. Probable cause -- The Ninth Circuit has rejected a government argument that the exigencies of "hot pursuit" allow entry into a residence upon less than probable cause. *United States v. Winsor*, 846 F.2d 1569, 1571 (9th Cir. 1988); *United States v. Howard*, 828 F.2d 552, 554-56 (9th Cir. 1987).

6. Particularized evidence -- Mere speculation is not sufficient to show exigent circumstances. The government bears a heavy burden to show exigent circumstances based on particularized evidence and specific articulable facts. *United States v. Furrow*, 229 F.3d 805, 812 (9th Cir. 2000); *United States v. Reid*, 226 F.3d 1020, 1027-28 (9th Cir. 2000).

F. Automobiles And Other Vehicles -- The inherent mobility of cars and the layered protections for closed containers within cars has provided the grist for a generation of Supreme Court cases refining the scope of the automobile exception to the warrant requirement. The Court has historically allowed searches of vehicles where there is probable cause to believe the vehicle contains a seizable item. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). The vehicle exception includes motor homes. *California v. Carney*, 471 U.S. 386 (1985). Exigent circumstances need not be established for the automobile exception to apply. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *Pennsylvania v. LaBron*, 518 U.S. 938 (1996) (*per curiam*).

COUNTERPOINT -- There may still be a warrant requirement for vehicles parked in private driveways -- the scope of such protection is derived from *Coolidge v. New Hampshire*, 403 U.S. 443, 458-62 (1971); *see also Cardwell v. Lewis*, 417 U.S. 583, 593 (1974). However, in *United States v. Hatley*, 15 F.3d 856, 858-59 (9th Cir. 1994), the court held that the automobile exception authorized the search of an apparently mobile car located in a residential driveway. IRS agents' warrantless seizure of an automobile in a private driveway was held to be unlawful in the absence of a warrant in *United States v. Main*, 598 F.2d 1086, 1092 (7th Cir. 1979).

If probable cause exists to search the vehicle, then any container in the vehicle may also be searched for the contraband. *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Johns*, 469 U.S. 478 (1985). This includes containers belonging to passengers that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

COUNTERPOINT -- The automobile exception did not apply to the search of a defendant's vehicle when she returned to a coin shop to pick up payment four days after delivering stolen coins because the connection between crime and car was only speculative. *United States v. Perez*, 67 F.3d 1371, 1375-76 (9th Cir. 1995), *rev'd in part on other grounds*, 116 F.3d 840 (9th Cir. 1997) (en banc). Closed containers not within the automobile exception should still be subject to the warrant requirement. *See Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

G. Inventory -- Beyond examinations during a *Terry* stop or a search incident to arrest, the government is free to promulgate policies for inventory of the personal possessions of an arrestee and the contents of vehicles without a warrant. *South Dakota v. Opperman*, 428 U.S. 364 (1976) (car); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (arrestee). The regulations must be reasonably related to protection of the individual's property and the state's interest in being free from false claims of theft and damage. The scope of such inventories, pursuant to policy, may include closed containers, provided that the inventory is not a pretext to search indiscriminately for incriminating evidence. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *see also Colorado v. Bertine*, 479 U.S. 367 (1987).

COUNTERPOINT -- The failure of the police to follow completely the state law on inventory searches requires the suppression of evidence uncovered during the inventory. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1035-36 (9th Cir. 1997); *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991); *United States v. Wanless*, 882 F.2d 1459, 1463-64 (9th Cir. 1987).

H. Administrative Searches -- A dangerously expanding area of warrantless searches falls under the category of administrative searches. These cases arose from several Warren era opinions in which warrantless searches by building inspectors were tested under a reasonableness test balancing the need for the search or seizure against the invasion that the search or seizure entails. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967). In a series of cases, this administrative exception has expanded to encompass large areas of interaction between government and the individual. *Vernonia School District v. Acton*, 515 U.S. 646 (1995); *New York v. Burger*, 482 U.S. 691 (1987).

COUNTERPOINT -- In *Portillo v. United States District Court*, 15 F.3d 819, 922-24 (9th Cir. 1994), the court held that a standing order requiring presentence urine testing violated the Fourth Amendment where the defendant's theft offense bore no relation to drug usage. In *United States v. Munoz*, 701 F.2d 1293, 1298-1300 (9th Cir. 1983), the Court rejected the government argument that national forests are sufficiently regulated that the stopping of all vehicles to check for game violations, regardless of the absence of specific suspicion, was justified as an administrative search. In *United States v. Bulacan*, 156 F.3d 963, 967-74 (9th Cir. 1998), the court suppressed search because the purported administrative search had an impermissible criminal investigative purpose. The legality of probation searches may depend on a showing that the search was a true probation search, not an investigative search where the probation officer was used as a "stalking horse" for the police. *United States v. Knights*, 219 F.3d 1138, 1141 (9th Cir. 2000), *pet. for cert. filed*, No. 00-1260 (Feb. 2, 2001); *United States v. Ooley*, 116 F.3d 370, 371-72 (9th Cir. 1997).

I. Border Searches -- A search may be conducted of all persons and property entering the country without individualized suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). In *United States v. Ramsey*, 431 U.S. 606 (1977), the Court held that the opening of international packages at the port of entry fell within the border search exception. Therefore, no probable cause or warrant was necessary when a customs official opened suspicious-looking packages from Thailand. The Court has also held that border patrol officials may stop ships on the open sea for documents inspection without articulable suspicion. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588-89 (1983).

COUNTERPOINT -- In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court limited the warrantless border search to the immediate vicinity of the border or the functional equivalent thereof. Also, border officials on roving patrols must have a reasonable suspicion before stopping a motor vehicle. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Nicasio v. United States*, 797 F.2d 700, 702 (9th Cir. 1985). In *United States v. Whiting*, 781 F.2d 692, 696-98 (9th Cir. 1986), the Court refused to apply the border search exception where the search was undertaken by a Department of Commerce agent who did not have the same statutory authorization as INS and Customs agents. A “non-routine” border search, such as drilling into the frame of a vehicle, must be supported by reasonable suspicion. *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998). The inspection of Federal Express packages destined overseas may constitute an extended border search, requiring reasonable suspicion, where conducted far from an international border. *United States v. Cardona*, 769 F.2d 625 (9th Cir. 1985).

VII. FRUIT OF THE POISONOUS TREE

The basic rule of *Wong Sun v. United States*, 371 U.S. 471 (1963), is that evidence seized as a result of a Fourth Amendment violation and evidence derived therefrom is inadmissible in criminal trials. The contraction of Fourth Amendment rights in recent years is paralleled by the expansion of exceptions and limitations to the fruit of the poisonous tree doctrine.

A. Independent Source Rule -- In *Murray v. United States*, 487 U.S. 533 (1988), the Court elaborated on the independent source rule, which allows evidence to be used that was the product of an unlawful intrusion as long as a separate and distinct evidentiary trail led to the same place. In *Murray*, agents unlawfully entered a warehouse and saw bales of marijuana. Without seizing anything, the officers drafted a warrant affidavit referring only to information in their possession prior to the entry; all reference to the illegal search was omitted. The Court approved the procedure for establishing an independent basis for the seizure of the marijuana.

COUNTERPOINT -- However, the Court remanded the case for a determination whether the agents' decision to seek a warrant was a product of the illegal entry and search. *Murray*, 487 U.S. at 542-44; *accord United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995). When a warrant has been tainted by an illegal search, the government must prove both that the decision to seek the warrant was not prompted by the unlawfully viewed evidence, and that probable cause existed in the absence of the tainted evidence. *United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999).

B. Inevitable Discovery -- In *Nix v. Williams*, 467 U.S. 431 (1984), the Court revisited the "Christian burial speech" case in which the Court earlier found that a confession leading to the discovery of a murder victim's body violated the Sixth Amendment. On remand, the state established that, with the massive search ongoing at the time of the confession, the body would have been found in a short time

anyway. In *Nix*, the Court approved the hypothetical inevitable discovery doctrine allowing the evidence where the government can establish that the illegally obtained evidence would have been discovered through legitimate means independent of official misconduct.

COUNTERPOINT -- In *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986), the court rejected a government claim that, if the illegal search had not occurred, a warrant would have been sought and obtained. The Court stated that the means by which the hypothetical inevitable discovery would have occurred must parallel, not follow, the primary illegality. See also *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399-1400 (9th Cir. 1989); *United States v. Maxwell*, 734 F.Supp. 280, 282-83 (S.D.Tex. 1990); but see *United States v. Boatwright*, 822 F.2d 862, 864-65 (9th Cir. 1987). In both *United States v. Mejia*, 69 F.3d 309, 319-20 (9th Cir. 1995), and *United States v. Reilly*, 224 F.3d 986, 994 (9th Cir. 2000), the court rejected the government's argument that the inevitable discovery doctrine applied where the police had probable cause to search but simply failed to obtain a warrant. The court rejected speculative application of the inevitable discovery rule in *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000), when the government offered no evidence of the procedures that would have been followed had the illegal car stop not occurred.

C. Attenuation -- In *Brown v. Illinois*, 422 U.S. 590, 604-05 (1975), the Court set out factors to be examined in determining whether a *Mirandized* statement obtained after an illegal arrest must be suppressed. In finding that the statement must be suppressed, the Court weighed three factors: 1) temporal proximity of the illegal conduct and the later statement; 2) the existence of intervening circumstances; and 3) the flagrancy of the initial misconduct. This methodology applies to the Fourth Amendment. *United States v. Ricardo D.*, 912 F.2d 337, 342-43 (9th Cir. 1990); *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1299-1300 (9th Cir. 1988); *United States v. Perez-Esparza*, 609 F.2d 1284, 1290-91 (9th Cir. 1979). Voluntary consent to search granted shortly after an unlawful stop of a vehicle will not support a search. *United States v. Arvizu*, 232 F.3d 1241, 1252 (9th Cir. 2000). A warrantless arrest in the home, with probable cause and without exigent circumstances, did not require suppression of the subsequent confession in *New York v. Harris*, 495 U.S. 14, 21 (1990).

D. Witness Testimony -- Causation is more difficult to establish where the product of the illegal search is witness testimony. Because witnesses might independently come forward regardless of the primary illegality, the witness's testimony is only excluded if there is a close and direct link between the illegality and the witness testimony. *United States v. Ceccolini*, 435 U.S. 268 (1978).

COUNTERPOINT -- In *United States v. Padilla*, 960 F.2d 854, 862-63 (9th Cir. 1992), *rev'd on other grounds*, 508 U.S. 77 (1993), the court held that all evidence based on an illegal stop of a drug courier was tainted by the stop and subject to suppression, including live witnesses who were induced to testify through cooperation agreements. See also *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396-99

(9th Cir. 1989).

Further, in *United States v. Crews*, 445 U.S. 463, 471-72 (1980), the Court held that in court identification testimony need not be suppressed where a pretrial identification procedure was the product of an illegal arrest.

COUNTERPOINT -- Testimony describing the defendant at the time of arrest should be suppressed if it is fruit of an illegal arrest. See *United States v. Terry*, 760 F.2d 939, 943 (9th Cir. 1985).

E. Impeachment -- A testifying defendant can be impeached with the products of an illegal search or seizure if he or she testifies on direct examination in a manner that is contradicted by the tainted evidence. *Walder v. United States*, 347 U.S. 62 (1954). In *United States v. Havens*, 446 U.S. 620 (1980), the Court expanded allowable impeachment of the defendant with the product of an illegal search and seizure to statements elicited in cross-examination "plainly within the scope" of the direct. However, the Court limited the impeachment exception to the exclusionary rule by reversing a case in which a defense witness, rather than the defendant, provided the inconsistent testimony. *James v. Illinois*, 493 U.S. 307 (1990).

F. Nature Of Illegal Intrusion -- The exclusionary rule is generally considered a remedy for violations of the Fourth Amendment rather than non-constitutional protections. In *United States v. Caceres*, 440 U.S. 741 (1979), conversations recorded in violation of IRS regulations were held to be admissible at trial. However, violation of statutes such as the limitations on the use of wiretaps under Title III of the Omnibus Crime Control and Streets Act of 1968 (18 U.S.C. §§2210-25) may require suppression. See also *United States v. Eide*, 875 F.2d 1429, 1434-37 (9th Cir. 1989) (VA drug records should have been suppressed because of confidentiality statute).

G. Type Of Proceeding -- In addition to criminal trials, the exclusionary rule applies to civil forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). However, the Supreme Court has allowed the use of illegally seized evidence in non-criminal contexts such as civil tax cases (*United States v. Janis*, 428 U.S. 433 (1976)), civil deportation hearings (*INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)), and grand juries (*United States v. Calandra*, 414 U.S. 338 (1974)). The federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights. *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998).

COUNTERPOINT -- Under some circumstances, the exclusionary rule may apply to sentencing proceedings. See *United States v. Perez*, 67 F.3d 1371, 1376 (9th Cir. 1995); *United States v. Kidd*, 734 F.2d 409, 414 (9th Cir. 1984); *United States v. Verdugo*, 402 F.2d 599, 612-13 (9th Cir. 1968); but see *United States v. Lynch*, 934 F.2d 1226, 1234-37 (11th Cir. 1991); *United States v. McCrory*, 930 F.2d 63, 67-69 (D.C. Cir. 1991); *United States v. Torres*, 926 F.2d 321, 322-25 (3d Cir. 1991).

Where the Fourth Amendment violation is egregious, due process requires suppression of evidence even in civil and administrative proceedings. *Orhorhaghe v. INS*, 38 F.3d 488, 501-04 (9th Cir. 1994); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448-52 (9th Cir. 1994). The good faith exception does not apply to motions for return of property under Rule 41(e). *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927-28 (9th Cir. 1996).

FEDERAL CRIMINAL DISCOVERY

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I. THOROUGH DISCOVERY

A Other than Brady Material, There Is No Constitutional Right to Discovery.
Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 845 (1977).

B. Limited Discovery Can Be Expanded by Effective Motion Drafting.

1. Tie motions to facts of case. See United States v. Breit, 767 F.2d 1084, 1091 (4th Cir. 1985).
2. Avoid "form" discovery motions.
3. Be specific. For an excellent discussion of general versus specific requests, see Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), cert. denied, 105 S.Ct. 601 (1985). See also United States v. Mack, 892 F.2d 134 (1st Cir. 1989) (blanket request phrased in language of rule too broad to show request for field test results and later lab tests relied on by government at trial); United States v. Mackey, 571 F.2d 376, 389 (7th Cir. 1977) (Brady request must focus on a particular witness to be specific); Nixon v. Attorney General of South Carolina, 538 F. Supp. 190, 194 (D.S.C. 1982)(same).
4. Support with law. Sources: Cases; Federal Rules of Criminal Procedure, commentary and annotations; ABA Standards.
5. File early -- supplement later if necessary.
6. Cover all aspects of case.

C. Don't Be Lulled into Inaction by a Reassuring Prosecutor.

II. FEDERAL RULES OF CRIMINAL PROCEDURE - RULE 16

- A. **Rule 16 Is Main Criminal Discovery Tool.**
- B. **Rule Is Mandatory Direction to Government to Furnish Certain Information, but Only upon Defense Request.**
- C. **Rule 16 (A)(1)(A) Requires the Government to Furnish To the Defense:**
 - 1. All relevant written or recorded statements made by the defendant which are in the custody or control of the government and which are known to the government or by the exercise of due diligence may become known to the government.
 - a. Standard does not create high threshold; production has become practically a matter of right. United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989).
 - b. This section should include draft transcripts of tape recordings in addition to tapes themselves. United States v. Shields, 767 F. Supp. 163 (N.D. Ill. 1991).
 - c. Due diligence requires government to disclose statements made to local police officers. United States v. Diggs, 801 F. Supp. 441 (D. Kan. 1992); United States v. Mitchell, 613 F.2d 779 (10th Cir. 1980).
 - 2. 1992 amendments to Rule:
 - a. Defendant entitled to written records of relevant oral statements made by defendant to a person defendant knew to be a government agent in response to interrogation. Includes before and after arrest. See United States v. Alvarez, 987 F.2d 77 (1st Cir.), cert. denied, 114 S. Ct. 147 (1993) (remand for new trial based on government's violation of R. 16 by failing to disclose oral statement of defendant to Customs agent until trial).

But see United States v. Flores & Garza, 63 F.3d 1342 (5th Cir. 1995) (outburst to co-defendant made in front of agent need not be disclosed under Rule 16)
 - b. Defendant entitled to summaries of oral statements not reduced to writing where statements were made by defendant to a person defendant

knew to be a government agent in response to interrogation, before or after arrest, if government intends to use statement. Government need not intend to introduce statement at trial.

3. Defendants generally not entitled to their oral statements made to a third person which were later repeated to government agents. United States v. Walk, 533 F.2d 417 (9th Cir. 1975); In re United States, 834 F.2d 283 (2d Cir. 1987). But see United States v. Mitchell, 613 F.2d 779 (10th Cir. 1980) (Rule 16 requires disclosure of defendant's oral statements made to probation officer who gave statements to government); United States v. Manetta, 551 F.2d 1352 (5th Cir. 1977) (defendant's oral statement to prison employee discoverable insanity case).
4. However, where a written record is contemplated at time defendant's oral statement is made, Rule 16 applies. United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975). Cf. United States v. Colletti, 984 F.2d 1339 (3d Cir. 1992) (citing Feinberg approvingly but refusing to order disclosure where written record was not verbatim, but merely a summary).
5. Written statements made by defendant to third person who gave them to a government agent who put in a report are discoverable. United States v. Caldwell, 543 F.2d 1333 (D.C. Cir.1974).
6. All grand jury testimony of the defendant, "which relates to the offense charged." Note testimony at other grand juries may "relate" under either your theory or government theory. Make clear in motion.
7. Generally, defendant is only entitled to coconspirator or co-defendant statements, admissible against defendant under F.R.E. 801(d)(2)(E) if the government does not intend to call the coconspirator as a witness. United States v. Disston, 612 F.2d 1035 (7th Cir. 1980); United States v. Percevault, 490 F.2d 126 (3d Cir. 1974); United States v. McMillen, 489 F.2d 229 (7th Cir. 1972). Contra United States v. Randolph, 456 F.2d 132 (3d Cir. 1972); cf. United States v. Mills, 641 F.2d 785 (9th Cir. 1981) (whoever prosecution originally thought would be witness always subject to Jencks restrictions). Most courts have rejected the argument that defendant is entitled to a coconspirator's statements on the theory that they are equivalent to statements of the defendant. See In re United States, 834 F.2d 283 (2d Cir. 1987) (reversing Judge Weinstein on government mandamus). But see United States v. Thevis, 83 F.R.D. 47 (N.D. Ga. 1979); United States v. Brighton Building & Maintenance Co., 235 F. Supp. 222 (N.D. Ill. 1964).

8. Disclosure of codefendant statements is discretionary, but refusal to order will not be error unless specific motion was made. So make the MOTION!!! United States v. Rivera, 6 F.3d 431 (7th Cir. 1993), cert. denied, 114 S. Ct. 1098 (1994).
9. "Booking" statements held admissible in United States v. Regilio, 669 F.2d 1169 (7th Cir. 1981) and discoverable in United States v. McElroy, 697 F.2d 459 (2d Cir. 1982).

D. Rule 16(a)(1)(B) Permits Discovery of Defendant's "Rap" Sheet - Request Both FBI and State; Need to Subpoena Records; Prepare Motions in Limine.

E. Defense Entitled to All Documents under 16(a)(1)(C) Which:

1. Are material to the defense. See United States v. Lloyd, 992 F.2d 348 (D.C. Cir. 1993) (government witnesses' tax returns discoverable and material under 16(a)(1)(C)); or
2. The government intends to introduce in its case-in-chief. Thus, cases hold defendants are entitled to perform independent drug tests on drugs obtained from the defendant. United States v. Butler, 988 F.2d 537 (5th Cir.), cert. denied, 114 S. Ct. 413 (1993).
3. Note no due diligence requirement. United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989) (mail fraud defendant was not entitled to discover out-of-district documents possessed by investigative agencies closely connected to prosecution and which prosecution knew of and had access to). Some cases hold that the government may not need to seek out evidence in possession of the State. See, e.g., United States v. Gatto, 763 F.2d 1040 (9th Cir. 1985).
4. Obtain originals of fingerprints and handwriting exemplars.
5. Request all lineup photos, photographic and reports stating results of such and circumstances surrounding them in preparation for possible motions to suppress. See, e.g., United States v. Taylor, 707 F. Supp. 696, 705 (S.D. N.Y. 1989).
6. Look for cases where shoe is on the other foot. In United States v. Poindexter, 727 F. Supp. 1470 (D. D.C. 1989), the court authorized discovery of documents resulting from meetings among government officials devoted in whole or part to Iran-Contra activities. Case also held the government must identify specifically which documents out of thousands of pages it intended to rely upon at trial; giving all documents and saying it "may" rely on all of them was

insufficient. (No kidding). See also United States v. Washington, 819 F. Supp.358 (D. Vermont 1993), aff'd 48 F.3d 73 (2d Cir.), cert. denied, 115 S. Ct. 2596 (1995) (discussing when order requiring government to tell what material it does not intend to use would be appropriate).

F. Defense Entitled under 16(a)(1)(D) to Results or Reports of Tests and Exams Which Are in the Possession or Control of the Government and Are Known to the Government or by the Exercise of Due Diligence May Become Known to the Government and Which:

1. Are material to the defense or the government intends to introduce in its case-in-chief.
2. Does require exercise of due diligence.
3. Request results of all lab tests. United States v. Taylor, 707 F. Supp. 696 (S.D. N.Y. 1989).
4. Request results of handwriting, hair, fingernail, voice, etc. comparisons.
5. Request samples on which to conduct independent tests. United States v. Noel, 708 F. Supp. 177 (W.D. Tenn. 1989).
6. Not sufficient for government to argue materials were released to prior lawyer. United States v. Long, 817 F. Supp. 79 (D. Kan. 1993).

G. Move under Rule 16(a)(1)(C) or (D) for the Underlying Data Used in Government Tests - Necessary to Attack Results. See United States V. Yee, 129 F.R.D. 629 (N.D. Ohio 1990) (Under 16 (A)(1)(C), Defendant Entitled to Discovery of "Predicate Materials" Which Give Information Such as the Reliability of a Particular Testing Process (Here DNA Testing), Population Data, and Results of Proficiency Data). Note: Now May Always Make this Request under New Rule 16(a)(1)(E), below.

H. Rule 16(a)(1)(E) - New, Effective December 1, 1993, Rule Requires Government to Furnish upon Defendant's Request, Written Summary of Expert Testimony Government Intends to Use During Case in Chief. Rule Is Reciprocal upon Request.

1. Rule requires notice of expert's qualifications, so can determine whether witness actually is expert.

2. Rule requires disclosure of summary of expected testimony.
3. Rule requires disclosure of summary of bases of expert's opinion, whether or not expert prepares report.
4. Rule contains no timing provisions, but notes contemplate "timely" disclosure. Few cases so far make clear defense should not wait until close to trial to make request, see, e.g., United States v. Von Willie, 59 F.3d 922 (9th Cir. 1995).
5. In first case in 7th Circuit, court warned government to offer more specific notices in future. United States v. Jackson, 51 F.3d 646 (7th Cir. 1995)(use of agents as experts in drug courier profile)

I. Rule 16(a)(2) - Exceptions to Government Disclosure:

1. Government work-product.
 - a. Government may waive.
 - b. May be overcome by undue hardship.
 - c. May be superseded by Brady. United States v. Starusko, 729 F.2d 256 (3d Cir. 1984). But see United States v. Presser, 844 F.2d 1275, (6th Cir. 1988) (impeachment evidence falling within Jencks material only discoverable under Jencks Act).
 - d. Government internal notes may be discoverable at trial as Jencks statements. United States v. North American Reporting Co., 740 F.2d 50 (D.C. Cir. 1984), cert. denied, 106 S.Ct. 273. But see United States v. Roach, 28 F.3d 729 (8th Cir. 1994) (internal reports or memoranda prepared by government attorneys in connection with a case investigation are not discoverable under Rule 16).
 - e. Local law enforcement reports may not be discoverable. See, e.g., United States v. Cherry, 876 F. Supp. 547 (S.D. N.Y. 1995). But see cases holding reports made prior to federal government's involvement are discoverable -- United States v. Green, 144 F.R.D. 631 (W.D. N.Y. 1992); United States v. Gatto, 729 F. Supp. 1478 (D. N.J. 1989).

2. Witness statements which are only discoverable pursuant to Jencks (18 U.S.C. § 3500).
3. Inadvertence not a defense to non-disclosure although defendant must show prejudice. United States v. Accetturo, 966 F.2d 631 (11th Cir. 1992), cert. denied, 113 S. Ct. 1053 (1993).

J. Reciprocal Discovery Under R. 16(b)

1. Reciprocal discovery triggered by defendant request under 16(a)(1)(C), (D) or (E). Government make request. Rule does not specify if request must be in writing. **NOTE:** Reciprocal discovery obligations do not arise until after government has complied with its own discovery obligations. United States v. Kraselnic, 702 F. Supp. 480 (D. N.J. 1988). **NOTE:** Reciprocal discovery obligations not triggered by Brady requests alone. United States v. Marengi, 893 F. Supp. 85 (D. Me. 1995).
2. Beware of Taylor v. Illinois, 484 U.S. 400 (1988), which held that preclusion of testimony was appropriate sanction for defense counsel's failure to disclose the names of alibi witnesses until second day of trial when counsel knew about the witnesses one week earlier and had been permitted to amend the witness list on the first day of trial. See also United States v. Rodriguez Cortes, 949 F.2d 532 (1st Cir. 1991) (court did not abuse discretion in precluding admission of defense documents as sanction for reciprocal discovery violation).
3. Under 16(b)(1)(A), defense must give copies of documents only if they are:
 - a. Within the defendant's control (no due diligence requirement); and
 - b. The defendant intends to introduce them at trial. Kraselnic holds that statements of witnesses need not be produced before where defense had not yet decided who it would call as witnesses.
4. Under 16(b)(1)(B), defense must give copies of examinations and tests only if they are:
 - a. Within the defendant's control (no due diligence requirement); and
 - b. The defendant intends to introduce the evidence at trial or the tests relate to testimony of a witness the defendant intends to call at trial; and

- c. The tests were made "in with the particular case." NOTE: No similar limitation on government.
- 5. Rule does not cover expert's verbatim notes of defendant's answers to expert's questions. United States v. Dennison, 937 F.2d 559 (10th Cir. 1991).
- 6. Rule does not require disclosure of oral opinion defense experts. Rule covers tangible evidence only. United States v. Peters, 937 F.2d 1422 (9th Cir. 1991).
- 7. Under **NEW** 16(b)(1)(C), defense must give summary of expert's testimony if:
 - a. Defense intends to use the testimony under Fed. R. Evid. 702, 703 and 705 "as evidence at trial."
 - b. Summary must include opinions of witness, bases and underlying reasons for opinion and witness' qualifications.
- 8. Three exceptions to reciprocal discovery:
 - a. Work-product
 - b. Reverse Jencks Act - Fed. R. Crim. P. 26.2 - Witness statements not disclosable until after direct-examination.
 - c. Fifth Amendment privilege of defendant - not available to government.
- 9. Under United States v. Nobles, 422 U.S. 225 (1975), impeachment of government witness maybe conditioned upon disclosure of defense investigator's interview notes, but only after defense witness' direct examination. Middleton v. United States, 401 A.2d 109 (D.C. App. 1979); United States v. Felt, 502 F. Supp. 71 (D. D.C. 1980).

K. Rule 16(c) - Continuing Duty to Disclose - Once Party Gives Some Information under R. 16, Party Has Obligation To Apprise Opponent of Any Changes Affecting Information. United States V. Formanczyk, 949 F.2d 526 (1st Cir. 1991).

III. FEDERAL RULE OF CRIMINAL PROCEDURE 12.1

- A. Requires Defense to Give Notice of Alibi Defense Only If Government Requests in Writing. Government's Request must Include Time, Date & Place Where Offense Was Committed. Failure to Comply Does Not Trigger Need to Respond.** United States v. Saa, 859 F.2d 1067 (2d Cir. 1989).
- B. Refusal to Respond to Proper Written Request May Result in Witness Exclusion, Even Where Continuance Would Cure Error.** United States v. Johnson, 970 F.2d 907 (D.C. Cir. 1992)

This is especially true for the defense. Compare United States v. Quesada-Bonilla, 952 F.2d 597 (1st Cir. 1991) (prosecution's failure to tell defense about alibi rebuttal witnesses as required under the Rule did not justify witness exclusion since defendant did not request continuance).

IV. FEDERAL RULE OF CRIMINAL PROCEDURE 12.2

- A. Always Requires Defense to Give Notice of its Intent to Use an Insanity Defense or of a Defendant's Intent to Introduce Expert Testimony Relating to Defendant's Mental State, Regardless of Whether Government So Requests.**

Absent good cause, failure to give proper notice of this defense could result in an exclusion of your witnesses, but not in exclusion of defendant's testimony. Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982).
- B. Make Sure Notice Is Timely. Know Your Court.** Compare United States v. Cameron, 907 F.2d 1051 (11th Cir 1989) (although notice of intent to rely on insanity defense was late, government was clearly aware of defendant's intent and had been granted opportunity to examine defendant) with United States v. Weaver, 882 F.2d 1128 (7th Cir. 1989) (court struck notice filed one week before trial where defendant did not have expert witness to support his defense that prison had destroyed his moral character).
- C. Not Clear What Mental Defenses Are Covered.** Compare United States v. Hill, 655 F.2d 512 (3d Cir. 1981) (rule does not apply to testimony relating to defendant's susceptibility to entrapment) with United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990) (rule does apply to same testimony).

V. FEDERAL RULE OF CRIMINAL PROCEDURE 12.3

A. Requires Defendants to Give Notice of Intent to Rely Defense They Believed They Were Acting on Behalf on A Law Enforcement Agency.

No government request is required. Notice must include the name of the agency, name of the person authorizing the actions and the time the actions were allegedly authorized. If the agency was a federal agency, it must be filed under seal. (Guess we know who wrote this rule.)

B. Failure to Comply May Result in Exclusion of Witnesses. United States v. Seeright, 978 F.2d 842 (4th Cir. 1992).

VI. WITNESS STATEMENTS - JENCKS ACT (18 U.S.C. § 3500) AND FEDERAL RULE OF CRIMINAL PROCEDURE 26.2

A. Requires Disclosure of Relevant Part of Witness' Statement After Direct Examinations. This includes FBI 302 reports, DEA-6 reports, etc. and underlying notes.

B. To Qualify as Statement, Jencks and 26.2 Require:

1. Written by the witness; and
2. Signed, adopted or approved by the witness; or
3. Substantially verbatim transcript made contemporaneously with witness' oral statement; or
4. Witness' grand jury testimony.

C. Make Motion for Jencks Material Before or During Suppression Hearing. Entitled under Fed. R. Crim. P. 12(i) and 26.2(g). See United States v. Salsedo, 477 F.Supp. 1235 (E.D. Cal. 1979), vacated on other grounds, sub nom. United States v. Torres, 622 F.2d 465 (9th Cir. 1980). Cf. United States v. Adams, 870 F.2d 1140 (6th Cir. 1989)(may be entitled to discovery on vindictive prosecution claim); United States v. Kerley, 787 F.2d 1147 (7th Cir. 1986)(entitled to discovery on selective prosecution claim where can show some evidence of the defense).

D. Make Motion for Jencks Material at Detention Hearings. Entitled under Fed. R. Crim. P. 46(i) and 26.2(g).

- E. **Make Motion for Jencks Material at Sentencing Hearings.** Entitled under Fed. R. Crim. P. 32(e) and 26.2(g). United States v. Rosa, 891 F.2d 1074 (3d Cir. 1989).

- F. **Make Motion for Jencks Material in § 2255 Proceedings.** Entitled under Fed. R. Crim. P. 26.2(g) and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255.

- G. **Ask for Early Disclosure of Jencks.** Although rule does not allow court to order, some courts have. See, e.g., United States v. MacFarlane, 759 F. Supp. 1163 (W.D. Pa. 1991). Court may always pressure government, United States v. Izz, 613 F.2d 205 (1st Cir. 1980); United States v. Percevault, 490 F.2d 126 (2d Cir. 1974). Be aware court may also expect defense to disclose early.

- H. **Agent's Rough Notes Generally Considered Producing under 26.2.** United States v. Ramos, 27 F.3d 65 (3d Cir. 1994)(rough notes must always be kept, but failure to keep by state police working with DEA who were unaware of DEA policy (!) was not reversible where not in bad faith and no showing notes were exculpatory); United States v. Gaston, 608 F.2d 607 (5th Cir. 1979) (per curiam); United States v. Rippey, 606 F.2d 1150 (D.C. Cir. 1979); United States v. Paoli, 603 F.2d 1029 (2d Cir. 1979). But see United States v. Mena, 863 F.2d 1522 (11th Cir. 1989) (Jencks Act does not give defendant right to view rough notes of agent's interview of defendant for impeachment purposes where substance of defendant's statement was made available in agent's final report) and United States v. Grunewald, 987 F.2d 531 (8th Cir. 1993)(no error to refuse disclosure of rough notes where court reviewed typed report and notes and found no differences).

- I. **Make Motion for Preservation of Agent's Notes Early.**

- J. **Agent Reports Are Discoverable Where the Agent Testifies, but Not Where the Witness Who Is the Subject of the Report Testifies Without Adopting Report.** United States v. Newman, 849 F.2d 156 (5th Cir. 1988); United States v. Cole, 634 F.2d 866 (5th Cir.), cert. denied, 452 U.S. 918 (1981); United States v. Layton, 564 F.Supp. 1391 (D. Ore. 1983). But if the reports contain material relevant to impeachment (government witness' prior criminal acts) then they should be discoverable under Brady. United States v. Dekle, 768 F.2d 1256, 1263 (11th Cir. 1985). But see United States v. Ruiz, 702 F. Supp. 1066 (S.D.N.Y. 1989).

- K. **Better Practice Not to Receive Jencks Material in Front of Jury.** Make motion before trial. Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); United States v. Gardin, 382 F.2d 601 (2d Cir. 1967).

- L. **Don't Let Government Hide Behind Work-product.** Prosecutor's notes of witness interview may be Jencks if read back to witness for corrections. Goldberg v. United States, 425 U.S. 101 (1976).
 - M. **Request "Case Summary Memos" from Agents.**
 - N. **Request Any Notes Used by Witnesses When Testifying Before Grand Jury.** United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988).
 - O. **Diary of Witness May Be Jencks Material.** United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988).
 - P. **Prosecutor May Not Unilaterally Decided What Material Is Relevant under Jencks.** Where there is dispute, court must review in camera. United States v. Smith, 984 F.2d 1084 (10th Cir. 1993); United States v. Rewald, 889 F.2d 836 (9th Cir. 1989); United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988); United States v. Allen, 798 F.2d 985 (7th Cir. 1986).
 - Q. **Beware of United States V. Capers, 61 F.3d 1100 (4th Cir. 1995), Which Held That Where Evidence Showed No Government Employee Was Aware of Notebook Kept by Government Witness, Failure to Disclose Notebook (Which Was Destroyed by Witness Before Trial) Was Not a Jencks Violation.**
- VII. **BRADY V. MARYLAND, 373 U.S. 83 (1963)** - Due process requires disclosure of evidence upon request where the evidence "is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution."
- A. **Always File a Brady Motion.** Brady should be interpreted liberally on side of disclosure. United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982); United States v. Allen, 513 F. Supp. 547 (W.D. Okla.1981).
 - B. **Brady May Override Jencks and Work-product.** United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984); Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980); United States v. Poindexter, 727 F. Sup. 1470 (D. D.C. 1989); United States v. Gleason, 265 F. Supp. 880 (S.D. N.Y. 1967); United States v. Recognition Equipment, Inc., 711 F. Supp. 1, 15 (D.D.C. 1989); United States v. Ruiz, 702 F. Supp. 1066 (S.D.N.Y. 1989).
- But see United States v. Campagniola, 592 F.2d 852 (5th Cir. 1979)(stating, without deciding the issue, that Brady may be compatible with Jencks); United States v. Bencs, 28 F.3d 555 (6th Cir. 1994), cert. denied 115 S. Ct. 915 (1995) (Jencks over Brady); United States v. Hart, 760 F. Supp. 653 (E.D. Mich 1991) (same).

C. Materiality - New Standard in All Cases under Bagley

1. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985); Pennsylvania v. Ritchie, 480 U.S. 39 (1987).
2. In Kyles v. Whitley, 115 S. Ct. 1555 (1995), the Court interpreted "reasonable probability" to mean "when the Government's . . . suppression 'undermines confidence in the outcome of the trial.'" Kyles focuses the test on the reliability of the verdict. Without expressly so holding, Bagley overruled the three-tiered analysis of materiality established in United States v. Agurs, 427 U.S. 97 (1976), replacing it with one standard of materiality for no request, general requests and specific requests under Brady.
3. Bagley also establishes that the same test of materiality applies to impeachment and exculpatory evidence under Brady.
4. Specificity of requests remains important under Bagley. United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995); United States v. Alberici, 618 F. Supp. 660, 668 (E.D. Pa. 1985). The standard for dealing with specific requests, however, is unclear. Brady requests, therefore, should be specific and tied as closely to the facts as possible. See United States v. Breit, 767 F.2d 1084 (4th Cir. 1985); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), cert. denied, 105 S.Ct. 601 (1985) (extensive discussion of what constitutes specific versus general request).

D. Prosecution must Exercise Some Efforts to Obtain Exculpatory Material, at Least from Other Government Investigative Agencies. United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980); United States v. Bryant, 439 F.2d, 642 (D.C. Cir. 1971). In general, the test applied is whether or not the agency is considered to be "an arm of the prosecution."

1. a. Police are an arm of the prosecution for Brady purposes. United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) (defense may make showing requiring government search of police files); United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991) (prosecutor must search local records for information about key witness' background); East v. Scott, 55 F.3d 996 (5th Cir. 1995) (prosecution required to conduct investigation of witnesses' criminal back-grounds); Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) (transcript of taped conversation); Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (police concealment of eyewitness); United States v.

Boyd, 883 F. Supp. 1277 (N.D. Ill. 1993), aff'd 55 F.3d 239 (7th Cir. 1995) (in El Rukn case, all members of investigative team, including police officers were part of prosecution team); Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995)(fact that defense knew others had previously been arrested for crime did not relieve prosecution of obligation of disclosing information).

- b. But cf. Blackmon v. Scott, 22 F.3d 560 (5th Cir.), cert. denied 115 S. Ct. 915 (1994) (information related by witness about defendant's personality was information already known to defendant and not discoverable under Brady); United States v. Moore, 25 F.3d 563 (7th Cir.), cert. denied, 115 S. Ct. 671 (1994) (prosecution not required to seek out witness prior conviction where prosecution had no knowledge of conviction); Morgan v. Salamack, 735 F.2d 354, 358 (2d Cir. 1984) (prosecutor not required to obtain police records which were not in files to provide defense with impeachment evidence against government witness); United States v. Young, 20 F.3d 758 (7th Cir. 1994) (where government diligently searched records known to it, not required to seek out witness' unknown criminal history in another state); United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992) (analogizes to duty under Rule 16(a)(1)(C) - no due diligence requirement).
2. DEA agent, United States v. Morell, 524 F.2d 550 (2d Cir. 1975) (suppression of a confidential file on informant).
3. Medical examiner, Martinez v. Wainwright, 621 F. 2d 184 (5th Cir. 1980) (murder victim's FBI rap sheet).
4. U.S. Post Office, United States v. Deutsch, 475 F.2d 55 (5th Cir. 1977) (personnel files).
5. Parole officer is not an arm of the prosecution for Brady purposes. Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985).
6. In general, FBI records are treated as if in the constructive possession of the prosecution. Briggs v. Raines, 652 F.2d 862, 865 (2d Cir. 1985) (homicide victim's rap sheet).
7. CIA affidavit containing exculpatory material. United States v. Diaz-Munoz, 632 F.2d 1330 (5th Cir. 1980).

8. Some disagreement exists regarding prosecution's duty to disclose information contained in public records. See United States v. Bi-CoPowers, Inc., 741 F.2d 730, 736 (5th Cir. 1984) (no general public record exception to Brady); Anderson v. South Carolina, 709 F.2d 887, 888 (4th Cir. 1983) (per curiam). See United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992), cert. denied, 113 S. Ct. 1581 (1993) (prosecution required to disclose transcript of key witness containing inconsistent statements, Jencks Act does not apply to trial transcripts in public domain).
9. Brady is satisfied, however, if a prosecutor discloses how to obtain a public record. Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980).
10. Where defendant makes plausible argument as to why government documents may contain exculpatory material, court may grant request. United States v. Lov-It Creamery, Inc., 704 F. Supp. 1532 (E.D. Wis. 1989) (corporation's IRS file discoverable to show defendant's lack of intent to profit).

E. Request Negative Exculpatory Statements Such as Statements by Informed Witnesses That Fail to Mention Your Client. United States v. Furlett, 1991 U.S. Dist. LEXIS 17220 (N.D. Ill. Nov. 25, 1991) (ordering production of statements of witnesses in a position to know who did not identify defendant); Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978), or eyewitness' failure to identify defendant. United States v. Torres, 719 F.2d 549 (2d Cir. 1985); Ganci v. Berry, 702 F. Supp. 400 (E.D. N.Y. 1988), aff'd, 896 F.2d 543 (2d Cir. 1990).

F. Identify in Your Motion and Request All Aspects Casting Doubt upon the Witness' Credibility, Citing Brady, Bagley, Giglio V. United States, 405 U.S. 150 (1972) and Kyles V. Whitley, including:

1. Prior inconsistent statements. United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995) (discrepancies between law enforcement officers and reports and grand jury testimony); United States v. Peters 732 F.2d 1004 (1st Cir. 1984) (grand jury testimony); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984) capital case; (inconsistent witness statements in FBI reports, held not material in light of overwhelming evidence of guilt, but material and reversible in sentencing phase); King v. Ponte, 717 F.2d 635 (1st Cir. 1983) (same); United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989) (same).
2. Bias. See generally United States v. Abel, 469 U.S. 45 (1984).

- a. Hostility. United States v. Sperling, 726 F.2d 69 (2d Cir. 1984) (tape of pre-trial conversation indicating that government witness motivated by revenge).
 - b. Pecuniary or other interest. United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (information contained in witness' probation file should have been disclosed because it related to his motives for informing as well as his tendency to overcompensate for problems and to lie).
 - c. Kinship with person adverse to client.
 - d. Favors from prosecution such as telephone calls, conjugal visits, etc. See El Rukn cases, United States v. Andrews, 824 F. Supp. 1273 (N.D. Ill. 1993); United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993); United States v. Boyd, 883 F. Supp. 1227 (N.D. Ill. 1993).
3. Character of witness. United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1992) (reversible error not to disclose government memorandum written to government agent highly critical of key government informant); United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) (remand to determine whether government witness lied to DEA about his prior criminal record).
 4. Witness' capacity to observe.
 - a. Logistics. Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993) (failure to produce photo tending to impeach witness's statement he could see out of window was Brady violation).
 - b. Use of alcohol or drugs. King v. Ponte, 717 F.2d 635 (1st Cir. 1983) (witness under heavy medication as treatment for unstable mental condition); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991) (sole eyewitness had been to methadone clinic within 2 hours of crime).
 - c. Hypnosis. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) (state's failure to disclose that two of its key witnesses had been hypnotized and that tape recordings and records of hypnosis procedures existed, was error).
 5. Testimony which is inconsistent with other evidence. Mesarosh v. United States, 352 U.S. 1 (1956); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); Ganci

v. Berry, 702 F. Supp. 400 (E.D.N.Y. 1988), aff'd, 896 F.2d 543 (2d Cir.1990) (statements of witnesses describing perpetrator's eye color different than defendant's).

6. Prior bad acts.
7. Presentence reports of witnesses or co-defendants. See United States v. McKinney, 758 F.2d 1036, 1048 (5th Cir. 1985) (portion of the report relating to the witness' criminal record). Some courts have developed two-tiered analysis for the disclosure of presentence reports:
 - a. Material which is exculpatory must be disclosed. United States v. Figurski, 545 F.2d 389 (4th Cir. 1976).
 - b. Material which merely impeaches the witness is discoverable only where there is a reasonable likelihood of affecting the trier of fact. United States v. Anderson, 724 F.2d 596, 598 (7th Cir. 1984) (quoting Figurski, 545 F.2d at 391-92).
 - c. After Bagley, this distinction would no longer seem to be viable, unless the courts determine that the privacy interests at stake warrant greater protection with regard to disclosure of presentence reports.
8. Autopsy reports. Anderson v. South Carolina, 709 F.2d 887 (4th Cir. 1983)(per curiam).
9. Witness' inability to recall, including drug use. United States v. Robinson, 956 F.2d 1388 (7th Cir.), cert. denied, 113 S.Ct. 654 (1992).

G. Obtain All Relevant Information on Agents Who Interviewed Your Client, Including, If Possible:

1. The agents' background or training;
2. Prior transcripts of cases in which the agent testified. See United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); McConnell v. United States, 393 F.2d 404 (5th Cir. 1968).
3. Agents' personnel files. United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). See Section I. below.

H. Request All Material Which Tends to Impeach a Government Witness. United States v. Bagley, 473 U.S. 667(1985); Giglio v. United States, 405 U.S. 150 (1972); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977); including:

1. Any formal or informal promises to reward a witness. Bagley, 473 U.S. 667 (1985); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977). This includes informal understandings. See Haber v. Wainwright, 756 F.2d 1520 (11th Cir. 1985)(case remanded to determine whether immunity actually given); Blanton v. Blackburn, 494 F. Supp. 895 (M.D. La. 1980), aff'd without opinion, 654 F.2d 719 (5th Cir. 1981) (informal plea agreement, witness denied existence); Ross v. Heynes, 638 F.2d 1979 (7th Cir. 1980) (disclosure required where witness falsely testified he was not testifying pursuant to any agreement); Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979) (disclosure required where witness denied existence of plea agreement because unaware of exact terms); but see McKleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), aff'd on other grounds, 107 S.Ct. 1756 (1987) (failure to disclose detective's agreement to "speak a word" for witness about pending charge not due process violation); Ruiz v. Cody, 710 F.2d 1214 (7th Cir. 1983) (failure to disclose fact that prosecutor wrote letter to other prosecutor recommending against incarceration or recommending place of incarceration not due process violation).
2. Witness' parole or probation status. Davis v. Alaska, 415 U.S. 308 (9th Cir. 1974); Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989) (prosecution must disclose that key witness had applied for sentence commutation and was scheduled to appear before parole board shortly); Meeks v. United States, 163 F.2d 599 (9th Cir.1947).
3. Promises as to witness' civil tax or administrative liability. United States v. Wolfson, 437 F.2d (2d Cir. 1970); United States v. Dawes, 1990 U.S. Dist. LEXIS (D. Kan. Oct. 15).
4. Help in forfeiture proceedings. United States v. Parness, 408 F.Supp. 440 (S.D. N.Y. 1975).
5. Money or other reward. United States v. Thornton, 1 F.3d 149 (3d Cir.), cert. denied, 114 S. Ct. 483 (1993); Wheeler v. United States, 351 F.2d 946 (1st Cir. 1965).
6. Living expenses.
7. Medical treatment.

8. Transportation expenses.
9. Witness protection program. United States v. LaFuente, 991 F.2d 1406 (8th Cir. 1993) (remand to determine if fact was material), appeal after remand, 54 F.3d 457 (8th Cir.) cert. denied, 64 USLW (1995); United States v. Librach, 520 F.2d 550 (8th Cir. 1975). Cf. United States v. Marino, 658 F.2d 11 6th Cir. 1981) (fact that witness was participating in the witness protection program did not damage witness' credibility or diminish the accuracy of information given).
10. Any type of informant status or files. United States v. Halbert, 668 F.2d 489, 496 (10th Cir.), cert. denied, 456, U.S. 934 (1982); United States v. Disston, 582 F.2d 1100 (7th Cir. 1978); United States v. Phillips, 854 F.2d 273 (7th Cir. 1988) (informer files).
11. Threats for failure to testify. United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976).
12. Witness' tax returns - especially for informant. See Internal Revenue Code § 6103(i)(1)(2). United States v. Wigoda, 521 F.2d 1221 (7th Cir. 1975) (in camera inspection); Johnson v. Sawyer, 640 F. Supp. 1126 (D. Tex. 1986) (tax returns may be disclosed).
13. Prior criminal convictions. East v. Scott, 55 F.3d 996 (5th Cir. 1995) (prosecution has duty to investigate its witnesses' criminal histories); United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984); United States v. Recognition Equipment, Inc., 711 F. Supp. 1, 14 (D. D.C. 1989); United States v. Auten, 632 F.2d 478 (5th Cir. 1980); United States v. Leichtfuss, 331 F.Supp. 723 (N.D. Ill. 1971).
14. FBI rap sheets. Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980) (of homicide victim); Briggs v. Paines, 652 F.2d 862 (9th Cir. 1981) (same); Perkins v. LeFeore, 691 F.2d 616 (2d Cir. 1982) (of witness). Cf. Boyer v. Redmann, 553 F. Supp. 219 (D. Del. 1982) (no obligation to produce victim's rap sheet absent specific request.)
15. Reports of polygraph tests performed upon government witnesses. But see Wood v. Bartholomew, 116 S.Ct. 7 (1995) (per curiam) (no Brady violation found where prosecution failed to disclose that codefendant testifying for prosecution was not completely truthful on polygraph); United States v. Greichunous, 572 F. Supp. 220 (N.D. Ill. 1983). This applies to oral as well as

written reports. Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988).

16. Fact that witness was target of investigation and threatened with prosecution, even if witness never charged. Moynihan v. Manson, 419 F. Supp. 1139 (D. Conn. 1976), aff'd without opinion, 559 F.2d 1204 (2d Cir.), cert. denied, 434 U.S. 939 (1977).
17. "El Rukn" type benefits -- free telephones, contact and conjugal visits, alcohol, clothing, failure to prosecute for drug use. Also goes to bias.

I. Request Witness' Personnel File. United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992) (limited to federal personnel only); United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) (defense has right to request that prosecution review FBI agent's personnel files for past instances of dishonesty or misconduct under Brady); United States v. Garrett, 542 F.2d 23 (6th Cir. 1976); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973); United States v. Austin, 492 F. Supp. 502 (N.D. Ill. 1980). Cf. United States v. Muse, 708 F.2d 513 (10th Cir. 1983) (request for personnel files was overly broad and superfluous in light of other Brady requests for impeachment evidence).

J. Request Rules and Regulations Governing Procedure in a Case to Determine If They Were Followed.

K. Request Any Psychiatric Treatment of Witness. United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); cf. United States v. Burns, 668 F.2d 855 (5th Cir. 1982) (where defendant requested psychiatric records indicating drug and alcohol related problems, he was not entitled to receive records regarding group transactional therapy for personal problems); United States v. Driver, 798 F.2d 248 (7th Cir. 1986) (psychological report not material.)

L. Defensive Maneuvers

1. Request in camera review of any material the government refuses to disclose. District court required to review specific documents to determine whether or not they contain exculpatory evidence. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States v. Phillips, 854 F.2d 273 (7th Cir. 1988) (court examined entire contents of FBI informant file to determine if government summary was accurate and complete); Application of Storer Communications, Inc., 828 F.2d 330 (6th Cir. 1987) (case remanded for in camera inspection of prosecutor's files); United States v. Gaston, 608 F.2d 607 (5th Cir. 1979) (FBI reports of interviews of government witnesses). See also United States v. Dupruy, 760 F.2d 1492 (9th Cir. 1985) (prosecutor's confidential notes of negotiations with co-defendants for

plea agreements); United States v. Anderson, 724 F.2d 596 (7th Cir. 1984)(witness' presentence report); United States v. Diaz-Munoz, 632 F.2d 1330 (5th Cir. 1980) (CIA affidavit).

2. The court is not required, however, to conduct an exploratory search through the government files to ensure compliance with Brady. United States v. McKinney, 758 F.2d 1036 (5th Cir. 1985); but see United States v. Criggs, 713 F.2d 672 (11th Cir. 1983) (in camera review of prosecutor's files for witness' exculpatory statements); United States v. Striffler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989) (same).
3. Investigate to determine whether agents deliberately circumvented Brady. Concealment to circumvent disclosure was prohibited in Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (case worth reading just to warm your heart).
4. Agree, if necessary, to a protective order to prevent claim of danger to witnesses.

M. Request That the Order Be Continuing. United States v. Lord, 710 F. Supp. 615 (E.D. Va.1989) (duty is continuing through day of sentencing); United States v. Greichunous, 572 F. Supp. 220 (N.D. Ill. 1983) (where a defendant relies on the government's undertaking to disclose Brady material when discovered", disclosure on the eve of trial of information which the government had for months is more likely to prejudice defense than where he had no expectation of receiving the evidence at an earlier time).

N. If Government Wrongfully Withholds Possibly Exculpatory Information, Request That:

1. The case be dismissed, United States v. Chen, 605 F.2d 433 (9th Cir. 1979); United States ex rel. Merritt v. Hicks, 492 F. Supp. 99 (D.N.J. 1980).

OR

2. The material be stricken. United States v. Butts, 535 F. Supp. 608 (E.D. Pa. 1982);

OR

3. The case be continued to permit review of the information and further investigation. Make your record. See United States v. Olson, 697 F.2d 273

(8th Cir. 1983) (conviction reversed and remanded where defense requested and was denied a continuance). Compare United States v. Ellsworth, 647 F.2d 957 (9th Cir. 1981) (no error where defense failed to request a recess, continuance, postponement or mistrial upon receipt of tardily disclosed evidence); United States v. Hemmer, 561 F. Supp. 386 (D. Mass. 1983), aff'd, 729 F.2d 10 (1st Cir. 1984) (same).

4. Absent bad faith, failure to preserve potentially useful evidence does not violate due process - police have no constitutional duty to conduct particular tests. Arizona v. Youngblood, 488 U.S. 51 (1988); but see United States v. Cooper, 983 F.2d 928 (9th Cir. 1993) (in meth case, destruction of lab equipment required dismissal where defense was that lab did not have capacity to produce meth).
5. If you discover the nondisclosure after the case is over, you may file a habeas or motion for new trial based on newly discovered evidence. The non-disclosure of documents may be sufficient "cause" in a habeas petition to explain the failure to raise the issue below or on direct appeal. Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994).
6. In United States v. Johnson, 26 F.3d 669, 683 (7th Cir.), cert. denied, 115 S. Ct. 344 (1994) the court said: "In the future, we will not hesitate to order a new trial if the government fails to make timely disclosure of all Brady/Giglio material." Famous last words.

O. Timing of Disclosure:

1. Brady does not mandate pre-trial disclosure. United States v. Knight, 867 F.2d 1289 (11th Cir. (1989)); United States v. Allain, 671 F.2d 248 (7th Cir. 1982). But courts may order pretrial disclosure. United States v. Hart, 760 F. Supp. 653 (E.D. Mich. 1991); United States v. Coggs, 752 F. Supp. 849 (N.D. Ill. 1991). And see United States v. Kendall, 766 F.2d 1426, 1440 (10th Cir. 1985), cert. denied, 106 S. Ct. 848 (Brady requires pretrial disclosure).
2. Prejudice to defendant determines whether or not the disclosure was timely. United States v. McKinney, 758 F.2d 1036, 1050 (5th Cir. 1980).
 - a. Generally, there is not denial of due process and a new trial is not required, if the defendant effectively used the Brady material at trial. United States v. Leibowitz, 857 F.2d 373 (7th Cir. 1988); United States v. Higgs, 713 F.2d 39, 41-42 (3d Cir. 1983), cert. denied sub. nom Kemp v. United States, 464 U.S. 1048 (1984).

- b. In some instances, due process requires that the exculpatory material be available for the preparation as well as the presentation of defendant's case. United States v. Peters, 732 F.2d 1004, 1009 (1st Cir. 1984); Grant v. Aldredge, 498 F.2d 378, 381 n.5 (2d Cir. 1974); United States v. Deutsch, 373 F. Supp. 289, 290 (S.D.N.Y. 1974). See also Blake v. Kemp, 758 F.2d 523, 532 and n.10 (11th Cir.), cert. denied, 474 U.S. 998 (1985) (ineffective assistance of counsel claim bolstered by Brady violation, where psychiatric report critical to the defense, was disclosed on the eve of trial); but see United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984) (nondisclosure must do more than impede defendant's ability to prepare for trial, it must adversely affect the court's ability to reach a just conclusion to the prejudice of the defendant).
3. The inquiry under Brady focuses on what information has been requested and how that information is to be used. United States v. Higgs, 713 F.2d 39, 41-42 (3d Cir. 1983), cert. denied sub. nom Kemp v. United States, 464 U.S. 1048 (1984)
4. Generally due process is met where the material is introduced in time for the jury to become aware of it. Accordingly, there is no violation in the following instances:
 - a. Exculpatory evidence is revealed during cross-examination of government's first witness. United States v. Smith, Grading and Paving, Inc., 760 F.2d 527 (4th Cir. 1985), cert. denied sub nom. Dellinger v. United States, 474 U.S. 1005.
 - b. Witness' grant of immunity and prior conviction disclosed the day before trial. United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984).
 - c. FBI fingerprint and footprint reports turned over to defendants when the government presented its case-in-chief. United States v. Hemmer, 729 F.2d 10 (1st Cir. 1984); cert. denied sub nom. Randazza v. United States, 467 U.S. 1218 (1984).
 - d. Kidnapping victim's statement to the FBI, disclosed the day before trial. United States v. Bittner, 728 F.2d 1038 (8th Cir. 1984).
 - e. Witness' prior inconsistent statement and favorable treatment for testimony, received the day before trial. United States v. Allain, 671 F.2d 248 (7th Cir. 1982).

- f. Discovery during trial that witness was a paid police informant, United States v. Adams, 914 F.2d 1404 (10th Cir. 1990).
- 5. Violation of due process found where exculpatory statement made to FBI by a person who was not a witness at trial, was disclosed at trial and two insurance policies were accidentally sent to jurors during jury deliberations. United States v. Greishunous, 572 F. Supp. 220 (N.D. Ill. 1985) (new trial granted).

P. Sentencing Guidelines

Brady clearly applies to sentencing information. United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989); United States v. Lord, 710 F. Supp. 615 (E.D. Va. 1989), aff'd without op., 902 F.2d 1567 (4th Cir. 1990). Specificity around specific offense characteristics or adjustments is important.

VIII. OTHER MOTIONS

A. Fed. R. Evid. 404(b)

Motion to reveal any prior similar acts of defendant the government intends to introduce in its case-in-chief or in rebuttal. Base motion on Fed. R. Evid. 104 (admissibility is for court); Fed. R. Crim. P. 12(b) (any legal matter may be raised pre-trial) and 12(d) (defendant may request government intent to use R. 16 discoverable evidence). See United States v. Shackelford, 738 F.2d 776 (7th Cir. 1984), United States v. Mahone, 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976). See Huddleston v. United States, 485 U.S. 681 (1988) (government need only meet 404(b) requirements by preponderance of the evidence).

B. Fed. R. Evid. 801(d)(2)(E)

Motion to reveal statements the government intends to use as coconspirator statements. These should be discoverable pre-trial so that a hearing can be held as to the admissibility of the statements. See, e.g., United States v. James, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978). But cf. Bourjaily v. United States, 483 U.S. 171 (1987) (court can consider hearsay itself and determination is just like any other evidentiary determination); United States v. DeOrtiz, 910 F.2d 376 (7th Cir. 1990) (en banc), cert. denied, 111 S. Ct. 684 (1991) (same).

C. Motion to Produce Informer.

Government need only produce where production relevant and helpful to a fair determination of the case. Roviaro v. United States, 353 U.S. 53 (1957). Government

has obligation to take reasonable steps to keep track of informer. United States v. Rothbart, 653 F.2d 462 (10th Cir. 1981); United States v. Mann, 590 F.2d 361 (1st Cir. 1978); United States v. Leon 487 F.2d 389 (9th Cir. 1973), cert. denied, 417 U.S. 933 (1974). But defense must show actual prejudice to obtain dismissal. United States v. Valenzuela- Bernal, 458 U.S. 858 (1982).

- D. Motion for Psychiatric Examination of Government Witness.** United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974).
- E. Motion for Government Press Releases.** Where publicity is an issue, the source of the publicity is important. See 28 C.F.R. § 50.2; ABA Standards on Fair Trial and Free Press; Rideau v. Louisiana, 373 U.S. 723 (1963).
- F. Motion for Agency Rules and Regulations.** Look for violations to support a motion to suppress. Beware of United States v. Cacaes, 440 U.S. 741 (1979).
- G. Motion to Reveal Existence of Electronic Surveillance.** Must make pre-trial. Alderman v. United States 394 U.S.165 (1969).
 - 1. If it exists, move for production of tapes - request enhancement if not audible.
 - 2. Review to determine if surveillance was properly minimized.
 - 3. Review court order authorizing the surveillance and supporting affidavit. United States v. Dorfman, 542 F. Supp. 345, aff'd, 690 F.2d 1217 (7th Cir. 1982).
 - 4. Review for compliance with all technical aspects of Title III. See, e.g., United States v. Ojeda-Rios, 495 U.S. 257 (1990)(failure to comply with Title III tape sealing requirement required reasonable explanation by government).
- H. Generally, Don't Waive Preliminary Hearing.** Can use to lock in specific testimony; entitled to transcript.
- I. Motion for Grand Jury Minutes.** Must show some evidence of a "particularized need," such as evidence of prosecutorial misconduct, United States v. Budzanoski, 462 F.2d 443 (3d Cir.), cert. denied, 409 U.S. 949 (1972) or that evidence would be exculpatory or impeaching. United States v. Cerone, 457 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972). NOTE that under Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) motions to dismiss indictments for prosecutorial misconduct may only be granted "'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was

free from the substantial influence of such violations." quoting United States v. Mechanick, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring).

J. Request List of Government Witnesses. Court has discretion to compel disclosure if defendant can show a particularized need. United States v. Climatemp, Inc., 482 F. Supp. 376 (N.D. Ill. 1979), aff'd sub nom, United States v. Reliable Sheet Metal Works, Inc., 705 F.2d 461 (7th Cir. 1983), cert. denied sub nom, Fakter v. United States, 103 S.Ct. 3116 (1983); United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975); United States v. Shoher, 505 F. Supp. 346 (S.D. N.Y. 1983); Will v. United States, 389 U.S. 90 (1967).

K. Defense Generally Entitled to Order Requiring Preservation of Agent's Rough Notes.

Make early motion for preservation of these notes for discovery of potential Brady material. United States v. Ramirez, 954 F.2d 1035 (5th Cir.), cert. denied, 112 S. Ct. 3010 (1992) (agent's destruction of rough notes violated Rule 16 and court could have precluded agent's testimony); United States v. Robinson, 546 F.2d 309 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977); United States v. Lewis, 511 F.2d 798 (D.C. Cir. 1975); United States v. Ramos, 27 F.3d 65 (3d Cir. 1994).

IX. BILL OF PARTICULARS - RULE 7(f)

A. Granting Is Discretionary. United States v. Addonizio, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

B. Purpose:

1. To describe charge.
2. To minimize surprise.
3. To protect against double jeopardy.

C. Cannot Save Fatal Indictment. Russell v. United States, 369 U.S. 749 (1962); United States v. Keith, 605 F.2d 462 (9th Cir. 1979).

D. Requests Should Be Granted Where Failure Causes Surprise Or Denies Opportunity for Meaningful Defense Preparation. United States v. Alegria, 1991 U.S. Dist. LEXIS 16079 (S.D. N.Y. Nov. 6, 1991); United States v. Thevis, 474 F. Supp. 117 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (5th Cir.), cert. denied, 459 U.S. 825

(1982); United States v. Bearden, 423 F.2d 805 (5th Cir.), cert. denied, 400 U.S. 836 (1970); United States v. Barket, 380 F. Supp. 1018 (W.D. Mo. 1974).

Typical requests include:

1. Circumstances surrounding action or making of statement, United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975), including:
 - a. Persons present. Thevis, supra; United States v. Eilberg, 465 F. Supp. 1076 (E.D. Pa. 1979); United States v. Fine, 413 F. Supp. 740 (N.D. Ill. 1976); United States v. Ahmad, 53 F.R.D. 194 (M.D. Pa. 1971).
 - b. Dates. See cases cited above.
 - c. Locations. United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); United States v. Orsini, 406 F. Supp. 1264 (E.D.N.Y. 1976); United States v. Smith, 65 F.R.D. 464 (N.D. Ga. 1974).
2. Names of unindicted coconspirators. United States v. Williams, 113 F.R.D. 177 (M.D. Fla. 1986).

E. Particularly Important in Complex Cases, Such as Rico. United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) (RICO); United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied sub nom. Massino v. United States, 479 U.S. 940 (1986)(RICO); United States v. McDonnell, 696 F. Supp. 356 (N.D. Ill. 1988) (RICO); United States v. Recognition Equipment, Inc., 711 F. Supp. 1 (D.D.C. 1989) (government contractor mail fraud).

F. Fact That Evidentiary Details or the Government's Theory of the Case May Be Revealed Is Insufficient Reason to Deny Defendant's Request. United States v. Greater Syracuse Board of Realtors, 438 F. Supp. 376 (N.D. N.Y. 1977); United States v. Kendall, 665 F.2d 126 (7th Cir. 1981), cert. denied, 455 U.S. 1027 (1982).

X. DEPOSITIONS - RULE 15

A. Rule 15 Depositions Are Rarely Ordered Unless it Appears a Witness Will Die or Disappear. For a case where depositions were ordered, see United States v. McDade, 1994 U.S. Dist. LEXIS 5334 (E.D. Pa. 4/18/94).

XI. SUBPOENAS - RULE 17

A. "In Forma Pauperis" Subpoenas Routinely Granted by Most Courts. If not routinely granted, you must show:

1. Defendant unable to pay; and,
2. Necessary to adequate defense. United States v. Garza, 664 F.2d 135 (7th Cir. 1981), cert. denied, 102 S.Ct. 1620 (1982). Some courts require a proffer of requested testimony before will approve subpoena. See, e.g., United States v. Hernandez-Urista, 9 F.3d 82 (10th Cir. 1993) (denying subpoena because no proffer submitted to meet requirement of particularized need).

B. Rule 17(c) Permits Early Return of Subpoenas. Must show above requirements and:

1. That evidence not otherwise procurable in advance;
2. That cannot properly prepare without evidence; and
3. That you are not on a fishing expedition. See generally United States v. Nixon, 418 U.S. 683 (1974); United States v. Arditti, 955 F.2d 331 (5th Cir. 1992).

XII. PRE-TRIAL CONFERENCE - RULE 17.1

Practice varies - request if you think it will engender additional discovery or better disposition.

XIII. FREEDOM OF INFORMATION ACT

Generally takes too long to obtain information for use at trial. Useful in lengthy case or for collateral attack. Note that under United States Dep't of Justice v. Julian, 486 U.S. 1 (1988), defendants serving prison terms may obtain their presentence reports under FOIA.

Discovery Outline Update

Carol A. Brook
April 6, 2001

Selective Prosecution

United States v. Armstrong, 116 S.Ct 1480 (1996) (Although defendant entitled to obtain discovery in case alleging selective prosecution of African Americans in crack cases if defendant can produce some evidence that similarly situated white persons were not prosecuted; defendant not entitled to that discovery under Rule 16 (a) (1) (C))

United States v. Olvis, 97 F.3d 739 (4th Cir. 1996)(Fact that African American defendants in crack conspiracy were indicted and white defendants were not was not insufficient to make out case for discovery on selective prosecution claim because of “distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.”)

Rule 7(f) - Bill of Particulars

United States v. Savin, 2001 U.S. Dist. LEXIS 2445 (S.D.N.Y. March 13, 2001)(court granted motion for bill of particulars, ruling that government’s production of 85 boxes of documents containing over 100,000 pages of material did not meet its obligations to provide notice of the means and methods of the alleged conspiracy)

Motion for List of Witnesses

United States v. Savin, 2001 U.S. Dist. LEXIS 2445 (S.D.N.Y. March 13, 2001)(court granted motion for witnesses based upon duration of alleged conspiracy and location of various witnesses)

United States v. Rueb, 2001 U.S. Dist. LEXIS 943 (S.D.N.Y. Feb. 6, 2001)(court granted motion for witnesses based upon voluminous nature of materials to review to prepare cross-examination, and considering limited nature of appointed counsels’ resources)

Rule 16(a)(1)(A)

United States v. Thomas, 239 F.3d 163 (2d Cir. 2001)(Prosecution violated Rule 16(a)(1)(A) where it failed to disclose transcript of defendant’s statements made during prior administrative hearing on

subject of his arrest until **after** defendant testified on direct at trial, error substantially prejudiced defendant and required new trial)

United States v. Fisher, 1999 U.S. App. LEXIS 18732 (4th Cir. August 12, 1999), cert. denied, 2000 U.S. LEXIS 1247 (2000)(unpublished)(Defendant's statement to arresting officer regarding who owned car he was driving was not discoverable under Rule 16(a)(1)(A) because it was offered in response to standard request for motor vehicle information analogous to routine booking questions, not in response to interrogation)

Rule 16(a)(1)(D)

United States v. Price, 75 F.3d 1440 (10th Cir. 1996)(Defendant not entitled to underlying test data supporting government expert's conclusion that substance was methamphetamine because Rule 16 (a) (1) (D) only applies to test results)

Experts & Rule 16(a)(1)(E)

United States v. Capleton, 2001 U.S. Dist. LEXIS 2556 (D. Mass. Feb. 16, 2001)(Court held there was "no doubt" that DEA agent prosecution intended to call to testify about the operation of the drug business generally was an expert witness and that defendant was entitled to specific information about the witness and his opinions under Rule 16(a)(1)(E), including a summary of his opinions, copies of any summaries or reports made, the underlying data he relied upon, his resume **and a list of cases in which he had previously testified**

United States v. Charley, 189 F.3d 1251 (10th Cir. 1999)(In child sexual abuse case, prosecution refused to disclose summaries of expert reports under 16(a)(1)(E) because it said all of its witnesses were testifying to facts as lay witnesses; court held the health care professionals were experts and the prosecution erred in refusing to turn over summaries – error held harmless)

United States v. Thompson, 923 F. Supp. 144 (S.D. Ind. 1996)(Under Rule 16 (a) (1) (E), government required to produce IRS auditor's calculations showing how he arrived at his figures)

United States v. Zanfordino, 833 F. Supp 429 (S.D.N.Y. 1993)(Although Pre-Rule 16 (a) (1) (E), case helpful on analysis of why underlying data of government expert is material under 16 (a) (1) (C) and broad reading of rules)

Rule 16(b)(1)(A) - Reciprocal Discovery

United States v. Moore, 2000 U.S. App. LEXIS 5237 (7th Cir. March 29, 2000)(Defense need not disclose handwritten note of defendant where note was used solely to impeach the testimony of a

prosecution witness and not as evidence in the defendant's case in chief)

Rule 16(d)(2) - Sanctions

United States v. Davis, 2001 U.S. App. LEXIS 5114 (8th Cir. March 29, 2001)(In unusual holding, court upheld district court's exclusion of prosecution DNA evidence as sanction for prosecution's failure to comply with court's discovery deadline for disclosure of DNA testing results)

Rule 12.1 - Notice of Alibi

United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996)(Defendant not required to give notice of alibi because notice not specifically requested by the government)

Rule 12.2 - Mental State

United States v. Davis, 93 F.3d 1286 (6th Cir. 1996)(Where defendant gave notice of intent to call an expert to testify to his mental state, not his sanity, under Rule 12.2 (b), the government is not entitled to have defendant examined by a government expert)

Brady v. Maryland

Strickler v. Greene, 119 S. Ct. 1936 (1999)(Death penalty habeas case, Court found prosecution withheld materially exculpatory evidence relating to eyewitness accounts, but refused to reverse because petitioner failed to show that there was "a reasonable probability that his conviction or sentence would have been different had these materials been disclosed")

Sherman v. Helling, 194 F.3d 937 (8th Cir. 1999)(Prosecution's failure to disclose police memorandum containing information indicating that key witness was unable to identify defendant was material and exculpatory under Brady and required a new trial, **27 years later!**)

Spicer v. Roxbury Correctional Institute, 194 F.3d 547 (4th Cir. 1999)(Information defense counsel gave prosecutor pursuant to plea negotiations about what his client knew and information client gave to prosecutor when his counsel was not present differed on whether client saw defendant at scene of crime; the court found discrepancy was material and impeaching, violating Brady and requiring a new trial or dismissal of the indictment)

United States v. Fisher, 106 F.3d 622 (5th Cir. 1997)(Brady violation where government belatedly disclosed report containing impeachment of government's key witness)

Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997)(Brady violation found where prosecution failed to disclose memo written by key prosecution witness accusing third party of committing crime)

United States v. Pelullo, 105 F.3d 117 (3d Cir. 1997)(Brady violation where cumulative effect of nondisclosure of impeaching evidence created verdict unworthy of confidence)

United States v. Smith, 77 F.3d 511 (D.C. Cir. 1996)(Government failure to disclose witness's psychiatric history and plea agreement was material under Brady and Kyles; case remanded)

United States v. Galvis - Valderamma, 841 F. Supp. 600 (D.N.J. 1994)(Government failure to disclose portion of case agent's report containing statements of defendant helpful to defense was material; government may not "avoid Brady obligations by failing to take the minimal steps necessary to acquire the requested information")

Jencks Act

United States v. Ramirez, 174 F.3d 584 (5th Cir. 1999)(Tape recordings made and taped over by Bureau of Prisons were "within the possession of the United States" under Jencks and should have been disclosed; court remanded for hearing on whether tapes were erased in bad faith, thus requiring dismissal of the case)

United States v. Williams - Davis, 90 F.3d 490 (10th Cir. 1996)(Rejecting defense argument that Jencks Act applies to persons whose statements are introduced as co-conspirator statements)

Destruction of Evidence

United States v. Ramirez, 174 F.3d 584 (5th Cir. 1999)(see above)

United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999)(Customs' destruction of marijuana day before indictment where it had given notice to defendant and prosecution of anticipated destruction 60 days earlier at time of seizure was in conformity with established procedure and not in bad faith – court suggests government consider modifying its drug destruction procedures)

FEDERAL CRIMINAL PRETRIAL MOTIONS

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I. Purposes of motions practice

II. Discovery and motions practice

- A. Disclosures required by the government, upon request
- B. Disclosures required by the government without a request

III. Motions which must be filed prior to trial: FRCrP 12(b)(1 - 5)

- A. Objections based on defects in the institution of the proceedings
- B. Objections based on defects in the indictment
- C. Motions to suppress evidence
- D. Requests for discovery
- E. Requests for severance

IV. Motions which may be made at any time

- A. FRCrP 12(b)(2): failure to charge an offense or show jurisdiction
- B. FRCrP 16(d)(2): failure to comply with discovery
- C. Violation of Speedy Trial Act
- D. Motion to dismiss for pre-accusatory delay
- E. Motion to dismiss: violation of 6th Amendment right to Speedy Trial
- F. FRCrP 48(b): motion to dismiss for unnecessary delay
- G. Request for *Daubert* hearing
- H. FRCrP 17(b): *ex parte* request for subpoenas
- I. Motion for transcript of pretrial hearings
- J. FRCrP 21(a): Motion for change of venue
- K. Motion to dismiss for violation of Jury Selection Act

V. Motions in Limine

VI. Appendix

- A. Letter requesting discovery
- B. Letter requesting additional discovery
- C. Letter giving notice of defense discovery
- D. Motion to dismiss due to non-compliance with discovery
- E. Memorandum in support of motion to dismiss

F. Motions checklist

I. Purposes of Motions Practice

- A. Acquire information
- B. Keep out (inadmissible) evidence
- C. Establish appellate parachutes
- D. Define/refine issues
- E. Make Them Work for It

II. Discovery and Motions Practice

A. Disclosures required by the government, upon request of defendant

1. F.R.Cr.P. Rule 16(a) information

a. 16(a)(1)(A): **statements of defendant**, including written statements, recorded statements, the substance of unrecorded oral statements, reports w/ summaries of oral statements, and any response to *Miranda* warnings. *United States v. McElroy*, 697 F.2d 459 (2d Cir. 1982);

b. 16(a)(1)(B): **defendant's prior record**, including convictions and arrests;

c. 16(a)(1)(C): **documents and tangible objects**, within the possession, custody or control of government and which are material to the preparation of the defense, OR are intended for use by the Government as evidence in chief, OR were obtained from or belong to the defendant;

d. 16(a)(1)(D): **reports of examinations and tests** within the possession, custody or control of government, the existence of which is known or by exercise of due diligence may become known to the attorney for the government, and which are material to the preparation of the defense OR are intended for use by the Government as evidence in chief;

e. 16(a)(1)(E): **expert witnesses**, including a written summary of testimony that the government intends to use during its case in chief, under FRE Rules 702, 703 or 705, including the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

2. Evidence of **bad acts arguably admissible under FRE 404(b)**, including the general nature of any evidence which the government intends to introduce at trial of other crimes, wrongs or acts of the defendant. *United States v. Barnes*, 49 F.3d 1144, 1148 - 1149 (6th Cir. 1995); *United States v. Lampley*, 68 F.3d 1296 (11th Cir. 1995) (404(b) notice should include a description of the proposed evidence to a degree which fairly apprises the defendant of its general nature and which is sufficiently clear so as to permit pretrial resolution of the issue of its admissibility).

3. Notice of the government's **intention to use evidence** in its case in chief which the defendant may be entitled to discover under Rule 16. F.R.Cr.P. 12(d)(2).

B. Disclosures required by the Government, even without a request:

1. **Brady material** - all information and material known to the government which may be favorable to the defendant on issues of guilt or punishment, without regard to materiality. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 474 U.S. 667, 678 (1985) (prosecution's duty under *Brady* includes the obligation to disclose contingent inducements to informants which would have been helpful in cross-examination); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (evidence of bias or a motive to lie); *Kyles v. Whitley*, 514 U.S. 419, 437 - 438 (1995) (individual prosecutor has responsibility to learn of any favorable evidence known to others acting on government's behalf in case); *Stickler v. Greene*, 119 S.Ct. 1936, 1948 (1999) (due process duty of the prosecution under *Brady* to disclose any evidence favorable to the defense includes the duty to disclose impeachment evidence and material known only to the police officer and not immediately known to the prosecuting attorney). Includes the following:

- a. any information which reduces/limits defendant's involvement/liability;
- b. any information which affects credibility of government witness/assists in cross-examination of a government witness, including evidence of bias or a motive to lie, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *United States v. Striffler*, 851 F.2d 1197 (9th Cir. 1988), evidence of bad conduct under FRE 608, 609, 613, impeachment evidence, evidence of any criminal investigation of the witness; evidence of any dissatisfaction with the witness' reliability, and any negative information in witness-agents' personnel files;
- c. any information which might weaken/contradict government case or strengthen a defense, including names of witnesses favorable to the defense;
- d. any material which might raise doubt of probative value/reliability of witness' testimony, including evidence affecting witnesses' perception abilities. *United States v. Scheer*, 168 F.3d 445(11th Cir. 1999), *United States v. Schledwitz*, 169 F.3d 1003 (6th Cir. 1999) - *Brady* violation in non-disclosure of prosecutor's intimidation of witness and expert's non-neutral involvement in investigation;
- e. any evidence of the charged offense, which omits evidence of the defendant;

2. **Giglio material** - inducements to government witnesses, including any information or evidence of contract, agreement, deal, payments, etc. between the witness and law enforcement. *United States v. Giglio*, 405 U.S. 150 (1972);

3. all such information in the hands of **any law enforcement agency**: *United States v. Brazel*, 102 F.3d 1120, 1150 at n. 19 (11th Cir. 1997) (on a case-by-case basis, the court may determine that “government” includes any investigative agency “aligned with the prosecution and to which the prosecutor has ready access.”); *United States v. Bryan*, 868 F.2d 1032, 1037 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989) (prosecutor must disclose exculpatory material in hands of another federal agency in another district).

4. all such **information learned subsequently**: F.R.Cr.P. Rule 16(c): “If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that party’s attorney or the court of the existence of the additional evidence or material.”

III. Motions which must be filed prior to trial

A. FRCrP 12(b)(1): defenses/objections based on defects in the institution of the proceedings, including:

1. Motion to dismiss due to illegally/insufficiently constituted grand jury
2. Motion to dismiss due to misconduct before grand jury
3. Motion to dismiss due to double jeopardy
4. Motion to dismiss due to selective prosecution
5. Motion to dismiss due to vindictive prosecution
6. Motion to dismiss because of unnecessary delay in presentation to magistrate judge, in violation of F.R.Cr.P. 5(a).

B. FRCrP 12(b)(2): defenses/objections based on defects in the indictment or information, including:

1. Motion to dismiss because statute charged is unconstitutional
2. Motion to dismiss because duplicitous or to require election
US v Murray, 618 F.2d 892 (2d Cir. 1980);
US v Cooper, 966 F.2d 936, 939 n 3 (5th Cir. 1992)
3. Motion to dismiss because multiplicitous/one act charged in multiple counts

4. Motion to strike aliases from indictment
US v Payden, 613 F.Supp. 800, 823-824 (S.D.N.Y. 1985)

C. FRCrP 12(b)(3): motions to suppress evidence, including:

1. Motion to suppress suggestive pretrial identification
2. Motion to suppress statements of the defendant
3. Motion to suppress results of search
4. Motion to suppress “fruits” of illegal conduct

D. FRCrP 12 (b)(4): requests for discovery under Rule 16, including:

1. Specific *Brady* demands
2. Requests for Bills of Particulars

a. Rule 7(f) of the Federal Rules of Criminal Procedure authorizes courts to direct a filing of a bill of particulars and the district courts have broad discretion in ruling upon motions for bills of particulars. *Will v. United States*, 389 U.S. 90, 98-99 (1967).

b. “in conspiracy cases, bills of particulars may be granted to disclose the names of the unindicted co-conspirators in cases in which the government plans to use them as witnesses.” *United States v. DuBon-Otero*, 76 F.Supp.2d 161,169 (D. Puerto Rico, 1999) (citing *United States v. Barrentine*, 591 F.2d 1069 (5th Cir.1979)); *United States v. Murgas*, 967 F.Supp. 695, 702 (N.D. N.Y. 1997).

c. Where a large number of acts have been attributed to co-conspirators in the indictment, the court may order a bill of particulars identifying, for each relevant paragraph of the indictment, which co-conspirator performed the specified acts. *United States v. Hsia*, 24 F.3d 14, 31 (D.D.C. 1998) (citing *United States v. Macleod Bureau*, 6 F.R.D. 590, 593 (D.Mass.1947), in which the court ordered a bill of particulars as to persons through whom corporate defendant became party to conspiracy in prosecution under Sherman Antitrust Act); *United States v. Johnson*, 973 F.Supp. 1102, 1110 (D.Neb. 1997) (describing prior bill of particulars ordered by the court, which directed the government to supply a description of the alleged criminal acts, the dates on which they occurred, the locations where they occurred; the names of any person(s) involved or present, and the specific quantity of any drugs involved, if known); *United States v. Hong Loi Cheng*, 350 F.Supp. 67, 70 (S.D. N.Y. 1972) (ordering disclosure of whether a codefendant is charged as a principal or aider and abetter and directing the government to specify whether it will be alleged at trial that the defendant distributed a narcotic drug or possessed a narcotic drug with intent to distribute it; or both).

3. Requests for identity of informant/percipient witness

a. Informant's identity must be disclosed when it is relevant and helpful to the preparation of a defense. *Roviaro v. United States*, 353 U.S. 53, 60 - 61 (1957). Disclosure is required where the informant is either a participant or the only non-participant eyewitness to the crime other than the government agents. *United States v. Brodie*, 871 F.2d 125 (D.C. Cir. 1989); *United States v. Barnes*, 486 F.2d 776 (8th Cir. 1973); *United States v. Barnett*, 418 F.2d 309 (6th Cir. 1969); *United States v. Roberts*, 388 F.2d 646 (2d Cir. 1968).

b. The defense motion for disclosure must provide sufficient detail to establish that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence. The defendant has the burden of establishing the necessity for disclosure. *United States v. Moreno*, 588 F.2d 490 (5th Cir. 1979), cert. denied, 441 U.S. 936 (1979). The government's mere assertion of the "informer privilege" will then not end the issue. At the very least, the government must provide information to the court, to be considered *in camera*, of the alleged need to continue to keep the information confidential. *United States v. Weir*, 575 F.2d 668 (8th Cir. 1978), appeal after remand 597 F.2d 648 (8th Cir. 1979). The court must then balance defendant's specific needs for the information in order to prepare a defense, against the public policy considerations of the "informer privilege."

c. If the informer can be characterized as a "material witness," either to the events of the crime itself, the identity of the perpetrator of the crime, or the potential defense of entrapment, then disclosure is required. See *United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir. 1975), cert. denied, 423 U.S. 826 (1975); *United States v. Eddings*, 478 F.2d 67 (6th Cir. 1973).

4. Motion for reconstruction of the evidence to its original form (FRCrP 16(a)(1)(C), (d)(2); *US v Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980) (Kennedy, J., concurring)

E. FRCrP 12(b)(5): requests for severance of charges/defendants because of prejudicial joinder, under Rule 14.

1. F.R.Cr.P. 8(a) covers joinder of offenses; F.R.Cr.P. 8(b) covers joinder of defendants.

2. In determining whether or not to grant Motion for Severance of Counts, "courts are directed to examine 'whether the charges are laid under the same statute, whether they involve similar victims, locations, or modes of operation, and the time frame in which the charged conduct occurred . . . so that the rule of joinder does not become a license to join any and all charges made against a single defendant, no matter what their interconnection One point seems both clear and prudent: A vague thematic connection among offenses may not support joinder.'" *United States v. Buchanan*, 930 F.Supp. 657, 662 (D. Mass. 1996) (citations omitted).

3. One consideration is whether the evidence of one offense would be admissible at a trial of the separate offense. See e.g., *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (evidence of name and nature of defendant's conviction was not admissible to show prior felony conviction element of offense of possession of firearm by felon); *United States v. Holloway*, 1 F.3d 307 (5th Cir. 1993) (error to improperly join defendant's weapons charge with robbery charge, where no evidence weapon found at time of arrest was used in robberies and arrest occurred over two months after latest alleged robbery); *United States v. Lewis*, 787 F.2d 1318, 1322 - 1323 (9th Cir.1986) as amended by 798 F.2d 1250 (9th Cir.1986), cert. denied 489 U.S. 1032, 109 S.Ct. 1169, 103 L.Ed.2d 227 (1989) (severance of counts granted); *United States v. Bradley*, 905 F.2d 1482, 1487 - 1489 (11th Cir. 1990) (severance of offenses mid-trial was a manifest necessity); *United States v. Edwards*, 700 F.Supp. 837 (W.D. Pa. 1988) (severance of counts granted where defendant charged with intent to distribute cocaine, knowing and intentional carrying of firearm during drug trafficking crime, and possession of firearm after having been convicted of felony); *United States v. Massaquoi*, 1999 WL 1241089, opinion at 1 (E.D.Pa. 1999) (evidence of cocaine possession prejudicial at trial on armed bank robbery charge).

4. Motion for Severance of Defendants may be granted where (1) a co-defendant's statement which the prosecution intends to introduce contains data which implicate the defendant, in violation of *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); (2) codefendants have antagonistic defenses; (3) one codefendant is willing to testify and exculpate the other defendant; and/or (4) joinder causes certain management problems for the court.

See *United States v. McKay*, 70 F.Supp.2d 208, 213 (E.D. N.Y. 1999) (trial of defendant and codefendant nephew must be severed, because in order to only introduce portions of nephew's statement which inculcate the nephew, the government "would have to be Mandrake the Magician"); *United States v. Mayfield*, 189 F.3d 895 (9th Cir. 1999) (trial court abused its discretion in failing to sever where codefendant's defense was antagonistic and defendant was denied a substantial trial right of confrontation by joinder); *United States v. Cobb*, 185 F.3d 1193, 1195 (11th Cir. 1999) ("Where a defendant argues for severance on the ground that it will permit the exculpatory testimony of a co-defendant, he 'must show: (1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial.'" HELD - severance should have been granted); *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), cert. denied, 110 S.Ct. 1138 (1990) (long multi-defendant trials may place burden on jurors, defendants, counsel and judges, and thus severance of groups of defendants is appropriate).

IV. Motions which may be made at any time

A. F.R.Cr.P. Rule 12(b)(2):

- that the indictment/info fails to show jurisdiction in the court
- that the indictment/info fails to state an offense

B. F.R.Cr.P. Rule 16(d)(2): Failure to Comply with a (discovery) Request

F.R.Cr.P. Rule 16(d)(2): “If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.”

1. Motion for sanctions and/or suppression of evidence due to noncompliance with discovery orders or Rule 16: The court will consider and weigh a number of factors before determining what remedy is appropriate for discovery violations. Those factors include: 1) the reasons for the government’s delay in disclosure; 2) the extent of prejudice to the defendant because of the delay; 3) the feasibility of curing the prejudice by various methods; 4) the importance of the evidence to the government’s case; 5) the availability of alternative, effective sanctions (other than suppression) to remedy even flagrant violations; and 6) whether the prosecutor acted in bad faith in the discovery violation. *United States v. Hasting*, 126 F.3d 310, 317 (4th Cir. 1997); *United States v. DeCoteau*, 186 F.3d 1008, 1010 (8th Cir. 1999); *United States v. Fernandez*, 780 F.2d 1573, 1576 (11th Cir. 1986); *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 - 1314 (11th Cir. 1985).

2. Motion to dismiss or seek sanctions for bad faith destruction/loss of evidence. *Arizona v. Youngblood*, 488 U.S. 51, 56 (1988) (destruction or loss of evidence potentially helpful to defendant may violate due process); *United States v. Jobson*, 103 F.3d 2214, 2218 (6th Cir. 1996) (due process violation occurs if government acted in bad faith in failing to preserve evidence, exculpatory nature of evidence was apparent, and defendant will be unable to obtain comparable evidence by other reasonably available means); *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993) (government’s bad faith failure to preserve drug laboratory equipment seized from defendant violated due process and required dismissal of indictment); *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994) (government’s destruction of potentially useful evidence required dismissal of indictment).

3. Motion to dismiss for *Brady* violation. *United States v. Williams*, 954 F.2d 668, 672 (11th Cir.), *cert. denied*, 116 S.Ct. 1546 (1996). But see *United States v. Valera*, 845 F.2d 923, 927 - 928 (11th Cir. 1988) (“There is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production).

C. 18 U.S.C. §3162(a)(2): violation of 70 day speedy trial rule, 18 U.S.C. §3161(c): must be made prior to trial or entry of a plea of guilty/nolo contendere

D. Motion to dismiss for pre-accusatory delay

(Where defendant suffered actual prejudice from the delay, OR where prosecution intentionally/recklessly delayed for strategic advantage -- violates 5th Amendment right to due process.

United States v. Lovasco, 431 U.S. 783 (1977); *United States v. Ross*, 112 F.3d 422 (9th Cir.), amended 123 F.3d 1181 (9th Cir. 1997).

E. Motion to dismiss for violation of 6th Amendment right to speedy trial

F. F.R.Cr.P. 48(b): Motion to dismiss for unnecessary delay

G. Request for *Daubert* hearing:

Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999): holding of *Daubert v. Merrell Dow Pharmaceuticals*, that court must conduct inquiry into both relevance and admissibility of testimony by expert, applies to ALL expert testimony, not just scientific testimony.

H. F.R.Cr.P. 17(b): *Ex parte* Motion for subpoena for witnesses/evidence

I. Motion for transcripts of pretrial hearings/mistrial

J. Motion to admit polygraph results

K. Motions in limine

L. Motion to view the scene

M. F.R.Cr.P. 21(a): Motion for change of venue

N. 28 U.S.C. §1867(d): Motion to dismiss for violation of Jury Selection Act

V. Motions in Limine

A district court's authority to manage trials includes the power to exclude evidence in limine. *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). A motion in limine to exclude evidence may be granted if the evidence sought to be excluded is clearly inadmissible for any purpose. *Plair v. E.J. Brach & Sons, Inc.*, 864 F.Supp. 67, 69 (N.D. Ill. 1994). Thus, defense counsel has the power to ask the court, in advance of trial, to rule on the admissibility of specific evidence which is likely to be presented by the government.

F.R.Cr.P. 12(b): "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . ."

FRE 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

Aliases

United States v. Clark, 541 F.2d 1016, 1018 (4th Cir. 1976) (admissible if necessary to identify defendant in connection with offense charged, but motion to strike may be renewed if government fails to prove or if alias is irrelevant);

United States v. Vogt, 910 F.2d 1184 (4th Cir. 1991);

United States v. Wilkerson, 456 F.2d 57, 59 (6th Cir.), cert. denied, 408 U.S. 926 (1972) (“We strongly disapprove of the practice of including aliases in indictments” -- “Only when proof of an alias is relevant to identifying the defendant should a court allow its inclusion in the indictment and its subsequent introduction at trial.” HELD: harmless error).

United States v. Jorge-Salon, 734 F.2d 789, 791 - 792 (11th Cir. 1984) (no error in court refusal to prohibit government reference to aliases -- defendants failed to renew pretrial motion to strike at close of evidence, failed to remind court to give cautionary instruction despite court’s earlier request for such a reminder. “The use of an alias in an indictment and in evidence is permissible if it is necessary to connect the defendants with the acts charged.”).

United States v. Hines, 955 F.2d 1449, 1454 (11th Cir. 1992) (no error to use aliases throughout trial, where “the Government produced substantial evidence that the appellants had used all of the different names listed in the indictment and mentioned during testimony. . . the Government connected the appellants to all of the aliases referenced at trial.”).

United States v. Preston, 1996 WL 254379 (D.Kan. 4/5/96) (if the government fails to show use or relevancy at trial, defendant may renew motion to strike surplusage).

United States v. Murgas, 967 F.Supp. 695, 709 (N.D. N.Y. 1997) (“a defendant may legitimately complain that he may be prejudiced by the aliases of his codefendants if the indictment containing such aliases is presented to the jury” HELD: aliases would not be stricken here).

Antagonistic Defenses

Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993) (Mutually antagonistic defenses are not prejudicial per se; Rule 14 does not require severance even if prejudice is shown; relief to be granted, if any, is within district court’s sound discretion and may include appropriate limiting instructions [example given]. Severance should be granted under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence).

United States v. Spitler, 800 F.2d 1267 (4th Cir. 1986)

United States v. Odom, 888 F.2d 1014 (4th Cir. 1989) (discussion of why severance granted midtrial, when antagonistic defenses became clear)

United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973) (where codefendant was “the government’s best witness against Johnson” and prejudice of compelling codefendants to trial became clear mid-trial, as predicted in pretrial motion for severance, severance should have been granted upon renewed motion).

United States v. Breinig, 70 F.3d 850 (6th Cir. 1995) (denial of motion for severance severely and unfairly prejudiced defendant -- this was an “exceptional case,” where the codefendant’s trial defense caused the admission of otherwise inadmissible “bad character” evidence against this defendant; HELD: reversed).

United States v. Warner, 971 F.2d 1189, 1196 (6th Cir. 1992) (Mere difference in trial strategies or attempt of one defendant to save self by inculcating others do not mandate severance; defendant has burden to show that antagonistic defenses are “so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.” (Citations omitted)).

United States v. Frost, 61 F.3d 1518 (11th Cir. 1995), modified 77 F.3d 139 (11th Cir. 1996) (HELD - this defendant did not establish that allegedly antagonistic defenses were irreconcilable or mutually exclusive, and therefore severance was not required -- “The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other,” quoting *United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984)).

Bad Acts

FRE 404(b): The prosecution, upon request by defense counsel, to give “reasonable notice in advance of trial,” of “the general nature” of “other crimes, wrongs, or acts” of non-offense misconduct by the defendant which it intends to introduce in its case in chief. While 404(b) prohibits the introduction of such evidence “to prove the character of a person in order to show action in conformity therewith,” such evidence is “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” FRE 404(b).

Test for admissibility: *United States v. United States v. Trenkler*, 61 F.3d 45, 52 (1st Cir. 1995) (two-part test for admissibility of 404(b): is the evidence relevant to a material issue and does its probative value substantially outweigh danger of unfair prejudice); *United States v. Liefer*, 778 F.2d 1236, 1242 (7th Cir. 1985) (to be admissible, such evidence must be directed toward an issue other than the defendant’s propensity to commit the crime charged, the other act must be similar enough and close enough in time to the charged offense to be relevant, the evidence must be clear and convincing, and the probative value must not be outweighed by the danger of unfair prejudice) *United States v. Baker*, 82

F.3d 273, 276 (8th Cir. 1996) (to be admissible, 404(b) evidence must be “relevant to a material issue, established by a preponderance of the evidence, more probative than prejudicial, and similar in kind and close in time;” *United States v. Wilson*, 107 F.3d 774, 782 (10th Cir. 1997) (404(b) evidence must be offered for a purpose proper under that rule, must be relevant under FRE 401, must meet the balancing test of FRE 403, and, upon request, a limiting instruction must be given); *United States v. Zapata*, 139 F.3d 1355, 1357 (11th Cir. 1998) (three-part test: (1) is the evidence relevant to a matter in issue other than the defendant’s character? (2) is the act established by sufficient proof to permit a finding that the defendant committed the particular act? and (3) is the probative value of the evidence substantially outweighed by its undue prejudice under FRE 403?).

United States v. Rosse, 418 F.2d 38, 41 - 42 (2d Cir. 1969), cert. denied, 397 U.S. 998 (1970) (government may not introduce bad-acts evidence relevant to matter not yet put in issue by defense).

United States v. Murray, 103 F.3d 310, 316 - 317 (3rd Cir. 1997): “it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact ‘that is of consequence to the determination of the action.’ Fed.R. Evid 401. And it is likewise advisable for the trial court to place on the record a clear explanation of the basis for its ruling on the admission of the evidence. Not only do these procedures help to ensure that sensitive Rule 404(b) rulings are made with care (and thus to diminish the likelihood that these rulings will result in reversals), but these procedures greatly assist the process of appellate review. Consequently, although the language of Rule 404(b) does not require such procedures, our cases have emphasized their usefulness.”)

United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) (evidence at trial on drug conspiracy charge, of defendant’s prior possession of recipe for cooking crack and sale of it in New York, was improperly admitted, requiring reversal of his conviction).

United States v. Hardwell, 80 F.3d 1471, 1488 (10th Cir. 1996) (the prosecution must “precisely articulate the purpose for which the defendant is offered and the trial court must specifically identify the purpose for which it is admitted.”)

United States v. Sullivan, 919 F.2d 1403, 1416-17 (10th Cir.1990) (defendants charged with conspiracy to manufacture, possess, and distribute amphetamine in Oklahoma were prejudiced by government’s repeated referrals to the participation of one of the defendants in a separate and unrelated drug “cook” in Mississippi, on the “bald assertion” by the government that such evidence was part of the “history of the conspiracy.” HELD: such assertion insufficient to meet the requirements of either Rule 403 or Rule 404(b) and because “the prosecutor made no effort to explain a probative purpose or connection of the earlier conduct in Mississippi to this case,” defendants were clearly prejudiced and entitled to a new trial).

United States v. Costa, 947 F.2d 919, 925 (11th Cir. 1991) (if admitted, limiting instruction

required).

United States v. Paniagua-Ramos, 182 F.R.D. 376, 378 (D. Puerto Rico, 1998) (defendant's alibi defense "does not dispute his knowledge or intent" but "disputes his physical whereabouts at the time of the crime" and thus proposed 404(b) prior acts were inadmissible).

United States v. Lee, 972 F.Supp. 1330, 1340 (D. Kansas, 1997) (The government may be prohibited from mentioning the Rule 404(b) evidence during voir dire or opening argument, and from seeking to introduce such evidence without first approaching the bench.)

Cash

United States v. Nwanze, 1993 WL 375787 (4th Cir. 1993) (admission of large amounts of cash was relevant to drug trafficking charges)

United States v. Hudson, 843 F.2d 1062, 1066 (7th Cir. 1988) (conviction for larceny reversed due to improper admission of other crimes evidence, including eighty-two pictures, seized from defendants' van, of defendants clowning around with a lot of cash which could not be linked to charged larceny and which was evidence of other larcenies).

United States v. Lara-Naranjo, 859 F.2d 155, 1988 WL 97747 (9th Cir.) (\$19,000 found in co-conspirator's car admissible: defendant's car was followed to that person's residence and was parked near that person's car -- "This evidence makes appellant's conspiracy to distribute drugs and distribution of drugs more probable than it had been before admission of the evidence.")

Character of defendant

United States v. Curry, 512 F.2d 1299, 1303 - 1304 (4th Cir. 1975) (sheriff's testimony about defendant's reputation as drug dealer was reversible error)

United States v. Davenport, 449 F.2d 696, 698 (5th Cir. 1971) (admission of evidence concerning lawsuit between defendant and insurance company for alleged fraud as alleged rebuttal of defendant's good character was reversible error -- the only type of evidence admissible to show character is proof of reputation in the community).

United States v. Thomas, 676 F.2d 531 (11th Cir. 1982) (relying on *United States v. Walker*, 313 F.2d 236 (6th Cir.), cert. denied, 374 U.S. 807 (1963) -- defendant does not put good character at issue by taking stand; HELD: defendant was not entitled to good character jury instruction just because he took the stand, where there was no other character evidence submitted).

United States v. Fox, 473 F.2d 131 (D.C. Cir. 1972) (reversible error to permit defense character witness to be cross-examined about defendant's alleged arrest for rape)

Character of witness

FRE 608(b): prohibits party from introducing extrinsic evidence of prior misconduct, merely to impeach general credibility of a witness -- but “extrinsic evidence which contradicts the material testimony of a prior witness is admissible.”

United States v. Calle, 822 F.2d 1016, 1021 (11th Cir. 1987) (reversible error to prohibit defense witness to testify to “first-class, cash-oriented lifestyle consistent with that of a major drug trafficker” of government’s star witness -- testimony would have contradicted government’s theory that witness was only intermediary who needed someone else -- the defendant -- to supply the large amount of cocaine involved in case).

Co-conspirator statement

FRE 801(d)(2)(E): “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy” is not considered hearsay and is admissible as substantive evidence against a defendant.

Bourjaily v. United States, 483 U.S. 171 (1987) (government must establish foundation admissibility by preponderance of evidence, and may include statements themselves as foundational proof).

United States v. Sepulveda, 15 F.3d 1161, 1181 - 1182 (1st Cir. 1993) (coconspirator statement alone may not establish defendant’s membership in conspiracy)

United States v. Liberman, 637 F.2d 95 (2nd Cir. 1980) (mere “puffing” is not in furtherance of conspiracy)

United States v. Arce, 997 F.2d 1123, 1128 (5th Cir. 1993) (post-arrest discussion between co-conspirators of pre-arrest events is not “in furtherance” of conspiracy)

United States v. Means, 695 F.2d 811 (5th Cir. 1983) (mere idle conversation is not in furtherance of conspiracy)

United States v. Knigge, 832 F.2d 1100 (9th Cir. 1987) (taped conversation between informant and coconspirator in charged stolen stock scheme, as to reason corporation changed transfer agents, was inadmissible against defendant transfer agent, but harmless error because mere speculation).

United States v. James, 590 F.2d 575 (5th Cir. 1979) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979) (trial judge alone must determine whether out-of-court statements by alleged co-conspirators are admissible).

Codefendant statement

United States v. Foree, 43 F.3d 1572 (11th Cir. 1995) (government introduced, without objection, codefendant's tape-recorded confession, which referred repeatedly to defendant Foree; HELD: admission was error in violation of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), but harmless).

Computer-generated records

United States v. Dioguardi, 428 F.2d 1033, 1038 - 1039 (2d Cir.), cert. denied, 400 U.S. 825 (1970) (proponent of records must identify the program the computer was instructed to perform and the precise instructions given)

United States v. Miller, 771 F.2d 1219, 1237 (9th Cir. 1985) (summary charts of subscriber information stored on microfiche were not admissible under FRE 803(6) because prepared in response to litigation and thus "lack trustworthiness" and because the government failed to provide defendants with a copy of the underlying documents prior to introduction of the summary; but error was harmless).

Confession

Ofshe, Richard J. & Leo, Richard A., "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions," 16 *Studies in Law, Politics and Society* 189 - 251 (1997).

Conviction

Old Chief v. United States, 117 S.Ct. 644 (1997) (if the defendant stipulates to his prior felony conviction as an element of the presently-charged offense -- felon in possession of a weapon -- FRE 403 prohibits admission of government proof of the prior felony).

United States v. Johnson, 137 F.3d 970, 975 (7th Cir. 1998) (while prior trafficking conviction is admissible in possession with intent to distribute case, to establish intent element, factual details of the prior crime -- such as possession of weapon or scuffle with police -- are not admissible).

United States v. Miller, 895 F.2d 1431, 1437 - 1438 (D.C. Cir. 1990) (witness' testimony that defendant had just been released from jail inadmissible, but harmless error).

Demeanor

United States v. Williams, 133 F.3d 1048, 1053 (7th Cir. 1998) (agent's observations about defendant's demeanor during confrontation are "improper characterizations of the defendant and useless in the determination of guilt.")

Drug Identification

United States v. Roman, 121 F.3d 136, 139, 141 (3rd Cir. 1997) (government “just barely” met its burden of proof at sentencing in establishing drug as cocaine base, based on non-chemist officer’s testimony that the drug was packaged in vials with color caps “which is how crack cocaine is typically packaged for sale in Philadelphia”).

United States v. Baggett, 954 F.2d 674 (11th Cir. 1992) (circumstantial evidence admissible for drug identification -- informant testimony concerning defendant’s prior admissions, evidence that defendant carried large amount of money and a firearm, and experienced officer’s visual identification of drug as cocaine -- therefore, admission of hearsay chemist’s report was harmless error).

United States v. Harrell, 737 F.2d 971, 978 (11th Cir. 1984) (circumstantial evidence may establish identity of drugs, through “lay experience based on prior use, trading or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use such as testing, weighing, cutting and peculiar ingestion.”

Drug Use

United States v. Contreras, 602 F.2d 1237 (5th Cir. 1979) (testimony concerning defendant’s personal use of cocaine immediately after alleged drug sale to DEA undercover agent admissible as circumstantial evidence that the defendant knew the item sold to be heroin).

United States v. Monzon, 869 F.2d 338, 344 0 345 (7th Cir.), cert. denied 490 U.S. 1075 (1989) (Prior personal drug use is **not** admissible to prove intent element in charge of possession for distribution or drug conspiracy.)

United States v. Robinson, 956 F.2d 1388, 1397 (7th Cir.), cert. denied, 506 U.S. 1020 (1992) (evidence of witness’ prior drug use should only be admitted if the witness’ mental capacity or memory are legitimately at issue)

United States v. Ono, 918 F.2d 1462, 1464 - 1465 (9th Cir. 1990). (Prior conviction for possession of heroin was admissible to prove knowledge and intent element in charge conspiracy to manufacture synthetic heroin).

United States v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997) (Prior personal drug use **is** admissible to prove intent in prosecution for distribution of narcotics.)

Experts

United States v. Agudelo, 988 F.2d 285 (1st Cir. 1993) (normally, expert should have some special qualifications or knowledge that would cause his opinion to add something of value - admission of agent's opinion as to source of seized cash was error but not prejudicial).

United States v. Washington, 44 F.3d 1271, 1283 (5th Cir.), cert. denied, 115 S.Ct. 2011 (1995) (experienced narcotics agent may testify about the significance of certain conduct or methods of operation unique to the drug distribution business).

United States v. Williams, 95 F.3d 723 (8th Cir. 1996) (testimony of polygraph examiner who administered test to government's chief witness did not support admission of polygraph exam under *Daubert* because examiner could not testify to reliability of polygraph testing or to field of polygraphy in general).

Fingerprints

United States v. Poindexter, 942 F.2d 354 (6th Cir. 1991) (reversible error to prohibit defense counsel from commenting on reasonable doubt raised by failure of government to introduce evidence concerning jar of cocaine which had apparently been dusted for fingerprints, and to further state to jury that an absence of fingerprint evidence does not "prove anything," where there was no direct evidence that defendant had processed or sold drugs, but harmless error as to codefendant).

Gambling

United States v. Jones, 28 F.3d 1574, 1579 (11th Cir. 1994), vacated and remanded on other grounds, 116 S.Ct. 663 (1995), conviction reversed on other grounds, 74 F.3d 275 (11th Cir. 1996).

United States v. Abodeely, 801 F.2d 1020 (8th Cir. 1986) (evidence of gambling activity in trial for tax evasion "is undoubtedly prejudicial to the defendant," 801 F.2d at 1025, but here more probative than prejudicial, to establish income: "After all, having been shown that Abodeely ran a bar and a brothel, even the most straitlaced Iowa jury could hardly have been adversely affected by a showing of his participation in the legal, though perhaps sinful and worldly in the eyes of a Midwestern jury, activity of gambling in Nevada." 801 F.2d at 1026).

Handwriting

United States v. O'Kane, 439 F. Supp. 211 (S.D. Fla. 1977) (handwriting not protected by Fifth Amendment; neither U.S. Attorney nor court may compel production of handwriting exemplar merely on basis of general subpoena of person to grand jury -- grand jury itself must direct the furnishing of nontestamentary evidence such as handwriting exemplars).

Informant testimony

United States v. Forrester, 60 F.3d 52 (2nd Cir. 1995) (Helpful opinion regarding vouching by government witnesses and presentation of inadmissible hearsay re prior statements: DEA Agent testimony that he did not find informant witness' testimony to be "inconsistent" was error -- no foundation for agent to testify as expert on credibility, and lay opinion invaded the jury's province; credibility of witnesses is matter exclusively for determination by jury. Admission of informant witness' seven-page handwritten statement was inadmissible hearsay even though prior consistent statement -- her motive to fabricate arose as soon as she was arrested -- statement must have been made before witness developed alleged motive to fabricate).

Jury view of scene

United States v. Bryant, 563 F.2d 1227, 1230 (5th Cir. 1977) (within trial court's discretion)

Ledger

United States v. Gil, 58 F.3d 1414, 1419 - 1420 (9th Cir.), cert. denied, 116 S.Ct. 430 (1995) (for writings in ledger to be admissible under FRE 801(d), there must be sufficient evidence to establish authorship of ledger).

United States v. Ordonez, 737 F.2d 793 (9th Cir. 1984) (ledger entries inadmissible as adoptive statements, co-conspirator statements, or business records -- no evidence connected ledgers to defendants, or established identity of declarants, or trustworthiness/reliability of records)

Marital communications

Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (private statements by defendant to spouse are privileged marital communications, unless spouse was co-participant in crime; however, only the spouse may assert privilege not to testify adversely to defendant)

United States v. Morris, 988 F.2d 1335, 1339 (4th Cir. 1993) ("it is self-evident that marital silence offers the same protection as does Fifth Amendment silence" -- HELD: reversible error to permit prosecutor to cross-examine defendant's wife about her assertion of marital privilege before the grand jury);

United States v. Archer, 733 F.2d 354, 359 (5th Cir. 1984) (statements made during and concerning conspiracy to spouse who was coconspirator were not within protected marital communications);

United States v. Sims, 755 F.2d 1239 (6th Cir. 1985) (defendant's wife's testimony about statements by defendant about crimes to which wife was coparticipant was admissible);

United States v. Byrd, 750 F.2d 585 (7th Cir. 1984) (communications not “marital” where made during permanent separation);

United States v. Lustig, 555 F.2d 737, 748 (9th Cir. 1977) (only the spouse has the privilege to refuse to testify adversely to the defendant and that privilege does not remain if the marriage has terminated).

United States v. Neal, 743 F.2d 1441 (10th Cir. 1984) (testimony by defendant’s wife who was accessory after the fact, was admissible);

United States v. Duran, 884 F.Supp. 537 (D. D.C., 1995) (defendant’s letters to wife were privileged).

Motel records

FRE 803(6)

United States v. McIntyre, 997 F.2d 687 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994) (motel records prepared by guests, without verification of accuracy of information, were inadmissible)

United States v. Cestnik, 36 F.3d 904, 909 (10th Cir. 1994) (motel records admission harmless)

Phone records

FRE 803(6): Records of regularly conducted activity are not excluded by the hearsay rule, even though the declarant is available as a witness. This covers a . . . “record . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . record . . . all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”

United States v. Briscoe, 896 F.2d 1476, 1494, n.13 (7th Cir. 1990) (admission of computerized phone records not error, even though the actual computer printouts were prepared specifically for this case -- “It is sufficient that the data compiled in the printouts was entered into the computer contemporaneous with the placing of each telephone call and maintained in the regular course of business.”)

United States v. Walt, 1997 WL 362205, 117 F.3d 1427 (table) (9th Cir. 7/1/97) (business records are not self-authenticating; admission requires testimony of a qualified witness that 1) the writing is made or transmitted by a person with knowledge at or near the time of the incident recorded and 2) the record is kept in the course of regularly conducted business activity; a qualified witness can be anyone

who understands the record-keeping system involved. HELD: no error in admission of phone records, despite fact that custodian witness did not prepare, file or retrieve the records).

United States v. Miller, 771 F.2d 1219, 1237 (9th Cir. 1985) (summary charts of subscriber information stored on microfiche were not admissible under FRE 803(6) because prepared in response to litigation and thus “lack trustworthiness” and because the government failed to provide defendants with a copy of the underlying documents prior to introduction of the summary; but error harmless).

Polygraphs

FRE 702: scientific evidence, in the form of “opinion or otherwise” may be admitted if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.”

See “Polygraph Policy Model for Law Enforcement,” Ronald M. Furgerson, Special Agent Assistant Section Chief, Document Section, Laboratory Division, *FBI Law Enforcement Bulletin*, June 1987 (“Consideration should be given to establishing a policy that requires polygraph be considered prior to significant commitments of manpower or financial resources solely on the basis of unsubstantiated information furnished by citizens or informants.”).

United States v. Scheffer, 118 S.Ct. 1261 (1998): Military Rule of Evidence 707 (which explicitly prohibits admission of polygraph evidence) does not abridge the Sixth Amendment right to present a defense. It serves the “legitimate interests” of ensuring only reliable evidence is introduced at trial, preserving the jury’s role in determining credibility, and avoiding collateral litigation. 118 S.Ct. at 1264 - 1265.
10).

General Electric, Co. v. Joiner, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (decisions on admissibility of evidence under FRE 702 are reviewed for abuse of discretion).

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993): (“liberal” relaxed approach of Federal Rules of Evidence governs the admissibility of scientific evidence in federal trials; evidence must meet two criteria for admissibility under FRE 702 -- 1) must be “scientific knowledge” and 2) must be relevant. 113 S.Ct. at 2794 - 2796. Trial judge is still the “gatekeeper”.)

Wood v. Bartholomew, ___ U.S. ___, 116 S.Ct. 7, 10, 133 L.Ed.3d 1 (1995) (polygraph results are not “material” under Brady if they would not have been admissible at trial; here, results were inadmissible even for impeachment purposes under Washington state law, it was pure speculation that knowledge of results would have affected trial preparation, and there was overwhelming evidence of defendant’s guilt).

United States v. Kwong, 69 F.3d 663, 668 (2nd Cir. 1995) (defendant's polygraph examination properly excluded because "questions asked were inherently ambiguous no matter how they were answered," and results would thus mislead and confuse the jury).

United States v. A & S Council Oil Co., 947 F.2d 1128, 1133 (4th Cir. 1991) (exception to general inadmissibility of polygraph exam of witness, where trial court should have permitted cross-examination of expert on credibility of key witness, on basis of a polygraph test taken by that witness).

United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (polygraphs no longer per se inadmissible -- here, should have been considered when offered at suppression hearing to support contention that consent to search was not voluntary).

United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995) (upholding exclusion of defendant's private polygraph examination, relying on *Conti v. Commissioner*, 39 F.3d 658, 663 (6th Cir. 1994), cert. denied, 115 S.Ct. 1793 (1995) ("unilaterally obtained polygraph evidence is almost never admissible under Evidence Rule 403").)

United States v. Scarborough, 43 F.3d 1021, 1026 (6th Cir. 1994) (results of polygraphs are inadmissible because they are inherently unreliable - no error in prohibiting cross-examination of testifying former codefendant's failure of two government polygraphs).

United States v. Williams, 95 F.3d 723 (8th Cir. 1996) (testimony of agent polygraph examiner who administered test to government's chief witness, did not support admission of polygraph exam under *Daubert* because agent could not testify to reliability of polygraph testing or to field of polygraph in general).

United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) (vacating and remanding for Daubert hearing on admissibility; holding that Daubert overrules its earlier prohibition of all unstipulated polygraph evidence, in Brown v. Darcy, 783 F.2d 1389, 1396 n. 13 (9th Cir. 1986)).

United States v. Gilliard, 133 F.3d 809 (11th Cir. 1998) (exclusion of polygraph results of defendant by defense expert was not abuse of discretion under *Daubert* -- contrary expert opinion submitted regarding reliability of particular questioning technique used, more prejudicial than probative, would have added from one-half to two days of testimony to four-day trial, and court "disturbed" over lack of opportunity for government to be present at examination -- government cross-examination hampered as result).

United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) (en banc) (polygraph results are not per se inadmissible -- will be admissible if parties stipulate to admissibility or when used to impeach or bolster witness' credibility, as long as opposing party has adequate notice of the evidence and opportunity to secure own polygraph).

United States v. Bellomo, 944 F. Supp. 1160, 1163 (S.D.N.Y. 1996) (polygraph submitted, and considered, at detention hearing but found not to outweigh government's substantial evidence of guilt).

United States v. Galbreth, 908 F. Supp. 877 (D. N.M. 1995) (polygraph admitted)

United States v. Crumby, 895 F. Supp. 1354 (D. Az. 1995) (polygraph admitted)

Prior Statements

United States v. Forrester, 60 F.3d 52 (2nd Cir. 1995) (admission of prior consistent statement improper because statement was not made prior to existence of witness' motive to fabricate);

United States v. Sisto, 534 F.2d 616 (5th Cir. 1976) (impeachment by a prior statement may not be permitted "when it is used as a stratagem to get before the jury otherwise inadmissible evidence.")

United States v. Garcia, 530 F.2d 650, 656 (5th Cir. 1976) (if admitted, must be accompanied by limiting instruction)

United States v. Gossett, 877 F.2d 91 (11th Cir. 1989) (admission of prior inconsistent statement).

United States v. Billue, 994 F.2d 1562, 1567 (11th Cir. 1993) (limiting instruction required).

Profile

United States v. Agudelo, 988 F.2d 285 (1st Cir. 1993) (agent's opinion that previously seized \$50,000 in cash was drug transaction proceeds was inadmissible, but harmless error).

United States v. Williams, 957 F.2d 1238, 1241 - 1242 (5th Cir. 1992) (The "probative value of a drug courier profile is so low in relation to its prejudicial effect that its admission is error.")

United States v. Quigley, 890 F.2d 1019 (8th Cir. 1989) (admission of drug profile through police opinion testimony was error)

United States v. Beltran-Rios, 878 F.2d ___, 1210 (9th Cir. ___) ("Drug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers . . . Every defendant has the right to be tried based on the evidence against him or her, not on the technique utilized by law enforcement officials in investigating criminal activity.")

United States v. Lui, 941 F.2d 844, 848 (9th Cir. 1991) (error to admit agent testimony about “typical” actions of drug couriers in concealing narcotics in false panels of luggage, claiming travel is for business purpose or relative visit, and creating itineraries with short intermediate stops -- such evidence should be admitted only in exceptional, criminal cases -- here, agent took “items that were perfectly innocent” and “turned them into evidence of guilt”)

United States v. Lim, 984 F.2d 331 (9th Cir.), cert. denied, 508 U.S. 965 (1993) (error to admit agent testimony about profile of a “shotgun” who travels with the mule, in case charging defendant whose travel itinerary connected him to passenger on whom drugs were discovered -- prejudicial effect from applying “the profile . . . to two innocuous bits of evidence” of domestic travel and the fact that the defendant was not carrying drugs).

Prostitution

United States v. DeGeratto, 876 F.2d 576 (8th Cir. 1989), cited approvingly in *United States v. Calderone*, 127 F.3d 1314, 1334 (11th Cir. 1997) (repeated questioning and closing argument concerning variety of uncharged misconduct, including unknowing participation in prostitution organization, required reversal of conviction for receiving and concealing stolen property).

Scene-setting

United States v. Reyes, 18 F.3d 65 (2d Cir. 1994) (reversing conviction because of improper use of “background” evidence as basis for state of mind of law enforcement officer)

United States v. Forrester, 60 F.3d 52 (2nd Cir. 1995) (Agent’s “concept of the nature of the investigation [that it was “narcotics-related”] was not relevant to ‘any fact that is of consequence to the determination of the action’.” 60 F.3d at 60. Second agent’s testimony to information he’d received from out-of-court declarant, when offered to explain omissions from report of interviews with other witnesses (that they’d allegedly identified the defendant as the leader of a narcotics courier organization), was “technically” not hearsay, but was inadmissible because the danger of prejudice outweighed the probative value of the evidence, which “went to a disputed issue at trial” 60 F.3d at 61 - 62).

United States v. Martin, 897 F.2d 1368, 1372 (6th Cir. 1990) (“when inculpatory out of court assertions name the criminal defendant in connection with ‘setting the scene’ for an investigation, the question of unfair prejudice under FRE 403 almost always arises. . . . The relevance and probative value of ‘investigative background’ is often low, but the potential for abuse is high.” But, harmless here, where defendant was acquitted on counts to which hearsay related.)

United States v. Fountain, 2 F.3d 656, 668 - 669 (6th Cir. 1993) (Error, but harmless, to admit agent’s testimony that “I had information that that was the likeliest spot . . . that I would find narcotics and/or firearms, that being the bedroom of Joe Fountain.” Out of court statements offered for the limited purpose of explaining why a government investigation was undertaken, while not necessarily

hearsay, must still be “evaluated for ‘relevancy’ under Rule 401 and for undue prejudice under FRE 403.” “Otherwise inadmissible hearsay evidence is not made admissible simply because it is claimed to be probative of a fact that is not in issue in the case.” Here, the agents’ actions needed no explanation, so “we can conclude only that Primak’s ‘information’ was offered to prove the truth of the matter asserted - that guns and narcotics were in the bedroom.”)

Scientific Evidence

United States v. Lee, 25 F.3d 997 (11th Cir. 1994) (judgment vacated and matter remanded for hearings on admissibility under *Daubert* of evidence from two machines, the Sentor and Ionscan, used to detect trace amounts of cocaine on defendant’s personal effects).

Severance

United States v. Holloway, 1 F.3d 307 (5th Cir. 1993) (error to improperly join defendant’s weapons charge with robbery charge, where no evidence weapon found at time of arrest was used in robberies and arrest occurred over two months after latest alleged robbery).

Summaries

FRE 1006: “The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.”

United States v. Brown, 136 F.3d 1176 (7th Cir. 1998) (where exhibits underlying summaries were admitted in evidence without objection, summaries are admissible).

United States v. Wood, 943 F.2d 1048 (9th Cir. 1991) (charts and summaries of evidence already admitted are not considered evidence and are not admissible as evidence or appropriate for use by jury during deliberations)

Tape-recordings/Transcripts

FRE 401, Advisory Committee Notes: relevant evidence permits the use of evidence that is “admitted as an aid to understanding.”

FRE 611(a): the trial court has the power to “exercise reasonable control over the mode and order of . . . presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of the truth, [and] (2) avoid needless consumption of time . . .”

FRE 1002: original is required to prove contents of a writing, recording, or photograph.

FRE 1004: original is not required and other evidence of a . . . recording is admissible, if (1) original lost or destroyed, unless the proponent lost or destroyed them in bad faith; (2) no original can be

obtainable . . . ; (3) original in possession of opponent; or (4) the . . . recording is not closely related to a controlling issue.

United States v. Fuentes, 563 F.2d 527, 532 (2nd Cir. 1977) (tape recordings are admissible upon a showing of authenticity, accuracy, and relevance).

United States v. Onori, 535 F.2d 938, 947 - 949 (5th Cir. 1976) (sets out the “best” procedure for use of transcripts, although finding no error in the improper procedure used at this trial (which “left the jury with the misleading impression that the speaker identifications in the transcript were unquestionably accurate:). Instead, “the use of a transcript as a guide is analogous to the use of expert testimony as a device aiding a jury in understanding other types of real evidence. . . .It is therefore incorrect to think of the transcripts as simply an ‘aid’ They are evidence and, like other evidence, may be admitted for a limited purpose only it is unnecessary for the trial court to decide whether a transcript is accurate before that transcript is given to the jury, so long as each side to the dispute is given an opportunity to submit a transcript containing its version of a conversation.”)

United States v. Sutherland, 656 F.2d 1181, 1201 n. 16 (5th Cir. 1981) (opponent’s failure to object does not relieve proponent of tape recording from meeting the minimal burden of authentication before the transcript can be admitted; HELD: government failed to introduce testimony that transcripts were accurate and introduced no testimony that translation of Spanish portions was accurate, but harmless error in light of two witnesses’ independent testimony concerning the subject conversations).

United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983) (Trial court must determine whether the tapes are “audible and sufficiently comprehensible for the jury to consider the contents.” Ideal procedure for testing accuracy of transcripts is to have the prosecution and defense counsel stipulate to a transcript; “the second best method is for the trial court to make a pretrial determination of accuracy by reading the transcript against the tapes.” 707 F.2d at 876.)

United States v. Scarborough, 43 F.3d 1021, 1024 (6th Cir. 1994) (HELD: no abuse of discretion in admitting composite tape. Abuse of discretion in admitting recording occurs only “where the unintelligible portions of a tape recording are so substantial that the recording as a whole is rendered untrustworthy,” quoting *United States v. Scaife*, 749 F.2d 338, 345 (6th Cir. 1984)).

United States v. Elder, 90 F.3d 1110, 1129 (6th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 529, 136 L.Ed.2d 415 (1996). (Trial court has discretion to permit use of transcript during deliberations.)

United States v. Howard, 90 F.3d 1194, 1199 (7th Cir. 1996) (“the jury is entitled to consider the divergence in two transcripts of the same conversation, with the recording of it, as a problem of fact to be resolved in the traditional manner.”)

United States v. Parks, 100 F.3d 1300 (7th Cir. 1994) (government appeal from order suppressing tapes until government transcribed entirety of 65 hours of recordings: HELD -- defendant had meaningful access to tapes without transcription of all hours of recordings; Brady did not require government to transcribe full tapes; audibility only goes to weight of evidence, not admissibility).

United States v. Brown, 136 F.3d 1176 (7th Cir. 1998) (recollection of eyewitnesses to events in question lay sufficient foundation for admission of audiotapes of events -- chain of custody not necessary, break in chain goes to weight of evidence).

United States v. Saunders, 94 F.3d 1134, 1147 - 1148 (8th Cir.) (no error, where trial court repeatedly instructed jury that tapes, not transcripts, were the evidence).

United States v. Booker, 952 F.2d 247 (9th Cir. 1991) (district court not required to listen to tapes or determine accuracy of transcript, prior to either being permitted before jury, where jurors not allowed to look at transcripts before tapes were played, transcripts were not admitted into evidence, court instructed jury that tape governed if discrepancy, and agent testified to accuracy of transcript).

United States v. Ross, 33 F.3d 1507, 1513 - 1514 (11th Cir. 1994) (although absence of original tapes due to routine destruction by Spanish National Police is “troubling,” FRE 1004's requirements are met and judge did not err in admitting English-language transcriptions of thirteen intercepted English and Spanish conversations concerning cocaine distribution-- prosecution not at fault in destruction, transcripts are best evidence, transcribers were subject to cross-examination, and appellants had “ample opportunity to attack the transcripts’ credibility before the jury”).

United States v. Howard, 953 F.2d 610, 612 - 613 (11th Cir. 1992) (best evidence rule did not bar police officer who had monitored phone conversation from testifying as to contents of conversation, even though partially inaudible tape recording of conversation was also played for jury -- rule requires introduction of original recording “only when content of recording is a factual issue relevant to the use Since the proffered testimony was offered not to prove the content of the tapes, but rather, the content of the conversations, the best evidence rule does not apply” and agent’s testimonial recollection of the conversation was properly admitted).

United States v. Nixon, 918 F.2d 895 (11th Cir. 1990) (transcripts are admissible as evidence, to assist the jury in identifying the speakers -- no error where district court repeatedly gave limiting instructions and government identified speakers through live witnesses who personally recognized voices).

United States v. Holton, 116 F.3d 1536 (D.C. Cir. 1997) (wrong procedure used, but harmless error -- good opinion on importance of limiting use of transcripts -- “Ironically, the same circumstances that make a transcript helpful to a juror may prejudice the defendant if it is presented without proper safeguards, for the only transcripts worth fighting about are those on which important words may be susceptible to different interpretations.” 116 F.3d at 1540. One of three alternate procedures should be used, along with instruction that the jurors’ personal understanding of the tape is to govern - 1) parties

stipulate to accuracy of one transcript; 2) if the parties cannot agree, the trial court makes a pretrial determination of the transcript's accuracy; or 3) the jury is provided with two transcripts, reflecting each party's version. 116 F.3d at 1541. Trial court has discretion to permit use of transcript during deliberations. 116 F.3d at 1541 - 1542.)

Tax returns, or not

United States v. Carter, 969 F.2d 197, 200 - 201 (6th Cir. 1992) (financial evidence concerning defendant, including his two bank loan applications and his failure to file tax returns, was irrelevant and inadmissible at trial on charge of conspiracy to possess with intent to distribute and to distribute cocaine).

United States v. Copeland, 51 F.3d 611, 617 (6th Cir. 1995) (failure to file income tax returns was irrelevant under the circumstances of this drug case, which did not include evidence of possession of large amount of cash or property by this defendant, but was harmless error).

United States v. Penny, 60 F.3d 1257, 1263 (7th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996) ("Evidence of unexplained wealth is probative and therefore admissible if it 'creates a reasonable inference of the defendant's involvement in the drug conspiracy or trafficking.' -- there must be "other evidence, mainly that the wealth was not derived from legitimate sources, . . . to support the charge of narcotics distribution" and the evidence must relate to wealth acquired during the period when the alleged drug trafficking occurred).

United States v. Wood, 834 F.2d 1382, 1386 (8th Cir. 1987) (defendant's possession and spending of large amounts of cash, and failure to file income tax returns, are relevant to establish that defendant lacked a legitimate source of income and that failure to report was due to defendant's participation in illegal activities)

Tips

United States v. Lovelace, 123 F.3d 650 (7th Cir. 1997), cert. denied, 118 S.Ct. 1088 (error, but harmless, to admit evidence that CI provided tip to police that defendant would be in town on a certain day, at a certain address, in a car to delivery cocaine).

Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996) (state appellate counsel's failure to raise issue concerning inadmissibility of officer's testimony describing contents of informant's tip constituted ineffective assistance of counsel, entitling habeas petitioner to new appeal).

Weapons

United States v. Lucien, 61 F.3d 366, 376 (D.C. Cir. 1995) (presence of weapons and ammunition is not sufficient basis on which to conclude that drugs present were being held for resale).

Western Union transfers

United States v. Pendergrass, 47 F.3d 1166 (Table), 1995 WL 56673 (4th Cir. 2/7/95) (conviction of one defendant for money laundering reversed because of prejudicial impact of admission of hearsay -- Western Union computer records and “send” and “receive” forms were clearly hearsay, offered for the truth of the matter asserted; information contained on them was not supplied by Western Union employees and, as to the “send” forms, there were no measures taken to ensure accuracy of the information).

United States v. Arteaga, 117 F.3d 388, 399 - 400 (9th Cir. 1997) (conviction for money laundering reversed where proof consisted of defendant’s name as intended payee on Western Union forms and prosecution had agreed that jury could not consider for its truth any customer-supplied information) (but see discussion, at 397 - 398, of non-hearsay theories available to justify admission, but not used by government, including statements that function as legally operative conduct, statements offered for the effect on the hearer, statements offered to impeach, and statements showing circumstantial evidence of state of mind.)

United States v. McIntyre, 997 F.2d 687, 701 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994) (information in business record provided by customer is admissible only if business has adequate verification or other assurance of accuracy, by a policy of verifying the information, or business had sufficient self-interest in accuracy to infer trustworthiness; HELD: Western Union “send” forms not admissible under FRE 803(6)).

United States v. Cestnik, 36 F.3d 904, 909 (10th Cir. 1994) (Western Union forms and computer-generated records admissible because “the government introduced the money transfer records . . . to link the ‘to-send-money’ forms to other information, such as the amount and origin of the transfer and the identity of the recipients, and not to establish identity of senders)

APPENDIX

- A. Letter requesting discovery
- B. Letter requesting additional discovery
- C. Letter setting out defense disclosures
- D. Motion to dismiss due to non-compliance with discovery
- E. Memorandum in support of Motion to dismiss
- F. Motions checklist

A. Letter requesting discovery

**, 2000

****, Esquire
Assistant U.S. Attorney
One Court Square, Suite 201
Montgomery, Alabama 36104

Re: United States v. **
Cr. No. 99-**

Dear Ms/Mr.**:

This letter is to confirm my request for discovery in this matter. I request an opportunity to inspect or review, or receive copies of, all information included in the following:

A. Under Rule 16(a)(1)(A), all oral, written, or recorded statements or testimony made by the defendant to any law enforcement officer, informant, or other government agent or employee, including the portion of any person's written record or report which includes the substance of such statements repeated, reported or incorporated into the document.

B. Under Rule 16(a)(1)(B), the defendant's prior criminal record, including any arrests or convictions.

C. Under Rule 16(a)(1)(C), a copy of, or notice of and an opportunity to inspect, all books, papers, documents, photographs, tangible objects or identification of buildings or places, which are material to the preparation of a defense, or intended for use in any way by the government at trial (including direct introduction or indirect reference), or which were obtained from or belong to the defendant.

*D. Under Rule 16(a)(1)(D), the results or reports of any physical or mental examinations, scientific experiments or tests, which are either intended for use by the government at trial (through either direct introduction or indirect reference) or which are material to the preparation of a defense (this latter category includes examinations or tests which were incomplete, inconclusive or not intended to be used by the government at trial).

*E. Under Rule 16(a)(1)(E), written summaries of testimony which the government intends to use under FRE Rules 702, 703, or 705, including each such witness' opinions, the basis and reasons for each such opinion, and each such witness' qualifications.

F. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985) and Kyles v. Whitley, 514 U.S. 419 (1995), including

1. Any material or information which would tend to attenuate, exculpate, exonerate, mitigate or reduce or limit the defendant's involvement in or liability for any of the circumstances alleged in the indictment;

2. Any material or information which affects the credibility of any government witness or which would be of assistance in the cross-examination of any government witness, including (a) prior criminal records (including juvenile court matters or arrests which did not result in conviction), (b) any records and information revealing prior misconduct or bad acts, (c) inconsistent statements, (d) self-incriminating statements, (e) inconclusive or deceptive performance on any portion of a polygraph examination, (f) any threats, investigations, or possible prosecutions pending or which could be brought against the witness, (g) any supervision status, (h) any pending or potential legal disputes with any local, state or federal government or agency, (i) information concerning any possible motive of the witness in offering statements or testimony, (j) information concerning any agreements, deals, promises or inducements offered, discussed or made with a witness by any local, state or federal government employee, without regard to whether or not such employee was authorized to offer such to the witness, (k) sufficient identification of each occasion on which the witness has previously testified so that defense counsel may investigate such matters and obtain transcripts if necessary, (l) personnel and Government files concerning the witness, and (m) whether the witness has ever had his or her credibility or reliability questioned or doubted by any court, prosecutor, or law enforcement agent.

3. Any material or information concerning other potential witnesses whose testimony might tend to weaken any portion of the government's case, or contradict any government witness, or strengthen the defense case;

4. Any material or information which might raise questions concerning (a) the probative value of any physical evidence which the government intends to use at trial, (b) the good faith or thoroughness of the investigation conducted by any law enforcement personnel which contributed to this indictment, or law enforcement reliance on unreliable informants or information; and

5. Any statements, testimony or physical evidence concerning criminal conduct relevant to the allegations contained in the indictment but which does not include reference to the defendant. For example, this would include prior statements of a government witness in which the witness was listing persons known by him to have committed relevant criminal acts, where such statement did not include a reference to the defendant. As another example, this would include the recovery of photographs or latent fingerprints from a crime scene, where such photographs did not show the defendant or the fingerprints did not include prints of the defendant.

G. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of United States v. Giglio, 405 U.S. 150 (1972), including any documents which reflect, or information concerning, any agreement with the witness, any conduct requirements or performance expectation of the witness, any payment promised to or made to the witness, any requests by the witness for payment, or any items submitted by the witness for payment, and the dates, times and amounts of any payments or promises given.

H. Any record of prior convictions of any alleged informant who will testify for the government at trial. Such information is of course impeachment for any government witness, and thus your production in response to this section should not be confined to persons whose testimony arose from confidential or undercover activities, but would include the prior record of any government witness.

I. If a line-up, show-up, photo spread or similar procedure was used in attempting to identify the defendant, the exact procedure and participants shall be described and the results, together with any pictures and photographs. Identification requests which did not result in the identification of the defendant are of course *Brady* and possible impeachment and thus would be included in your response.

J. If any vehicle, vessel or aircraft was allegedly utilized in the commission of any offenses charged, an opportunity for myself and/or any expert selected by the defense to inspect it, if it is in the custody of any governmental authority. Identification of any vehicle described as being involved in the commission of the offense and as being owned by or in the control of the defendant should also be disclosed under this provision. Identification of any vehicle described as being involved in the commission of the offense and as not being owned by or in the control of the defendant should also be disclosed as *Brady* and possible impeachment and thus would be included in your response.

K. Copies of any latent fingerprints, or prints of any type, and any reports concerning those prints. Of course, any latent fingerprints identified as not being those of the defendant should also be provided as *Brady* and possible impeachment.

L. Any intention by the government to introduce evidence in its case in chief at trial, pursuant to Rule 404(b) of the Federal Rules of Procedure, including a description of such proposed evidence to a degree which fairly apprises the defendant of its general nature and which is sufficiently clear so as to permit pretrial resolution of the issue of its admissibility. United States v. Barnes, 49 F.3d 1144, 1148 - 1149 (6th Cir. 1995); United States v. Lampley, 68 F.3d 1296 (11th Cir. 1995).

M. Information concerning whether or not the defendant was an "aggrieved person" as defined in 18 U.S.C. 2510(11).

N. Notice, pursuant to F.R.Cr.P. 12(d), complete notice of all evidence which the government intends to use at trial of this matter which was obtained as a result of a search, seizure, electronic or video interception, or statement of the defendant, so that I may timely determine whether such evidence is subject to a motion to suppress.

O. I further request that you arrange for the transcription of, the grand jury testimony of all witnesses who will testify in the government's case in chief, if subject to Fed.R.Crim.P. 26.2 and 18 U.S.C. 3500. Of course, statements discoverable under *Brady* and *Jencks* include all relevant prior statements of a witness, including trial or pretrial testimony and reports which include verbatim descriptions of the witness or which have been adopted by the witness.

P. I further request early production of "Jencks Act Statements," in order to avoid delay or necessity for a continuance during trial. Please inform me as to when this material will be available.

Q. I further request that you advise all government agents and officers involved in the case to preserve all rough notes. Those notes should thus be provided to us, through copies or an opportunity for inspection, if they contain any of the information or material mentioned above or *Jencks* material discoverable under paragraph 2(A) of the Standing Discovery Order.

As you know, the identification and production of all discoverable evidence or information is the personal responsibility of the Assistant United States attorney assigned to the case and may not be delegated without express permission of the court. It is thus required that you personally review your own files on this case and all related files of all law enforcement agencies known to have some connection to or involvement in this case, to identify and produce the required disclosures of evidence and information.

Finally, I ask that you continue to supplement any response to these requests, as required by F.R.Cr.P. 16(c).

Sincerely,

B. Letter requesting additional discovery

**, 2000

****, Esquire
Assistant U.S. Attorney
One Court Square, Suite 201
Montgomery, Alabama 36104

Re: United States v. Innocent Citizen
Cr.... No. 99-**

Dear Ms/Mr.**:

This letter is to confirm that I received the following materials from you on ****, 1999:

It's my understanding that these materials were produced with the intent to comply with the government's discovery obligations under applicable law and the Court's rules and Orders.

However, it is my belief that this discovery was deficient in the following ways:

- **1. The following pages were blurred and/or illegible:
- **2. The following items were not included:
- **3. The following sources of information appear not to have been reviewed and disclosed:

Please provide these missing items to me as soon as possible. If you will phone my office when they are ready, I will be happy to pick them up. However, I must have them by ***, in order to complete review and complete any necessary motions by the deadlines set forth in the Order on Arraignment and Standing Order on Criminal Discovery.

In addition, I am requesting, pursuant to F.R.Cr.P. 12(d), complete notice of all evidence which the government intends to use at trial of this matter which was obtained as a result of a search, seizure, electronic or video interception, or statement of the defendant, so that I may timely determine whether such evidence is subject to a motion to suppress. The information you have provided thus far fails to identify what, if any, items were seized or obtained by such interceptions.

Please provide these materials to me or contact me by ____, which is ____ days before the pretrial conference. This deadline is necessary so that we may each determine if we can resolve this issue before the scheduled pretrial conference, or if either of us will need to file an appropriate motion before the pretrial conference.

Sincerely,

C. Letter setting out defense disclosures

**, 2000

****, Esquire
Assistant U.S. Attorney
One Court Square, Suite 201
Montgomery, Alabama 36104

Re: United States v. Innocent Citizen
Cr. No. 99-**

Dear Ms/Mr.**:

Pursuant to F.R.Cr.P. 16(b)(1), I am notifying you that:

A. I do **not presently have in my possession, custody or control, any books, papers, documents, photographs, tangible objects, or copies or portions thereof, other than any such items produced by you in discovery, which I presently intend to introduce as evidence in chief at trial.

B. I do **not presently have in my possession or control any results or reports or copies thereof of any physical or mental examinations or scientific tests or experiments made in connection with this particular case, other than any such items produced by you in discovery, which I presently intend to introduce as evidence in chief at trial or which were prepared by and relate to the testimony of a witness whom I presently intend to call at the trial.

C. I do **not presently intend to use any testimony as evidence at trial which would be discoverable under the circumstances of F.R.Cr.P. 16(b)(1)(C).

Sincerely,

Attorney for Innocent Citizen

D. Motion to dismiss due to non-compliance with discovery

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 99-xxx-N
	)	
INNOCENT CITIZEN	)	

**MOTION TO DISMISS PROSECUTION
FOR NON-COMPLIANCE
WITH ORDERS OF THE COURT, or
MOTION TO COMPEL DISCOVERY**

NOW COMES the Defendant Innocent Citizen by and through undersigned counsel and pursuant to Rule 16(d)(2) of the Federal Rules of Criminal Procedure, and respectfully moves this Court to dismiss this indictment, due to the prosecution's failure to provide discovery previously ordered by this Court. Alternatively, the defendant moves the Court to compel the prosecution to provide the discovery previously ordered by this Court.

These motions are made pursuant to the defendant's rights under the Fifth, Sixth and Eighth Amendments to due process, to the right to present a defense, and to a fundamentally fair trial, as further described and enforced in Kyles v. Whitley, 115 S.Ct. 1555 (1995), Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 474 U.S. 667 (1985), Giglio v. United States, 405 U.S. 150 (1972) and Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

In support thereof, Defendant would show as follows:

1. Mr. Citizen was arrested on this case on or about _____; defense counsel entered an appearance on _____, and Mr. Citizen was arraigned on _____.
2. An arraignment order was filed on _____; that order directed the completion of discovery by the government by _____.
3. Discovery material was offered to defense counsel by the prosecutor in this case on _____.
4. The discovery material provided was deficient in that: (1) certain items, including _____, were not provided; (2) illegible copies were received of the items Bates-stamped _____; and (3) _____.
5. Defense counsel notified the prosecutor in this case of the deficiencies in discovery by telephone on _____ and by letter mailed on _____ (copy attached as Exhibit A).
6. Despite defense counsel's request, the prosecutor has failed to provide the requested, required material: *** On _____, the prosecutor notified defense counsel that the requested material would not be provided because _____ (a copy of the prosecutor's letter is attached); ***As of _____, no response has been received from the prosecutor to the defendant's discovery request.
7. Defendant is entitled to receive the requested discovery because:***
8. Thus, the government has deliberately chosen not to provide the disclosure required by the Federal Rules of Criminal Procedure and by the government's obligations under the Fifth, Sixth and Eighth Amendments.

WHEREFORE, the Defendant respectfully prays that these motions be granted, and that this prosecution be dismissed as a sanction for the government's failure to obey the orders of this Court.

Respectfully submitted,

Attorney for Innocent Citizen

CERTIFICATE OF SERVICE

I hereby certify that I have this ____th day of _____, 2000 served a copy of the foregoing upon following, by placing a copy of the same in the U.S. mail, postage prepaid and properly addressed and by telefax of same to::

T.He Prosecutor, Esquire
Assistant U.S. Attorney
One Court Square, Suite 201
Montgomery, Alabama 36104

Attorney for Innocent Citizen

FEDERAL DEFENDERS
MIDDLE DISTRICT OF ALABAMA
201 Monroe Street, Suite 1960
Montgomery, Alabama 36104
TEL: (334) 834-2099
FAX: (334) 834-0353

E. Memorandum in support of Motion to dismiss

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 99-xxx-N
	)	
INNOCENT CITIZEN	)	

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PROSECUTION
FOR NON-COMPLIANCE WITH
ORDERS OF THE COURT, or
MOTION TO COMPEL DISCOVERY**

Rule 16(d)(2) of the Federal Rules of Criminal Procedure, states:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

The Eleventh Circuit has held:

Under Fed.R.Crim.P. 16(d)(2), the district court had the power to enforce its discovery orders. The district court's exercise of that power was a matter of discretion, and will be reversed only for an abuse of that discretion. See United States v. Fernandez, 780 F.2d 1573, 1576 (11th Cir.1986) (per curiam). As a general rule, the district court should impose the least severe sanction necessary to ensure prompt and complete compliance with its discovery orders. See generally United States v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir.1985). Factors for the district court to consider in deciding to impose a sanction include reasons for the delay in complying with the discovery order,

whether there was any bad faith on the part of the prosecution, prejudice to the defendant, and the availability of a means to cure the prejudice, including continuances and recesses. Fernandez, 780 F.2d at 1576 (quoting Euceda-Hernandez, 768 F.2d at 1312).

United States v. Turner, 871 F.2d 1574, 1580 (11th Cir. 1989).

WHEREFORE, the Defendant respectfully prays that these motions be granted, and that this prosecution be dismissed as a sanction for the government's failure to obey the orders of this Court.

Respectfully submitted,

Attorney for Innocent Citizen

**FEDERAL DEFENDERS
MIDDLE DISTRICT OF ALABAMA**

201 Monroe Street, Suite 1960
Montgomery, Alabama 36104
TEL: (334) 834-2099
FAX: (334) 834-0353

CERTIFICATE OF SERVICE

I hereby certify that I have this ____th day of _____, 2000 served a copy of the foregoing upon following, by placing a copy of the same in the U.S. mail, postage prepaid and properly addressed and by telefax of same to::

T.He Prosecutor, Esquire
Assistant U.S. Attorney
One Court Square, Suite 201
Montgomery, Alabama 36104

Attorney for Innocent Citizen
FEDERAL DEFENDERS
201 Monroe Street, Suite 1960
Montgomery, Alabama 36104
TEL: (334) 834-2099

F. MOTIONS CHECKLIST

DISCOVERY

- ___ Discovery demand letter
 - ___ statements of defendant
 - ___ defendant's prior record
 - ___ documents and objects
 - ___ reports of examinations and tests
 - ___ expert witness' summary of testimony, bases & reasons for opinion, qualifications
 - ___ *Brady* material
 - ___ info limiting defendant's liability
 - ___ info affecting credibility of government witness
 - ___ motive to lie/bias
 - ___ prior bad conduct
 - ___ impeachment evidence
 - ___ criminal investigation of witness
 - ___ negative info in personnel files
 - ___ info favorable to defense
 - ___ names of witnesses making helpful statements
 - ___ info regarding witness' perception abilities

___ INFO PARTICULAR TO THIS CASE:

- ___ *Giglio* material
 - ___ info regarding and production of
 - ___ contracts
 - ___ proffer & plea agreements
 - ___ cooperation agreements
 - ___ agreements regarding other charges
 - ___ payments
 - ___ reimbursement of expenses
 - ___ provision of services
- ___ witnesses' convictions
- ___ any identification procedure
- ___ opportunity to inspect any vehicles involved
- ___ any fingerprints lifted or analyzed
- ___ details on any FRE 404(b) info
- ___ electronic surveillance info
- ___ transcripts of grand jury testimony
- ___ *Jencks* disclosure
- ___ agents' rough notes
- ___ review of all applicable agencies' files

- ___ Defense discovery disclosure
 - ___ returning discovery because not accepted/requested, pursuant to F.R.Cr.P. 16
 - ___ documents/objects in possession/custody/control wh intend to intro as evidence in chief
 - ___ results/reports of examinations/scientific tests/experiments made in connection with case which you intend to introduce as evidence in chief
 - ___ summary of testimony intend to intro as evidence at trial, discoverable under F.R.Cr.P. 16(b)(1)(C)

MOTIONS DUE BEFORE TRIAL

F.R.Cr.P. Rule 12(b)(1) - motions based on defects in the institution of the proceedings

- ___ Motion to dismiss due to illegally/insufficiently constituted grand jury
- ___ Motion to dismiss due to misconduct before grand jury
- ___ Motion to dismiss due to double jeopardy
- ___ Motion to dismiss due to selective prosecution
- ___ Motion to dismiss due to vindictive prosecution
- ___ Motion to dismiss because of unnecessary delay in presentation to magistrate judge, in violation of F.R.Cr.P. 5(a).

F.R.Cr.P. Rule 12(b)(2) - motions based on defects in the indictment

- ___ Motion to dismiss because statute charged is unconstitutional
- ___ Motion to dismiss because duplicitous or to require election
- ___ Motion to dismiss because multiplicitous (one act charged in mult. counts)
- ___ Motion to strike aliases from indictment

F.R.Cr.P. Rule 12(b)(3) - motions to suppress evidence

- ___ Motion to suppress search
- ___ Motion to suppress statement
- ___ Motion to suppress identification
- ___ Motion to suppress evidence

F.R.Cr.P. Rule 12(b)(4)

Requests for Discovery - with copy of demand letter and certification of good faith attempt to resolve dispute

- ___ specific *Brady* demands
- ___ Bill of Particulars
- ___ identity of informant/percipient witness
- ___ Motion for reconstruction of the evidence to its original form
- ___ Motion for sanctions under F.R.Cr.P. Rule 16(d)(2), for failure to comply

F.R.Cr.P. Rule 12(b)(5) - Requests for severance of charges or defendants under F.R.Cr.P. 14

___ Motion to sever defendants (F.R.Cr.P. 8(b))

___ Motion to sever counts (F.R.Cr.P. 8(a))

F.R.Cr. P. Rule 12(d)(2)

___ Notice by the Govt of Intent to Use Evidence

F.R.Cr.P. Rule 12 notices

___ Alibi (F.R.Cr.P. 12.1)

___ Insanity defense (F.R.Cr.P. 12.2(a))

___ Expert testimony regarding defendant's mental condition (F.R.Cr.P. 12.2(b))

___ Defense of public authority (F.R.Cr.P. 12.3)

ANY TIME MOTIONS

F.R.Cr.P. Rule 12(b)(2):

___ the indictment/info fails to show jurisdiction in the court

___ the indictment/info fails to state an offense

Discovery - without certification of attempt to resolve

___ Motion to dismiss or seek sanctions for bad faith/reckless destruction/loss of evidence.

___ Motion for sanctions under F.R.Cr.P. Rule 16(d)(2), for failure to comply

___ Motion to dismiss due to *Brady* violation

Speedy trial

___ Motion to dismiss for violation of 18 U.S.C. §3161(c)

___ Motion to dismiss for pre-accusatory delay in violation of 5th Amendment

___ Motion to dismiss for violation of 6th Amendment right to speedy trial

___ Motion to dismiss under F.R.Cr.P. 48(b) for unnecessary delay/failure to prosecute

Experts

___ Request for *Daubert* hearing

___ Motion to compel disclosure of notes, tests, work product of government expert

___ Motion to admit polygraph results

___ Motion to prohibit evidence and testimony concerning

___ handwriting analysis

___ police "expert" on "tools of the drug trade"

___ police "expert" on typical drug trade practices

___ (other non-expert "expert")

Subpoenas - ***Ex Parte***

___ Motion for pretrial production of evidence, under F.R.Cr.P. 17(c)

___ Motion for subpoena of witnesses, under F.R.Cr.P. 17(b)

Transcripts

___ Motion for transcripts of pretrial hearings/mistrial

___ Motion for early *Jencks* (requires certification of attempt to resolve dispute)

Motions in limine

___ to prohibit introduction of government's proposed admissions under FRE 404(b)

___ to prohibit introduction of evidence of codefendant's _____

___ to prohibit introduction of _____

___ to permit jury view of the scene

F.R.Cr.P. 21(a)

___ Motion for change of venue, due to prejudicial pretrial publicity

28 U.S.C. §1867(d)

___ Motion to dismiss for violation of Jury Selection Act

**MOTION TO SUPPRESS PRACTICALITIES:
NOT GETTING THE DEFENSE
THROWN OUT ON TECHNICALITIES**

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I. PROCEEDINGS TO WHICH EXCLUSIONARY RULE APPLIES

- A. The exclusionary rule applies only to searches and/or seizures conducted by governmental agents. It does not prohibit the use of evidence obtained as a result of illegal searches and seizures conducted by private parties. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Walter v. United States*, 447 U.S. 649 (1980); *United States v. Jacobsen*, 466 U.S. 109 (1984).
- B. The exclusionary rule does not prohibit the use of evidence seized in violation of the Fourth Amendment in all proceedings:
 - 1. The exclusionary rule “does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served.” *United States v. Calandra*, 414 U.S. 338 (1974).
 - 2. The rule does not apply to grand jury proceedings, *Calandra*, *supra*.
 - 3. Evidence illegally seized by state agents may be used in federal *civil* proceedings, *United States v. Janis*, 428 U.S. 433 (1976) (federal civil tax proceedings); presumably, the reverse would be true. The court in *Janis* noted it “never has applied [the exclusionary rule] to exclude evidence from a civil proceeding” but that it need not address the issue due to the inter-sovereign nature of the case before it.
 - 4. The rule does not prohibit the admission of results of a blood-alcohol test in a civil personal injury lawsuit, notwithstanding an allegation that the blood sample was obtained in violation of the Fourth Amendment, if “neither the State nor any of its officers is a party.” *Devine v. Groshong*, 235 Kan. 127 (1984) (automobile collision).

5. The rule does apply to forfeiture proceedings which, although technically “civil” cases, are “quasi-criminal in character.” ***One 1958 Plymouth Sedan v. Pennsylvania***, 380 U.S. 693 (1965).
6. The rule has been held or assumed to apply in many, but not all, administrative proceedings. See 1 Wayne R. LaFave, *Search and Seizure* § 1.7(e) (3rd ed. 1996); ***Sims v. State Tax Commission***, 841 P.2d 6 (Utah 1992) (exclusionary rule applicable to drug tax assessment proceeding); ***Field v. Goldberg, Commissioner of Motor Vehicles***, 42 Conn. Supp. 306, 618 A.2d 80 (Conn. 1991) (exclusionary rule applicable in driver’s license suspension proceedings). Note, however, ***I.N.S. v. Lopez-Mendoza***, 468 U.S. 1032 (1984) (exclusionary rule inapplicable in civil deportation hearing).
7. The rule has generally been held by lower courts to apply to juvenile delinquency proceedings but the U. S. Supreme Court has never so held--see ***In re Gault***, 387 U.S. 1 (1967) (court expressly declined to hold that a juvenile court hearing “must conform with all of the requirements of a criminal trial or even of the usual administrative hearing”). See also ***In re Winship***, 397 U.S. 358 (1970).
8. The exclusionary rule does not apply to state parole revocation proceedings. ***Pennsylvania Board of Probation and Parole v. Scott***, 524 U.S. 357 (1998). Nor does it apply to proceedings to revoke federal supervised release. ***United States v. Armstrong***, 187 F.3d 392 (4th Cir. 1999). The exclusionary rule is generally held not applicable in probation revocation proceedings. ***United States v. Finney***, 897 F.2d 1047 (10th Cir. 1990); ***United States v. Frederickson***, 581 F.2d 711 (8th Cir. 1978). Occasionally, a court will apply it in such proceedings. See ***Owens v. State***, 153 Ga. App. 525, 265 S.E.2d 856 (Ga. 1980); ***Wilson v. State***, 621 S.W.2d 799 (Tex. Crim. App. 1981). Other courts hint that they might apply the rule in such proceedings if the officer was aware of the probationary status at the time of the Fourth Amendment violation. See ***State v. Sears***, 553 P.2d 907 (Alaska 1976); ***Chase v. State***, 309 Md. 224, 522 A.2d 1348 (Md. 1987); ***United States v. Rea***, 678 F.2d 382 (2nd Cir. 1982). Other courts take a more hard line, rejecting officer awareness of the status as test. See ***State v. Turner***, 257 Kan. 19, 27 (1995) (indicating, in a case involving a ***Franks v. Delaware*** violation conceded by the State, that suppression may be appropriate only if the illegal acts of the officers are “so egregious that the need for their deterrence outweighs the court’s need for information.”), *appeal after remand*, 259 Kan. 864 (1996) (crafting of search warrant affidavit by Assistant U. S. Attorney and two law enforcement officers to mislead reader as to location of drug sale not sufficiently egregious to warrant application of exclusionary rule to probation revocation hearing).

9. The rule has been held inapplicable in determining relevant conduct under the United States Sentencing Guidelines. **United States v. Torres**, 926 F.2d 321 (3rd Cir. 1991) (“evidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges.”); *see also* **United States v. Graves**, 785 F.2d 870 (10th Cir. 1986).
10. The exclusionary rule does not prevent impeachment of trial testimony of defendant with evidence illegally obtained. **United States v. Havens**, 446 U.S. 620 (1980) (“[A] defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government’s direct case, or otherwise, as substantive evidence of guilt.”).

II. REASONS TO FILE A MOTION TO SUPPRESS

- A. May be dispositive of the case.
- B. Pares down the evidence against the defendant at trial and may make certain defenses more marketable (e.g., entrapment defense better without the \$25,000.00 in cash seized from defendant's house).
- C. Creates work for the prosecutor.
- D. Creates appellate issues.
- E. In Federal Court, a Motion to Suppress may be all the discovery you get.
 1. Under Fed. R. Crim. P. Rule 12(i), at a Motion to Suppress, the government is required to disgorge **Jencks** material regardless of who calls the witnesses to the stand.

III. PRE-MOTION DISCOVERY AND INVESTIGATION

- A. Preserve dispatcher tapes and aircraft tracking data before erasure.
 1. Motion to Preserve Dispatcher Tapes - *See Exhibit A. But see United States v. Sanchez*, 866 F. Supp. 1542 (D. Kan. 1994) (motion to preserve dispatch tapes denied as overbroad).
- B. Shoot pictures first and ask questions later.

1. Photograph ransacked houses.
 2. Photograph beaten defendants.
 3. Photograph destroyed doors.
 4. Take ground and aerial photos and videos of the alleged marijuana field.
 5. Make video of the route driven before the stop.
 6. Take photographs and measurements of the cramped airport security office in which the defendant's consent was freely obtained.
- C. Obtain statements from witnesses.
1. Neighbors who heard the door break down before any announcement of purpose or authority.
 2. Innocent citizens also stopped before and after your client's seizure as revealed by the dispatcher tapes.
- D. The State Court Preliminary Hearing.
1. Do the search and seizure research before the preliminary hearing.
 2. If you get the answers you want, consider stipulating that the preliminary hearing transcript may be considered as the State's evidence at a hearing on the Motion to Suppress.
 3. If no open file discovery, get the officers' reports after they testify on direct at the preliminary hearing under state counterparts to the Jencks Act.
- E. The Driver's License Hearing.
1. Take a court reporter and cross-examine the cop without a prosecutor there to protect him.
- F. The Municipal Court Proceeding On The Related Traffic Ticket.
1. Take a court reporter.
- G. The Detention Hearing.

H. Subpoena the arresting officer *duces tecum*.

1. Subpoena the arresting officer *duces tecum* to bring with him the “data” on which he relies for his expert opinion that these “profile” characteristics constituted probable cause or reasonable grounds. See Fed. R. Evid. 705 and Kan. Stat. Ann. 60-458.
2. *Caveat*: Comply with the code of federal regulations when issuing a Subpoena or Subpoena *Duces Tecum* to a federal officer.
 - a. Your subpoena must be accompanied by an affidavit/statement containing a summary of the testimony sought and its relevance to the proceeding. See 28 C.F.R. § 16.21 (definitions); § 16.22(c) (applicable to state criminal proceedings); and § 16.23(c) (applicable to federal criminal proceedings); **United States v. Lewis**, 1993 WL 525521 (4th Cir. 1993) (unpublished) (approving lower court’s order granting government’s motion to quash subpoenas for failure to comply with regulations); **United States v. Allen**, 554 F.2d 398, 406 (10th Cir. 1977) (where record shows no effort by defendant to submit required affidavit or statement, “defendant is in no position to claim error in the court’s refusal to require testimony by the prosecutor”).
 - b. If the government refuses to produce the subpoenaed documents or testimony, you may file a motion for order to show cause why the government should not be held in contempt. Be aware that in *state* proceedings, the government may then remove the case to federal court under 28 U.S.C. § 1442 to seek a federal order quashing the subpoena underlying the contempt proceeding.
 - c. If the subpoena is quashed, most opinions suggest that the courts are without jurisdiction to review the issue if Justice’s refusal to produce the testimony/evidence was pursuant to “valid agency regulations,” and thus protected by sovereign immunity; hence the only recourse is to file an action in federal court under the Federal Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, for review of the agency’s decision. **Edwards v. United States Department of Justice**, 43 F.3d 312 (7th Cir. 1994); **State v. Adams**, 892 F. Supp. 1101 (S.D. Ind. 1995). A stay should be sought in the underlying criminal action while any administrative appeal is pending.

I. Motions for Discovery.

1. Motion For Narcotics Detection Dog's Veterinary Records, Canine School Records and Test Records - See **Exhibit B**.
 - a. *But see United States v. Gonzalez-Acosta*, 989 F.2d 384 (10th Cir. 1993) (discovery motion for dog records denied despite allegations that dog recovering from serious injury and had false-alerted upon initial contact with defendant's car; court finds records not relevant because dog certified on day of search and properly alerted to the presence of contraband forming basis of prosecution).
 - b. *State v. Barker*, 252 Kan. 949 (1993) (" . . . some foundation testimony is necessary to establish that the 'alert' of the dog provided probable cause. A description of the dog's conduct, training, and experience by a knowledgeable person who can interpret the conduct as signaling the presence of a controlled substance would constitute the minimum requirement for finding probable cause.").
2. Motion For Policies & Procedures Relating To Detentions For: - See **Exhibit C**.
 - a. Traffic Offenses -- "[T]he defendant bears the burden of proving that a legally sufficient basis asserted as a justification for a search or seizure was pretextual. Thus, if there is a lack of evidence on the issue of the police's policies, defendant bears the risk." *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994). This strategy may now be of limited value after *Whren v. United States*, 517 U.S. 806 (1996) (holding that stop of motorist based on probable cause to believe a traffic violation has been committed is reasonable under Fourth Amendment regardless of whether stop was motivated by a desire to investigate another offense for which officer lacks probable cause or reasonable, articulable suspicion) and *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995) (abandoning previous test in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), of whether a reasonable officer *would* stop the car for the alleged violation in favor of test whether an officer *could* stop the car for the violation). However, it is still possible to attack the stop by questioning whether any traffic violation was actually observed. *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996) (stop of truck based on single incident of crossing into right emergency lane of interstate highway unreasonable as such act did not violate Utah traffic statute requiring that vehicles be operated as nearly as practical within a single lane).

- b. DUI Offenses.
 - c. Profile Stops.
- 3. Motion for Discovery of Items Material to Defendant's Motion to Suppress - See **Exhibit D**.
- J. Right To Pre-Suppression Motion Discovery.
 - 1. Right of Confrontation applies at hearing on a Motion to Suppress. **State v. Sigerson**, 282 So.2d 649 (Fla. App. 1963); **United States v Clark**, 475 F.2d 240 (2nd Cir. 1973).
 - 2. In order to have meaningful confrontation at a motion to suppress, the defendant needs the government's records. **United States v. Salsedo**, 477 F. Supp. 1235 (E.D. Cal. 1979), *vacated and remanded sub nom. United States v. Torres*, 622 F.2d 465 (9th Cir. 1980).
 - 3. Fed. R. Crim. P. 12(i) extends **Jencks** discovery rights under 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2 to hearing on motion to suppress.
 - 4. **United States v. McElroy**, 697 F.2d 459 (2nd Cir. 1982) (conviction reversed for prosecutor's failure pre-trial to advise defense counsel of defendant's invocation of his **Miranda** rights).

IV. SPECIFICITY OF THE MOTION ITSELF

- A. In State court, **State v. Whitehead**, 229 Kan. 133 (1981) and Kan. Stat. Ann. 22-3216(2) require that "the motion shall be in writing and state facts showing wherein the search and seizure were unlawful."
- B. In Federal court, motion is generally required to be accompanied by a Memorandum of Law. The moving papers must be sufficient to demonstrate that movant is entitled to a hearing. **United States v. Hickok**, 481 F.2d 377 (9th Cir. 1973) (allegations of relevant factual issues must be set forth with definiteness, clarity, and specificity in moving papers before movant entitled to evidentiary hearing; factual allegations which are general and conclusory or based upon suspicion and conjecture will not suffice). See **Exhibits E, F and G**.
- C. The motion and brief should be sufficiently specific to demonstrate existence of factual issues, but consider omitting important details if including them will educate the officers on how they should testify to avoid suppression. But if the defendant testifies at trial, the

prosecution may try to impeach with contents of motion. ***People v. Sturgis***, 317 N.E.2d 545 (Ill. 1974) (Proper to allow impeachment with inconsistent statements contained in “Motion to Quash Arrest and Suppress Evidence” sworn to and signed by defendant).

- D. Incorporate content of Brief in Support of Motion to Suppress into Motion itself by reference - See **Exhibits E, F and G** (“Wherefore” clauses).

V. THE BRIEF IN SUPPORT OF MOTION TO SUPPRESS

A. The Format.

1. Format according to the Rules of the applicable appellate jurisdiction.
2. Maybe put a heavy paper cover on it with a spiral binder (not permitted under some local federal rules).
3. Have an index.

B. When To File The Brief In Support Of Motion To Suppress.

1. In State court, usually rules require service seven days before motions are heard. However, since the State has the burden of proof, your brief is really a response to the brief the State failed to write.
2. In Federal court, memorandum required to accompany Motion to Suppress.

VI. FILE SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

- A. Make it easy for the judge to rule your way and in a manner which can be upheld on appeal.
 1. ***State v. Dolack***, 216 Kan. 622, 637 (1975), Kansas Supreme Court Rule 165 and Kan. Stat. Ann. 60-252 require the judge to make findings of fact and conclusions of law - See **Exhibit H**.
 2. In federal court, Fed. R. Crim. P. 12(e): “Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.”

VII. PRE-HEARING STATUS CONFERENCES

- A. Do not frighten the judge at the last minute by bringing in a two day evidentiary motion

for which he has scheduled 30 minutes.

- B. Request a pre-hearing conference or status conference under Federal Rule of Criminal Procedure 17.1. See **Exhibit I**.
- C. At the status conference, prepare the judge for what is to come:
 - 1. Video and audio tapes and the machinery needed to play them.
 - 2. Diagrams or blowups.
 - 3. Visits to the scene required.
 - 4. Number of witnesses.
 - 5. Possible submission of brief and proposed findings of fact and conclusions of law.
 - 6. Request that both briefs be due on the day of the hearing.
 - 7. Stipulations.
 - 8. Special problems with the attendance of witnesses such as experts.
 - 9. Special experiments or tests required in the courtroom possibly involving live animal acts.

VIII. STANDING

- A. “Standing” is probably not the correct terminology:

Although the parties and many Tenth Circuit opinions characterize this as a question of “standing,” the Supreme Court expressly rejected a standing analysis in **Rakas v. Illinois**, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). “In order to determine whether a defendant is able to show the violation of his (and not someone else’s) Fourth Amendment rights, the ‘definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.’” **Minnesota v. Carter**, 525 U.S. 83, ___, 119 S. Ct. 469, 472, 142 L. Ed. 2d 373 (1998) (quoting **Rakas**, 439 U.S. at 140). Although we have applied the appropriate standard in our previous opinions, on many occasions we have labeled it “standing.”

United States v. Fuentes, 1999 WL 311481, at **2, n. 1 (10th Cir. 1999) (unpublished).

- B. There is no “automatic standing” -- there must be an invasion of defendant’s own reasonable expectation of privacy by a government agent. *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Salvucci*, 448 U.S. 83 (1980).
- C. The burden of proving a legitimate expectation of privacy is on the proponent of the motion to suppress. *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991); *United States v. Sneed*, 732 F.2d 886 (11th Cir. 1984).
- D. An explicit allegation of “standing” is probably required in the Motion to Suppress. *United States v. Sneed*, 732 F.2d 886 (11th Cir. 1984):

* * * [T]he defendant as the movant to suppress evidence has the burden of establishing his “legitimate expectation of privacy.” However . . . prior to reaching this point in the inquiry, it is necessary for the movant to allege that he has an expectation of privacy in the premises searched or in some other manner allege that he has standing to file the motion to suppress. The concepts of due process do not require that a defendant who fails to make the fundamental allegations in his motion to suppress be afforded a pretrial hearing on his motion. Thus, we hold that where a defendant in a motion to suppress fails to allege facts that if proved would require the grant of relief, the law does not require that the district court hold a hearing independent of the trial to receive evidence on any issue necessary to the determination of the motion.

See **Exhibit J**.

- E. **Brady** Motion For Discovery of All Favorable Evidence of Defendant’s Connection With Searched Premises - See **Exhibit K**.
 - 1. Generates important discovery.
 - 2. May draw a stipulation as to standing.
- F. Stipulations as to standing.
 - 1. Although the defendant has the burden of alleging and proving standing, the consequences of the government’s failure to contest the allegation of standing are unclear. Off-the-record agreements by the government not to contest “standing” and non-factual stipulations are probably not safe on appeal. See generally, *United States v. Hansen*, 652 F.2d 1374 (10th Cir. 1981); *United States v.*

Smith, 621 F.2d 483 (2nd Cir. 1980) (“The Government denies that it conceded Smith’s standing below. Nevertheless, standing is a question of law and a concession by the Government on a question of law is never binding on this Court. . . . Thus the Government is free to argue the question of Smith’s standing even if it ‘conceded’ it during the proceedings below.”); **United States v. Kinsey**, 843 F.2d 383 (9th Cir. 1988) (standing held lacking despite government’s failure to raise in district court); **United States v. Skowronski**, 827 F.2d 1414 (10th Cir. 1987) (court holds no standing in car driven by another conspirator despite fact that no one addressed standing in district court; defense counsel conceded at oral argument defendant had no interest in car). *But see* **Steagald v. United States**, 451 U.S. 204 (1981) (“The Government . . . may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.”); **United States v. Dewitt**, 946 F.2d 1497 (10th Cir. 1991) (government waives standing issue by failing to raise in district court unless failure “excusable”); **United States v. Amuny**, 767 F.2d 1113 (5th Cir. 1985) (government waived standing issue by expressly conceding standing in district court).

2. If you stipulate, draft a factual testimonial stipulation. See **Exhibit L**.

G. The defendant's testimony at the hearing on the Motion to Suppress is immunized under **Simmons v. United States**, 390 U.S. 377 (1968) but he will not want to testify.

1. It has been suggested that **Simmons** testimony by defendant at suppression hearing may be used to impeach him if he testifies differently at trial. See 5 Wayne R. LaFave, *Search and Seizure* § 11.2(d) (3rd ed. 1996); **United States v. Quesada-Rosadal**, 685 F.2d 1281 (11th Cir. 1982) (“the use of prior inconsistent statements given at a suppression hearing can be used to impeach a defendant’s trial testimony, whether given during direct or cross-examination.”); **United States v. Beltran-Gutierrez**, 19 F.3d 1287 (9th Cir. 1994).

2. The prosecutor will try to make the defendant a snitch on cross-examination

H. Ways to prove standing without requiring defendant to testify:

1. Introduce as exhibits at the hearing car titles and registration or vehicle lease agreements showing owners, lessees and authorized drivers. Beware of gaps in “chains” of authorization -- See **United States v. Carr**, 939 F.2d 1442 (10th Cir. 1991) (even if defendant’s affidavit, rejected by district court because not

submitted until after suppression motion ruled on, had been considered, his statement that he and co-defendant had occupied the motel room for three weeks prior to search insufficient to show standing where room not registered to either defendant and defendant did not demonstrate he was sharing room with someone to whom it was registered); **United States v. Arango**, 912 F.2d 441 (10th Cir. 1990) (defendant's testimony he received truck from Gonzalez insufficient to show standing since no evidence presented to show Gonzalez had acquired lawful possession of truck from registered owners); **United States v. Roper**, 918 F.2d 885 (10th Cir. 1990) (driver of car rented in California by common law wife of passenger had no standing because not listed as authorized driver on rental contract and not in lawful possession of car because stopped in Oklahoma when rental contract prohibited driving car out of California without written permission).

2. Have the defendant's mother, father, wife, husband, sister, brother, or friend testify.
3. The officers themselves may say the reason they arrested the defendant was because all the evidence known to them suggested that the suitcase in which the cocaine was found, and the cocaine, belonged to the defendant. In **People v. Gonzalez**, 510 N.Y.S.2d 86, 502 N.E.2d 1001 (N.Y. 1986), the court stated: "There is no requirement that a defendant testify in order to sustain his burden of proving standing . . . , and evidence elicited during the People's direct case may be cited in support of a defendant's standing claim."
4. Affidavits -- If hearsay is admissible at a hearing on a Motion to Suppress, what is wrong with the defendant submitting an affidavit as to his interest in the invaded place or premises? In **People v. Gonzalez**, 510 N.Y.S.2d 86, 502 N.E.2d 1001 (N.Y. 1986) it was held that a police officer's testimony of defendant's post-arrest hearsay statement that he borrowed the vehicle from a friend combined with evidence that defendant produced the registration from glove box and that a subsequent check revealed no stolen vehicle reports was sufficient to confer standing. Note: Court cited state statute authorizing use of hearsay at suppression hearings. In **United States v. Williams**, 536 F.2d 810 (9th Cir. 1976), the court stated that "an undisputed affidavit . . . alleging facts that demonstrate a legitimate proprietary or possessory interest in the premises searched, could establish one's standing without his being required to testify," but noted that "the decision to require a defendant to testify at a suppression hearing lies, to some extent, within the discretion of the trial judge, and we would not deny his authority to require such testimony if the Government is able to advance reasonably adequate reasons for his doing so."

IX. THE HEARING ON THE MOTION TO SUPPRESS ITSELF

A. The burden of proof and the burden of going forward.

1. “At the hearing on the motion to suppress, who has the burden of proof with respect to the matters at issue? To understand the full significance of this inquiry, it is first necessary to recall that the term ‘burden of proof’ actually encompasses two separate burdens. One burden is that of producing evidence, sometimes called the ‘burden of evidence’ or the ‘burden of going forward.’ If the party who has the burden of producing evidence does not meet that burden, the consequence is an adverse ruling on the matter at issue. The other burden is the burden of persuasion, which becomes crucial only if the parties have sustained their respective burdens of producing evidence and only when all the evidence has been introduced. It becomes significant if the trier of fact is in doubt; if he is, then the matter must be resolved against the party with the burden of persuasion.”

5 LaFave, *Search and Seizure* § 11.2(b), p. 37 (3rd ed. 1996).

2. However, most courts allocate these burdens to the same party and speak only of the ‘burden of proof’:

It is not inevitably true that the burden of production and the burden of persuasion must both fall upon the same party. In the context of the motion to suppress evidence, for example, it is sometimes the case that the initial burden of production has been placed on the state and the ultimate burden of persuasion on the defendant. It is also sometimes the case that these burdens are instead on the defendant and the prosecution, respectively. But as is true in the law generally, the prevailing practice is to allocate the two burdens jointly to one party or another. Sometimes courts expressly state that this is what they are about, but more commonly it results from [a] general ruling that the “burden of proof” on the motion to suppress rests upon either the defendant or the state.

Id., p. 37-38. These observations are also made in William E. Ringle, *Searches and Seizures, Arrests and Confessions*, § 20.4 (2nd ed. 1993):

When a warrantless search has occurred, the burden of going forward with evidence, as well as the overall burden of proof, rest with the government. Initially, the defendant must show that there was no warrant for the search or arrest. The government then must show by a

preponderance of the evidence that the warrantless search was justified under one of the narrow exceptions to the rule requiring a search warrant. If the government alleges that the defendant consented to the search, it also has the burden of proving such consent.

Id., pp. 20-28 to 20-29.

3. Which party bears the burden of proof generally depends on whether the police acted with or without a warrant:

With respect to the issue which is usually central in a motion to suppress hearing -- the reasonableness of the challenged search or seizure -- most states follow the rule which is utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution.

5 LaFave, *Search and Seizure* § 11(b), p. 38. The parties' respective burdens of proof were summarized in ***Russell v. State***, 717 S.W.2d 7 (Tex. Crim. App. 1986), as follows:

When a defendant seeks to suppress evidence on the basis of a Fourth Amendment violation, this Court has placed the burden of proof initially upon the defendant. . . . As the movant in a motion to suppress evidence, a defendant must produce evidence that defeats the presumption of proper police conduct and there shifts the burden of proof to the State. . . . A defendant meets his initial burden of proof by establishing that a search or seizure occurred without a warrant. . . .

Once a defendant has established 1) that a search or seizure occurred and 2) that no warrant was obtained, the burden of proof shifts to the State. . . . If the State produces evidence of a warrant, the burden of proof is shifted back to the defendant to show the invalidity of the warrant. . . . If the State is unable to produce evidence of a warrant, then it must prove the reasonableness of the search or seizure.

717 S.W.2d at 8.

- a. Warrantless searches and seizures are presumptively unreasonable. ***Coolidge v. New Hampshire***, 403 U.S. 443 (1971) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment --

subject only to a few specifically established and well delineated exceptions. The exceptions are ‘jealously and carefully drawn’ and there must be ‘a showing by those who seek exemption that the exigencies of the situation made the course imperative.’ ‘(T)he burden is on those seeking the exemption to show the need for it.’”); **United States v. Maestas**, 2 F.3d 1485 (10th Cir. 1993); **United States v. Roch**, 5 F.3d 894 (5th Cir. 1993) (While, in general, defendant has burden of proving by preponderance of evidence that material in question was seized in violation of his constitutional rights, if defendant produces evidence that he was arrested or subjected to a search without a warrant, burden shifts to government to justify warrantless search); **State v. Damm**, 246 Kan. 220 (1990).

- b. If the search or seizure was conducted pursuant to a warrant, the defendant generally has the burden of overcoming a presumption of validity which attaches to a warrant. **United States v. Carhee**, 27 F.3d 1493 (10th Cir. 1994) (“Generally, if the search or seizure was pursuant to a warrant, the defendant has the burden of proof.”); **State v. Prewett**, 246 Kan. 39 (1990) (“a presumption of validity attaches to an affidavit which supports a search warrant.”); **State v. Jacques**, 225 Kan. 38 (1978).

4. As noted earlier, the defendant must allege a legitimate expectation of privacy in the place searched or the property seized and has the burden of proving the search or seizure affected that legitimate expectation of privacy (“standing”); however, the government may or may not have an obligation to contest the allegation. See Section VIII, above, and **Russell v. State**, 717 S.W.2d 7 (Tex. Crim. App. 1986):

* * * A mere allegation by a defendant that he was a victim of an illegal search or seizure, if not disputed by the State, is sufficient to establish standing to challenge a search or seizure. . . . However, once the State challenges the defendant’s allegation, the defendant carries the burden of proof.

Id. at 8.

5. If the claim is made that the reason given by the officer for a seizure was a pretext, once the government has presented facts falling within a recognized exception to the warrant requirement, the burden shifts to the defendant to prove that the asserted justification was pretextual:

A defendant who seeks to challenge a search or seizure that otherwise has been justified by the government on the ground that the asserted justification is pretextual stands in the same position as a defendant who seeks to challenge the validity of a search pursuant to a warrant on the basis that the warrant is invalid. Once a search or seizure is shown to have satisfied the requirements of a warrant or one of the exceptions to a warrant, it is prima facie constitutional, and the burden of proving the invalidity of the warrant or the pretextual nature of the exception relied on is placed on the defendant.

United States v. Maestas, 2 F.3d 1485, 1492 (10th Cir. 1993). See also ***United States v. Greenspan***, 26 F.3d 1001 (10th Cir. 1994).

6. The defendant has the burden of proving by a preponderance of evidence that a private party acted as a government instrument or agent in order to show that a Fourth Amendment search occurred. ***United States v. Feffer***, 831 F.2d 734 (7th Cir. 1987).
7. The government has the burden of proving the objective reasonableness of an officer's good faith reliance on a warrant later determined to be invalid under ***United States v. Leon***. ***United States v. George***, 975 F.2d 72 (2nd Cir. 1992).
8. As to execution questions in search warrant cases:

When the defendant comes forward with evidence showing that items were seized which were not listed in the warrant, courts will shift the burden to the prosecution to prove that the seizure of the items was justified under the requirements of the plain view doctrine as set forth in *Coolidge*.

Ringle, *Searches and Seizures, Arrests and Confessions*, § 7.6(b), p. 7-47 (2nd ed. 2000). See also ***Commonwealth v. Rodriguez***, 391 N.E.2d 889 (Mass. 1979) (Commonwealth had burden of proving the nexus between items seized from defendant's apartment but not described in warrant and crime of which defendant was suspected); ***State v. Williams***, 257 S.E.2d 457 (N.C. Ct. App. 1979), *reversed on other grounds*, 263 S.E.2d 571 (N.C. 1980) (state has burden of proving "plain view" exception as to seizure of documents not authorized by warrant for seizure of drugs). But see ***United States v. Taylor***, 882 F.2d 1018 (6th Cir. 1989) (search warrant authorized search for only weapons; Taylor claimed seizure of a receipt he alleged was in a basket too small to contain a weapon. Court held Taylor presented no proof by way of

affidavit or evidence at hearing that document was in fact obtained by search beyond scope of warrant and, therefore, failed to carry his burden of proving the same).

9. As to knock-and-announce violations under 18 U.S.C. § 3109 and the Fourth Amendment:

* * * [A] defendant has the burden of establishing a prima facie case when asserting a section 3109 claim. Defendant must put into evidence at least some testimony that establishes the factual basis for a claim that section 3109 has been violated. . . . “[T]he burden is not great, and parallels the necessity that a defendant assert a search was conducted without a warrant before the government is forced to prove that the search was reasonable within the confines of the Fourth Amendment.”

We see no reason why [this] burden-of-proof requirement for a section 3109 claim should not also apply to unannounced-entry claims brought under the fourth amendment. . . .

United States v. Mueller, 902 F.2d 336 (5th Cir. 1990). *See also United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989) (“There is a presumption of government propriety . . . and the defendant bears the burden to establish a prima facie case by putting on some evidence that § 3109 has been violated.”).

10. The burden of proof is by a preponderance of the evidence. ***United States v. Matlock***, 415 U.S. 164 (1974).

B. How much hearsay is admissible at a hearing on a Motion to Suppress?

1. “. . . there should be no automatic rule against the reception of hearsay evidence in such proceedings . . .” ***United States v. Matlock***, 415 U.S. 164, 177 (1974).
2. Federal Rule of Evidence 104(a): “Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.
3. “Here the prosecutor should have called witnesses on the suppression issue rather than relying on the transcript of the Grand Jury testimony because the State had the burden of proof on this issue and defendant had not had an opportunity to confront the witnesses in question at the Grand Jury proceeding.”

State v. Terrell, 283 N.W.2d 529 (Minn. 1979). See also, *State v. Ehtesham*, 309 S.E.2d 82 (W. Va. 1983); *United States v. Clark*, 475 F.2d 240 (2nd Cir. 1973).

- C. Do not rely on the State or Government to subpoena its witnesses for you.
- D. Use Fed. R. Crim. P. 12(i) to get field notes and statements of testifying witnesses, even if you call them as your witnesses.
- E. You may have the right to ask leading questions of law enforcement officers even if you call them as witnesses. Fed. R. Evid. 611(c); cf., Kan. Stat. Ann. 60-243(b).
- F. Proffer all the exhibits and testimony you will need for a complete appellate record.
- G. Determine whether the jurisdiction requires renewing failed motions to suppress by objection to admission of evidence at trial in order to preserve suppression issues for appeal. *United States v. Martin*, 982 F.2d 1236 (8th Cir. 1993) (court notes generally, overruling of pretrial motion to suppress makes it unnecessary to object when evidence is offered at trial, but it is “the better practice for defense counsel to object when unsuppressed evidence is offered at trial.” Court notes that its holding that the suppression motion was properly denied was based in part on officer’s trial testimony but then states that since no objection was made at trial, defendant failed to preserve issue of whether officer’s trial testimony warranted reconsideration of district court’s denial of pretrial suppression motion); *United States v. Pacheco*, 617 F.2d 84 (5th Cir. 1980) (failure to reiterate objection to unsuppressed evidence at trial not a waiver of issue). State or local practice may require even more than renewal during trial to preserve suppression issues. *Commonwealth v. Metz*, 633 A.2d 125 (Pa. 1993) (suppression issues not preserved because not renewed in post-trial motions).

X. SPECIAL CONSIDERATIONS IN WARRANT CASES: THE GOOD FAITH EXCEPTION OF *UNITED STATES v. LEON*

- A. Execution issues are not protected by *Leon*: “Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated search warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. *United States v. Leon*, 468 U.S. 897, 918 n. 19 (1984).
 - 1. Exceeding the scope of the warrant’s authority.
 - a. The warrant authorized a search for drugs. Why did they take all the guns, all the documents and all the pocket change?

- b. Why did they look for elephants in matchboxes?
- c. Why did they continue to search after they found the particularly described items?
- d. Request total suppression as sanction for execution violations:

When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant.

United States v. Medlin, 842 F.2d at 1194, 1199 (10th Cir. 1988).

2. The manner of execution.

- a. “Knock and announce” violations:
 - i. In federal searches, 18 U.S.C. § 3109: “The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.” See ***Sabbath v. United States***, 391 U.S. 585 (1968); ***Miller v. United States***, 357 U.S. 301 (1958); ***United States v. Baker***, 638 F.2d 198 (10th Cir. 1980); ***United States v. Stewart***, 867 F.2d 581 (10th Cir. 1989) (entry into residence at night using two-man steel battering ram and full charge stun grenade held a violation of 18 U.S.C. § 3109; evidence suppressed).
 - ii. In state searches, ***Wilson v. Arkansas***, 514 U.S. 927 (1995) holds that the common law knock-and-announce principle is an element of the Fourth Amendment reasonableness inquiry and failure of law enforcement officers executing a search warrant to knock and announce their purpose and authority before entry may render the entry unreasonable under the Fourth Amendment.
 - iii. The amount of time officers must wait after knocking depends on the facts and circumstances. ***United States v. Jenkins***,

175 F.3d 1208 (10th Cir. 1999) (noting that the Wichita Police Department appears to have a “10 second rule” for all cases; such an inflexible rule could violate the Fourth Amendment).

- b. Nighttime searches, particularly of residences, may be unreasonable under the Fourth Amendment:

At common law, prior to the adoption of the Bill of Rights there was a strong aversion to nighttime searches. . . . [T]he focal point of contemporary antipathy has centered around the intrusion into the home. As Justice Frankfurter stated in his concurring and dissenting opinion in *Monroe v. Pape*, 365 U.S. 167, 210, 81 S.Ct. 473, 496, 5 L.Ed.2d 492 (1960): “Searches of the dwelling house were the special object of this universal condemnation of official intrusion. Night-time search was the evil in its most obnoxious form.” This element of a nighttime intrusion is one element in considering the reasonableness of the search.

United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979). *See also* Fed. R. Crim. P. 41(c)(1); *United States v. Callwood*, 66 F.3d 1110, 1112-13 (10th Cir. 1995) (“In conducting the Fourth Amendment inquiry, we recognize that a nighttime search is particularly intrusive.”).

- B. *Leon* does not salvage warrants obtained by use of affidavits containing false statements made by the affiant intentionally or with reckless disregard of the truth (*Franks v. Delaware* situations).
 - 1. The mechanics for a motion to suppress evidence based on *Franks v. Delaware*, 438 U.S. 154 (1978) are generally as follows:
 - a. The defendant must make a “substantial preliminary showing” by motion and/or affidavit that:
 - i. The *affiant*, intentionally or with reckless disregard for the truth, made false statements in the affidavit in support of the warrant.
 - (a) False statements of some person other than the affiant (*e.g.*, the informant) will not do unless the affiant knew them to be false or included them with reckless disregard for their truth. Exception: When the nonaffiant making the false statement is another

government official. **United States v. DeLeon**, 979 F.2d 761 (9th Cir. 1992) (“misstatements or omissions of government officials which are incorporated in an affidavit for a search warrant are grounds for a *Franks* hearing, even if the official at fault is not the affiant.”).

- (b) Intentional or reckless omissions of material facts which tend to cast doubt upon the existence of probable cause are treated the same as false statements. **United States v. Stanert**, 762 F.2d 775 (9th Cir. 1985); **State v. Lockett**, 232 Kan. 317 (1982); **State v. Olson**, 11 Kan. App.2d 485 (1986).

Practice Tip: Be aware of any pattern of attempts to skirt *Franks* violations that may be developing. For example, in Kansas, see, e.g., **United States v. Ruiz**, 822 F. Supp. 708, 713 (D. Kan. 1993) (Sedgwick County Sheriff’s Detective Robert Benton found to have committed *Franks* violation by submitting affidavit for search warrant containing “misleading inferences” resulting from “an artfully constructed series of half-truths”); **State v. Olson**, 11 Kan. App.2d 485, 490 (1986) (“While perhaps true in a literal and abstract context, the statements in the affidavit certainly conveyed a false meaning to the judge who issued the warrants”); **State v. Ratzlaff**, 255 Kan. 738 (1994) (No probable cause in Hutchinson search warrant affidavit; misleading statements and intentional omissions casting doubt on probable cause precluded application of the “good faith” exception to exclusionary rule); **State v. Turner**, 259 Kan. 864, 869 (1996) (“It is clear that the officers in this case intentionally inserted false information in their search warrant affidavit The assertions by both Detective Prince and Agent Derby that the statement was not false . . . are not credible.”).

- ii. The affidavit in support of the warrant, **after** excision of the false statements or inclusion of the intentional or reckless omissions, fails to establish probable cause for the search. **United States v. Barrera**, 843 F.2d 1576 (10th Cir. 1988) (“Under *Franks*, even if a defendant makes a substantial preliminary showing that the affiant, either knowingly or recklessly, made false statements in his affidavit, a hearing need not be held if, after setting aside the material which is subject to the charge of falsity, ‘there remains sufficient content in the warrant affidavit to support a finding of probable cause.’”).

- b. If that substantial preliminary showing is made, and only if it is made, “the Fourth Amendment requires that a hearing be held at the defendant's request.” If, at the hearing, the defendant establishes the allegation of perjury or reckless disregard by a preponderance of evidence, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.
- c. **Practice tip:** Many courts are strict about the *substantial* preliminary showing and will not grant a hearing based solely upon unsworn allegations in the motion for the **Franks** hearing. Affidavits of persons with knowledge of false nature of affiant's statements are often necessary:

* * * To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. . . .

Franks, 438 U.S. at 171. See **Exhibits M and N**.

- C. **Leon** does not save warrants issued by a judge or magistrate who wholly abandons his or her judicial role as happened in **Lo-Ji Sales, Inc. v. New York**, 442 U.S. 319 (1979). See **State v. Probst**, 247 Kan. 196 (1990) (District court judge hearing motion to suppress same judge who issued warrant. Kansas Supreme Court upholds district court judge's determination that he, himself, had wholly abandoned his judicial role in issuing warrant). In a marginal case, complain that the boilerplate nature of the affidavit is indicative of the magistrate's abandonment of his “neutral and detached” role:

We add a note of caution to law enforcement officials. Police officers will not be permitted to undermine the warrant application process, and the important Fourth Amendment interests it is intended to protect, through resort to boilerplate, vague, or unduly brief affidavits. It takes but a few minutes more of the affiant's time to ask the informant about, for example, the amount or form of drugs seen, and to include such information in the affidavit. This kind of information is essential “if the magistrate is to perform his detached function and

not serve merely as a rubber stamp for the police.”

United States v. Schauble, 647 F.2d 113, 116 (10th Cir. 1981) (quoting **United States v. Ventresca**, 380 U.S. 102, 109 (1965)).

- D. Warrants so lacking in specificity that officers cannot determine the places to be searched or things to be seized are not protected by **Leon**. **Center Art Galleries-Hawaii, Inc. v. United States**, 875 F.2d 747 (9th Cir. 1989) (six search warrants, identical except for description of places to be searched (six art galleries), to search for, *inter alia*, “documents, books, ledgers, records and objects which are evidence of violations of federal criminal law including but not limited to . . .” overbroad and not saved by **Leon** good faith as reasonable reliance on such overbroad warrants precluded); **United States v. Williamson**, 1 F.3d 1134 (10th Cir. 1993) (search warrant for “Star Route Box 302, Tijeras, New Mexico” failed to describe place to be searched when actual address of target building was 1277 Old Highway 66 in Tijeras while “Star Route Box 302” identified rural mail box at the end of a dirt road located a mile east and eight miles south of target building; executing officer’s knowledge of actual location not sufficient and warrant so facially deficient in failing to describe place to be searched that executing officers could not reasonably presume it to be valid).

But see **United States v. George**, 975 F.2d 72 (2nd Cir. 1992) (search warrant issued during robbery investigation to search apartment for certain items of personal property taken during robbery and “any other evidence relating to the commission of a crime” overbroad; court notes **Leon** good faith doctrine would not avoid suppression of shotgun (not listed in warrant) seized during search, but court then holds invalid portions of warrant may be “severed” from valid portions and remands for determination of whether shotgun discovered in “plain view” during search for items permissible under the “redacted” warrant).

- E. Warrants so lacking in probable cause as to render official belief in their validity unreasonable are not protected by **Leon**. **United States v. Jackson**, 818 F.2d 345 (5th Cir. 1987) (failure to adequately demonstrate informant’s veracity, reliability or basis of knowledge in arrest warrant affidavit rendered affidavit lacking in probable cause under **Illinois v. Gates**’ totality of circumstances test; **Leon** not applicable to this “bare bones” affidavit and government failed to offer evidence relating to officers’ good faith); **United States v. Leake**, 998 F.2d 1359 (6th Cir. 1993) (affidavit based on anonymous telephone call was “far richer in detail than that provided in affidavits determined in other cases to be conclusory or ‘bare bones’” but warrant still not protected by **Leon** because officer “could not properly have placed objective good faith reliance on the warrant in light of his knowledge that corroboration was needed, and that none, of any significance, was obtained.”).

- F. Some warrants which do not fit within a recognized exception to **Leon** are still not protected by **Leon**. **State v. Doile**, 244 Kan. 493 (1989) (court finds none of four listed exceptions set forth in **Leon** applicable but holds the good faith exception inapplicable because probable cause determination by judge issuing warrant reflected an “improper analysis of the totality of the circumstances”).
- G. If officers detain a person’s luggage without probable cause or reasonable, articulable suspicion of criminal activity but later obtain a search warrant for the luggage based on an affidavit containing facts learned as a result of the illegal detention, **Leon** should not save the subsequent search of the luggage. **United States v. Scales**, 903 F.2d 765 (10th Cir. 1990) (Amtrak passenger detained and luggage seized without probable cause or reasonable, articulable suspicion; luggage exposed to drug detection dog, which alerted; search warrant based on affidavit containing these facts not saved by **Leon**: “The ‘illegality’ which arguably existed here was not a function of the agents’ good faith reliance on a presumptively valid warrant. Moreover, the search of the suitcase after the search warrant was issued does not prevent us from evaluating the agents’ behavior prior to that time. * * * Because the DEA agents were not acting in reliance on a search warrant when they seized the luggage and held it for more than twenty-four hours, **Leon** does not ratify their actions.”). *But see* **United States v. White**, 890 F.2d 1413 (8th Cir. 1989) (airline passenger and luggage detained illegally but evidence seized during search of luggage pursuant to warrant obtained on basis of information gained during the warrantless detention admissible under **Leon**).

XI. CONCLUSION

- A. Great Policy Quotations for Inclusion in the Concluding Paragraphs of the Motion, Brief or Oral Argument:
 - 1. * * * It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616 (1886).
 - 2. * * * In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the

omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438 (1928), *overruled in part*, ***Katz v. United States***, 389 U.S. 347 (1967).

3. If this nation were to win its “War on Drugs” at the cost of sacrificing its citizens' constitutional rights, it would be a Pyrrhic victory indeed. It ill behooves a great nation to compromise or sacrifice the freedoms of its citizens as the price of more efficient law enforcement. Many countries have written constitutions similar to ours that define the rights of their people in words as forceful and inspiring as those of the United States constitution. But for most people living under those other constitutions the rights so emphatically guaranteed them are hollow, because there is no practical means to enforce them. The rights they define are illusory and disappear like vapor in the face of governmental pressure. Our tradition is different. It requires judges and police officers, who are equally sworn to uphold the same Constitution, to enforce constitutionally guaranteed rights, even when their enforcement is unpopular and even when those rights are asserted on behalf of persons whose activities are considered despicable. If the rule of law -- rather than the rule of man -- is to prevail, there cannot be one set of search and seizure rules applicable to some and a different set applicable to others. We deal here with rights, not privileges. There must be one guarantee of rights for all. As a practical matter if we are not all free, none of us is really free, for exceptions which deny constitutional rights to some erode them for all. While we deal today only with denial of Mr. Laymon's rights, who knows which of us may be next.

A society cannot remain free or strong if it undermines its own principles. Law enforcement officials are not licensed to disregard the law --especially not the law enshrined in the Constitution. . . .

United States v. Laymon, 730 F. Supp. 332, 341 (D. Colo. 1990).

EXHIBITS

- A. Motion to Preserve Dispatcher Tapes
- B. Motion for Discovery of Detector Dog Information and Suggestions in Support Thereof
- C. Motion for Discovery
- D. Motion for Discovery of Items Material to Defendant's Motion to Suppress
- E. Motion to Suppress Evidence (warrantless case -- car stop)
- F. Motion to Suppress Evidence (warrantless case -- airport detention)
- G. Motion to Suppress Evidence (warrant case -- personal residence)
- H. Suggested Findings of Fact and Conclusions of Law
- I. Motion for Status Conference
- J. Motion to Suppress (with allegation of "standing" underlined)
- K. *Brady* Motion for Discovery of All Favorable Evidence of Defendant's Connection With Searched Items for Defendant's Motion to Suppress
- L. Stipulation of Facts regarding standing
- M. Motion to Suppress Evidence and for Hearing Pursuant to *Franks v. Delaware*
- N. Affidavit of Daniel E. Monnat and Offer of Proof Re: *Franks v. Delaware* Hearing

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-XXXXX
	)	
JOHN DOE,	)	
	)	
Defendant.	)	
_____	)	

MOTION TO PRESERVE DISPATCHER TAPES

COMES NOW the Defendant, John Doe, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and moves the Court for an Order requiring the proper custodian of the Sedgwick County Emergency Communications Department, the Sedgwick County Sheriff's Office, the Wichita Police Department, the Drug Enforcement Administration and the United States Attorney's Office or such other custodian as may be applicable, to preserve until trial of the above-captioned case, any and all tape recordings of radio transmissions, dispatches and/or telephone calls in any way relating to the above-named Defendant, John Doe, or Mary Smith, both of whom were occupants of a vehicle stopped by law enforcement officers at approximately 4:00 a.m. on Friday, March 17, 1989, in the 4500 block of South Broadway, Wichita, Sedgwick County, Kansas. Said tape recordings of radio transmissions, dispatches and/or telephone calls commenced at a time previous to the detention of the vehicle occupied by the above named subjects and continued through and including Noon on Friday, March 17, 1989. (Approximate Radiogram Number). For further specificity, see the Affidavit of James R. Jones, Narcotics Detective, Sedgwick County Sheriff's Office, attached hereto and incorporated herein by reference as if specifically set forth. Counsel further requests that the Court order the above-named entities or persons to allow defense counsel or his investigator the opportunity to listen to and copy said tape recordings at defense counsel's expense.

In support of this Motion, the Defendant alleges:

1. Counsel for the Defendant has determined that said tape recordings sought to be preserved are relevant to issues both on a motion to suppress and at trial and constitute **Brady** material, or, at a minimum, Jencks material. **United States v. Florack**, 155 F.R.D. 49, 55 n. 2 (W.D.N.Y. 1994) (noting "no functional difference" between undercover investigation tapes constituting Jencks Act materials and dispatch tapes).

2. If the tape recordings are not preserved, the defense of this case will be prejudiced and severely hampered by foundational and other evidentiary difficulties which may result in the exclusion of relevant evidence.

3. It is the customary practice of the custodian of said tape recordings to destroy the same thirty days after the event recorded.

WHEREFORE, the Defendant prays that the Court enter an Order allowing defense counsel or his investigator to listen to and copy said tape recordings at his expense and requiring the preservation of the above-designated tape recordings in the above-captioned matter until trial of this matter.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT B

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. XX CR X
	)	
ROBERT LAWRENCE,	)	
	)	
Defendant.	)	
_____	)	

MOTION FOR DISCOVERY OF DETECTOR DOG
INFORMATION AND SUGGESTIONS IN SUPPORT THEREOF

COMES NOW the defendant, Robert Lawrence, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and respectfully moves the Court for an Order requiring the government to disclose and allowing the defendant's attorneys to inspect, copy, photograph and possess those items set forth below:

1. The name and present address of the owner of the detector dog named "Wenka", allegedly utilized in this case.
2. The name and address of Wenka's veterinarian.
3. All records, documents, transcripts, certifications, notes, memoranda or other documents, as well as any such information contained in any magnetic storage devices (*e.g.* computer hard drives, magnetic tape, floppy disks, and any other such storage media) concerning the following:
 - a. Any and all training, testing or certification of the detector dog named "Wenka", allegedly utilized in this case.
 - b. Any and all records of the job performance of the detector dog named "Wenka", allegedly utilized in this case, including, but not limited to, all records showing the number of times the dog has been exposed to suspected illegal material and the number of occasions on which Wenka has correctly alerted and the number of occasions on which the dog has incorrectly alerted. This request includes records of real exposures and simulated exposures conducted for testing purposes, and includes, but is not limited

to, K-9 Narcotics Search forms, Detector Dog Utilization forms, and any other similar forms, whether relating to real or simulated situations and whether relating to closed or active cases of any government agency using the dog.

c. With regard to the handler of the detector dog “Wenka” in this case, Deputy Dawg, the following: Any and all information concerning the handler’s education and training in handling and interpreting signals given by detector dogs, including, but not limited to, the name and location of any school or class attended by the handler, the length of the training or education and interim and final grades, if any, received by the handler, any certification received by the handler, and any training or education the handler has received since being certified; and any and all information concerning the experience of the handler since he began handling detector dogs, including, but not limited to, records of all actual and simulated exposures of any detector dogs being handled by Deputy Dawg to suspected controlled substances or items of property which might contain controlled substances, and records evaluating the accuracy of either the dog or the handler on those occasions.

4. Any and all medical or veterinary records of the detector dog named “Wenka”, allegedly utilized in this case.

5. The defendant specifically requests that the government permit defense counsel and/or their investigator, either Private Eye or Private Ear, to inspect, photograph and/or diagram the following:

a. Those portions of Mid-Continent Airport which were involved in the instant case, including, but not limited to, the area at or in which the defendant’s suitcase was allegedly exposed to a detector dog named “Wenka” on December 11, 1992.

b. Those portions of DEA headquarters in Wichita, Kansas, or any other location in or at which the aforesaid suitcase was allegedly exposed to a detector dog named “Wenka” on December 11, 1992.

Suggestions In Support Of Motion

In support of this motion, the defendant hereby incorporates, as if fully set forth herein, his Motion for Discovery of Documents Necessary for Preparation of Pretrial Motions, filed previously in this case, and the arguments and authorities set forth therein.

As set forth more fully in the defendant’s Brief in Support of Motion to Suppress, the validity of the extended detention of the suitcase depends, in part, on whether and how the detector dogs reacted to the suitcase and whether those reactions, if any, were sufficiently meaningful to supply probable cause. In *State v. Barker*, 252 Kan. 949 (1993), the Kansas Supreme Court recognized the government’s evidentiary obligation to lay a foundation for the reliability of the dog’s reaction:

* * * On a proper showing, a narcotics dog’s reaction to a vehicle may supply the probable cause necessary to justify a search of the vehicle, but there must be some

evidence that the dog's behavior reliably indicated the likely presence of a controlled substance: "Obviously . . . a description of the dog's conduct, training and experience by a knowledgeable person who can interpret the conduct of the dog as signaling the presence of a controlled substance would constitute the minimum requirement for finding probable cause." *Doe v. Renfrow*, 475 F. Supp. at 1025.

252 Kan. at 959-60.

Since the government will rely upon the reaction of the dog in attempting to sustain its burden of showing probable cause for the extended detention and subsequent search of the suitcase in this case, the defendant needs the aforesaid information in order to adequately prepare for cross-examination of the officers involved.

WHEREFORE, the defendant prays that the Court issue an order in conformity with the above and foregoing and for such other and further relief as to the Court seems just.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-XXXXX
	)	
JOHN DOE,	)	
	)	
Defendant.	)	
_____	)	

MOTION FOR DISCOVERY

COMES NOW the Defendant, John Doe, by and through his attorney of record, Daniel E. Monnat of Monnat & Spurrier, Chartered, and, pursuant to Rule 16(a)(1) of the Federal Rules of Criminal Procedure, the principals of **Brady v. Maryland**, 373 U.S. 83 (1963) and **United States v. McElroy**, 697 F.2d 459 (2nd Cir. 1982), moves the Court for entry of an order directing the Plaintiff forthwith to make inquiry, disclose and produce all of the following within the possession, custody or control of the Plaintiff, or the existence of which is known or by the exercise of due diligence could become known to the Plaintiff:

1. All offense, incident and/or investigative reports arising from all drug seizures made by Sedgwick County Sheriff's Officer Chris Cop, I.D. DO123, from July 1, 1998 to the present.
2. All offense, investigative and/or incident reports arising from all drug seizures made by Wichita Police Department Officer Brian Police from July 1, 1998 to the present.
3. All daily activity logs of Sedgwick County Sheriff's Officer Chris Cop from July 1, 1998 to the present.
4. Printouts of computerized dispatcher logs of stops made by said Sheriff's Officer Chris Cop from July 1, 1998 to the present.
5. All daily activity logs of Wichita Police Department Officer Brian Police from July 1, 1998 to the present.

6. Printouts of computerized dispatcher logs of stops made by said Wichita Police Department Officer Brian Police from July 1, 1998 to the present.

7. All training manuals, instructional manuals, standard operating procedures manuals, tapes, films and other audio-visual training materials, directives, policies, guidelines and/or other memoranda reflecting any instructions or policies provided by the Sedgwick County Sheriff's Office to its officers regarding procedures for the stopping of vehicles or the investigation of traffic violations.

8. All training manuals, instructional manuals, standard operating procedures manuals, tapes, films and other audio-visual training materials, directives, policies, guidelines and/or other memoranda reflecting any instructions or policies provided by the Wichita Police Department to its officers regarding procedures for the stopping of vehicles or the investigation of traffic violations.

9. All training manuals, instructional manuals, standard operating procedures manuals, tapes, films and other audio-visual training materials, directives, policies, guidelines and other memoranda reflecting any instructions or policies provided by the Sedgwick County Sheriff's Office to its officers regarding procedures for the stopping of vehicles to investigate drug offenses. This request includes, but is not limited to, any of the above-requested information related to "profile stops", "Operation Pipeline" and/or "Operation Nighthawk". By "profile stops", counsel intends the term to include, as used in this paragraph, any list of characteristics utilized by the Sedgwick County Sheriff's Office, Officer Chris Cop or any other Sheriff's Officer to identify drug suspects. This request also includes, but is not limited to, any and all information concerning plans, or suggestions, for law enforcement officers to request, randomly or otherwise, consents to search from citizens stopped for alleged traffic violations. The material requested in this paragraph is requested whether actually disseminated to Sheriff's Officers by the Sedgwick County Sheriff's Office or, directly or indirectly, by the Drug Enforcement Administration, the Wichita Police Department or any other law enforcement agency.

10. All training manuals, instructional manuals, standard operating procedures manuals, tapes, films and other audio-visual training materials, directives, policies, guidelines and other memoranda reflecting any instructions or policies provided by the Wichita Police Department to its officers regarding procedures for the stopping of vehicles to investigate drug offenses. This request includes, but is not limited to, any of the above-requested information related to "profile stops", "Operation Pipeline" and/or "Operation Nighthawk". By "profile stops", counsel intends the term to include, as used in this paragraph, any list of characteristics utilized by the Wichita Police Department, Officer Brian Police or any other Wichita Police Department Officer to identify drug suspects. This request also includes, but is not limited to, any and all information concerning plans, or suggestions, for law enforcement officers to request, randomly or otherwise, consents to search from citizens stopped for alleged traffic violations. The material requested in this paragraph is requested whether actually disseminated to Wichita Police Department Officers by the Wichita Police Department or, directly or indirectly, by the Drug Enforcement Administration, the Sedgwick County Sheriff's Office or any other law enforcement agency.

11. All tapes made by the Government of radio broadcasts made on March 17, 1999 in connection with the stop of the automobile occupied by the Defendant.

12. All written notes, logs, or other memorabilia relating to, or in any way touching upon, the stop and arrest of this Defendant on March 17, 1999.

13. All complaints made by citizens, personnel of the Sedgwick County Sheriff's Office, Wichita Police Department, Drug Enforcement Administration or others regarding conduct by Sedgwick County Sheriff's Officer Chris Cop alleged to be in violation of constitutional rights or proper police procedure. This includes specifically, but is not limited to, material in personnel or internal affairs files and material relating to improper procedures for conducting searches, seizures, arrests, or other encounters with citizens. This request also includes records of any action taken by either the Sedgwick County Sheriff's Office or the Wichita Police Department or the Drug Enforcement Administration in response to such complaints, such as suspensions, reprimands, reassignments or other such action. See ***Denver Policeman's Protective Association v. Lichtenstein***, 660 F.2d 432 (10th Cir. 1981).

14. All complaints made by citizens, personnel of the Sedgwick County Sheriff's Office, Wichita Police Department, Drug Enforcement Administration or others regarding conduct by Wichita Police Department Officer Brian Police alleged to be in violation of constitutional rights or proper police procedure. This includes specifically, but is not limited to, material in personnel or internal affairs files and material relating to improper procedures for conducting searches, seizures, arrests, or other encounters with citizens. This request also includes records of any action taken by either the Sedgwick County Sheriff's Office or the Wichita Police Department or the Drug Enforcement Administration in response to such complaints, such as suspensions, reprimands, reassignments or other such action. See ***Denver Policeman's Protective Association v. Lichtenstein***, 660 F.2d 432 (10th Cir. 1981).

15. Any and all information including, but not limited to, material in personnel or internal affairs files relating to the involvement of Sheriff's Officer Chris Cop, I.D. DO123, in marijuana offenses, or the concealment of said offenses, in approximately February or March of 1994 when said Cop was a jailer at the Sedgwick County jail and his involvement in which led to his suspension from duty at that time.

As grounds for this motion, Defendant states as follows:

1. The hearing on the Defendant's Motion to Suppress evidence obtained from the unlawful search and seizure in this case will bring into question the propriety of the officers' conduct in this case as part of a pattern of conduct on the part of the Sedgwick County Sheriff's Office, the Wichita Police Department and the Drug Enforcement Administration and these officers in particular, to stop vehicles for pretextual reasons and claim to justify warrantless searches and seizures by consent and the waiver of rights.

2. Without the materials requested, the Defendant will be unable to present the full picture disclosing patterns of pretextual conduct as required by, *e.g.*, ***State v. Ladson***, 979 P.2d 833 (Wash. 1999); ***State v. DeBooy***, 2000 WL 126749 (Utah 2000); ***State v. DeSantiago***, 983 P.2d 1173 (Wash. Ct. App. 1999); ***People v. Valenzuela***, 74 Cal. App. 4th 1202, 88 Cal. Rptr. 2d 707 (1999); ***People v. Ynoa***, 223 A.2d 975, 636 N.Y.S. 2d 888 (N.Y. App. Div. 1996); ***Whitehead v. State***, 698 A.2d 1115 (Md. Ct. Spec. App. 1997).

3. The documents sought are evidentiary and relevant because they would reflect the officers' conduct in this particular case and would disclose a pattern of conduct relevant to the factual determination this Court may be required to make at the conclusion of the hearing on the Motion to Suppress evidence. *See* cases cited *supra*.

WHEREFORE, Defendant respectfully prays of the Court an order in conformity with the above and foregoing.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-XXXXX
	)	
GARY L. WINNER,	)	
	)	
Defendant.	)	
_____	)	

MOTION FOR DISCOVERY OF ITEMS MATERIAL TO
DEFENDANT’S MOTION TO SUPPRESS

COMES NOW the Defendant, Gary L. Winner, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and, pursuant to Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, the principles of ***Brady v. Maryland***, 373 U.S. 83 (1963), ***United States v. McElroy***, 697 F.2d 459 (2nd Cir. 1982) and the Due Process Clauses of the United States and Kansas Constitutions, moves this Court for entry of an order directing the Plaintiff forthwith to make inquiry, disclose and produce all of the following within the possession, custody or control of the Plaintiff, or the existence of which is known or by the exercise of due diligence could become known to the Plaintiff:

A. Any and all records and information which would assist defense counsel in obtaining an evidentiary hearing under ***Franks v. Delaware***, 438 U.S. 154 (1978), including, but not limited to, information in possession of the government on or about November 18, 1988 calling into question the credibility of the confidential informant utilized in this case whom the government has designated in the instant Application for the search warrant as SIL44X007 by any of the following means:

1. Drug trafficking, dependency or addiction on the part of the confidential informant himself;
2. Hallucinations, delusions or mental illness on the part of the confidential informant;
3. The existence of crimes, charged or uncharged, involving dishonesty committed by the instant confidential informant;
4. Previous false, incorrect or reckless information provided by the

confidential informant;

B. Any and all information or records suggesting that law enforcement officers were unable to verify the instant confidential informant's assertions in paragraphs "8." and "10." of the instant Affidavit to the effect that Gary L. Winner was the drug source of Patsy Loser including, but not limited to the following information:

1. Any information or records suggesting that the surveillance of law enforcement officers on September 15, 1988 was unable to establish that Patsy Loser either returned the one ounce of cocaine not purchased to Gary Winner or to meet with Gary Winner on or about said date in any manner.

C. Any information or records tending to suggest that the information provided to law enforcement agents by SIL44X007 at any time in connection with this case was either false, speculative or without a reliable "basis of knowledge".

D. Any information or records helpful to the Defendant in any way in litigating the Motion to Suppress which he has filed in this case.

E. Any information or records tending to show that law enforcement officers were unable to corroborate, whether by surveillance or otherwise, certain information provided to them by confidential informant SIL44X007 in connection with the instant investigation.

F. Copies of any notes, field notes, memoranda, or reports made by any individual participating in the search of the residence at 123 S. Main, Wichita, Kansas, about said search, including, but not limited to, the reports of the following individuals who counsel is informed participated in this search:

Task Force Agent Robert Snoop
Task Force Agent Joe Johnson
Task Force Agent Mike Forreal
Special Agent Top Notch
Special Agent Ronald Upstanding
Special Agent Randy Watch
Special Agent Rod Spy
Special Agent Dennis Hidey

G. Copies of any notes, field notes, memoranda, transcripts, recordings or reports made in connection with the investigation of Gary L. Winner regarding any attempted surveillance of either Gary L. Winner or the confidential informant SIL44X007

in an effort to corroborate statements made about Winner by said informant.

H. Copies of any notes, field notes, memoranda, transcripts, recordings or reports made concerning information received by law enforcement agents from “concerned citizens” about Gary L. Winner.

MEMORANDUM IN SUPPORT OF MOTION

In this Motion, defense counsel seeks material necessary and helpful to, *inter alia*, the competent litigation of a Motion to Suppress in the instant case. Counsel believes that he is entitled to said information by a variety of sources.

First of all, the Due Process Clauses of the state and federal Constitutions and the principles of ***Brady v. Maryland***, 373 U.S. 83 (1963), require that the government not suppress evidence favorable to the accused or discrediting to its own case, and, upon request, that it disclose to defense all such information. *See also*, ***United States v. Agurs***, 427 U.S. 97 (1976); ***Mooney v. Holohan***, 294 U.S. 103 (1935); ***Pyle v. Kansas***, 317 U.S. 213 (1942). This requirement of candor by the sovereign encompasses information which bears upon the credibility of its witnesses as well as matters more directly material to guilt or innocence. ***Napue v. Illinois***, 360 U.S. 264 (1959); ***Giglio v. United States***, 405 U.S. 150 (1972). As well, the specific provisions of Fed. R. Crim. P. 16(a)(1)(C) provide, in pertinent part:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant’s defense

Fed. R. Crim. P. 16(a)(1)(C).

In many drug prosecutions, part of the “defense” is a motion to suppress evidence by reason of the law enforcement officers’ violation of the Fourth Amendment. As such, counsel submits that items “material to the preparation of the defendant’s” motion to suppress are therefore within the ambit of Rule 16(a)(1)(C), and, therefore, discoverable. That “clear notice of possible grounds for a suppression motion” is within the compass of Rule 16(a)(1)(C) has been squarely held by at least one court:

More important, the government’s failure to disclose prejudiced McElroy because it kept from his counsel’s eyes possible grounds for a suppression motion. We reject as unrealistic the government’s argument that appellate relief must be denied because counsel could have obtained from McElroy the information necessary to make the motion. The defendant in a criminal case often mistrusts his counsel who, in most

instances, has been assigned and not chosen or believes that his counsel will best defend him if he is kept ignorant of the facts. Even a defendant who cooperates with his counsel cannot always remember all of the relevant facts, or realize the importance to his defense of seemingly inconsequential police actions. Defense lawyers, as a result, often learn much more about what has happened from the government discovery, formal and informal, than they do from their clients. This fact surely is one of the reasons behind the adoption of Rule 16 and other rules which have greatly broadened discovery in criminal cases.

United States v. McElroy, 697 F.2d 459 (2nd Cir. 1982) (conviction reversed for prosecutor's failure pre-trial to advise defense counsel of defendant's invocation of his *Miranda* rights).

The Sixth Amendment right of confrontation is of course another reason for pre-motion discovery in the instant case. And, clearly, the Sixth Amendment right of confrontation applies at a Fourth Amendment suppression hearing:

The hearing on the Motion to Suppress, while not deciding the guilt or innocence of the appellee, is clearly a critical stage of the prosecution and the confrontation clause of the Sixth Amendment of the United States Constitution guarantees an accused in a criminal case the right to confront the witnesses against him.

State v. Sigerson, 282 So.2d 649 (Fla. App. 1973). Accord, **United States v. Clark**, 475 F.2d 240 (2nd Cir. 1973). Likewise, this constitutional right of confrontation at a suppression hearing guarantees a moving defendant the right to such discovery as is necessary to effectively exercise that right:

The issue to be resolved in a warrantless search and seizure case is whether the government had reasonable and probable cause. Thus in this case the hearing requires a particular and close examination of the events leading up to the stop in question and what the arresting officers knew at the time of the stop. That information can only be obtained from the arresting officers. It exists nowhere else and thus independent investigation by the defendant must almost always be fruitless. Accordingly, effective cross-examination on what the government asserts it knew can only arise in a context in which the defendants are permitted to searchingly examine the question at the hearing. *Depriving the defendants of the government's records as to what the agents knew at the time of the stop makes meaningful cross-examination almost impossible.* Where the defendants are “* * * denied the right of effective cross-examination,” the effect is “* * * constitutional error of first magnitude and no amount of showing of want of prejudice would cure it.” * * *

United States v. Salsedo, 477 F. Supp. 1235 (E.D. Cal. 1979) (emphasis supplied) (quoting **Davis v. Alaska**, 415 U.S. 308 (1974)), *vacated and remanded sub nom. United States v. Torres*, 622

F.2d 465 (9th Cir. 1980). The right to effectively utilize pre-hearing discovery to cross-examine and impeach witnesses called to testify at a Motion To Suppress is clearly the impetus behind the 1983 amendment to Federal Rule of Criminal Procedure 12(i) which now requires formerly undiscoverable Jencks material to be produced at a suppression hearing for use on cross-examination by counsel. Thus, counsel respectfully submits that he is entitled to such material as will allow him to effectively litigate a Motion to Suppress in the instant case.

WHEREFORE, for all of the above and foregoing reasons, counsel respectfully requests of the Court an order allowing him the discovery requested in this motion. Additionally, counsel would respectfully request said discovery sufficiently in advance of a hearing on Defendant's Motion to Suppress as to allow counsel to competently prepare therefore with a minimum of interruptions to examine documents and other items of discovery at the time of hearing.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 95-00000-01
	)	
JAMES JONES,	)	
	)	
Defendant.	)	
_____	)	

MOTION TO SUPPRESS EVIDENCE

COMES NOW, the Defendant James Jones, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and moves the Court for an Order suppressing the following evidence obtained in the above-captioned matter on or about the evening of April 8, 1995:

A. All physical evidence seized from or near James Jones' person, possessions, or in or around the tan Ford Escort (hereinafter referred to as "the car") which he was driving, in all of which the defendant alleges reasonable expectations of privacy, in the vicinity of 25th Street North and Raleigh, Wichita, Kansas, or at or en route to the jail and/or booking facility or any other location to which the defendant or the car were taken;

B. All statements made by the defendant on or after April 8, 1995, either at the scene of the seizure and search of the car and/or the defendant in the vicinity of 25th Street North and Raleigh, Wichita, Kansas, or at or en route to any of the locations identified in paragraph A, above; and

C. All observations made by law enforcement officers on the evening of April 8, 1995, of the defendant, the car or possessions, either at the scene of the seizure of the defendant and the car 25th Street North and Raleigh, Wichita, Kansas, or at or en route to any of the locations identified in paragraph A, above.

In support of his motion, the defendant alleges as follows:

The evidence which the defendant seeks suppressed was obtained as a result of unreasonable and unconstitutional searches and seizures which were undertaken in violation of his rights under the

Fourth and Fourteenth Amendments to the United States Constitution and Section 15 of the Kansas Bill of Rights, to be free from unreasonable governmental restraint and intrusion in the following respects:

1. The initial seizures of the defendant and the car were undertaken without either an arrest or search warrant and the officers lacked probable cause or reasonable grounds to believe that the car's occupants were committing, had committed or were about to commit a crime, or that evidence of a crime was present in the car, or that the occupants were armed and dangerous. **Terry v. Ohio**, 392 U.S. 1 (1968); **Illinois v. Gates**, 462 U.S. 213 (1983); **Michigan v. Long**, 463 U.S. 1032 (1983); **Delaware v. Prouse**, 440 U.S. 648 (1979); **State v. Epperson**, 237 Kan. 707, 703 P.2d 761 (1985). The Government cannot bear its burden of proving the searches and seizures which followed were justified by any recognized exception to the warrant requirements of the Fourth Amendment or Section 15. **Coolidge v. New Hampshire**, 403 U.S. 443 (1971).

2. No traffic violations were actually observed by law enforcement officers. **United States v. Gregory**, 79 F.3d 973 (10th Cir. 1996).

3. Assuming, *arguendo*, the initial stop of the car was valid, the detention which followed exceeded the permissible scope and/or duration of the initial stop and rendered the seizures of the car, its occupants and possessions unreasonable under the Fourth Amendment and Section 15. **United States v. McSwain**, 29 F.3d 558 (10th Cir. 1994).

4. The government cannot bear its burden of proving that any consents to search the defendant's person, the car or possessions, which the government may allege were given by the defendant, were freely and voluntarily given. **Bumper v. North Carolina**, 391 U.S. 543, 548-49 (1968). Any alleged consents to search were fruit of the prior illegal seizures of the car, its occupants and possessions and, therefore, were ineffective to justify the warrantless searches which followed. **Florida v. Royer**, 460 U.S. 491 (1983); **Wong Sun v. United States**, 371 U.S. 471 (1963). The officers involved in the searches which occurred exceeded the scope of any consent allegedly given by the defendant.

5. The "plain view" doctrine is inapplicable because the incriminating character of anything the officers may claim to have seen was not immediately apparent before the officers had seized the car, its occupants and possessions. The officers were, by the time of any alleged "plain viewing", no longer in a place in which they had a right to be for plain view purposes. **Coolidge v. New Hampshire**, 403 U.S. 443 (1971); **Jones v. United States**, 391 A.2d 1188 (D.C. 1978). The government cannot rely on an "abandonment" theory to justify the seizure and search of the blue duffle bag because any "abandonment" was the product of the preceding illegal stop of the car and the seizure of its occupants. **Wong Sun v. United States**, 371 U.S. 471 (1963).

6. The government cannot rely upon any other theory that the defendant's own conduct exposed incriminating evidence to the officers' view because any such conduct by the defendant was precipitated

by the officers' own illegal seizures of the car, its occupants and possessions. ***Wong Sun v. United States***, 371 U.S. 471 (1963).

7. Any statements made by the defendant on or after the seizures of the car, its occupants and possessions are fruit of the unlawful searches and seizures, ***Wong Sun v. United States***, 371 U.S. 471 (1963); and, in addition, were involuntary and not made pursuant to a knowing and intentional waiver of his rights under the United States Constitution, the Kansas constitution and ***Miranda v. Arizona***, 384 U.S. 436 (1966).

8. The searches and seizures conducted in the above-captioned case on or about April 8, 1995, were accomplished in violation of the defendant's rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 1, 10, 15 and 18 of the Kansas Bill of Rights.

9. All physical evidence and statements and/or admissions made by the defendant and observations of law enforcement officers on or after April 8, 1995, were the fruit of the unconstitutional searches and seizures as set forth above and must be suppressed. ***Wong Sun v. United States***, 371 U.S. 471 (1963).

WHEREFORE, the defendant prays that the Court issue an order suppressing the aforesaid evidence for the reasons set forth herein and in any memorandum of law later submitted by counsel; and for such other and further relief as to the Court seems just.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00-00000-01
	)	
JOHN DOE,	)	
	)	
Defendant.	)	
_____	)	

MOTION TO SUPPRESS EVIDENCE

COMES NOW the defendant, John Doe, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and respectfully moves the Court for an Order suppressing all physical evidence, whether tangible or intangible; any statements or admissions of the defendant; any and all observations of law enforcement officers and any other tangible or intangible evidence obtained during, or directly or indirectly derived from, the seizures and searches of his person and the blue Samsonite suitcase seized from his possession in the parking lot of Wichita Mid-Continent Airport on December 11, 1998, at approximately 6:00 p.m.. Facts set forth below are taken from discovery provided by the government.

The defendant and the suitcase were seized and detained by DEA Task Force agents in said parking lot without a search or arrest warrant. The suitcase was taken to DEA headquarters and subjected to a “sniff test” by a Wichita Police Department drug detection dog at approximately 7:35 p.m.. The dog allegedly alerted and a search warrant for the suitcase, a copy of which is attached hereto as Exhibit “A”, was obtained later that night by the agents from Judge Ballard. The Application and Affidavit for Search Warrant, submitted to Judge Ballard by Agent Gerald Lloyd, a copy of which is attached hereto as Exhibit “B”, set forth allegations regarding the events leading up to the seizures of the defendant and the suitcase and events subsequent to those seizures.

Defendant alleges that the evidence described above is the fruit of illegal, unreasonable and unconstitutional searches and seizures in the following respects:

- A. The defendant was subjected to a warrantless seizure by law enforcement officers in the parking lot of Wichita Mid-Continent Airport on December 11, 1998. **United States v. Lambert**, 46 F.3d 1064 (10th Cir. 1995).
- B. The defendant and the suitcase were further subjected to seizure when agents physically seized the suitcase or informed the defendant that the agents were seizing the suitcase. **United States v. Place**, 462 U.S. 696 (1983); **United States v. Hall**, 978 F.2d 616 (10th Cir. 1992).
- C. At the time of the above-described seizures of the defendant and the suitcase, the officers lacked reasonable suspicion, based on articulable facts, of criminal activity on the defendant's part, which is a prerequisite for a valid investigative detention under the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Bill of Rights. **United States v. Hall**, 978 F.2d 616 (10th Cir. 1992). Cf. **United States v. Place**, 462 U.S. 696 (1983); **United States v. Sokolow**, 490 U.S. 1 (1989); **Reid v. Georgia**, 448 U.S. 438 (1980). The government cannot bear its burden of proving that a valid exception to the warrant requirements of those constitutional provisions justified the seizures and searches of the defendant and the suitcase. **Coolidge v. New Hampshire**, 403 U.S. 443 (1971).
- D. Even if, *arguendo*, the agents had reasonable suspicion, based on articulable facts, that the defendant was committing or had committed a crime, the conduct of the agents exceeded the permissible scope of an investigative detention by detaining the suitcase for an unreasonably long period of time in order to expose the suitcase to the drug detection dog; and by failing to accurately inform the defendant of the place to which they were transporting the suitcase, the length of time he might be dispossessed of the suitcase, and what arrangements would be made for the return of the suitcase if the investigation dispelled the agents' suspicions. **United States v. Place**, 462 U.S. 696 (1983); **United States v. Scales**, 903 F.2d 765 (10th Cir. 1990). The government has the burden to demonstrate that a seizure it seeks to justify on the basis of reasonable suspicion is sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. **Florida v. Royer**, 460 U.S. 491 (1983).
- E. The evidence obtained from the defendant and the suitcase subsequent to their unlawful detentions, including the evidence seized from the suitcase during the execution of the search warrant is fruit of those preceding illegal detentions and must be suppressed. **Wong Sun v. United States**, 371 U.S. 471 (1963); **United States v. Place**, 462 U.S. 696 (1983); **Florida v. Royer**, 460 U.S. 491 (1983); **United States v. Hall**, 978 F.2d 616 (10th Cir. 1992); **United States v. Scales**, 903 F.2d 765 (10th Cir. 1990). The fact that a search warrant for the luggage was obtained prior to opening it does not retroactively justify the preceding illegal seizures of the defendant and the suitcase and the "good faith" exception to the exclusionary rule, **United States v. Leon**, 468 U.S. 897 (1984), is inapplicable because the officers were not acting in reliance

on a search warrant at the time they unlawfully seized and detained the defendant and the suitcase. **United States v. Scales**, 903 F.2d 765 (10th Cir. 1990).

- F. Any and all statements and/or admissions made by the defendant after the aforesaid illegal seizures were involuntary and not made pursuant to a free, knowing and intelligent waiver of the defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, Section 10 of the Kansas Bill of Rights, and **Miranda v. Arizona**, 384 U.S. 436 (1966). They are also fruit of the illegal detentions and inadmissible under **Wong Sun v. United States**, 371 U.S. 471 (1963).
- G. The government's conduct in this case, taken as a whole, so far departed from well-established Fourth Amendment law and resulted in such egregious federal and state constitutional violations in the instant case as to constitute a deprivation of the due process rights of the defendant under the Fifth and Fourteenth Amendments to the United States Constitution, requiring suppression of all evidence obtained as a result. **United States v. Medlin**, 842 F.2d 1194 (10th Cir. 1988).
- H. The searches and seizures conducted in the above-captioned case were accomplished in violation of the defendant's rights under the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 15 of the Kansas Bill of Rights.
- I. All evidence, tangible and intangible, including the observations of law enforcement officers after the defendant and/or his suitcase were illegally seized, is the fruit of the unconstitutional searches and seizures as set forth above and must be suppressed. **Wong Sun v. United States**, 371 U.S. 471 (1963).

WHEREFORE, the defendant prays that the Court issue an order suppressing the aforesaid evidence for the reasons set forth herein, in the Brief in Support of Motion to Suppress Evidence filed herewith, and in any supplemental memorandum of law later submitted by counsel; and for such other and further relief as to the Court seems just.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. XX-XXXXXX-XX
	)	
MICHAEL J. SMITH,	)	
Defendant.	)	
_____	)	

MOTION TO SUPPRESS EVIDENCE

COMES NOW the defendant, Michael J. Smith, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and respectfully moves the Court for an Order suppressing all physical evidence, whether tangible or intangible; any statements or admissions of the Defendant; any and all observations of law enforcement officers and any other tangible or intangible evidence obtained during, or directly or indirectly derived from, the search of a residence located at 100 South Main, Wichita, Kansas, and storage unit G-3, Johnson Storage, 100 West Maple, Wichita, Kansas, locations in which the defendant had a reasonable expectation of privacy, on or about August 26, 1992.

The searches and seizures involved in this case were conducted pursuant to search warrants (copies of which are attached hereto as Exhibits 1 and 3), issued upon applications and affidavits of Sedgwick County Sheriff's Detective Robert Bender (copies of which are attached hereto as Exhibits 2 and 4).

The defendant alleges that evidence described above is the fruit of illegal, unreasonable and unconstitutional searches and seizures in violation of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 15 of the Kansas Bill of Rights, in the following respects:

I. The search warrants for both locations were "drug records" or "documents" warrants, which did not authorize a search for controlled substances or paraphernalia. Hence, the seizures of marijuana and Valium from either location were warrantless. *Cf. State v. Kelsey*, 592 S.W.2d 509 (Mo. 1979). The government cannot bear its burden of proving that the warrantless seizures were reasonable and justified by an exception to the warrant requirements of the Fourth Amendment and Section 15 of the Kansas Bill of Rights. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The officers unlawfully sought the drug records warrants as a pretext to search for drugs at the residence because they lacked

probable cause to believe that drugs were then present in the residence. **Kelsey, supra; United States v. Tranquillo**, 330 F. Supp. 871, 876 (M.D. Fla. 1971).

II. Det. Bender's affidavit submitted in support of the application for the warrant to search 100 South Main, failed to set forth facts which would allow a neutral and detached magistrate to conclude that there was probable cause to believe that a controlled substance offense was being committed at that location or that contraband or evidence of such a crime was then located therein. **Illinois v. Gates**, 462 U.S. 213 (1983). Virtually all of the information in the affidavit was stale and the affidavit failed to set forth any facts from which a neutral and detached magistrate could make an independent determination as to the veracity of the informants allegedly providing facts which were incorporated into the affidavit or the reliability of their information. **Sgro v. United States**, 287 U.S. 206 (1932); **United States v. Johnson**, 461 F.2d 285 (10th Cir. 1972); **Illinois v. Gates**, 462 U.S. 213 (1983); **Aguilar v. Texas**, 378 U.S. 108 (1964); **Spinelli v. United States**, 393 U.S. 410 (1969); **Draper v. United States**, 358 U.S. 307 (1959).

III. Det. Bender intentionally, or with reckless disregard for the truth, made false statements in, and omitted material facts from, his affidavit in support of the warrant for 100 South Main. Said false statements and omissions rendered allegations in the affidavit misleading and materially affected the probable cause determination and the defendant hereby moves for a hearing on said issue. **Franks v. Delaware**, 438 U.S. 154 (1978). The material omissions and the legal basis for this Motion are set forth in argument "IV" of the defendant's Brief in Support of Motion to Suppress Evidence.

IV. The search warrants were unconstitutionally overbroad and amounted to general warrants in that they failed to specify with sufficient particularity the things to be seized; and the search purportedly authorized by the warrants exceeded the scope of any arguable probable cause showing. The warrants purportedly authorized the search for and seizure of, a potentially large quantity of generally described private papers and electronic analogues thereof, thus infringing upon not only Fourth Amendment privacy interests, but also First Amendment privacy interests. **United States v. Leary**, 846 F.2d 592 (10th Cir. 1988); **State v. Muldowney**, 292 A.2d 26 (N.J. 1972); **Application of Lafayette Academy, Inc.**, 610 F.2d 1 (1st Cir. 1979); **Zurcher v. Stanford Daily**, 436 U.S. 547 (1978).

V. The warrant to search storage unit G-3, Johnson Storage, 100 West Maple, was fruit of the initial warrant. Since that initial warrant violated the Fourth Amendment, the evidence seized during the execution of the storage unit warrant is inadmissible as fruit of the poisonous tree. **Wong Sun v. United States**, 371 U.S. 471 (1963).

VI. The law enforcement officers executing the search warrant in the instant case exceeded the scope of the warrant's authorization by seizing numerous items not specifically named in the warrant without probable cause or any other constitutionally permissible justification. These officers so far exceeded the scope of any search which was purportedly authorized by the warrants which were issued that the searches which occurred amounted to general exploratory searches prohibited under the federal

and state constitutions. **Walter v. United States**, 447 U.S. 649 (1980); **Marron v. United States**, 275 U.S. 192 (1927); **Coolidge v. New Hampshire**, 403 U.S. 443 (1971); **Texas v. Brown**, 460 U.S. 730 (1983); **United States v. Leon**, 468 U.S. 897 (1984).

VII. The officers executing the warrants in the instant case violated defendant's statutory and constitutional rights of privacy by precipitously entering the various structures without proper notice of their purpose and authority and before the occupants were given a reasonable opportunity to voluntarily surrender the premises to the officers. **Wilson v. Arkansas**, 514 U.S. 927 (1995); **Ker v. California**, 374 U.S. 23 (1963); **Miller v. United States**, 357 U.S. 301 (1958).

VIII. The "good faith" exception to the Fourth Amendment exclusionary rule of **United States v. Leon**, 468 U.S. 897 (1984) does not apply to the instant case for the following reasons:

- a. The affidavits in support of the search warrants were so deficient in showing probable cause that no law enforcement officer could harbor an objectively reasonable belief that probable cause existed to search the places and seize the items set forth in the search warrant. **United States v. Leon**, 468 U.S. 897 (1984); **United States v. Peltier**, 422 U.S. 531 (1975).
- b. The magistrate issuing the warrants abandoned his judicial role in issuing the warrants. **Leon**, *supra*.
- c. The good faith doctrine does not apply to warrantless searches or to search warrant executions. **Leon**, *supra*.
- d. The good faith exception does not apply to search warrants issued upon affidavits containing false statements intentionally or recklessly made, or to affidavits from which material information has been intentionally or recklessly omitted. **Leon**, *supra*; **Franks v. Delaware**, 438 U.S. 154 (1978).

IX. The government's conduct in this case, taken as a whole, so far departed from well-established Fourth Amendment law and resulted in such egregious federal and state constitutional violations in the instant case as to constitute a deprivation of the due process rights of the defendant under the Fifth and Fourteenth Amendments to the United States Constitution, requiring suppression of all evidence obtained as a result. **United States v. Medlin**, 842 F.2d 1194 (10th Cir. 1988).

X. The searches and seizures conducted in the above-captioned case on or about August 26, 1992, and September 1, 1992, were accomplished in violation of the defendant's rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 1, 10, 15 and 18 of the Kansas Bill of Rights.

XI. Any statements made by the defendant after his arrest were involuntary and not made pursuant to a knowing and intentional waiver of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, Section 10 of the Kansas Bill of Rights, and ***Miranda v. Arizona***, 384 U.S. 436 (1966), or were fruit of the execution of the illegal search warrants issued in this case.

XII. All physical evidence and statements and/or admissions made by the defendant and observations of law enforcement officers on or after August 26, 1992, were the fruit of the unconstitutional searches and seizures as set forth above and must be suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 479-84 (1963).

WHEREFORE, the defendant prays that the Court issue an order suppressing the aforesaid evidence for the reasons set forth herein and in the Brief in Support of Motion to Suppress Evidence submitted herewith; and for such other and further relief as to the Court seems just.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT H

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 83 CR XXXX
	)	
JOHN DOE,	)	
Defendant.	)	
_____	)	

SUGGESTED FINDINGS OF FACT

1. Between July 15 and September 8, 1983, undercover narcotics detective Lorrie Smith arranged to purchase a quarter ounce of cocaine from defendant Bill Jones. (R. 26-31, 63-70).

2. On the evening of September 8, Detective Smith went to Jones' apartment, located at 1234 N. Market, and waited for the cocaine to arrive. (R. 26-27). Surveillance had been set up on the apartment with two unmarked cars, one occupied by Detective Clark and located at the 1300 block of North Market, (R. 76, 78); the other occupied by Officer Parsons and initially located on 12th Street between Broadway and Market (R. 109).

3. While waiting at the apartment, Detective Smith listened to Jones' side of approximately six telephone conversations (R. 66) during which Jones talked to an individual he called "Kent". (R. 67-69). After many of these calls, Jones would inform the detective how long it would be before Kent would arrive. (R. 67-69). From all the information he had, Detective Smith "expected that only one individual or one guy would be bringing by the cocaine." (R. 69-70).

4. Around 11:30 p.m., surveillance teams observed a blue Chevrolet Chevelle proceeding west on 12th. (R. 86). The car turned north on Market and came to a stop in the parking lot of 1234 N. Market. (R. 72, 86). At that time, Kenton Hays got out from the passenger side of the car and went to Jones' apartment. (R. 78-79). Detective Smith answered the door and asked Kenton Hays "if he was the guy with the stuff," to which Kenton Hays answered "yeah." (R. 29).

5. Once inside the apartment, Hays took the alleged quarter ounce of cocaine "out of his pocket and placed it on the table." (R. 29). Detective Smith then gave the "bust signal" and the surveillance officers moved in to make the arrests. (R. 31, 74, 88).

6. The driver of the vehicle, Defendant John Doe, remained in the car during all of this activity and, according to Detective Clark, did “nothing that I could observe. Stayed in the car.” (R. 74). None of the officers knew who Doe was or anything about him. (R. 82, 114-16, 122-23).

7. When Detective Smith gave the “bust signal”, Officer Parsons, who had pulled his car onto Market and parked it just north of Jones’ apartment, testified that, as he was approaching the defendant’s vehicle from the north, he was “moving in to effect the arrest”. (R. 88). As Parsons approached the car, Clark told him “there was someone still in the car and asked him to arrest that suspect”. (R. 83). It was Parsons’ “intention to remove (Doe) from the vehicle” at that time. (R. 110).

8. When the officer reached the car with his service revolver drawn (R. 90), he pointed it at Doe’s head at a distance of “six inches” (R. 120) identified himself as a police officer and “told (Doe) to put his hands on the steering wheel and not to make any noise”. (R. 89). The officer then told Doe to “get out of the car”. (R. 120-21). Doe stepped out and Parsons then had “his gun placed up against the back of Doe’s neck” and conducted an uneventful pat-down search. (R. 120). While Parsons does not recall at exactly what point he “told him he was under arrest” (R. 121), sometime within “five minutes” after removing Doe from the car, Parsons formally advised him he was under arrest. (R. 121).

9. Thereafter, Doe was ushered at gunpoint to Parsons’ vehicle one or two houses north of 1234 Market. (R. 122). There, Parsons radioed for back-up, uniformed officers, notified the dispatcher of the arrest (R. 91) and, then walked Doe back to his vehicle. (R. 123). Doe and Parsons stood there “three to five minutes until the uniformed officers arrived”. (R. 123).

10. When the uniformed officers arrived, only then did Parsons borrow a flashlight from them and examine the interior of the vehicle. (R. 123-24). “In the floorboard of the driver’s side of the car there was a white envelope that was partially underneath the seat and partially out in the floorboard area”. (R. 93). Until that time, Parsons had not observed the envelope or sandwich bag corner. (R. 124).

11. Officer Parsons examined the vehicle’s interior, he “saw the envelope and (he) saw just the tip of a plastic bag”. (R. 125). He “could not tell anything about the contents of that plastic bag as (he) observed it with the flashlight” but, nonetheless, opened the car door and removed the envelope. (R. 126, 93). It was not until the envelope was removed from the vehicle and the sandwich bag in turn, removed from the envelope that Parsons could see any white powder. (R. 125).

12. After defendant Doe was arrested in the parking lot of 1234 Market, Officer Parsons drove Doe’s car to the police garage. (R. 98-99). Once there, the officer “went to the trunk area of the car and opened up the trunk”. (R. 99). Inside the trunk “was a brown and white plastic bag” (R. 100) with a “logo” which read “You’re looking good, Regis Hairstylists”. (R. 131). It was “kind of a shopping bag” with “a little handle on top”. (R. 131). “The contents of the bag were not visible as (the officer) looked in at the bag in the trunk”. (R. 131). The officer then seized the shopping bag, opened it and

found a plain white envelope, also “closed sufficient that the contents . . . were not visible”. (R. 100, 132). A search of the envelope revealed a plastic sandwich bag containing white powder. (R. 100).

SUGGESTED CONCLUSIONS OF LAW

1. When Detective Parsons approached the defendant Doe, seated in his auto, it was Parsons’ intention to arrest Doe. And, indeed, he had been directed to do so by Detective Clark. When Parsons thereafter ordered Doe from the car at gunpoint, patted him down, and ushered him at gunpoint over to his police vehicle, Parsons had effected an arrest of Doe which must be supported by probable cause, regardless of when the formal announcement of arrest took place.

2. The warrantless search of defendant Doe’s automobile conducted by Officer Parsons in the parking lot of 1234 Market cannot be justified under the “search incident to arrest” exception to the warrant requirements of the Fourth Amendment to the U.S. Constitution and Section 15 of the Bill of Rights of the Kansas Constitution, because at the time the defendant was ordered at gunpoint from his vehicle and placed under arrest, Doe was unknown to the officers and no criminal conduct on his part had been observed by anyone. Doe was merely present outside an apartment where suspected criminal activity was occurring. Therefore, the arrest of the defendant Doe was without probable cause and unlawful. ***United States v. Di Re***, 332 U.S. 581 (1948).

3. The warrantless search of defendant Doe’s vehicle cannot be justified under the “automobile exception” to the warrant requirements of the state and federal constitutions because the officer lacked probable cause to support a reasonable belief that the vehicle contained any additional seizable items after the object of the search, the quarter ounce of cocaine, had been already located and reduced to police custody inside defendant Jones’ apartment. The officer’s “plain view” of the plain white envelope with the corner of a plastic sandwich bag protruding therefrom adds nothing to the officer’s vague suspicion that additional contraband remained in the vehicle because the appearance of such common items which serve a wide variety of legitimate purposes cannot serve as the basis for probable cause to believe these items are connected or associated with criminal activity. The “immediately apparent” requirement of the “plain view” doctrine was, therefore, not met and that doctrine is inapplicable.

4. The search of the white envelope contained within the brown and white plastic shopping bag, the contents of both not being in plain view of the officer, in the trunk of defendant Doe’s vehicle, which search was conducted in the police garage after the defendant’s vehicle was transported there by Officer Parsons:

- (a) cannot be justified as a search incident to arrest under ***New York v. Belton***, 453 U.S. 454 (1981), because such a search is limited to the passenger compartment and must be contemporaneous with the arrest; both limitations were exceeded here;

- (b) cannot be justified under the “automobile exception” under ***United States v. Ross***, 456 U.S. 798 (1982) and ***State v. Jaso***, 231 Kan. 614 (1982), because, as decided above, the police lacked probable cause to believe the vehicle contained any seizable items.

5. The State has failed to bear its burden of establishing a valid exception to the warrant requirements of the federal and state constitutions. The searches of the defendant Doe’s vehicle were, therefore, *per se* unreasonable under ***Coolidge v. New Hampshire***, 403 U.S. 443 (1971), and the evidence obtained as a result of those unreasonable searches must be suppressed.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-XXXXX
	)	
JOHN DOE,	)	
Defendant.	)	
_____	)	

MOTION FOR STATUS CONFERENCE

COMES NOW the Defendant, John Doe, by and through his attorney of record, Daniel E. Monnat of Monnat & Spurrier, Chartered, and, pursuant to Fed. R. Crim. P. 17.1, moves the Court for an Order setting a date for a status conference in the above-captioned matter. In support hereof, counsel would respectfully suggest to the Court the following:

1. Counsel has this day filed numerous requests for discovery as well as a Motion to Suppress in the instant matter.
2. As well, counsel has filed a Motion for Change of Brief Filing and Service.
3. Many of the discovery requests filed relate to material necessary to effectively litigate a Motion to Suppress.
4. A hearing on some of the discovery requests before a hearing on the Motion to Suppress will facilitate an orderly and expeditious presentation of the evidence at the Motion to Suppress.

For the above and foregoing reasons, counsel respectfully suggests to the Court that a status conference in this matter might allow the following to be resolved:

- a. Any procedural difficulties caused by Defendant's Motion for Change of Brief Filing and Service.
- b. A hearing on Defendant's discovery requests could be had.

c. A date could be set by the Court by which the parties should comply with such discovery requests as are granted by the Court. Said date could be set sufficiently in advance of a hearing on Defendant's Motion to Suppress as to allow both sides adequate preparation time after receipt of the discovery.

d. A date for a hearing on Defendant's Motion to Suppress could be set sufficiently in advance of the trial date as to allow for a ruling thereon sufficiently in advance of trial so as to allow each side to be prepared to meet the evidence which will be presented at trial.

e. Any other matters or scheduling problems.

WHEREFORE, counsel respectfully requests of the Court an Order setting a status conference in the above-captioned matter and for such other and further relief as the Court deems just.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,

EXHIBIT J

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 91 CR XXXX
	)	
JOHN DOE,	)	
Defendant.	)	
_____	)	

MOTION TO SUPPRESS

COMES NOW, the Defendant, John Doe, by and through his attorney, Daniel E. Monnat of Monnat & Spurrier, Chartered, and moves the Court for an Order suppressing the following evidence for the following reasons:

1. All the physical evidence and any evidence or testimony derived from said physical evidence which was taken either from the person of the defendant or the vehicle in which he was riding at or near Second and Seneca Streets in Wichita, Sedgwick County, Kansas on or about the 1st day of May, 1989. Said evidence was the fruit of an illegal, unreasonable and unconstitutional search and seizure for the following reasons:

- A. Said search and seizure was without reasonable grounds.
- B. Said search and seizure was without probable cause.
- C. Said search and seizure was without either an arrest warrant or a search warrant.
- D. Said search and seizure was accomplished by looking inside of personal possessions which had already been reduced to police custody without a warrant.
- E. Said search and seizure was the product of an initial illegal stop or arrest.

For purposes of standing, and subject to the protections and immunities of the Fifth Amendment and *Simmons v. United States*, 390 U.S. 377 (1968) respectively, the defendant hereby asserts that his Fourth Amendment rights were personally violated by the instant search and seizure in that he had a legitimate expectation of privacy in the 1975 black Chevy pickup truck in which he was present with the permission of its owner and/or possessor. The defendant asserts that he had a legitimate expectation of privacy in all compartments of said pickup truck and such expectation of privacy in both the brown paper

bag and the clear plastic bag searched. Further, the defendant asserts both a possessory interest in the pickup truck as well as a possessory and ownership interest in the two (2) bags searched and the alleged contraband located therein.

2. All statements and/or admissions made by the defendant after his arrest as the same were the fruits of both an illegal arrest and an illegal search and seizure for the reasons set forth in paragraph one above as well as that the arrest of defendant was made without probable cause, reasonable grounds and without either an arrest or search warrant.

The admissibility of the aforementioned evidence is proscribed by the Fourth and Fourteenth Amendments to the United States Constitution and Section Fifteen of the Bill of Rights of the Constitution of the State of Kansas.

WHEREFORE, the defendant respectfully moves this Court for an order suppressing the aforesaid evidence for the aforesaid reasons.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 89-XXXXX
	)	
JOHN DOE,	)	
Defendant.	)	
_____	)	

**BRADY MOTION FOR DISCOVERY OF ALL FAVORABLE
EVIDENCE OF DEFENDANT’S CONNECTION WITH SEARCHED
ITEMS FOR DEFENDANT’S MOTION TO SUPPRESS**

COMES NOW the Defendant, John Doe, by and through his attorney of record, Daniel E. Monnat of Monnat & Spurrier, Chartered and, under the authority of ***Brady v. Maryland***, 373 U.S. 83 (1963), moves for discovery of any and all evidence or testimony which the Government has or is aware of, or through due diligence could obtain, that would indicate that Defendant John Doe owned, possessed, or was connected with either the 1979 Chevrolet Trans Van, SGBXX123 or the black gym bag which were seized and searched on or about March 17, 1989. In support hereof, counsel would respectfully show the Court the following:

1. Apart from any discovery under Rule 16 of the Federal Rules of Criminal Procedure, an accused has a constitutional right to the disclosure of all favorable evidence in the possession of the prosecution, pursuant to the “due process” clause of the Fifth Amendment. ***Brady v. Maryland***, 373 U.S. 83 (1963); ***Ashley v. Texas***, 319 F.2d 80 (5th Cir. 1963); ***Austin v. McKaskle***, 724 F.2d 1153 (5th Cir. 1984).

2. Even if this evidence would appear to be detrimental to Defendant Doe on the merits, the same will assist and enable Defendant to meet his burden of proof in demonstrating his standing at the suppression hearing with regard to the instant searches, and therefore is favorable and helpful to the defense.

3. Principles of fundamental fairness require that the Defendant Doe have access to any such evidence at this time, prior to trial, for without this evidence, Defendant Doe cannot effectively prepare his defense or preserve his constitutional rights guaranteed by the Fourth Amendment to the United States Constitution and Kansas statutory and constitutional law.

WHEREFORE, the Defendant respectfully prays that the Court grant this Motion for Discovery of all favorable or exculpatory evidence and in particular any and all evidence or statements demonstrating Defendant Doe's ownership or possessory interest or connection with either the 1979 Chevrolet Trans Van or black gym bag.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. XX-XXXXX-01
	)	
ROY DOUGLAS DOE,	)	
Defendant.	)	
_____	)	

STIPULATION OF FACTS

On _____, 1990, for purposes of a hearing on Defendant's Motion to Suppress, the plaintiff and the defendant, Roy Douglas Doe, have entered into an agreement that said defendant has "standing" to contest the search of the 1979 Chevrolet Trans Van and the black zippered gym bag based upon the testimony of the following witnesses who, if called to testify at a hearing on the defendant's Motion to Suppress Evidence, would testify as follows:

MARY E. DOE

Mary E. Doe is the mother of the defendant Roy Douglas Doe. On May 26, 1984, she and her daughter Patsy A. Doe purchased a 1979 Chevrolet Trans Van, VIN CGL33801483653. The van was titled in the names of "Patsy A. Doe and/or Mary E. Doe" and registered to them at 1234 E. Main Street South, Sedgwick County, Kansas. Copies of the title to the van and a receipt for its purchase are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by reference. Mary E. Doe and Patsy A. Doe together own the family farm at 1234 E. Main Street South, Sedgwick County, Kansas and reside nearby together at 123 N. Attorney Ave., Wichita, Kansas. The van was purchased in part with the proceeds of a bank loan from Rose Hill State Bank. This was the vehicle which was stopped by Sedgwick County Sheriff's Officer Chris Stingy in the 4500 block of South Broadway on the morning of March 17, 1989. Although the van was owned by Mary E. and Patsy A. Doe, the defendant Roy Douglas Doe was often permitted to use the van. He had, on occasions prior to March 17, 1989, used the van to travel to Kansas City; Dallas, Texas; to the Winfield State Lake; and to Canada. The van had been parked at Joe's Bait, a bait store where Roy Doe works, for some period of time before March 16, 1989.

On the evening of March 16, 1989, Mary E. Doe, Patsy A. Doe, the defendant and several other persons ate dinner together at Angelo's Restaurant. Mary E. Doe knew the defendant was going to use

the van on March 17, 1989. She placed no conditions upon Roy's use of the van that day and no restrictions were discussed. Roy had Mary E. Doe's authority to permit any of his friends, including James Friend with whom she was acquainted, to drive the van.

PATSY A. DOE

Patsy A. Doe is the sister of the defendant Roy Douglas Doe. She is employed at Wesley Hospital. Patsy and her mother, Mary, own the Doe family farm at 1234 E. Main Street South, Sedgwick County, Kansas and together live nearby at 123 N. Attorney Ave., Wichita, Kansas. On May 26, 1984, Patsy A. Doe and her mother purchased a 1979 Chevrolet Trans Van, VIN CGL33801483653. The van was titled in the names of "Patsy A. Doe and/or Mary E. Doe" and registered to them at 1234 E. Main Street South, Sedgwick County, Kansas. The van was purchased in part with the proceeds of a bank loan from Rose Hill State Bank. This was the vehicle which was stopped by Sedgwick County Sheriff's Officer Chris Stingy in the 4500 block of South Broadway on the morning of March 17, 1989. Although the van was owned by Patsy A. Doe and her mother, her brother Roy Douglas Doe, the defendant, was often permitted to use the van. He had, on occasions prior to March 17, 1989, used the van to travel out-of-town to Kansas City; Dallas, Texas; to the Winfield State Lake; and to Canada. For some period of time before March 16, 1989, the van had been parked at Joe's Bait, a bait store where Roy Doe works.

On the evening of March 16, 1989, Patsy A. Doe, her brother Roy, her mother, and some of Roy's friends ate dinner together at Angelo's Restaurant. Patsy A. Doe knew that Roy Doe was going to use the van on March 17, 1989, and he had her consent to use the van that day. He discussed this with her at Angelo's. He told her he was going to drive it to Kansas City in connection with the bait business and she agreed that he could do so. She placed no conditions upon Roy's use of the van that day and no restrictions were discussed. Roy had her authority to permit any of his friends, including James Friend with whom she was acquainted, to drive the van.

ROY DOUGLAS DOE

Subject to the protections and immunities of the Fifth Amendment to the United States Constitution and ***United States v. Simmons***, 390 U.S. 377 (1968), the parties stipulate that Roy Douglas Doe would testify as follows on the issue of "standing":

The defendant Roy Douglas Doe was sitting in the passenger seat of the above-described 1979 Chevrolet Trans Van when it was stopped on the morning of March 17, 1989, by Sedgwick County Sheriff's Officer Chris Stingy. The defendant had borrowed the van from its owners, Patsy A. Doe and Mary E. Doe, the defendant's sister and mother. The van had been parked at Joe's Bait, a bait store where Roy Doe works, for some period of time before March 16, 1989.

On the evening of March 16, 1989, the defendant, his mother, Mary E. Doe, his sister Patsy A. Doe, and several other persons ate dinner at Angelo's Restaurant. Patsy A. Doe knew the defendant was going to use the van on March 17, 1989. The defendant had discussed the fact that he was going to transport a type of fishing bait in the van to Kansas City the next morning with Patsy A. Doe at Angelo's. She agreed that he could do so. She placed no conditions upon Roy's use of the van that day and no restrictions were discussed. Roy had her authority to permit any of his friends, including James Friend with whom Patsy was acquainted, to drive the van.

The black gym bag in which the cocaine and U.S. currency were found by Sedgwick County Sheriff's Officer Chris Stingy on March 17, 1989, was owned by the defendant Roy Douglas Doe. The bag was closed and zippered at the time Officer Stingy first seized it and it was not possible to see the contents of the bag without unzipping it and pulling it open. The defendant expected that no one but himself would open the bag for any purpose and he intended that its contents remain private and not exposed to view by anyone but himself without his specific and express consent.

JAMES FRIEND

James Friend is a friend of the defendant Roy Douglas Doe. On the evening of March 16, 1989, Friend ate dinner at Angelo's Restaurant with the defendant and some of the defendant's family and friends. The defendant had asked Friend to help him transport some "Magic Cheeze" fish bait to Kansas City on the morning of March 17, 1989, and Friend had agreed. It was decided that Friend was to drive the 1979 Chevrolet Trans Van to Kansas City, with the defendant riding in the passenger seat.

Friend knew the van was owned by the defendant's mother and sister and that the black zippered gym bag in which the cocaine and U.S. currency were found by Sedgwick County Sheriff's Officer Chris Stingy on March 17, 1989, was owned by the defendant.

IS SO STIPULATED.

DANIEL E. MONNAT
Attorney for Roy Douglas Doe

Assistant U. S. Attorney

EXHIBIT M

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 94 CR XXXX
	)	
JOHN DOE,	)	
Defendant.	)	
_____	)	

MOTION TO SUPPRESS EVIDENCE AND FOR HEARING PURSUANT TO *FRANKS V. DELAWARE*

COMES NOW the defendant, John Doe, by and through his attorney, Daniel E. Monnat of Monnat and Spurrier, Chartered, and respectfully moves the Court for an Order suppressing all physical evidence, whether tangible or intangible; any statements or admissions of the defendant; any and all observations of law enforcement officers and any other tangible or intangible evidence obtained during, or directly or indirectly derived from, the searches of his person and/or the premises commonly known as 100 N. Main in Wichita, Kansas, and any outbuildings or other structures, vehicles or other property located on or near said location, in which the defendant had a reasonable expectation of privacy on or about April 3, 1992.

Background

On the morning of April 3, 1992, law enforcement officers executed a search warrant at 100 N. Main, Wichita, Kansas. The defendant was not present at the time. The residence was searched pursuant to a federal search warrant issued by Kansas District Court Judge Real E. Smart on April 2, 1992. A copy of the warrant is attached hereto as Exhibit “1”. The warrant was issued upon an “Application and Affidavit for Search Warrant” executed by Sedgwick County Sheriff’s Detective Robert T. Snoop, a copy of which is attached hereto as Exhibit “2”.

The description of things to be seized is contained in the search warrant’s “Exhibit A”, which was purportedly attached to the warrant. Although this warrant resulted from a drug investigation and the defendant was supposed to be a drug trafficker, the warrant does not authorize the search for or seizure of any controlled substances. Examination of the warrant’s “Exhibit A” shows the warrant to be a generic “drug records” or “documents” search warrant. The exhibit lists over a page of boilerplate paragraphs encompassing a vast array of documents, monetary instruments, electronic equipment and various other items. The generic nature of the description of things to be seized is demonstrated by paragraph 5, wherein the warrant purports to authorize the seizure of “[e]vidence pertaining to Steve’s obtaining, secreting, transfer, concealment, and/or expenditure of narcotics proceeds” Det. Snoop’s affidavit nowhere mentions an individual named “Steve” and it is anticipated that the evidence at the hearing on this motion

should show that this “Exhibit A” was simply lifted in its entirety from another search warrant in another investigation having nothing to do with the defendant Doe.

Det. Snoop’s affidavit, slightly more than three pages, contains an introductory paragraph describing his training and experience in drug investigations, followed by several standard paragraphs similar to those found in most applications for drug records warrants, alleging, generally, things that drug-traffickers do and own. The remainder of the affidavit contains allegations regarding the defendant, most of which amount to no more than unsubstantiated rumor. The affidavit contains virtually no information proximate in time to the search making it likely that seizable evidence will be found in the place to be searched. Rather, the affidavit relies primarily on the highly dubious notion that, once an individual is rumored to be a drug trafficker, a court may issue a drug records warrant to search locations associated with that person at virtually any time thereafter.

Contentions In Support Of Motion

Defendant alleges that the evidence herein sought to be suppressed is the fruit of illegal, unreasonable and unconstitutional searches and seizures in the following respects:

I. The search warrant was a “drug records” or “documents” warrant, which did not authorize a search for controlled substances or paraphernalia. Hence, the seizures of marijuana and cocaine from the premises were warrantless. *Cf. State v. Kelsey*, 592 S.W.2d 509 (Mo. 1979). The government cannot bear its burden of proving that the warrantless seizures were reasonable and justified by an exception to the warrant requirements of the Fourth Amendment and Section 15 of the Kansas Bill of Rights. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The officers unlawfully sought the drug records warrant as a pretext to search for drugs at the residence because they lacked probable cause to believe that drugs were then present in the residence. *Kelsey*, *supra*; *United States v. Tranquillo*, 330 F. Supp. 871, 876 (M.D. Fla. 1971).

II. Det. Snoop’s affidavit (hereinafter referred to as the “affidavit”), failed to set forth facts which would allow a neutral and detached magistrate to conclude that there was probable cause to believe that a controlled substance offense was being committed at the place sought to be searched or that fruits, contraband or evidence of such a crime were then located at that location. *Illinois v. Gates*, 462 U.S. 213 (1983); *Sgro v. United States*, 287 U.S. 206 (1932); *State v. Morgan*, 222 Kan. 149 (1977); *State v. Mitchell*, 8 Kan. App. 2d 416 (1983). Virtually all of the information in the affidavit was stale and the affidavit failed to set forth any facts from which a neutral and detached magistrate could make an independent determination as to the veracity of the informants allegedly providing facts which were incorporated into the affidavit or the reliability of their information. *Sgro v. United States*, 287 U.S. 206 (1932); *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972); *Illinois v. Gates*, 462 U.S. 213 (1983); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *Draper v. United States*, 358 U.S. 307 (1959).

III. Det. Snoop intentionally, or with reckless disregard for the truth, omitted material facts from his affidavit. Said omissions rendered allegations in the affidavit misleading and materially affected the probable cause determination and the defendant hereby moves for a hearing on said issue. *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Olson*, 11 Kan. App. 2d 485 (1986). See Affidavit of Daniel E. Monnat, filed herewith.

IV. The search warrant was unconstitutionally overbroad and amounted to a general warrant in that it failed to specify with sufficient particularity the things to be seized; and the search purportedly authorized by the warrant exceeded the scope of any arguable probable cause showing. The warrants purportedly authorized the search for and seizure of, a potentially large quantity of generally described private papers and electronic analogues thereof, thus infringing upon not only Fourth Amendment privacy interests, but also First Amendment privacy interests. **Marron v. United States**, 275 U.S. 192 (1927); **United States v. Leary**, 846 F.2d 592 (10th Cir. 1988); **State v. Muldowney**, 393 A.2d 26 (N.J. 1972); **Application of Lafayette Academy, Inc.**, 610 F.2d 1 (1st Cir. 1979).

V. The law enforcement officers executing the search warrant exceeded the scope of the warrant's authorization by seizing items not specifically named in the warrant without probable cause or any other constitutionally permissible justification. The officers so far exceeded the scope of any search which was purportedly authorized by the warrant that the search which occurred amounted to a general exploratory search prohibited under the federal and state constitutions. **Walter v. United States**, 447 U.S. 649 (1980); **Marron v. United States**, 275 U.S. 192 (1927); **Coolidge v. New Hampshire**, 403 U.S. 443 (1971); **Texas v. Brown**, 460 U.S. 730 (1983); **United States v. Leon**, 468 U.S. 897 (1984). The seizures of items not specifically named in the warrant were warrantless seizures and the State cannot bear its burden of demonstrating that said seizures were justified by any recognized exception to the warrant requirements of the Fourth Amendment and Section 15. **Coolidge v. New Hampshire**, 403 U.S. 443 (1971).

VI. The federal search warrant violated Fed. R. Crim. P. 41 in the following respects:

A. Det. Snoop was not a federal law enforcement officer at the time he sought the warrant and, therefore, the warrant was not issued "[u]pon the request of a federal law enforcement officer or an attorney for the government", in violation of Rule 41(a).

B. The warrant appears to authorize a search "at any time in the day or night", inasmuch as that provision is not crossed- or lined-out; however, nothing in Det. Snoop's affidavit establishes reasonable cause for the authorization of a nighttime search, in violation of Rule 41(c)(1).

VII. The "good faith" exception to the Fourth Amendment exclusionary rule of **United States v. Leon**, 468 U.S. 897 (1984) does not apply to the instant case for the following reasons:

A. The affidavit in support of the search warrant was so deficient in showing probable cause that no law enforcement officer could harbor an objectively reasonable belief that probable cause existed to search the place and seize the items set forth in the search warrant. **United States v. Leon**, 468 U.S. 897 (1984); **United States v. Peltier**, 422 U.S. 531 (1975).

B. The judge issuing the warrant applied an improper analysis of the "totality of the circumstances" test in determining whether probable cause existed for the issuance of the warrant. **State v. Doile**, 244 Kan. 493 (1989).

C. The judge issuing the warrant abandoned his judicial role in issuing the warrant. **Leon**, *supra*; **State v. Probst**, 247 Kan. 196 (1990).

D. The good faith doctrine does not apply to warrantless seizures or to search warrant executions. **Leon**, *supra*.

E. The good faith exception does not apply to search warrants issued upon affidavits containing false statements intentionally or recklessly made, or to affidavits from which material information has been intentionally or recklessly omitted. **Leon**, *supra*; **Franks v. Delaware**, 438 U.S. 154 (1978).

VIII. Any and all statements and/or admissions made by the defendant on or after April 3, 1992, were involuntary and not made pursuant to a free, knowing and intelligent waiver of the defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, Section 10 of the Kansas Bill of Rights, and **Miranda v. Arizona**, 384 U.S. 436 (1966).

IX. The State's conduct in this case, taken as a whole, so far departed from well-established Fourth Amendment law and resulted in such egregious federal and state constitutional violations in the instant case as to constitute a deprivation of the due process rights of the defendant under the Fifth and Fourteenth Amendments to the United States Constitution, requiring suppression of all evidence obtained as a result. **United States v. Medlin**, 842 F.2d 1194 (10th Cir. 1988).

X. The searches and seizures conducted in the above-captioned case were accomplished in violation of the defendant's rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 15 of the Kansas Bill of Rights.

XI. All evidence, tangible and intangible, including the observations of law enforcement officers while on the aforesaid property, are the fruit of the unconstitutional searches and seizures as set forth above and must be suppressed. **Wong Sun v. United States**, 371 U.S. 471 (1963).

WHEREFORE, the defendant prays that the Court issue an order suppressing the aforesaid evidence for the reasons set forth herein and in any brief or memorandum of law later submitted by counsel; and for such other and further relief as to the Court seems just.

MONNAT & SPURRIER, CHARTERED

DANIEL E. MONNAT,
Attorney for Defendant

EXHIBIT N

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 94 CR XXXX
	)	
JOHN DOE,	)	
Defendant.	)	
_____	)	

AFFIDAVIT OF DANIEL E. MONNAT AND OFFER
OF PROOF RE: **FRANKS V. DELAWARE** HEARING

STATE OF KANSAS	)	
	)	SS:
SEDGWICK COUNTY	)	

I, Daniel E. Monnat, of lawful age, being first duly sworn, on oath depose and state as follows:

1. I am an attorney of record for the defendant, John Doe, in the above-captioned matter. I am making this affidavit in support of the defendant's Motion to Suppress Evidence and For Hearing Pursuant to ***Franks v. Delaware***.

2. After reviewing the Application and Affidavit for Search Warrant executed by Sedgwick County Detective Robert T. Snoop, which was submitted by Det. Snoop in support of his application to Sedgwick County District Judge Real E. Smart; and after reviewing the narrative reports of Det. Snoop and otherwise conducting an investigation of the facts of the above-captioned case, I believe that Det. Snoop, intentionally or with reckless disregard for the truth, made misleading statements and omitted facts from his affidavit which were material to the probable cause determination. I further believe that these misleading statements and material omissions may have misled Judge Smart into authorizing a search of 100 N. Main, Wichita, Kansas, when, in fact, probable cause did not exist for such a search.

3. The search warrant issued by Judge Smart was a "drug records" or "documents" warrant, in that it did not authorize the search for drugs. Such a warrant rests on the proposition that drug traffickers commonly do and have certain things, evidence of which is commonly present in their residences. It was thus critical to the probable cause calculus for Det. Snoop to provide sufficient evidence to Judge Smart

that the defendant Doe was a drug trafficker in order to support the ultimate finding that the things commonly done or possessed by drug traffickers were then located at 100 N. Main.

4. However, of the 10 paragraphs of Det. Snoop's affidavit which related specifically to the defendant, most contain general allegations of stale information from alleged confidential informants.

5. Paragraphs 6 through 10 of Det. Snoop's affidavit describe an attempted "controlled buy". Det. Snoop alleges that a confidential informant, having first been searched for contraband and money, was given money by Det. Snoop and then sent into 100 N. Main with instructions to "buy either cocaine or marijuana from JOHN DOE" Snoop Affidavit, p. 3 (unnumbered).

6. Det. Snoop alleged that the informant came out of 100 N. Main and subsequently "handed over a quantity of a green botanical substance" Det. Snoop then stated that "[t]he confidential informant stated that JOHN DOE, gave the green botanical substance to the CI and that the CI did not have to use the police funds that had been given to them for the purchase of the drugs."

7. Det. Snoop did not state, either in exact, approximate or relative terms, the quantity of marijuana with which the informant returned. An examination of Det. Snoop's narrative report, however, reveals the following language:

The CI advised Detective Snoop at that time that John Doe had given her a *small* quantity of marijuana and at one point ***rolled up some marijuana into a cigarette, lit it at which time the cigarette was put out and handed back to the CI.***

Snoop Investigative Report, typed April 13, 1992, p. 1.

8. My investigation leads me to believe that what the informant returned with was the equivalent of approximately one marijuana cigarette. It is my belief that, at a hearing on this matter, the evidence will show that Det. Snoop intentionally or recklessly omitted both the quantity and form of the marijuana to mislead Judge Smart into believing that the defendant had "fronted" the informant a larger quantity of marijuana, which would support Det. Snoop's theory that the defendant was a drug trafficker.

9. The second false or misleading statement contained in Det. Snoop's affidavit is the following:

(9) The CI then told your Affiant that they observed other drugs in the office area of JOHN DOE, residence.

Snoop Affidavit, p. 4 (unnumbered).

10. Nowhere in Det. Snoop's own report of the attempted controlled buy is it mentioned or implied that the informant made such a statement and it is believed, that if the identity of the confidential informant were known, the informant herself would deny making that statement.

11. My investigation further leads me to believe that, contrary to the impression engendered by Snoop's affidavit, the confidential informant was flatly unable to persuade anyone inside 100 N. Main to sell her drugs and only produced this small quantity of marijuana after spending approximately one hour inside 100 N. Main, begging to obtain drugs, finally resorting to claiming her affliction with a health problem for which she required pain relief. My investigation suggests that Snoop knew these facts vitiating his claim that the defendant was a drug trafficker and intentionally omitted them from his affidavit.

FURTHER AFFIANT SAITH NAUGHT.

DANIEL E. MONNAT

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this _____ day of June, 1994.

NOTARY PUBLIC

My Appointment Expires:

MAKING YOUR DEAL WITH THE DEVIL

PLEA AGREEMENTS UNDER THE FEDERAL RULES, FEDERAL SENTENCING GUIDELINES, AND DEPARTMENT OF JUSTICE POLICIES

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1 INTRODUCTION

Most criminal cases in federal court are resolved not by trials, but by plea bargains. In order to negotiate a successful plea agreement, defense counsel must understand what kind of agreements can be made and the effect of each kind on the client's sentencing exposure. Although plea agreements are generally referred to and treated as *contracts*, they are like contracts in a heavily regulated industry. Rights and responsibilities under these contracts are controlled by layers of statutes, rules, guidelines, Department of Justice (DOJ) policies, and case law. Regardless of the type of plea agreement, counsel must understand the impact of all these layers of regulation in order to know what the provisions of the agreement will mean to the client.

The Department of Justice Manual – the blue looseleaf standard reference manual for all U.S. Attorney's offices, cited herein as the DOJ Manual – requires that plea agreements for all felonies and misdemeanors negotiated down from felonies be in writing and filed with the court. (DOJ Manual 9-27.450) Some U.S. Attorney's offices have standard plea agreement forms, others give individual assistants more leeway in what can or must be in plea agreements. Some agreements cover the basics in a couple of pages, others extend to ten or twenty pages. For some time the trend seemed to be toward longer and more complex agreement forms. Any new provision that a prosecutor came up with was simply tacked on to the previously "standard" form. A trend to simplify plea agreements is emerging, particularly where the agreement has to be translated into another language for the defendant.

This article sets out the basic federal rules, sentencing guidelines and DOJ policies controlling plea agreements in federal court, and analyzes typical provisions that show up in many "standard" federal plea agreements. The article is divided into six main sections as follows:

1. **Introduction** – this section describing the content of the article.
2. **General Law of Plea Agreements** – rules and guidelines that impact on plea bargaining in general, DOJ policies about the charging decision and plea bargaining, involvement of judges in plea bargains, and enforcement of plea agreements.
3. **Specific Types of Plea Agreements** – individual analysis of charge bargains, recommendation bargains, stipulated sentences, stipulations to guideline facts, cooperation agreements, etc.
4. **Waivers: Trial, Appeal, and Collateral** – effectiveness of various kinds of waivers, ethical problems, ways in which the waiver itself can be "waived" or otherwise ineffective.
5. **Miscellaneous Typical Provisions** – problems with inaccurate penalty statements, typical warnings included in plea text, effect of admissions in the factual basis, effect of the acceptance of the bargain on your ability to withdraw.
6. **Collateral Consequences of Plea** – a brief mention of various collateral consequences of plea agreements, a subject generally beyond the scope of this article.

Sample language from a hypothetical typical plea agreement is presented in italics in some sections to illustrate certain points.

2 GENERAL LAW OF PLEA AGREEMENTS

A defendant who is considering a plea is usually primarily concerned about what he or she will plead guilty to and what penalties will be assessed. Although the shape of the plea is controlled by many fact-specific factors related to the crime and the defendant, there are some general principles of law and policy that impact on (1) the prosecutor's initial charging decision, (2) the amount of prosecutorial discretion available for bargaining, (3) the involvement of the court in the bargaining process, and (4) the defendant's ability to enforce the plea bargain once it is entered into. These general matters are the subject of this section. Specific ramifications of the various kinds of plea bargains available in federal court are covered in Section 3.

Plea bargains are controlled or influenced by various sources of law. Federal court practitioners are familiar with Rule 11 of the Federal Rules of Criminal Procedure (FRCP), which, together with case law interpretations, sets out much of the basic law on plea bargaining. Certain portions of the Federal Sentencing Guidelines (USSC or Guidelines)—in particular §1B1.2-4 on Relevant Conduct and §6B1 on Plea Agreements—also have a strong effect on plea bargains. Probably the least familiar source of information is the Department of Justice (DOJ) Manual. Most of the DOJ policies discussed in this article are contained in Title 9, Chapter 27 of the DOJ Manual at 9-27.001 et seq. They will be referred to herein by their section numbers. Most of the provisions of the various DOJ Bluesheets and other memoranda referred to herein have been compiled into that chapter. Copies of the relevant portions of the DOJ Manual should be included as an appendix to this article. If they are not, they should be available in local court libraries and in local federal defender offices.

2.1 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11, FRCP, sets out the basic ground rules for all plea bargaining in federal court. Much of the case law regarding how the plea hearing is handled and the effects of various pleas is based on interpretation of Rule 11. It should be the first source consulted on any plea question. The following are some notable provisions of the rules. Citations to the rules in this section are to the FRCP unless otherwise stated.

2.1.1 TYPES OF PLEAS ALLOWED UNDER RULES

Rule 11(e)(1) describes the kinds of pleas allowed under the FRCP and provides that the government can: (A) move to dismiss other charges in return for a plea, (B) make a non-binding sentencing recommendation to the court, or (C) agree that a specific sentence is appropriate. The ability to agree to a specific sentence under subsection (C) is also relied on by most courts to allow agreement to a "cap" — a maximum not to be exceeded — or a "range" of sentence. As will be discussed below, some courts have doubted whether Rule 11(e)(1)(C) allows caps or ranges.

2.1.2 ABILITY TO WITHDRAW FROM PLEA

Rule 11(e)(2) and (4) combine to allow the defendant to withdraw if a plea involving a dismissal under 11(e)(1)(A) or a specific sentence under 11(e)(1)(C) is rejected. In essence, this is a "back to square one" provision. Unfortunately, if the plea agreement includes a requirement that the defendant perform some action prior to the sentencing, it is difficult to get all the way back to square one. If a recommendation under 11(e)(1)(B) is rejected, the defendant cannot withdraw under this rule.

2.1.3 INVOLVEMENT OF JUDGES IN PLEA NEGOTIATIONS

In general, Rule 11(e)(1) forbids the court to “participate in any [plea bargaining] discussion.” For example, a meeting of the judge, prosecutor, defendant, and defense counsel in chambers, off the record, during which the judge said he followed the prosecutor’s recommendation 90% of the time, required reversal under Rule 11(e)(1). United States v. Daigle, 63 F.3d 346 (5th Cir. 1995). Similarly, where defendant got cold feet at the change of plea hearing and the judge told him (1) that if he was tried on all three counts he would have to get 15 years, (2) that if he pled guilty he would get 10 years, and (3) that he should talk to his lawyer to see if that is what he really wanted to do, the court crossed the line into the realm of forbidden participation in plea bargaining. United States v. Casallas, 59 F.3d 1173 (11th Cir. 1995).

Some districts, like the district of Arizona and the southern district of California, implemented a criminal settlement conference plan involving the assistance of a “settlement judge.” In finding that the *sentencing* judge did not improperly participate in settlement negotiations under such a plan, the 9th Circuit noted that the “parties had already hammered out their agreement with the assistance of [a *settlement* judge].” United States v. Torres, 999 F.2d 376, 378 (9th Cir. 1993). This implicit approval was made more explicit in United States v. Clolari, 72 F.3d 751 (9th Cir. 1996), where the court approved the program, describing it as involving “completely voluntary participation” in settlement conferences under a general order. The southern district of California has now canceled its settlement conference program, but the practice continues in Arizona.

2.1.4 USE OF STATEMENTS MADE IN FAILED PLEA DISCUSSIONS

Rule 11(e)(6), along with Rule 410, Federal Rules of Evidence (FRE), prohibits the use of statements “made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a guilty plea.” Thus, ordinarily, counsel need not worry about the use of such statements against the client except in the two situations specifically excepted by the rules: an exception providing a “rule of completeness” that allows the rest of the statement in where part of it is already in, and an exception for use in perjury prosecutions.

Unfortunately, the Supreme Court has held that the protection of these rules is “presumptively waivable”. United States v. Mezzanatto, 513 U.S. 196 (1995). The 9th Circuit had previously held that, except for the specific exceptions stated in the rules as noted above, the protection of the rules could not be waived. United States v. Mezzanatto, 998 F.2d 1452, 1454-1456 (9th Cir. 1993). The Supreme Court rejected the 9th Circuit’s analysis and permitted proffer statements made in plea discussions to be used as prior inconsistent statements in cross-examination at trial and to be proved up by an agent who attended the proffer meeting, noting that such use was consistent with the wording of the waiver executed before the proffer.

2.2 FEDERAL SENTENCING GUIDELINES

The Guidelines impact on plea bargaining in several ways, and have added a new dimension to the analysis of the benefits of any plea federal bargain. Counsel can now see with some clarity the effect on the sentence that a particular bargain might have. The guidelines have also set up their own standard for when judges should accept or reject plea bargains. Finally, and perhaps most importantly, the guidelines have radically changed the way in which conduct in addition to the conduct involved in the

offense of conviction – so-called “relevant conduct”, including acquitted conduct – is factored into the calculation of the sentence.

2.2.1 STANDARDS FOR ACCEPTANCE OR REJECTION OF PLEA

The Guideline standard for acceptance of plea agreements is set forth in USSG §6B1.2, a Policy Statement which has three sections dealing with the three distinct types of plea agreements authorized under Rule 11(E)(1): (a) dismissals and agreements not to prosecute, (b) non-binding recommendations and (c) specific sentence agreements. The ramifications of these Guideline sections are dealt with more fully below in Section 3 describing the particular kinds of bargains available.

2.2.2 USE OF RELEVANT CONDUCT UNDER GUIDELINES

The concept of *relevant conduct* has its genesis in USSG §1B1.3. A detailed analysis of relevant conduct is too broad a topic to be addressed in this article, although more detail about the use of relevant conduct under specific types of plea bargains is given in Section 3. In general, relevant conduct includes all conduct that occurred during the commission of the offense of conviction, or during the preparation for or attempt to avoid detection or responsibility for that offense – provided that the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused the conduct. USSG §1B1.3(a)(1)(A). If the offense was a joint criminal activity, conduct is relevant if it was in furtherance of the activity and was reasonably foreseeable. USSG §1B1.3(a)(1)(B). The rules are different in a *groupable* offense as defined in USSG §3D1.2(d) – the seriousness of which is usually measured in a quantity like weight of drugs or number of dollars. In those cases relevant conduct also includes conduct that was part of a common scheme or plan with the offense of conviction. USSG §1B1.3(a)(2). Regardless of the type of offense, relevant conduct also includes all harm flowing from any of the above-described conduct, USSG §1B1.3(a)(3), and any special items specifically identified in the applicable guideline. USSG §1B1.3(a)(4). Obviously this is a very broad definition, particularly in conspiracy cases.

The problem facing the defense lawyer is that determination of the guideline range in a particular case is a multi-stage process, with relevant conduct being considered in different ways at different stages. Initially, a specific guideline from Chapter 2 – where there is a guideline for each general type of offense – is selected to be used as a basis for calculation based on the offense of conviction without regard to relevant conduct. USSG §1B1.2(a). Within that chosen guideline, the base offense level and the applicability of various specific offense characteristics and cross references are all based on relevant conduct. USSG §1B1.2(b),3(a). Adjustments under Chapter 3 – for things like role in the offense, obstruction of justice, or acceptance of responsibility – are also based on relevant conduct. USSG §1B1.3(a).

It is usually fair to assume that relevant conduct can and will be considered by the judge in one form or another at sentencing. This can sometimes negate the value of a plea bargain, although the defendant can often derive substantial benefit from the application of a particular guideline based on pleading to a particular charge. The defendant may also benefit from the removal of certain relevant conduct from the sentencing calculus because of the dismissal of some charges, at least in the 9th Circuit.

2.2.3 USE OF ACQUITTED CONDUCT UNDER GUIDELINES

The rationale for allowing conduct for which defendant was acquitted to be considered at sentencing is that there is a different burden of proof, preponderance of the evidence, in effect at sentencing. United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (conviction requires proof beyond a reasonable doubt, sentencing facts need only be proven by a preponderance of the evidence); United States v. Lawrence, 934 F.2d 868 (7th Cir.1991); United States v. Fonner, 920 F.2d 1330 (7th Cir.1990); United States v. Smith, 953 F.2d 1060 (7th Cir.1992); United States v. Manor 936 F.2d 1238 (11th Cir.1991).

In the mid-90s there was some controversy about the use of acquitted conduct to enhance sentences, but this came to an end when the Supreme Court held that acquitted conduct *can* be used in sentencing guideline calculations. United States v. Watts, 519 U.S. 148 (1997). The court followed the usual reasoning, holding that acquittal does not mean innocence, it merely means there exists a reasonable doubt.

Most courts had consistently allowed the use of acquitted conduct in guideline calculations. 79 Cornell L. Rev. 299, n.251 citing United States v. Paulino, 996 F.2d 1541, 1546-49 (3^d Cir.), cert. denied, _____ U.S. _____, 114 S. Ct. 449 (1993) (jury determined that 390 *grams* of cocaine were involved in conspiracy, sentence based on 127 to 140 *kilograms* of cocaine); United States v. Wright, 996 F.2d 312 (10th Cir. 1993) (defendant acquitted of conspiracy), United States v. Lynch, 934 F.2d 1226, 1234-37 (11th Cir. 1991), cert. denied, 112 S. Ct. 885 (1992) (defendant acquitted of firearm possession); see also United States v. Boney, 977 F.2d 624, 635 (D.C. Cir. 1992); United States v. Galloway, 976 F.2d 414, 422-25 (8th Cir. 1992), cert. denied, 113 S. Ct. 1420 (1992); United States v. Fonner, 920 F.2d 1330, 1332-33 (7th Cir. 1990); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-81 (2^d Cir.), cert. denied, 498 U.S. 844 (1990); United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Isom, 886 F.2d 736, 738-39 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 748-49 (5th Cir. 1989); United States v. White, 888 F.2d 490 (7th Cir.1989) (defendant acquitted of conspiracy but drug weight of all deals used to calculate sentence).

But until 1996, the 9th Circuit did not allow the use of acquitted conduct at sentencing, United States v. Brady, 928 F.2d 844 (9th Cir. 1991), although counts on which the jury hung *could* be used. United States v. Duran, 15 F.3d 131 (9th Cir. 1994). Some judges in other circuits also felt strongly that use of acquitted conduct "must be modified [because a] just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." United States v. Conception, 983 F.2d 369, 396 (2^d Cir. 1992), cert. denied, 114 S. Ct. 163 (Newman, J., dissenting).

2.3 DEPARTMENT OF JUSTICE (DOJ) POLICIES

Although DOJ policies do not impact directly on the court and do not create a right in the defendant to certain treatment, they do impact on the decisions made by the prosecutor. Knowledge of these policies – knowing what the prosecutor can and cannot consider – can assist the defense lawyer in framing arguments during the plea bargaining stage.

2.3.1 POLICIES AFFECTING THE CHARGING DECISION

Since pre-guideline days, prosecutors have been directed to bring to the Grand Jury “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.” Principles of Federal Prosecution, July 1980; DOJ Manual at 9-27.001 et seq. A Justice Department Bluesheet dated March 13, 1989 reiterated that requirement, which is now codified at DOJ Manual 9-27.310. The prosecutor can charge other offenses as well, in addition to the most severe, if needed to reflect the nature of the conduct, provide an appropriate sentence, or strengthen the government’s case.

Policies set forth in the Thornburgh Bluesheet dated June 16, 1989 emphasized the requirement that prosecutors file gun counts and informations alleging prior convictions under 21 U.S.C. 851 to enhance penalties. The annotation at DOJ Manual 9-27.750A adds more emphasis to the requirement with its description of Project Triggerlock.

The Reno Bluesheet dated October 12, 1993 appeared on its face to loosen up the “most serious readily provable charge” requirement. (DOJ Manual 9-27.750B). In particular, it stated that it was appropriate for the prosecutor to consider the sentencing guideline range of a contemplated charge, whether the penalty would be proportional to the seriousness of the defendant’s conduct, and whether the charge achieved the purposes of punishment, protection, deterrence and rehabilitation. Unfortunately, in response to an attack by Senator Hatch, Attorney General Reno “clarified” the Bluesheet by saying that it is still DOJ policy that prosecutors charge the most serious offense that is consistent with the conduct and likely to result in a sustainable conviction. In the wake of that “clarification”, many people feel that the Reno Bluesheet is no longer of any effect.

2.3.2 POLICIES AFFECTING PLEA BARGAINING

The 1980 Principles of Federal Prosecution set out a list of things the prosecutor can consider in reaching a plea bargain, including: cooperation, criminal history, seriousness of offense, remorse or acceptance of responsibility, fact that plea is quick and sure for government, probabilities at trial, effect on witnesses, probable sentence at trial, public interest in trial instead of plea, expense of trial and appeal, and effect of this plea on resolving other related or non-related cases. (DOJ Manual 9-27.420). Unfortunately, it is unclear how many of these factors remain viable in light of the later Bluesheets in the guideline era. The Thornburgh Bluesheet notes that after indictment, prosecutors are bargaining about charges that they have *already determined to be readily provable* and reflective of the seriousness of the defendant’s conduct, and thus should rarely be in a position to drop charges. However, that same Bluesheet goes on to note that circumstances can arise, such as the need to protect a witness, that might change the bargaining calculus. Nonetheless, the thrust of all the policies is clear: charges are easy to make, hard to drop.

2.4 ENFORCEMENT OF PLEA AGREEMENTS

In general, the terms of a plea agreement are “contractual in nature” and disputes will be “determined by objective standards”. United States v. Goroza, 941 F.2d 905 (9th Cir. 1991). Any government promises that are part of the inducement to plead must be fulfilled. Santobello v. New York, 404 U.S. 257,262 (1971). For a collection of cases on interpretation of plea agreement terms, see U.S. v Anderson, 970 F.2d 602 (9th Cir. 1992) (meaning is a fact question, government held to literal terms, government responsible for lack of clarity, question is what the parties reasonably understood). There

is also a substantial amount of fact specific case law dealing with specific questions of plea agreement interpretation. Some cases involving breaches of specific types of agreements are detailed in the relevant portion of Section 3, below.

The issue of a breached plea agreement is cognizable on direct appeal where defendant has already been sentenced and thus cannot file a motion to withdraw the plea. United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996) (defendant need not move to withdraw under Rule 32, move to reduce under Rule 35, or move to correct under 2255, particularly, where, as here, the defendant does not want to withdraw, but wants to enforce the plea agreement). However, defendant cannot raise the government's breach of the plea agreement for the first time on appeal. United States v. Robertson, 52 F.3d 789 (9th Cir. 1994) (defendant should ordinarily recognize the breach immediately and should be required to raise issue in the district court while the alleged breach can still be repaired).

Many defense claims of government breach involve failure to provide an agreed benefit and are discussed in the relevant parts of Section 3. But what about other types of government misconduct not linked to a benefit in the plea? Where the government solicited grand jury testimony from defendant in the absence of his counsel, in order to avoid the demands of defense counsel for a 5K1.1 substantial assistance motion, the district court was free to depart downward for substantial assistance even in the absence of a government motion. United States v. Treleven, 35 F.3d 458 (9th Cir. 1994).

3 SPECIFIC TYPES OF PLEA AGREEMENTS

This section discusses the three types of plea bargains recognized under the rules of criminal procedure and the sentencing guidelines: charge bargaining, recommendation bargaining, and stipulation bargaining. It also covers some other forms of bargains that are not mentioned in the rules but are prevalent: pre-indictment bargaining, factual stipulations, restitution agreements, cooperation agreements, and agreements related to deportation.

3.1 PRE-INDICTMENT PLEA BARGAINING

Although the 1989 Thornburgh Bluesheet does not provide that the AUSA can ignore the "most serious provable offense" policy if a deal is worked out before the charge is filed, it recognizes that the prosecutor often has more freedom of movement before the indictment is handed up. It notes that "whether bargaining takes place before or after indictment, the Department policy is the same," but it also recognizes that "it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to the indictment, the prosecutor bargained in conformity with the Department's policy." In practice, it is often possible to avoid more serious charges by getting with the prosecutor early and arranging a pre-indictment plea.

3.2 CHARGE BARGAINING

Charge bargaining – the agreement to dismiss or not charge certain counts, or to substitute a less serious charge for a more serious one – is one of the most effective bargaining tools. Absent extremely unusual circumstances, judges cannot prevent the prosecution from dismissing charges and can never force them to file charges. Charge bargaining is limited by the DOJ policies mentioned in Section 2.3.2 above, but is widespread in practice.

Sample Plea Agreement Language

Pursuant to Fed.R.Crim.P. 11(e)(1)(A), the government agrees to dismiss counts 2-7. Insofar as the District of Arizona has venue over such matters, the government agrees not to prosecute the following charges: Robbery of the Valley National Bank at 200 N. Central, Phoenix, Arizona on January 16, 1999.

3.2.1 RULES AND GUIDELINES

Agreements to dismiss or not to pursue charges are authorized under Rule 11(e)(1)(A). Guideline §6B1.2(a) advises the court to accept such agreements if the court determines “for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” Just what it means to “adequately reflect the seriousness” of the offense behavior is unclear. The 1989 Thornburgh Memorandum cites the example of dropping charges that would not have any effect on the guideline range. (DOJ Manual 9-27.410). This extremely narrow construction is not very helpful to the defense.

3.2.2 DOJ POLICIES

In general, as mentioned in Section 3.1 above, DOJ frowns on dismissing “readily provable charges that reflect the seriousness of the defendant’s conduct”. DOJ Manual 9-27.410. Surprisingly, the 1989 Thornburgh Memorandum suggested that prosecutors may drop readily provable charges in order to effectuate aims of the criminal justice system other than observance of the guidelines, such as the conservation of resources. The example given was the dropping of a case because it would be too time consuming or would interfere with the prosecution of other cases. (DOJ Manual 9-27.410). Unfortunately, this principle is not reflected in the Sentencing Guidelines Policy Statements in USSG Chapter 6.

The DOJ manual does not appear to contain a separate treatment of agreements not to charge. Instead, they seem to be subsumed in the section on agreements to dismiss in §9-27.410. This makes some sense, as agreeing not to charge something is much like charging it and then agreeing to dismiss it. There is, however, a separate treatment of non-prosecution agreements that are made in return for cooperation. Counsel pursuing such agreement should refer to §9-27.600. In particular, §9-27.641 sets forth the process for obtaining such an agreement where the offenses were in multiple districts.

3.2.3 EFFECT OF PLEA ON MAXIMUM SENTENCE AVAILABLE

Even under the Guidelines, the court is limited to the statutory maximum sentence for the offense or offenses of conviction. In some cases, the consideration of relevant conduct under the Guidelines, along with the application of various upward departures, may drive the guideline range to an unacceptable height. Although it is difficult to control guideline calculations, pleading to an offense with a maximum of five years as opposed to one with a maximum of ten years at least gives the client some protection.

3.2.4 USE OF DISMISSED AND UNCHARGED CONDUCT UNDER GUIDELINES

The guideline sentencing range and the eventual sentence in a particular case are influenced by the selection of the appropriate guideline to serve as the basis for calculation, the decision to apply various adjustments to that guideline based on analysis of the conduct “relevant” to the offense of conviction, the determination of the defendant’s criminal history category, and the decision to effect an upward departure. The effect on each of these of a bargain dismissing charges is discussed below. The general rules regarding the use of *relevant conduct* are discussed in Section 2.2.2.

3.2.4.1 SELECTING THE APPROPRIATE GUIDELINE

Although almost all relevant conduct can be considered in some form at sentencing, USSG §1B1.2&3, the selection of the actual *guideline section* to be applied is determined by the charge of conviction. USSG §1B1.2(a). The defendant can often derive some benefit from having the choice of guideline, and thus the base offense level, based on conviction for a particular charge. Other relevant conduct is then relegated to consideration only in terms of specific offense characteristics or possible departures. Thus a plea agreement can be effective by preventing the use of dismissed counts in deciding which guideline to apply.

Nonetheless, counsel must plead carefully. The benefit of pleading to a lesser charge can be nullified by a stipulation that more serious conduct occurred. In such cases, the court may apply the guideline appropriate to the more serious conduct. USSG §1B1.2(a). Counsel should also be alert to the possibility of a cross reference to another guideline. For example, the guideline on obstructing or impeding officers, USSG §2A2.4, refers the court to the assault guideline, USSG §2A2.2, if the “conduct constituted aggravated assault”.

3.2.4.2 DETERMINING THE GUIDELINE RANGE

USSG §1B1.3 provides that, once the appropriate guideline section has been selected based on the offense of conviction, all *relevant conduct* should be used to determine the applicability of specific offense characteristics, cross-references, and adjustments – and thus the actual guideline range – under the chosen guideline. Conduct that constitutes or is related to counts that are dismissed – or not charged – pursuant to a plea bargain can still influence the guideline calculation if that conduct is found to be “relevant” to the offense of conviction. The definition of *relevant conduct* is discussed more fully in Section 2.2.2, but in general it includes: all conduct that the defendant aided, abetted or was otherwise personally responsible for, conduct in a joint criminal activity that was foreseeable and in furtherance of the activity, and conduct in a *groupable* offense that was part of a common scheme or plan with the offense of conviction. This is a very broad definition, particularly in conspiracy cases.

The general rule is that counts dismissed as part of a plea agreement *will* be used to calculate the defendant’s sentence if the counts are part of the same course of conduct to which the defendant pled guilty. 79 Cornell L. Rev. 299, n.160 citing United States v. Frierson, 945 F.2d 650, 653-55 (3d Cir. 1991), *cert. denied*, 503 U.S. 952 (1992); United States v. Smallwood, 920 F.2d 1231, 1239 (5th Cir. 1991), *cert. denied*, 501 U.S. 1238 (1991); United States v. Taplette, 872 F.2d 101 (5th Cir. 1989), *cert. denied*, 493 U.S. 841 (1989); United States v. Rodriguez- Nuez, 919 F.2d 461, 464-65 (7th Cir. 1990); United States v. Williams, 880 F.2d 804, 805-06 (4th Cir. 1989); United States v. Scroggins, 880 F.2d 1204, 1213-14 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); United States v. Wright, 873 F.2d 437, 440-41 (1st Cir. 1989); United States v. Sailes, 872 F.2d 735, 738-39 (6th Cir. 1989);

United States v. Baird, 109 F.3d 856, 865 (3rd Cir. 1997). *But see* United States v. Griggs, 71 F.3d 276 (8th Cir. 1996) (uncharged conduct can be considered in determining the base offense level for drug cases *unless* the plea agreement limits the court to the stipulated facts in the plea).

Not all circuits thought that it was fair to use dismissed counts in calculating the sentencing guideline range. The 9th Circuit prohibited such use, based in part on analysis of a since-changed version of the plea bargaining guideline, USSG §6B1.2(a), and in part on the heretical idea that the defendant should get the benefit of his bargain. United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). USSG §6B1.2(a) was amended effective 11/1/92 to specifically provide that both dismissed charges and charges not filed pursuant to a plea agreement *can* be considered as relevant conduct under §1B1.3. As a result, there is now some doubt in the 9th Circuit about whether Casto-Cervantes will remain good law. In United States v. Chatlin, 51 F.3d 869, 871 (9th Cir.1994), the court in *dicta* presumed that Castro-Cervantes was still good law.

The 9th Circuit prohibition on the use of dismissed conduct for sentencing under Castro-Cervantes may be getting narrower. In 1996, the Circuit held that where a 924(c) gun count was dismissed, the defendant could still be sentenced for armed bank robbery (maximum of 25 years) instead of bank robbery (maximum of 20 years). United States v. Beierle, 77 F.3d 1199, 1201 (9th Cir. 1996). Although the court primarily dealt with statutory construction of the robbery statute, and the Castro-Cervantes rationale was not addressed, the court clearly stated that “the fact that this count was dismissed pursuant to the plea bargain does not negate the fact that he used a dangerous weapon during the robbery”. *Id.*

Even in the 9th Circuit, the rationale of Castro-Cervantes was not extended to offenses that are *groupable* under the aggregate harm analysis of USSG §3D1.2. Therefore, if the level of an offense depends on some quantity such as the weight of drugs or the number of dollars involved in a fraud, such that it would be groupable under §3D1.2, then the quantities involved in the dismissed counts *will* be considered in determining the guidelines. United States v. Fine, 975 F.2d 596 (9th Cir. 1992) (en banc).

3.2.4.3 DETERMINATION OF CRIMINAL HISTORY CATEGORY

In general, counts dismissed pursuant to a plea agreement are not considered in the calculation of the criminal history category in the instant case. However, as discussed in Section 3.2.4.4, upward departures for inadequacy of criminal history under §4A1.3 are governed by much the same principles as other upward departures, and thus the dismissed counts might well be considered for this purpose depending on circuit law. Some circuits have specifically permitted departures under USSG §4A1.3 based on dismissed conduct. United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994) (*en banc*); United States v. Collins, 104 F.3d 1436 (8th Cir. 1997). Note also that counts dismissed in one case might also be considered for upward departure in a separate case. United States v. Ruffin, 997 F.2d 343 (7th Cir.1993)

3.2.4.4 DECIDING ON AN UPWARD DEPARTURE

Under the guideline scheme, the “relevant conduct” is used not only in setting the guideline range under USSG §1B1.3, but also in deciding if a departure may be appropriate under USSG §1B1.4.

In the 9th Circuit dismissed counts cannot be used as a basis for upward departure. United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). Nor can uncharged counts be used for that purpose. United States v. Faulkner, 952 F.2d 1066 (9th Cir. 1991). The 8th Circuit also held that dismissed

counts may *not* be used for upward departure, but noted that there was a split in the circuits on this issue at the time. United States v. Harris, 70 F.3d 1001 (8th Cir.1995) (citing for support United States v. Thomas, 961 F.2d 1110, 1112-21 (3rd Cir.1992); United States v. Faulkner, 952 F.2d 1066, 1069-70 (9th Cir.1991); and United States v. Castro-Cervantes, 927 F.2d 1079, 1082 (9th Cir.1990); but also citing contrary holdings in United States v. Kim, 896 F.2d 678, 684 (2nd Cir.1990); United States v. Ashburn, 38 F.3d 803, 807 (5th Cir.1994); and United States v. Zamarripa, 905 F.2d 337, 341 (10th Cir.1990)). Thomas, cited for support by Harris, has since been somewhat undermined by the Supreme Court holding in United States v. Watts, 519 U.S. 148 (1997) (discussed in Section 2.2.3), that *acquitted* conduct *can* be used in sentencing guideline calculations. United States v. Rudolph, 137 F.3d 173 (3rd Cir. 1998) (Thomas no longer good in the aftermath of Watts; dismissed conduct can support an upward departure even in the plea context).

Other circuits have embraced upward departures based on dismissed conduct more readily, particularly since Watts was decided. See United States v. Kim, 896 F.2d 678, 684 (2nd Cir.1990) (dismissed counts can be used in some circumstances); United States v. Ashburn, 38 F.3d 803, 807 (5th Cir.1994) (same); United States v. Zamarripa, 905 F.2d 337, 341 (10th Cir.1990) (same); United States v. Rudolph, 137 F.3d 173 (3rd Cir. 1998) (dismissed conduct can support an upward departure even in the plea context). See also United States v. Cross, 121 F.3d 234 (6th Cir. 1997), and United States v. Barber, 119 F.3d 276 (4th Cir 1997), *cert. denied*, _____ U.S. _____, 118 S.Ct. 457 (1997) (rejecting both Harris and Castro-Cervantes).

3.3 RECOMMENDATION BARGAINING

Recommendation bargaining – the entering of a plea in return for a simple non-binding recommendation from the prosecutor – gives the defendant less than any other bargain. Sometimes, however, it is the best that can be done. When coupled with strong knowledge of the judge and probation officer it can yield great benefit.

Sample Plea Agreement Language

Pursuant to Fed.R.Crim.P. 11(e)(1)(B), the United States and the defendant agree as follows: a) The United States will recommend a sentence of 36 months imprisonment; b) Supervised release and fines shall be determined by the court.

3.3.1 RULES AND GUIDELINES

Non-binding recommendations are authorized under Rule 11(e)(1)(B). Guideline §6B1.2(b) authorizes, but does not require, the court to accept the recommendation if it is within the applicable guideline range or departs for “justifiable reasons”. When confronted with a recommendation – or a cap – below the guidelines, some courts simply recite the mantra that “the sentence departs for justifiable reasons” and go ahead and accept the deal. Unfortunately, the commentary to Guideline §6B1.2(b) notes that departing for *justifiable reasons* actually means that “such departure is authorized by 18 U.S.C. §3553(b).” That statute requires the court to impose a sentence *within* the guideline range unless there exists an aggravating or mitigating circumstance not adequately considered by the Sentencing Commission. In other words, the words “justifiable reasons” in the Guideline do not create a new reason

for departure – the facts of the case must be sufficient to justify a departure under the normal rules.

Where there is no right to withdraw from a plea – such as where the plea agreement is for a recommendation under Rule 11(e)(1)(B) – the court should advise the defendant that he has no right to withdraw if the government’s recommendation is rejected. Failure to so advise has been held to be reversible error unless the record shows that the defendant possessed that knowledge. United States v. Graibe, 946 F.2d 1428 (9th Cir. 1991). However, there are a number of exceptions. For example, failure to advise the defendant that she would not be allowed to withdraw her guilty plea if the court rejected the government’s sentencing recommendation was error, but when the court did in fact follow the recommendation, there was no prejudice and the sentence was affirmed. United States v. Chan, 82 F.3d 921, *opinion amended and superseded by* 97 f.3d 1582 (9th Cir. 1996). A similar failure to advise the defendant during the colloquy was harmless where, at sentencing, the court became aware of the problem and gave the defendant the opportunity to withdraw and the defendant refused. United States v. Diaz-Vargas, 35 F.3d 1221 (7th Cir. 1994).

3.3.2 DOJ POLICIES

The 1989 Thornburgh Bluesheet seems to give carte blanche for recommendations of sentences within the guideline range and recommendations for acceptance of responsibility. Recommendation of departures is discouraged, other than USSG §5K.1 departures for substantial assistance.

DOJ Manual 9-27.730 states that recommendations should only be made when a plea agreement requires it or the public interest warrants it. The text is fairly even-handed – it even states that a prosecutor should make a recommendation if the prosecutor feels that otherwise it is likely that the sentence will be unfair to the defendant. However, the listing of considerations to be weighed in making a recommendation are heavily weighted toward the government. DOJ Manual 9-27.745. The listing of things to take into account in determining whether to enter into a plea bargain at all is much more extensive and useful to the defense. DOJ Manual 9-27.420. The DOJ manual does not make a big distinction between recommendations and stipulations, but it draws a bright line between recommendations that are in the guideline range and those that are not. DOJ Manual 9-27.410.

3.3.3 EFFECT OF RECOMMENDATION BELOW THE GUIDELINE RANGE

The court can always reject a plea under Rule 11(e)(4). The Guidelines require the court to reject a plea outside the guideline range unless there is justification for a departure under 18 U.S.C. 3553(b) and the Guidelines themselves. USSG §6B1.2(c)(2) and Commentary. Nonetheless, if the court does accept a recommendation and sentence below the guideline range, that decision *may* be shielded from appellate scrutiny by the doctrine of waiver. After all, the fact that the prosecution has recommended the sentence should lead the court and the defendant to reasonably expect that the government would not appeal the sentence. This result would be troubling for the appellate courts because the parties would in effect create their own “self-help” departure scheme.

Courts have held in numerous cases that a *defendant* waives any objection that he fails to make in the district court. See, e.g., United States v. Belden, 957 F.2d 671 (9th Cir. 1992), *cert. denied*, 506 U.S. 882 (1992); United States v. Bafia, 949 F.2d 1465, 1476 (7th Cir.1991) (defendant waived objections to enhancement for obstruction of justice and denial of departure for acceptance of responsibility by failing to object at sentencing). One would expect the same rule to apply to the

government. The 11th Circuit so held where the prosecutor agreed that the court had discretion and did not object to downward departure. United States v. Prickett, 898 F.2d 130 (11th Cir. 1990). However, the 9th Circuit has found an exception to allow the government to appeal where there was plain error and "injustice". United States v. Snider, 957 F.2d 703 (9th Cir. 1992). *Accord*, United States v. Perkins, 108 F.3d 512 (4th Cir. 1997) (plain error rule allows review of unwarranted downward departure in order to protect integrity of judicial system).

For other exceptions to the rule against raising issues for the first time on appeal see United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir.1991) (exceptions to general rule exist for exceptional circumstances, change in law during appeal, issue is purely one of law and other party not prejudiced, and plain error and injustice). What constitutes "plain error" varies from place to place. See United States v. Fant, 974 F.2d 559, 565 (4th Cir.1992) (plain error results when prosecutor breaches plea agreement); United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir.1992) (same); United States v. Phillips, 37 F.3d 1210 (7th Cir.1994) (no plain error where plea agreement breached) Also of relevance are United States v. Hand, 913 F.2d 854, 856 n.2 (10th Cir.1990) (breach of plea agreement may be raised for first time on appeal) and United States v. Moscahlaidis, 868 F.2d 1357, 1360 (3rd Cir.1989) (same).

3.3.4 EFFECT OF GOVERNMENT FAILURE TO MAKE RECOMMENDATION

The government's failure to recommend a sentence at the low end of the guideline range, as called for by the plea agreement, called for a reversal even where, in response to the court's question, the prosecutor admitted that she was recommending the low end. In reversing, the court noted that "the harmless error rule does not apply to the law of contractual plea agreements." United States v. Myers, 32 F.3d 411, 413 (9th Cir. 1994) (situation aggravated by the fact that the prosecutor drew the court's attention to facts justifying a higher sentence, and that the defense attorney's objections, the court's question, and the prosecutor's acknowledgment of the agreement all came after the sentence had been passed). *Accord*, United States v. Hawley, 99 F.3d 682 (10th cir. 1996) (defendant entitled to relief "regardless of whether the government's conduct actually affected the sentencing judge"). A contrary result obtained in a case where the written plea agreement contained the substance of the government's recommendation and the appellate court felt that if the government had made the recommendation in court at the time of sentencing it "would not have likely changed defendants' sentence". United States v. Flores-Sandoval, 94 F.3d 346 (7th Cir. 1996).

The prosecutor may not pay lip service to the agreement with a recommendation but undermine that recommendation by supporting the higher presentence report guideline calculation in a sentencing memo. United States v. Taylor, 77 F.3d 368 (11th Cir. 1996). *See also* United States v. Canada, 960 F.2d 263 (1st Cir. 1992) (ordering specific performance via resentencing and noting that while the recommendation need not be made with any particular degree of enthusiasm, nonetheless it is unfair for the prosecutor to inject material reservations about an agreement to which the government has committed itself.)

Where defendant pleaded guilty in federal court in Wyoming with an agreement that the United States would recommend *concurrent* time with an upcoming federal sentencing in Iowa, and where the government attorney in Iowa in fact requested a *consecutive* sentence, the defendant was entitled to specific performance from the government because "absent an express limitation, any promises

made by an AUSA in one district will bind an AUSA in another district.” United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996).

Apparently, even an impossible promise must be kept. Where the government agreed to recommend probation but probation was not permissible under the guidelines, and the government informed the court that it “was not bound to impose a sentence that would be illegal under the guidelines”, the plea bargain was based on an unfulfillable promise and the defendant should be allowed to withdraw his plea. United States v. Cooper, 70 F.3d 563 (10th Cir. 1995).

3.4 STIPULATION BARGAINING

Stipulation bargaining – the entering of a plea in return for a “binding” recommendation – is the holy grail of plea bargaining in federal court. Armed with a stipulated sentence a client can be assured of what is going to happen, unless the judge rejects the plea altogether.

Sample Plea Agreement Language

Pursuant to Fed.R.Crim.P. 11(e)(1)(C), the United States and the defendant stipulate and agree that the following is an appropriate sentence: a) The parties stipulate that defendant shall receive a maximum of 60 months imprisonment. b) Supervised release and fines shall be determined by the court. c) If the court, after reviewing this plea agreement, and before accepting it, concludes that any provision is inappropriate, it may reject the plea agreement, giving the defendant, in accordance with Fed.R.Crim.P. 11(e)(4), an opportunity to withdraw the guilty plea. d) Pursuant to Sentencing Guidelines §6B1.1(c), the court shall defer acceptance or rejection of this plea agreement until there has been an opportunity to consider the presentence report.

3.4.1 RULES AND GUIDELINES

Bargaining for stipulated sentences is authorized under Rule 11 (e)(1)(C) and is analyzed for Sentencing Guidelines purposes under §6B1.2(c). The guideline standard is the same as that for a recommended sentence discussed in Section 3.3.1– the judge may accept the agreement if the sentence is within the guideline range or departs for “justifiable reasons”, meaning that there is a legally sufficient reason for departure.

Rule 11(e)(4), referred to in the sample plea agreement language above, refers to the right to withdraw provided by the rules and the guidelines in the case of Rule 11(e)(1)(A) and 11(e)(1)(C) agreements. As noted previously, this is a “back to square one” provision that attempts to allow both parties to go back to the *status quo ante*. This is the only sense in which a plea agreement including a stipulation is *binding* on the court – the court need not accept it, but the defendant will be allowed to withdraw if the court does not.

3.4.2 DOJ POLICIES

Stipulation bargaining is recognized under DOJ Manual 9-27.410, but little is said about it. The manual makes little distinction between recommendations and stipulations.

3.4.3 SENTENCE "CAPS " UNDER RULE 11(E)(1)(C)

Often the plea agreement will not stipulate an exact sentence, but will instead set forth a maximum – often called a *cap* – or a range of sentence. The 9th Circuit reasonably thinks that such a cap qualifies as a “specific sentence” under Rule 11(e)(1)(C), United States v. Bolinger, 940 F.2d 478 (9th Cir.1991), but at least one court has ruled that it does not. United States v. Newsome, 894 F.2d 852 (6th Cir. 1990). The 2nd Circuit seems to favor the Newsome rational. United States v. Nutter, 61 F.3d 10, 12 (2nd Cir.1995) (stating that its holding that a narrow range of 151-188 months is a specific sentence is *not* in conflict with the Newsome holding that a cap of 57 months – effectively a 0-57 month range – is not specific enough). *But see* United States v. Veri, 108 F.3d 1311 (11th Cir. 1997) (noting that 2nd, 4th, 6th and 9th Circuits all say that a range is specific enough under Rule 11(e)(1)(C), as is a cap or any other agreement that curtails the court’s discretion). If Newsome is correct, which is unlikely, the government may not have the authority to enter into an agreement for a "cap" and such an agreement may not be permitted under Rule 11 at all.

Although this distinction may seem academic at the district court level, it may be important for defendants who want to appeal a sentence below the cap. Title 18 U.S.C. §3742(c)(1) prohibits certain types of appeals where the sentence does not exceed the "specific sentence" set forth in a Rule 11(e)(1)(C) agreement.

3.4.4 EFFECT OF “CAP” BELOW THE GUIDELINE RANGE

As discussed in Section 3.3.3, *supra*, the court can always reject a plea under Rule 11(e)(4) and the guidelines require it to do so if the plea is outside the guideline range unless a departure is justified. However, if the agreement is under Rule 11(e)(1)(C), the court must either accept the agreement or allow the defendant to withdraw from the plea. Under these circumstances, the court is under some pressure to go ahead and accept the agreement and sentence below the guideline range. The discussion in section 3.3.3 of a possible waiver of appeal by the government would also apply in this case.

3.5 STIPULATIONS REGARDING GUIDELINE RELEVANT FACTS

Generally, Guideline §6B1.4(d) states that sentencing courts are not bound by stipulations in plea agreements but instead are free to determine the facts relevant to sentencing. However, the treatment of such stipulations has not been entirely even-handed.

Sample Plea Agreement Language

The parties agree as follows: the offense did not involve more than minimal planning; there are no role-in-the-offense, victim-related, obstruction, or Multiple-Count Sentencing Adjustments within the meaning of the Guidelines, Chapter 3; c) it is understood by both parties that subparagraphs (a) and (b) are not binding on either the court or the United States Probation Office.

3.5.1 STIPULATIONS THAT BENEFIT THE DEFENDANT ARE NOT BINDING

In general, the court is not bound by a stipulation of facts and may rely on the presentence report to determine the sentence. USSG §6B1.4(d); United States v. Lutfiyya, 26 F.3d 1468 (8th Cir. 1994). The fact that the government stipulated to certain facts in the plea agreement does not prevent the district court from considering conduct *outside* the stipulated facts, including uncharged conduct. United States v. Griggs, 71 F.3d 276 (8th Cir. 1995).

The court is not bound by *inaccurate* stipulations contained in the plea agreement. United States v. Mason, 961 F.2d 1460 (9th Cir. 1992) (inaccurate stipulation regarding the amount of cocaine did not bind the sentencing court); United States v. Forbes, 888 F.2d 752 (11th Cir. 1989) (stipulations to "minor participation" are ineffective); United States v. Russell, 913 F.2d 1288, 1293 (8th Cir. 1990); Moore v. United States, 500 U.S. 906 (1991) (court need not follow stipulation even if defendant mistakenly believes that presentence report would be in agreement); United States v. Howard, 894 F.2d 1085, 1089 (9th Cir.1990) (stipulation to minor participation not followed by court); United States v. Kemper, 908 F.2d 33 (6th Cir.1990) (stipulation to drug quantity not followed by court); United States v. Rutter, 897 F.2d 1558 (10th Cir.1990) (stipulation to relevant factors for sentencing not binding on court)

However, if the government argues a position contrary to its stipulation – as opposed to the judge simply rejecting it – there may be a violation of the plea agreement. United States v. Valencia, 985 F.2d 758 (5th Cir. 1993).

3.5.2 STIPULATIONS THAT HURT THE DEFENDANT MAY BE RELIED UPON

Stipulations that go against the defendant can be relied by the court, apparently as admissions of a party. United States v. Cambra, 933 F.2d 752 (9th Cir. 1991) (stipulated to value of fraud loss); United States v. Bos, 917 F.2d 1178 (9th Cir. 1990) (stipulation to greater offense). Even stipulations regarding dismissed counts may be considered. United States v. Saldana, 12 F.3d 160 (9th Cir. 1993).

In determining *relevant conduct* the district court could properly rely on stipulation in the plea agreement that certain conduct “constitutes relevant conduct under § 1B1.3 of the guidelines”. United States v. Flores-Sandoval, 94 F.3d 346 (7th Cir. 1996) (court ignores defense argument that some conduct not truly “relevant”, relying on stipulation that it was relevant). Similarly, defendant’s stipulation that the “abuse of trust” enhancement should apply, coupled with an agreement not to appeal the accuracy of the stipulated facts, constituted a waiver of her right to appeal a finding based thereon. United States v. Allison, 59 F.3d 43 (6th Cir. 1995), *cert. denied*, 516 U.S. 1002 (1995). A stipulation may constitute a waiver, under appropriate circumstances, but does not relieve the court of its obligation to determine its own view of the facts and law. United States v. Mankiewicz, 122 F.3d 399, 403 n.1 (7th Cir. 1997).

The guidelines also provide that stipulation to a greater offense requires the use of the guideline for that offense. USSG §1B1.2(a). Thus if the defendant pled guilty to one offense but stipulated to facts constituting a more serious offense, the court will sentence the defendant based on the latter more serious offense. United States v. Martin, 893 F.2d 73, 74-76 (5th Cir. 1990). *See also* United States v. Gardner, 940 F.2d 587, 590-92 (10th Cir. 1991) (defendant pled guilty to bank larceny, stipulated to bank robbery, sentenced for bank robbery).

3.5.3 ENFORCEMENT OF STIPULATIONS THROUGH CONDITIONAL WAIVERS

Although the law is that stipulations regarding guideline relevant facts or the application of specific guidelines are not binding the court, some defense attorneys have tried making such stipulations in connection with conditional plea waivers. A survey of federal defenders around the country noted that in some districts the appeal waiver is conditioned on the judge sentencing a defendant in accordance with the stipulations (or in such a way as to reach the same effect that the stipulations would have caused). If not, the defendant retains the right to appeal.

3.6 AGREEMENTS REGARDING RESTITUTION

Restitution is not covered exhaustively here. This section only attempts to point counsel toward some of the problems that may be encountered and toward some of the relevant law.

Sample Plea Agreement Language

Defendant specifically agrees to make restitution to the victim in the amount of \$400,000 even though the defendant is not pleading guilty to and has not been convicted of the offense giving rise to the victim's losses.

3.6.1 VICTIM WITNESS PROTECTION ACT PRIOR TO 1990

Restitution to the victim of the offense of conviction for amounts involved in the count of conviction has always been allowed. 18 U.S.C. 3651 (the Federal Probation Act or FPA) (repealed), 18 U.S.C. 3663 (the Victim Witness Protection Act or VWPA). Restitution to persons who are not victims of the offense of conviction or for losses not resulting from the offense of conviction is more problematic.

Before the VWPA, restitution was ordered under the FPA which allowed restitution to *all* victims for *all* harms. United States v. Hammer, 967 F.2d 339 (9th Cir. 1992). The FPA was repealed November 1, 1987. The VWPA came into effect January 1, 1983 and appears to have overlapped with the FPA until the FPA was repealed. The VWPA applied only to Title 18 and certain sections of the Federal Aviation Act. United States v. Snider, 957 F.2d 703 (9th Cir. 1992). The VWPA only authorized restitution to the victim of the offense of conviction for the losses caused by the offense, and it did not allow restitution by agreement. Hughey v. United States, 495 U.S. 411 (1990).

3.6.2 VICTIM WITNESS PROTECTION ACT AFTER 1990

As of November 29, 1990 the VWPA was amended to allow restitution in any criminal case "to the extent agreed by the parties in a plea agreement". This has been held not retroactive because of *ex post facto* problems. United States v. Snider, 957 F.2d 703 (9th Cir. 1992). Agreements to allow otherwise unenforceable restitution are a useful bargaining tool, but may create a situation where the defendant is certain to violate probation and end up back in custody.

3.6.3 MANDATORY VICTIMS RESTITUTION ACT OF 1996

The Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. §3663A-3664, a part of the Anti-Terrorism Act of 1996, has changed the face of restitution, mostly to the detriment of the defendant. The MVRA modified the VWPA and “makes restitution mandatory, without regard to a defendant’s economic situation.” United States v. Dubose, ____ F.3d ____, 1998 W.L. 338106 (9th Cir. June 26, 1998) (holding restitution under MVRA is punishment but does not violate the 8th Amendment prohibition against excessive fines or cruel and unusual punishment). By its terms, the MVRA applies in all but a few cases. 18 U.S.C. §3663(c)(3).

Courts have split on whether mandatory restitution is punishment and thus subject to the Ex Post Facto Clause. See United States v. Newman, 144 F.3d 531 (7th Cir. 1998) (holding it does not violate Ex Post Facto Clause and characterizing cases from the 2nd, 9th and D.C. Circuits holding to the contrary as “without reasoning”); United States v. Dubose, ____ F.3d ____, 1998 W.L. 338106 (9th Cir. June 26, 1998) (holding restitution under MVRA is punishment but does not violate the 8th Amendment prohibition against excessive fines or cruel and unusual punishment). Compare United States v. Baggett, 125 F.3d 1319 (9th Cir. 1997) (stating that retrospective application of the MVRA violates the Ex Post Facto Clause).

3.6.4 WAIVER OF APPEAL REGARDING RESTITUTION

Where a plea agreement acknowledged that the court could order restitution of a certain amount, and the presentence report stated restitution was applicable, defendant’s failure to object to the report or the restitution order was a waiver of the right to appeal the restitution. United States v. Allison, 59 F.3d 43 (6th Cir. 1995).

3.7 AGREEMENTS INVOLVING COOPERATION

Cooperation agreements usually require the defendant to perform some act in the future. As a result, they must be analyzed like complex employment contracts in order to determine exactly what the client will be required to do and what benefit or risk is involved. Cooperation agreements are often long and complex. The text of the cooperation portion of a sample plea agreement has been broken up and set forth under the relevant subheadings below.

3.7.1 SUBJECT MATTER OF COOPERATION

Sample Plea Agreement Language

Defendant will provide information about all criminal activity known to the defendant, including the criminal drug activities of the defendants in CR 98-001-PHX, and including all criminal activity leading to the securing of forfeitable assets and the details of how such assets were obtained and used.

This specifies “all criminal activity known to defendant”. Most agreements are the same, although it is often possible to negotiate a deal that does not require the giving of information or testimony against family members.

3.7.2 UNDERCOVER WORK

Sample Plea Agreement Language

Defendant will not work undercover without the permission and supervision of government agents.

Prosecutors often say that this provision is to prevent “free-lance” work – usually drug activity – by the defendant, which the defendant later claims to have performed on behalf of the government. But, does this provision imply that the defendant has agreed to work undercover? If so, to what extent? Does he have to set up deals? Wear a wire? Be there when the deal goes down? These kinds of details should be worked out ahead of time to avoid unpleasant surprises.

3.7.3 WAIVER OF FIFTH AMENDMENT RIGHTS

Sample Plea Agreement Language

Defendant will waive his/her Fifth Amendment privilege against self-incrimination and will provide information and testify at any time requested by the United States, including at any state or federal grand jury proceeding, forfeiture proceeding, bond hearing, pretrial hearing, civil and criminal trial, retrial or post-trial hearing.

Defendant must give information and testify at every conceivable type of hearing, pre- or post-trial. Query whether this is limited to trials that are related to the offense in the indictment, or be against anyone, anywhere at any time?

3.7.4 USE OF INFORMATION AGAINST DEFENDANT

Sample Plea Agreement Language

Self-incriminating information provided by the defendant during cooperation involving criminal activity for which he is charged, has not been charged, or will not be charged pursuant to this agreement will not be used in determining defendant's applicable guideline range pursuant to Section 1B1.8 of the Sentencing Guidelines. The Guideline range will be calculated with the government's proof independent of defendant's cooperation.

USSG §1B1.8 prevents the use of information provided by the defendant pursuant to a cooperation agreement to determine the guideline range *if the government has agreed not to use it*, as the government does in the sample agreement above. Note that the information cannot be used to determine the guideline range, but other uses are not specifically prohibited. Nonetheless, some courts have refused to allow the prosecution to use the information for any purpose that would result in a harsher sentence. United States v. Malvito, 946 F.2d 1066 (4th Cir. 1991); United States v. Ledesma, 979 F.2d

816, 820, n.6 (11th Cir.1992) (information divulged pursuant to plea agreement may not be used for upward departure).

There may be a distinction between information provided pursuant to a cooperation agreement and statements made during failed plea negotiations. Note that the protection of USSG §1B1.8 is contingent on government agreement, unlike the protections of Rule 410, FRE, and Rule 11(e)(6), FRCP, both of which prohibit the use of statements “made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a guilty plea.”

In the absence of a Guideline §1B1.8 agreement not to use information, boilerplate language in a plea agreement saying that the government was free to provide all relevant information to the court at sentencing was held to override the Rule 410 and Rule 11(e)(6) protection of statements made during a proffer in plea negotiations, even though the proffer agreement itself provided that the information would not be used. United States v. Fagge, 101 F.3d 232 (2nd Cir. 1996).

3.7.5 TIMING OF SENTENCING PROCEEDINGS

Sample Plea Agreement Language

The plea of guilty shall be entered as soon as practicable but The sentencing on the guilty plea will be deferred, with consent of the court, for a period of one year from the entry of the guilty plea, and upon motion of the government and concurrence of the court, for a period beyond that one year. It is the intention of the parties that sentencing on the instant charges be postponed until such time as defendant's cooperation and all related forfeiture actions have been completed.

The agreement provides that sentencing will be delayed for benefit of both parties. The government wants time for defendant to work, and the defendant wants more work to show the court. There should be an upper limit on the court's and the government's ability to delay the sentencing. Under this agreement, the court can refuse a continuance past one year and can force sentencing to go forward.

3.7.6 DETERMINATION OF BREACH OF AGREEMENT

Sample Plea Agreement Language

If there is a dispute regarding the obligations of the parties under this agreement, the United States District Court shall determine whether the United States or the defendant has failed to comply with this agreement including whether the defendant has been truthful.

Nothing shall limit the United States' methods of verifying the truthfulness of defendant's statements. As part of this process, in the sole discretion of the United States, the defendant agrees to submit to a polygraph examination to verify any information the defendant may provide to the United States, including but not limited to defendant's assets. Such examination will be conducted by a polygrapher chosen and

conducted in a manner determined in the sole discretion of the United States. Neither party shall object to the admissibility in evidence of the results of such examination in any proceeding to enforce or set aside this agreement in which compliance with the terms of this agreement are in issue.

The usual breach in cooperation cases is failure to testify truthfully. The agreement provides that the court makes the final determination on failure to comply. Other forms of the agreement require the government to make a "good faith" determination on truthfulness, which may also lead to a hearing.

The agreement allows the government to require a polygraph exam. It does not condition the agreement on passing the exam, but it does make the exam admissible at a hearing on compliance. To counter this, the defense should try to insert an agreement that allows the defense to present its own polygraph evidence.

In a case based on a similar agreement, the government introduced at trial a confession made by a cooperating defendant whose deal had fallen through after he failed a polygraph. The 9th Circuit originally showed its dislike of polygraphs by ruling that statements made in a cooperation deal conditioned on a polygraph were involuntary and could not be used after defendant failed the polygraph, describing the results of a polygraph as being out of the defendant's control and unreliable. United States v. Escamilla, 966 F.2d 465 (9th Cir. 1992) (withdrawn opinion). Unfortunately, that opinion was withdrawn and replaced with a narrower one that focused on the wording of the agreement, noting that the defendant had not specifically *agreed* that his confession would be admissible if he failed the polygraph. United States v. Escamilla, 975 F.2d 568 (9th Cir. 1992). Recently, the 9th Circuit has taken a more liberal, but still hostile, view of polygraphs under Daubert. United States v. Cordova, 104 F.3d 225 (9th Cir. 1997). ([W]e do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact ... We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.) See also United States v. Posado, 57 F.3d 428, 431-34 (5th Cir.1995).

3.7.7 PENALTIES FOR BREACH BY DEFENDANT

Sample Plea Agreement Language

If the defendant fails to comply with any obligation or promise pursuant to this agreement, the United States: 1) may, in its sole discretion, declare any provision of this agreement null and void in accordance with [the paragraph calling for the court to determine the breach] and the defendant understands that he/she will not be permitted to withdraw his/her plea of guilty made in connection with this agreement; 2) may indict and prosecute the defendant for any offense known to the United States for which he is responsible, including all offenses committed pursuant to his/her failure to cooperate, and defendant waives any statute of limitations, Speedy Trial Act and constitutional restrictions on bringing charges after the execution of this agreement; 3) may argue for a maximum sentence

for the offenses to which defendant has plead guilty; 4) may use in any prosecution any information, statements, documents and evidence provided by defendant both before and after the plea agreement including derivative evidence; 5) may advise the Bureau of Prisons that defendant is no longer a cooperating witness, and recommend redesignation of defendant to a higher custodial level.

The agreement indicates that "any provision" may be declared null by the government, subject to review of the alleged breach by the court. This right of the government appears to be limited by several cases. For example, this part says that the defendant cannot withdraw her plea. However, if the plea is under Rule 11(e)(1)(C) (for a specific sentence) the judge must honor the agreement or allow the defendant to withdraw. United States v. Fernandez, 960 F.2d 771 (9th Cir. 1992). It also says that the government can use any information provided by the defendant against the defendant. However, the 9th Circuit has prevented such use where the breach was failure to pass a polygraph, in the absence of a specific agreement to allow such use. United States v. Escamilla, 975 F.2d 568 (9th Cir. 1992). Nonetheless, the thrust of this part is clearly that all benefit will be lost in the event of a breach by defendant.

3.7.8 TYPES OF PROMISES MADE BY THE GOVERNMENT

Sample Plea Agreement Language

At the conclusion of defendant's cooperation, pursuant to this agreement, the United States will, at the time of sentencing, move pursuant to Title 18, United States Code, Section 3553(e), Title 28, United States Code, Section 994(n) and Sentencing Guidelines §5K1.1 that the court depart from the Guidelines and any applicable minimum sentence established by law to reflect defendant's substantial assistance in the investigation and prosecution. The United States will also bring the nature and extent of defendant's cooperation to the attention of the court, and the Bureau of Prisons, if applicable, at sentencing or any other appropriate time.

The United States retains the right to make a sentencing recommendation, including a recommendation that the defendant receive a maximum possible sentence provided for under this agreement. The United States further retains the right to allocute at the time of sentencing. Defendant understands that the United States will bring to the attention of the court all pertinent facts concerning defendant's participation in any criminal activity, and all facts affecting the sentencing guidelines calculations.

In a cooperation agreement, the government may makes several kinds of promises. Most importantly, the government may promise to make a motion for downward departure under USSG

§5K1.1 for *substantial assistance*. Without this motion, there is no benefit to the defendant in most cases. Note that in order to permit departure below a statutory mandatory minimum, the government must also move for departure pursuant to 18 U.S.C. §3553(e). Melendez v. United States, 518 U.S. 120 (1996) (government motion attesting to the defendant's substantial assistance in a criminal investigation and requesting that the district court depart below the minimum of the applicable *guideline sentencing range* does not also authorize the court to depart below a lower *statutory minimum sentence*). The government should also agree to bring the defendant's cooperation to the court's attention, including at least all of the criteria that USSG §5K1.1(a) lists as significant, such as truthfulness, completeness, reliability, nature and extent of assistance, injury or danger to defendant or his family, and timeliness.

However, after the departure motions have been made by the government, downward departure by the court is discretionary, not mandatory. The appellate court has no jurisdiction to review the trial court's discretionary decision to refuse downward departure under §5K1.1. United States v. Castellanos, 904 F.2d 1490, 1497 (11th Cir.1990); United States v. Vizcarra-Angulo, 904 F.2d 22 (9th Cir.1990) (same); United States v. Munoz, 946 F.2d 729, 730-31 (10th Cir.1991) citing United States v. Richardson, 939 F.2d 135, 139-140 (4th Cir.1991) *cert. denied*, 502 U.S. 1061 (1992) (§5K1.1 substantial assistance departure is discretionary); United States v. Miro, 29 F.3d 194 (5th Cir. 1994). See also United States v. Hayes, 939 F.2d 509, 511-13 (7th Cir.1991) (interpreting 18 U.S.C. §3553(e)). Thus there appears to be no appellate relief if the defendant gets a §5K1.1 motion from the prosecution but the court refuses to depart. If, on the other hand, the government promises to make such a motion – but fails to do so – there may be relief under certain circumstances. See Section 3.7.9, below.

The government may also reserve the right to make a *recommendation* based on the cooperation. Where possible this should be within a specific negotiated range. Or the government may agree to a *cap* under Rule 11(e)(1)(C) – something not done in the language above. This is always important, and may become more important if there is a breach of the agreement. If the plea is under Rule 11(e)(1)(C) (specific sentence) the judge must honor the agreement or allow the defendant to withdraw. United States v. Fernandez, 960 F.2d 771 (9th Cir. 1992).

Note that a provision like the one above saying that the government was free to provide all relevant information to the court at sentencing was held to override the protected nature of statements made during a proffer in plea negotiations, even though the proffer agreement itself provided that the information would not be used. United States v. Fagge, 101 F.3d 232 (2nd Cir. 1996) (discussed in Section 3.7.4). Under the same theory, namely that the plea agreement contract modifies any previous agreements, the government could possibly provide the court with information gained during cooperation under a promise of confidentiality.

3.7.9 REMEDIES FOR BREACH BY GOVERNMENT

Where the government agrees to file a §5K1.1 motion *if* the defendant provides substantial assistance, the government's failure to file after determining that the assistance was not "substantial" is not a breach. United States v. Price, 95 F.3d 364 (5th Cir. 1996); United States v. Knight, 96 F.3d 307 (8th Cir. 1996), *cert. denied*, _____ U.S. _____, 117 S.Ct. 1458 (1997). Such refusals are reviewed by the district court only on a limited basis, to determine if the refusal was arbitrary or was based on an unconstitutional motive (*e.g.*, racial discrimination). Wade v. United States, 504 U.S. 181 (1992). See United States v. King, 62 F.3d 891, 894, n.2 (7th Cir. 1995) (refusing to review failure to make motion,

but noting that a few courts say it may be reviewable if “irrational or withheld in bad faith”). *See also United States v. De la Fuente*, 8 F.3d 1333 (9th Cir. 1993) (motion to depart from statutory minimum could not be withheld where to do so would imply bad faith on the part of the government because defendant would receive no benefit for his cooperation).

Where the government agrees to recommend a reduction if the defendant is truthful when debriefed by agents, the government’s failure to debrief the defendant prior to his sentencing is a breach of the agreement, particularly where the debriefing could have allowed the defendant to satisfy the one remaining requirement he needed for safety valve protection. *United States v. Beltran-Ortiz*, 91 F.3d 665 (4th Cir. 1996).

The government’s agreement to move for 5K1.1 departure if the defendant provided substantial assistance obligated the government to give the defendant the *opportunity* to furnish such assistance. *United States v. Laday*, 56 F.3d 24 (5th Cir. 1995). Although defendant changed his plea to nolo contendere and was denying knowledge of much of the criminal activity, the government knew that when it amended the plea agreement to allow the nolo plea. The amended agreement still included the substantial assistance provision and thus the government was obligated to carry through and allow defendant to try to cooperate.

Where government agreed to present a Rule 35 motion detailing extent of defendants’ post-sentence cooperation, but details of the cooperation were not in the motion for security reasons and the court refused to grant an evidentiary hearing on the motion, the government was effectively prevented from presenting the Rule 35 motion and the plea agreement was breached. *United States v. Hernandez*, 34 F.3d 998 (11th Cir. 1994) (case came up on appeal from the denial of the Rule 35 motion and the appellate court vacated and remanded for an evidentiary hearing).

3.8 AGREEMENTS REGARDING DEPORTATION

A “fast track” policy allowing illegal re-entry defendants to stipulate to a two year sentence and waive appeal under 8 U.S.C. § 1326(a) (simple reentry after deportation), in order to avoid 1326(b) (reentry after deportation with felony conviction), showed no discriminatory intent and passed constitutional muster. *United States v. Estrada-Plata*, 57 F.3d 757 (9th Cir. 1995).

4 WAIVERS: TRIAL, APPEAL, AND COLLATERAL

The waiver section of a plea agreement usually covers two distinct types of waivers. First, there is the set of non-negotiable waivers that must accompany any guilty plea, such as the waiver of the right to trial. Second, there is the somewhat more negotiable set of waivers that the prosecution tries to extract in return for the plea bargain, such as the waiver of the right to appeal.

4.1 WAIVER OF TRIAL AND ATTENDANT RIGHTS

The general waiver sections of plea agreements vary from minimal to extensive. A few sample paragraphs from a fairly long waiver section are set out below.

Sample Plea Agreement Language

Advice by attorney: *I have read each of the provisions of the plea agreement with assistance of counsel and I understand it. I have discussed the case and my constitutional and other rights with my attorney. I have been advised by my attorney of the nature of the charge[s], of the nature and range of the possible sentence, and that my ultimate sentence will be determined according to the guidelines promulgated pursuant to the Sentencing Reform Act of 1984. I am satisfied that my defense attorney has represented me in a competent manner.*

Waiver of trial rights: *I understand that by entering my plea of guilty I will be giving up my rights to plead not guilty, to trial by jury, to confront, cross-examine, and compel the attendance of witnesses, to present evidence in my defense, to remain silent and refuse to be a witness against myself by asserting my privilege against self-incrimination – all with the assistance of counsel – and to be presumed innocent until proven guilty beyond a reasonable doubt.*

Acting on own volition with clear mind: *My guilty plea is not the result of force, threats, assurances or promises other than the promises contained in this agreement. I agree to the provisions of this agreement as a voluntary act on my part, rather than at the direction of or because of the recommendation of any other person, and I agree to be bound according to its provisions. I am not now on or under the influence of any drug, medication, liquor, or other intoxicant or depressant, which would impair my ability to fully understand the terms and conditions of this plea agreement.*

Merger clause: *I agree that this written plea agreement contains all the terms and conditions of my plea and that promises made by anyone (including my attorney), and specifically any predictions as to the guideline range applicable, that are not contained within this written plea agreement are without force and effect and are null and void.*

Rule 11(c), FRCP, lays out a laundry list of things of which the court must advise the defendant, including information about penalties that could be imposed, the right to representation (at no cost if needed), the right to go to trial and attendant rights, the effect of a plea of guilty on those rights, and a warning about testifying under oath. Case law identifies notice of three particular rights as constitutionally essential – the right to confront accusers, the right to a trial by jury, and the privilege against compulsory self-incrimination. Boykin v. Alabama, 395 U.S. 238 (1969). The catch-all provision above covers those Rule 11 and Boykin rights not covered elsewhere in a typical agreement. Some attorneys dislike the reference to their competency, but the defendant will often be asked that question by the judge in one form or another during the colloquy anyway.

This agreement waives many of the rights attendant on trial. Some plea agreements go farther and contain a waiver of sentencing rights, such as the right to seek a downward departure. Although such waivers have become common in immigration cases, it is also beginning to appear in other types of cases.

4.2 WAIVER OF APPEAL

Waiver of appeal is a fairly recent development. It is meeting with mixed response in different parts of the country. In some districts it is not pushed by the U.S. Attorney – in others it is in practice a non-negotiable part of the agreement. Appellate courts generally favor the waiver. A sample appeal waiver follows:

Sample Plea Agreement Language

Defendant hereby waives any right to raise and/or appeal any and all motions, defenses, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution and to the court's entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement. Defendant further waives any right to appeal this Court's imposition of sentence upon him under Title 18, United States Code, Section 3742 (sentence appeals).

4.2.1 STATUTORY LIMITS ON RIGHT TO APPEAL.

The defendant's right to appeal a sentence is statutory only, and is embodied in 18 U.S.C. 3742(a). Defendants may appeal when the sentence (1) violates law, (2) is based on incorrect guideline application, (3) is greater than the guidelines allow, or (4) is for a crime that has no guideline and is plainly unreasonable. Restrictions on the defendant's right to appeal a sentence are set out in 18 U.S.C. 3742(c)(1), and generally prevent appeal under parts (3) and (4) – sentence above guidelines or sentence unreasonable and no guideline – where there is an agreement for a specific sentence under Rule 11(e)(1)(C) and the agreed sentence is not exceeded.

4.2.2 DEFENSE WAIVERS OF APPEAL RIGHTS ARE GENERALLY EFFECTIVE.

In general, an express waiver of the right to appeal in a negotiated plea agreement is valid. United States v. Schmidt, 47 F.3d 188 (7th Cir.1995) citing United States v. Bushert, 997 F.2d 1343, 1347-50 (11th Cir..1993), *cert. denied*, 513 U.S. 1051 (1994); United States v. Melancon, 972 F.2d 566, 567-68 (5th Cir.1992); United States v. Rivera, 971 F.2d 876, 896 (2d Cir.1992); United States v. Rutan, 956 F.2d 827, 829 (8th Cir.1992); United States v. Navarro-Botello, 912 F.2d 318, 321-22 (9th Cir.1990), *cert. denied*, 503 U.S. 942, 112 S.Ct. 1488, 117 L.Ed.2d 629 (1992); United States v. Wiggins, 905 F.2d 51, 52-54 (4th Cir.1990); *see also* United States v. Hendrickson, 22 F.3d 170, 174 (7th Cir...1994), *cert. denied*, 513 U.S. 898 (1994) (finding no waiver of the right to appeal because such a waiver "must be express and unambiguous"); Griffen v. United States, 109 F.3d 1217 (7th Cir. 1997) (permitting a habeas action to proceed on issue of whether waiver was the result of ineffective assistance of counsel).

The remedy for an invalid waiver clause is severance of the clause, not invalidation of the plea. Thus the defendant can appeal, but the plea and sentence remain in effect unless the appeal is successful. United States v. Bushert, 997 F.2d 1343, 1350-54 (11th Cir...1993), *cert. denied*, 513 U.S. 1051 (1994).

4.2.3 APPEAL WAIVERS MUST BE KNOWING AND VOLUNTARY

A waiver of appeal must be knowing and voluntary. United States v. Bushert, 997 F.2d 1343, 1350-54 (11th Cir.1993), *cert. denied*, 513 U.S. 1051 (1994). A waiver is knowing if the court advises defendant of the waiver or if it is manifestly clear that defendant understood the full significance of waiver. *Id.*; United States v. Marin, 961 F.2d 493, 496 (4th Cir..1992). *See also* United States v. Benitez-Zapata, 131 F.3d 1444 (11th Cir. 1997) (holding that waiver will be upheld if either: (1) the district court specifically questioned the defendant about the waiver during the colloquy, or (2) the record clearly shows that the defendant understood the full significance of the waiver). The 5th Circuit has upheld a waiver in a written plea agreement even where the court did not advise the defendant of the waiver, in the absence of any indication that the defendant did not understand it. United States v. Portillo, 18 F.2d 290, (5th Cir. 1994), *cert. denied*, 513 U.S.893 (1994); *Accord*, United States v. Michelsen, 141 F.3d 868 (8th Cir. 1998). *See* United States v. Agee, 83 F.3d 882 (7th Cir. 1996) (specific dialogue with defendant not needed); United States v. Michlin, 34 F.3d 896, 898 (9th Cir.1994) (waiver good even though court did not specifically advise defendant of waiver provision). On the other hand, a waiver was struck down where the colloquy indicated that the defendant did not really understand it even though it was in the written agreement. United States v. Baty, 980 F.2d 977 (5th Cir. 1992), *cert. denied*, 508 U.S. 956 (1993).

The 11th Circuit has held that, unless there is a manifestly clear indication in the record that the defendant understood the full significance of his appeal waiver, a lack of sufficient inquiry by the district court during the Rule 11 hearing would be error and would invalidate the appeal waiver. United States v. Bushert, 997 F.2d 1343, 1352 (11th Cir. 1993), *cert. denied*, 513 U.S. 1051 (1994). The 9th Circuit rejects this argument, saying that a Rule 11 colloquy on the waiver of appeal is not necessary, and that a finding that the waiver is knowing and voluntary can be based on the text of the plea agreement, the fact that the waiver is mentioned in the presentence report, and the presumption that the lawyer has discussed both of these with the defendant. United States v. DeSantiago-Martinez, 38 F.3d 394, 395 (9th Cir. 1992), *cert. denied*, 513 U.S. 1128 (1995).

Note that if the court advises a defendant that he *has* a right to appeal, that may override a waiver in the plea agreement, United States v. Buchanan, 59 F.3d 914, 917 (9th Cir. 1996), unless the district court's advice indicated some doubt about the right to appeal. United States v. Martinez, 143 F.3d 1266, 1272 (9th Cir. 1998). *But see* United States v. Michelsen, 141 F.3d 867 (8th Cir. 1998) (where advice of right to appeal came at time of sentencing, it was irrelevant to the earlier decision to plead). The result may be different if the prosecutor makes a timely objection to the court's advice, even if the court refuses to change it.

There is also a possibility of implicit waiver of a defendant's appeal rights as to certain issues. Courts have held in numerous cases that a *defendant* waives any objection that he fails to make in the district court. *See, e.g.,* United States v. Belden, 957 F.2d 671 (9th Cir. 1992), *cert. denied*, 506 U.S. 882 (1992).

4.2.4 SOME APPEAL WAIVERS MAY BE INVALID

A jurisdictional challenge based on a defective indictment is not waived by the waiver of the right to appeal in a plea agreement. United States v. Ruelas, 106 F.3d 1416 (9th Cir. 1997), *cert. denied*, ____ U.S. ____, 117 S.Ct. 2470 (1997) (amended opinion).

Nor will a waiver prevent an appeal "where the sentence imposed is not in accordance with the negotiated agreement". Navarro-Botello, *supra* at 321. If the sentence is outside the agreed range, the waiver clause is void and defendant can appeal all aspects of the sentence, even those that did not violate plea agreement. United States v. Haggard, 41 F.3d 1320, 1325 (9th Cir..1994). On the other hand, where the sentence does not exceed an agreed cap, waiver is effective even though the sentence exceeds the guidelines and is not adequately justified as a departure. United States v. Bollinger, 940 F.2d 478 (9th Cir. 1991). Thus, at least in the 9th Circuit, any agreement to a cap, in combination with a waiver, gives the court license to disregard the guidelines as long as it honors the cap.

Appeal in spite of a waiver was allowed in United States v. Kelly, 974 F.2d 22 (5th Cir. 1992), where the term of supervised release exceeded the statutory maximum. *See also* United States v. Bushert, 997 F.2d 1343, 1350-54 (11th Cir.1993) (waiver not applicable if sentence is in excess of maximum penalty provided by statute or violates equal protection or violates plea agreement). *See also* United States v. Broughton-Jones, 71 F.3d 1143, 1147 (4th Cir. 1995) (allowing appeal despite waiver where defendant claimed that restitution exceeded the amount allowed by statute, making this similar to a claim of a sentence above the statutory maximum); United States v. Zink, 107 F.3d 716 (9th Cir. 1997) (following United States v. Catherine, 55 F.3d 1462 (9th Cir. 1995) and United States v. Ready, 82 F.3d 551 (2d Cir. 1996)) (defendant who waives his right to appeal a sentence may not have waived his right to appeal restitution, where the plea agreement had specific references to guidelines and maximum sentences but no references to restitution, and restitution was outside the guidelines – but note that the court also *told* Zink he could appeal, which may have had some effect on the decision).

Waiver of appeal may be subject to certain exceptions such as claims of breach of the plea agreement, racial disparity in sentencing among co-defendants, or illegal sentence in excess of the statutory maximum. United States v. Baramdyka, 95 F.3d 840 (9th Cir. 1996), *cert. denied*, ____ U.S. ____, 117 S.Ct. 1282 (1997). Baramdyka was cited in United States v. Martinez, 143 F.3d 1266, 1270-71 (9th Cir. 1998) for the proposition that a waiver is generally enforceable if the language of the waiver “encompasses the defendant’s right to appeal on the grounds claimed on appeal”. This is reasonable, but somewhat circular. Appeal may also be allowed where the violation of rights appealed from occurs *after* the waiver, as where a defendant was arguably denied counsel at sentencing after attorney withdrew. United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994).

It appears to be difficult for the government to “waive the defendant’s waiver”. In one case, the government did not raise the issue of defendant's waiver in its brief to the appellate court. The court noticed the clause *sua sponte*, found it to be valid, and declined to reach the merits of defendant's argument. United States v. Schmidt, 47 F.3d 188, 190 (7th Cir.1995). The dissent suggested that if the government chose not to argue that defendant has waived appeal rights, this decision (to waive the waiver clause) should be respected by the court. *Id.*, (Ripple, J. in dissent). *See also* United States v. Doe, 53 F.3d 1081, 1082-83 (9th Cir. 1995) (noting general rule that court will not address waiver if not raised by the opposing party – albeit in a case where the government urged the court to reach the merits).

4.2.5 GOVERNMENT WAIVER OF APPEAL RIGHTS

The 11th Circuit has found an implicit waiver of the right to appeal where the prosecutor agreed that the court had discretion and did not object to downward departure. United States v. Prickett, 898 F.2d 130 (11th Cir. 1990). However, the 9th Circuit has found an exception to allow the government to appeal where there was plain error and "injustice". United States v. Snider, 957 F.2d 703 (9th Cir. 1992). The government could also be prevented from appealing certain types of errors if the sentence is not less than the agreed "specific sentence". 18 U.S.C. §3742(c)(2).

4.3 WAIVER OF COLLATERAL REVIEW

Sample Plea Agreement Language

Further, defendant hereby waives any right to raise, appeal, and/or file any post-conviction writs of habeas corpus or coram nobis concerning any and all motions, defenses, hearings, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution or to the court's entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement.

In addition to waiving direct appeal, the provision above purports to waive any kind of post conviction relief such as writ of habeas corpus. This may create an ethical problem, as the attorney who is advising the client to enter into the guilty plea is probably the same attorney that the client would be calling ineffective counsel in a post-conviction action. Can that attorney ethically advise the client to waive the potential claim against the attorney? The Tennessee Bar issued an advisory ethics opinion saying that neither the prosecutor nor defense counsel can ethically include such a provision in a plea agreement. However, waivers of all claims other than allegations of ineffective assistance of counsel or prosecutorial misconduct were held to be ethical. Unfortunately, the Arizona Bar has issued an ethics opinion holding that such a provision is not unethical – although it specifically refused to address the constitutionality of such a provision. Arizona State Bar Ethics Opinion 95-08 (Nov. 1, 1995). In the wake of those opinions, some defenders have sought opinions on the same subject from their state bar committees.

The 5th Circuit has upheld waivers of collateral relief. United States v. Wilkes, 20 F.3d 651 (5th Cir. 1994). However, waiver of appeal does not include waiver of ineffective assistance of counsel claim under 21 U.S.C. § 2255. United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994). Dismissal of an appeal on waiver grounds would be inappropriate where defendant files a motion to withdraw from the plea because the waiver was tainted by ineffective assistance of counsel. United States v. Price, 95 F.3d 364, 369 (5th Cir. 1996) (although Price appeal was dismissed because he did *not* file a motion to withdraw).

The 9th Circuit also has faced the problem of counsel advising a defendant to waive claims of ineffective assistance of counsel, although in a slightly different form. In United States v. Muro, 87 F.3d 1078 (9th Cir. 1996), the defendant claimed that his counsel was ineffective and asked that a new one be appointed to argue his motion for new trial on that ground. The district court refused and forced the "ineffective" counsel to handle the evidentiary hearing on the motion. The 9th Circuit reversed, stating that forcing a lawyer to try to prove his own ineffectiveness at an evidentiary hearing for new trial created an

inherent conflict of interest. The same type of conflict analysis should apply to waiving the right to make ineffective assistance claims.

4.4 CONDITIONAL WAIVERS

A conditional waiver of appeal was enforced in United States v. Littlefield, 105 F.3d 527(9th Cir. 1997), *cert. denied*, ____ U.S. ____, 117 S.Ct. 2423 (1997). Littlefield's waiver was conditional upon the sentence being within the agreed cap. It was, so he could not appeal.

5 MISCELLANEOUS TYPICAL PROVISIONS

5.1 PENALTIES

The penalties section of a plea agreement sets forth the maximum penalties that the law allows for the charge to which the defendant will plead. Its only real functions are to make sure that the defendant has been properly advised of the penalties and to inform the judge of what to tell the defendant at the change of plea hearing.

Sample Plea Agreement Language

a) A violation of Title 21 U.S.C. §841(a)(1) and §841(b)(1)(A)(vii), is punishable by a mandatory minimum term of imprisonment of ten years, and a maximum term of imprisonment of up to life, or a maximum fine of \$4,000,000 or both.

b) According to the Sentencing Guidelines, the court shall: 1) Order the defendant to make restitution to any victim of the offense, unless, pursuant to Title 18, U.S.C. §3663, the court determines that restitution would not be appropriate; 2) Order the defendant to pay a fine, unless, pursuant to Section 5E1.2(f) of the Guidelines, the defendant establishes the applicability of the exceptions found therein; 3) Order the defendant, pursuant to Title 18 U.S.C. §3583 to serve a term of supervised release when required by law or when a sentence of imprisonment of more than one year is imposed, the court may impose a term of supervised released in all other cases.

c) Pursuant to Title 18 U.S.C. §§3561-3566, §3559, the defendant may not be sentenced to a period of probation.

d) Pursuant to Title 18 §3013, the court is required to impose a special assessment on the defendant of \$100.00 per count.

5.1.1 COMMON ERRORS IN PENALTY TERMS

Maximum incarceration terms are usually correct, as they are set out in the statutes. Mandatory minimum terms must be checked carefully, particularly in drug, gun and Continuing Criminal Enterprise (CCE) cases.

Authorized supervised release terms are often wrong. They are controlled in general by 18 U.S.C. §3583, which in turn relies on the classification of the offense under 18 U.S.C. §3559. Specific statutes sometimes have their own supervised release requirements, such as the drug statute 21 U.S.C. §841.

Authorized fines amounts are often wrong. Fines for offenses before the guidelines went into effect are controlled by the specific statute. Guideline case fines are controlled by the greater of the specific statute or the fine in 18 U.S.C. §3571, which was amended in December of 1987 to change the misdemeanor fines. The general fine statute relies on the classification of the offense under 18 U.S.C. §3559.

Special assessments are controlled by 18 U.S.C. §3013, which provides for smaller assessments for class A, B, and C misdemeanors. The section was amended in 1996 to provide for \$100, as opposed to \$50, assessments for felonies.

5.1.2 EFFECT OF ERRORS IN PENALTY TERMS

Rule 11(c)(1) requires that defendants be advised of the mandatory minimum provided by law, if any, and the maximum possible penalty including the effect of special parole or supervised release. Many mistakes in advising defendants are harmless errors, generally because the defendant receives a sentence well below the maximum. United States v. Sanclemente-Bejarano, 861 F.2d 206, 209-10 (9th Cir. 1988) (harmless error where defendant was advised maximum sentence was life imprisonment and received 15 years sentence and five year term of supervised release). However, there may be harmful error where the combination of sentences received could cause defendant's liberty to be restricted beyond the maximum sentences described. See United States v. Roberts, 5 F.3d 365 (9th Cir. 1993) (defendant was not advised of supervised release and receive maximum term and maximum supervised release). Also, advising a defendant that he was subject to a five year mandatory minimum at arraignment, and then finding him responsible for more cocaine at sentencing, triggering a mandatory 10 year sentence, invalidated his guilty plea. United States v. Still, 102 F.3d 118 (5th Cir., 1996), *cert. denied*, ____ U.S. ____, 118 S.Ct. 43 (1997).

Failure to mention restitution during plea colloquy was harmless error, where defendant was made aware of the restitution obligation through his plea and cooperation agreements. United States v. McCarty, 99 F.3d 383 (11th Cir. 1996). It was also harmless error where defendant was advised of a possible fine – but not of possible restitution – and the restitution imposed was less than the fine could have been. United States v. Pomazi, 851 F.2d 244 (9th Cir. 1998), *overruled in part on other grounds*, Hughey v. United States, 495 U.S. 411 (1990). It has been suggested that now that restitution is mandatory under the MVRA failure to advise of restitution runs afoul of the Rule 11(c)(1) requirement that mandatory minimums be mentioned. See Section 3.6.3.

The remedy in some cases for a bad penalty advisement has been a direction by the appellate court that the district court vacate the part of the sentence that exceeds the advisement, rather than allowing the defendant to withdraw his plea. United States v. Rogers, 984 F.2d 314 (9th Cir. 1993).

There may also be error where it appears that the decision to plead was impacted by the erroneous advice given by the court. For example, in a situation where a defendant was told at arraignment that he faced 60 years for two drug counts but he actually faced only 30 years, where he pled guilty to one or the counts in return for dismissal of the other, and where the court thought he was subject to 30 years – which he was not – and sentenced him to 15, the defendant’s guilty plea and waiver of trial was invalid. United States v. Guerra, 94 F.3d 989 (5th Cir. 1996) (significantly, there was nothing in the record suggesting that defendant ever received the correct information about his exposure from his counsel).

Note that it is also possible that failure of the attorney to advise the defendant of certain consequences of the plea, such as failure to warn of possible career offender status, may be ineffective assistance of counsel. Risher v. United States, 992 F.2d 982 (9th Cir. 1993).

5.2 WARNINGS

The warnings are usually spread around in the plea agreement, but have been grouped here for discussion.

5.2.1 PERJURY AND OTHER FALSE STATEMENT OFFENSES

Sample Plea Agreement Language

Nothing in this agreement shall be construed to protect the defendant in any way from prosecution for perjury, false declaration or false statement, as defined by the law of any sovereign, or any other offense committed by defendant after the date of this agreement. Any information, statements, documents, and evidence which defendant provides to the United States pursuant to this agreement may be used against him in any such prosecutions.

This paragraph makes explicit the policy set out in USSG §1B1.8(b)(3) regarding the use of information provided in cooperation agreements in a later perjury prosecution.

5.2.2 REINSTITUTION OF PROSECUTION

Sample Plea Agreement Language

If defendant's guilty plea is rejected, withdrawn, vacated, or reversed at any time, the United States will be free to prosecute the defendant for all charges of which it has knowledge, and any charges that have been dismissed because of this plea agreement will be automatically reinstated. In such event, defendant waives any objections, motions, or defenses based upon the Statute of Limitations, the Speedy Trial Act or constitutional restrictions on bringing of charges.

This is the government side of the “back to square one” provision. Because under some circumstance a defendant may be able to withdraw from a plea or have a plea set aside on appeal, the

government wants to be able to get back to the *status quo ante* in that event. This kind of provision is not unfair, but is very hard to explain to poorly educated or non-English speaking clients. The second sentence in the above sample language is probably overly broad. It should only waive impediments to prosecution that have resulted from the delay caused by the plea proceedings. No case has surfaced where this language has been used for any more nefarious purpose.

5.2.3 DISCLOSURE OF INFORMATION TO PROBATION OFFICE AND COURT

Sample Plea Agreement Language

Defendant understands the United States' obligation to provide all information in its file regarding defendant, including charged and uncharged criminal offenses, to the United States Probation Office.

This provision describes, and perhaps causes, a problem. The probation office gets the information on all the conduct known to the prosecutor even if the defendant only pleads to part of it. This is the genesis of the problems regarding consideration of dismissed and uncharged conduct, because it requires the prosecution to give the probation officer information on such conduct – which the officer then uses to increase the defendant’s guidelines.

Note that a similar provision in a plea agreement saying that the government was free to provide all relevant information to the court at sentencing was held to override the protected nature of statements made during a proffer in plea negotiations, even though proffer agreement itself provided that the information would not be used, . United States v. Fagge, 101 F.3d 232 (2nd Cir. 1996) (discussed in Section 3.7.4). At sentencing the judge asked the government why the defendant was not entitled to a “minimal role” adjustment and the government used information from the proffers to show that defendant had engaged in several drug deals. The court of appeals held that the language in the plea agreement overrode the proffer agreement.

5.2.4 EFFECT ON FORFEITURE, CIVIL, AND ADMINISTRATIVE PROCEEDINGS

Sample Plea Agreement Language

Nothing in this agreement shall be construed to protect the defendant from civil forfeiture proceedings or prohibit the United States from proceeding with and/or initiating an action for civil forfeiture. Further, this agreement does not preclude the United States from instituting any civil or administrative proceedings as may be appropriate now or in the future.

This provision reflects the government’s concern that the Double Jeopardy Clause may be implicated when a defendant receives a sentence in one proceeding and suffers a civil forfeiture in another. The Supreme Court found that a tax on marijuana imposed on the defendant after the defendant was prosecuted for possession of the marijuana constituted a violation of double jeopardy. Montana Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994). The tax was authorized by the same statute as the prosecution and was conditioned upon the commission of the crime. Prior to Kurth Ranch, the Supreme Court had also upheld the double jeopardy complaint where what was denominated a “civil

penalty” was imposed after a conviction, but the court found that the penalty was non-remedial and had a punitive character. United States v. Halper, 490 U.S. 435 (1989). Taken together these cases had fairly put an end to the practice of following criminal convictions with civil forfeiture actions. In most cases, the government began to seek forfeiture *in* the criminal action, thus avoiding the bar. However, the Supreme Court in United States v. Ursery, 518 U.S. 267 (1996), recently held that *in rem* civil forfeitures are neither “punishment” nor “criminal”, and thus do not create a double jeopardy problem. See also Hudson v. United States, _____ U.S. _____, 118 S.Ct. 488 (1997) (no bar to prosecution for misapplication of bank funds where defendant already suffered monetary penalties and occupational debarment at hands of Comptroller of Currency – largely disavowing the Harper analysis and finding the previous penalties to be “civil remedies”).

5.3 FACTUAL BASIS

The factual basis section establishes that there are sufficient facts to support a conviction. These facts may also form the basis of some of the probation officer’s guideline calculations and must be examined carefully.

Sample Plea Agreement Language

I further agree that if this matter were to proceed to trial the United States could prove the following facts beyond a reasonable doubt, and that these facts accurately represent my readily provable offense conduct and specific offense characteristics:

[facts of the offense of conviction]

Although mentioned in other sections, the warning cannot be repeated too often: the guidelines provide that stipulation to a greater offense requires the use of the guideline for that offense. USSG §1B1.2(a). Thus if the defendant pled guilty to one offense but stipulated to a more serious offense in the factual basis, the court will sentence the defendant based on the guideline for the more serious offense. United States v. Martin, 893 F.2d 73, 74-76 (5th Cir. 1990); see also United States v. Gardner, 940 F.2d 587, 590-92 (10th Cir. 1991) (defendant pled guilty to bank larceny, stipulated to bank robbery, sentenced for bank robbery)

Inadequacy of factual basis is waived where at sentencing defendant failed to raise the issue and defense counsel agreed that a basis existed. United States v. Reyes-Alvarado, 963 F.2d 1184 (9th Cir. 1992).

5.4 APPROVAL AND ACCEPTANCE

5.4.1 DEFENSE ATTORNEY APPROVAL

The defense attorney approval section, requiring counsel’s signature rather than the defendant’s, basically tries to lock defense counsel in to vouch for the plea.

Sample Plea Agreement Language

I have discussed this case and the plea agreement with my client in detail and have advised the defendant in all matters within the scope of Fed.R.Crim.P. 11, the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea. No assurances, promises, or representations have been given to me or to the defendant by the United States or by any of its representatives which are not contained in this written agreement. I concur in the entry of the plea as indicated above and on the terms and conditions set forth in this agreement as in the best interests of my client. I agree to make a bona fide effort to ensure that the guilty plea is entered in accordance with all the requirements of Fed.R.Crim.P. 11.

Failure to properly advise the defendant of the elements of the offense, defenses, or penalties, resulting in a mistaken decision to plead guilty, has always been possible ineffective assistance of counsel. Now failure to properly advise defendant on sentencing guidelines, resulting in a defendant's decision *not* to take a plea bargain, can also be ineffective assistance. United States v. Day, 969 F.2d 39 (3rd Cir. 1992); United States v. Sanders, 3 F.Supp. 2d 554 (M.D.Penn 1998). Failure to warn a client of possible career offender status has also been held to be ineffective assistance. Risher v. United States, 992 F.2d 982 (1993).

The remedy for such a failures is not completely clear. In re Alvernaz, 2 Cal. Rptr. 2nd 713, 830 P.2d 747 (Cal. Sup. Ct. 1992) suggests that where a defendant failed to accept a plea bargain because of ineffective counsel, the remedy would be modification of the judgment consistent with the plea offer or a new trial with resumption of the plea negotiation process. When the same case came before a federal district court on a habeas claim, the court ordered that Alvernaz be allowed to consider the former offer with assistance of competent counsel. Alvernaz v. Ratelle, 831 F.Supp 790 (S.D.Cal. 1993). Where a plea offer was never communicated to the client, the 9th Circuit has said that the remedy would be reinstatement of the plea offer. United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994). To be eligible for relief, the defendant has to demonstrate that he would have accepted the plea had it been communicated. Engelen v. United States, 68 F.3d 238 (8th Cir. 1995) (citing Blaylock).

5.4.2 GOVERNMENT APPROVAL

Sample Plea Agreement Language

I have reviewed this matter and the plea agreement. I agree on behalf of the United States that the terms and conditions set forth are appropriate and are in the best interests of justice.

The government approval section is usually nothing more than a signature block, and has no real significance beyond making the government a party to the “contract”.

5.4.3 COURT ACCEPTANCE

Rule 11(e)(2) *allows* the court to delay acceptance of the plea agreement until after the presentence report in the case of a Rule 11(e)(1)(A) or (C) agreement, and the guidelines *require* the court to delay acceptance of the plea agreement until the presentence report has been considered in most cases. USSG §6B1.1(c). Under the Guidelines, the court's acceptance of the plea is contingent on court's consideration of presentence report. United States v. Cordova-Perez, 65 F.3d 1552 (9th Cir.1995); United States v. Kemper, 908 F.2d 33, 36 (6th Cir.1990); United States v. Foy, 28 F.3d 464, 471 (5th Cir.1994); United States v. Salva, 902 F.2d 483, 488 (7th Cir..1990).

Acceptance usually takes place on the record at the sentencing hearing, rather than at the change of plea hearing. Prior to United States v. Hyde, _____ U.S. _____, 117 S.Ct. 1630 (1997) some courts began to accept the plea agreement at the time of the plea hearing to prevent the defendant from withdrawing from the plea before sentencing. Defendants did so based on United States v. Washman, 66 F.3d 210 (9th Cir. 1996), which held that either party should be entitled to modify its position and even withdraw from the bargain until the plea is tendered and the bargain as it then exists is accepted by the court. Washman in turn relied on United States v. Ocanas, 628 F.2d 353, 358 (5th Cir.1980), cert. denied, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 840 (1981) which held that unless and until the trial judge approves a plea agreement and accepts a guilty plea, neither party is bound by the agreement. The controversy was laid to rest when the Supreme Court held that once a plea is entered “a defendant may not withdraw his plea unless he shows a ‘fair and just reason’ under Rule 32(e)”. Hyde, *supra* at _____, 117 S.Ct.1631.

6 COLLATERAL CONSEQUENCES OF PLEA

There are numerous collateral consequences to pleading guilty. The right to vote, the right to bear arms, access to government benefits, and a host of other rights can be effected. Below I mention only three consequences that have been troublesome.

6.1 LOSS OF RIGHT TO CARRY FIREARMS

A plea to a felony under federal law will preclude the defendant from bearing firearms under 18 U.S.C. §922(g) and §921(a)(20). There is no provision for restoration of this right for federal felons except for petitions to the Secretary of the Treasury under 18 U.S.C. §925(c), which are no longer being processed. A state cannot restore a federal felon's right to bear arms. Beecham v. United States, 511 U.S. 368 (1994).

6.2 IMMIGRATION CONSEQUENCES

The immigration consequences of a plea agreements are very complex and are beyond the scope of this article. Defense counsel should be aware that loss of status, deportation, and other immigration consequences may be even more severe than the criminal sanctions. Whenever the defendant has any kind of immigration status, the consequences of a plea on that status should be evaluated and explained to the defendant prior to the decision to plead. In some cases, pleas can be structured so as to minimize the ill effect on the client.

6.3 USE OF PLEA STATEMENTS IN OTHER PROCEEDINGS

Uncoerced statements made by a defendant in a tribal guilty plea may be used for impeachment purposes at his federal trial. United States v. Tsinnijinnie, 91 F.3d 1285 (9th Cir. 1996). The court reasoned that if statements taken in violation of Miranda, evidence seized in violation of the Fourth Amendment, and suppression hearing testimony of the defendant may all be used for impeachment at trial, then there is no reason to treat statements made during a tribal plea any differently.

APPENDIX – DOJ MANUAL EXCERPTS

9-27.300 SELECTING CHARGES

9-27.310 CHARGING MOST SERIOUS OFFENSES

A. Except as hereafter provided, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.

B. Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribery provisions of 18 U.S.C. Sec. 201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. Sec. 1621 but not under 18 U.S.C. Sec. 1623.

USAM 9-27.310 expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is likely to result in a sustainable conviction. Ordinarily, this will be the offense for which the most severe penalty is provided by law. This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320, *infra*), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

In assessing the likelihood that a charge of the most serious offense will result in a sustainable conviction, the attorney for the government should bear in mind some of the less predictable attributes of those rare federal offenses that carry a mandatory, minimum term of imprisonment. In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

The exception noted at the beginning of USAM 9-27.310 refers to pre-charge plea agreements provided for in USAM 9-27.330, *infra*.

9-27.320 ADDITIONAL CHARGES

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgment, additional charges:

1. Are necessary to ensure that the information or indictment:
 - a. Adequately reflects the nature and extent of the criminal conduct involved; and
 - b. Provides the basis for an appropriate sentence under all the circumstances of the case; or
2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

B. Comment

It is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive-and potentially unfair-exercise of power. To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: when necessary adequately to reflect the nature and extent of the criminal conduct involved; when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

1. Nature and Extent of Criminal Conduct

Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity; should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.

2. Basis for Sentencing

Proper charge selection also requires consideration of the end result of successful prosecution-the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he/she is convicted, the court may impose an appropriate sentence. The phrase "all the circumstances of the case" is intended to include any factors that may be relevant to the sentencing decision. Examples of such factors are the basic purposes of sentencing (deterrence, protection of the public, just punishment, and rehabilitation); the penalty provisions of the applicable statutes; the gravity of the offense in terms of its actual or potential impact, or in terms of the defendant's motive; mitigating or aggravating factors such as age, health, restitution, prior criminal activity, and cooperation with law enforcement officials; and any other legitimate legislative, judicial, prosecutorial, or penal or correctional concern, including special sentencing provisions for certain classes of offenders and other post-conviction consequences such as disbarment or disqualification from public office or private position.

3. Effect on Government's Case

When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion of relevant evidence, but may impair the prosecutor's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one defendant may affect the strength of the case against another defendant.

In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

9-27.330 PRE-CHARGE PLEA AGREEMENTS

A. The attorney for the government may file or recommend a charge or charges without regard to the provisions of USAM 9-27.310 and 9-27.320, *supra*, if such charge or charges are the subject of a pre-charge plea agreement entered into under the provisions of USAM 9-27.400, *infra*.

B. Comment

USAM 9-27.330 addresses the situation in which there is a pre-charge agreement with the defendant that he/she will plead guilty to a certain agreed-upon charge or charges. In such a situation, the charge or charges to be filed or recommended to the grand jury may be selected without regard to the provisions of USAM 9-27.310 and 9-27.320, *supra*.

Before filing or recommending charges pursuant to a pre-charge plea agreement, the attorney for the government should consult the plea agreement provisions of USAM 9-27.400, *infra*, and should give special attention to USAM 9-27.430, *infra*, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

9-27.400 ENTERING INTO PLEA AGREEMENTS

9-27.410 PLEA AGREEMENTS GENERALLY

A. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or *nolo contendere* to a charged offense or to a lesser or related offense, he/she will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action.

B. Comment

USAM 9-27.410 permits, in appropriate cases, the disposition of federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or *nolo contendere* to fewer than all counts of an information or indictment in the absence of any agreement with the government. Only the former type of disposition is covered by the provisions of USAM 9-27.400.

Negotiated plea dispositions are explicitly sanctioned by Rule 11(e)(1), Federal Rules of Criminal Procedure, which provides that:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) Move for dismissal of other charges; or

(B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) Agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of USAM 9-27.410, agreements whereby, in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

It should be noted that the provision relating to "charge agreements" is not limited to situations in which the defendant is the subject of charges to be dismissed. Although this will usually be the case, there may be situations in which a third party would be the beneficiary of the dismissal of charges. For example, one family member may offer to plead guilty in return for the termination of a prosecution pending against another family member, or a corporation may tender a plea in satisfaction of its own liability as well as that of one of its officers. Although plea agreements of this sort are permitted under paragraph 1 they can easily be misunderstood as manifestations of a double standard of justice. Accordingly, they should not be entered into routinely, but only after careful consideration of all relevant factors, including those specifically set forth in USAM 9-27.420, *infra*.

The language of USAM 9-27.410 with respect to "sentence agreements" is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine, probation, or sentencing under a specific statute such as the Youth Corrections Act), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in USAM 9-27.500, *infra*, there are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

9-27.420 CONSIDERATIONS TO BE WEIGHED

A. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;
2. The defendant's history with respect to criminal activity;

3. The nature and seriousness of the offense or offenses charged;
4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;
5. The desirability of prompt and certain disposition of the case;
6. The likelihood of obtaining a conviction at trial;
7. The probable effect on witnesses;
8. The probable sentence or other consequences if the defendant is convicted;
9. The public interest in having the case tried rather than disposed of by a guilty plea;
10. The expense of trial and appeal; and
11. The need to avoid delay in the disposition of other pending cases.

B. Comment

USAM 9-27.420 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11(e), Federal Rules of Criminal Procedure. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgment as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved in any case in which it would be helpful to have its views concerning the relevance of particular factors or the weight they deserve.

1. Defendant's Cooperation

The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under Title 18, U.S.C. Secs. 6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction.

2. Defendant's Criminal History

One of the principal arguments against the practice of plea-bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by federal prosecutors, especially when dealing with repeat offenders or "career criminals." Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past convictions, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his/her past cooperation with law enforcement officials.

3. Nature and Seriousness of Offense Charged

Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing these factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g. , the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

4. Defendant's Attitude

A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his/her criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his/her acts. These are factors that bear upon the likelihood of his/her repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate.

It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him/her later to proclaim lack of culpability or even complete innocence. Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he/she will admit the facts of the offense and of his/her culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his/her guilt beyond a reasonable doubt. Except as provided in USAM 9-27.440, *infra* , the attorney for the government should not enter into a plea agreement with a defendant who admits his/her guilt but disputes an essential element of the government's case.

5. Prompt Disposition

In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last-minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and judicial time reserved for the aborted trial. For these reasons, government attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

6. Likelihood of Conviction

The trial of a criminal case inevitably involves risks and uncertainties, both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In this connection, the prosecutor should weigh the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met.

7. Effect on Witnesses

Although the public has "the right to every person's evidence," attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that, sometimes, to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his/her identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

8. Probable Sentence

In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement," the prosecutor should realize that the position he/she agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware of the need to preserve the basis for an appropriate sentence under all the circumstances of the case.

9. Trial Rather Than Plea

There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrong-doing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

10. Expense of Trial and Appeal

In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

11. Prompt Disposition of Other Cases

A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a "domino effect," leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the district, the desirability of handling a larger volume of criminal cases, and the workloads of prosecutors, judges, and defense attorneys in the district.

9-27.430 SELECTING PLEA AGREEMENT CHARGES

A. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

1. That bears a reasonable relationship to the nature and extent of his/her criminal conduct;
2. That has an adequate factual basis;
3. That makes likely the imposition of an appropriate sentence under all the circumstances of the case; and
4. That does not adversely affect the investigation or prosecution of others.

B. Comment

USAM 9-27.430 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information.

1. Relationship to Criminal Conduct

The charge or charges to which a defendant pleads guilty should bear a reasonable relationship to the defendant's criminal conduct, both in nature and in scope. This principle covers such matters as the seriousness of the offense (as measured by its impact upon the community and the victim), not only in terms of the defendant's own conduct but also in terms of similar conduct by others, as well as the number of counts to which a plea should be required in cases involving offenses different in nature or in cases involving a series of similar offenses. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. In many cases, this will probably require that the defendant plead to the most serious offense charged. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense.

The requirement that a defendant plead to a charge that bears a reasonable relationship to the nature and extent of his/her criminal conduct is not inflexible. There may be situations involving cooperating defendants in which considerations such as those discussed in USAM 9-27.600, *infra*, take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his/her credibility may be subject to successful impeachment if he/she is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

2. Factual Basis

The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11(f), Federal Rules of Criminal Procedure, a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea under these principles. However, as noted *infra*, in cases in which Alford or nolo contendere pleas are tendered the attorney for the government may wish to make a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his/her plea. Consequently,

in order to avoid such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

3. Basis for Sentencing

In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute for the offense to which the guilty plea is entered. Thus, the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes, the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, a sufficient number of counts should be retained under the agreement to provide a basis for an adequate restitution order, since the court's authority to order restitution as part of the sentence it imposes is limited to the offenses for which the defendant is convicted, as opposed to all offenses that were committed. See 18 U.S.C. Sec. 3651; *United States v. Buechler*, 557 F.2d 1002, 1007 (3d Cir.1977); USAM 9-16.210.

4. Effect on Other Cases

In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

9-27.440 PLEA AGREEMENTS WHEN DEFENDANT DENIES GUILT

A. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies that he/she has in fact committed the offense to which he/she offers to plead guilty, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty.

B. Comment

USAM 9-27.440 concerns plea agreements involving "Alford" pleas—guilty pleas entered by defendants who nevertheless claim to be innocent. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his/her innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of *nolo contendere*, where the defendant does not expressly admit his/her guilt, and a plea of guilty by a defendant who affirmatively denies his/her guilt.

Despite the constitutional validity of Alford pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement

by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." See *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir.1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. For this reason, government attorneys should not enter into Alford plea agreements without the approval of the responsible Assistant Attorney General.

Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to Alford pleas may be limited. Although a court may accept a proffered plea of *nolo contendere* "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11(b), Federal Rules of Criminal Procedure), at least one court has concluded that it is abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." *United States v. Gaskins*, 485 F.2d 1046, 1048 (D.C.Cir.1973); but see *United States v. Bednarski*, *supra*; *United States v. Biscoe*, 518 F.2d 95 (1st Cir.1975). Nevertheless, government attorneys can and should discourage Alford pleas by refusing to agree to terminate prosecutions where an Alford plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the U.S. Attorney or, in cases handled by departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11(f) of the Federal Rules of Criminal Procedure in an Alford case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11(f) of the Federal Rules of Criminal Procedure, the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. See *United States v. Navedo*, 516 F.2d 293 (2d Cir.1975); *Irizarry v. United States*, 508 F.2d 960 (2d Cir.1974); *United States v. Davis*, 516 F.2d 574 (7th Cir.1975). Accordingly, attorneys for the government in Alford cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11(f) of the Federal Rules of Criminal Procedure, but also to minimize the adverse effects of Alford pleas on public perceptions of the administration of justice.

9-27.450 RECORDS OF PLEA AGREEMENTS

A. If a prosecution is to be terminated pursuant to a plea agreement, the attorney for the government should ensure that the case file contains a record of the agreed disposition, signed or initialed by the defendant or his/her attorney.

B. Comment

USAM 9-17.450 is intended to facilitate compliance with Rule 11, Federal Rules of Criminal Procedure, and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. Rule 11(e)(2), Federal Rules of Criminal Procedure, requires that a plea agreement be disclosed in open court (except upon a showing of good cause, in which case disclosure may be made in camera), while Rule 11(e)(3), Federal Rules of Criminal Procedure, requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he/she pleads guilty, or at the time of sentencing, or at a later date. If time does not permit the preparation of a record of the plea agreement in advance, as when the plea disposition is agreed to on the morning of arraignment or trial, the attorney for the government should subsequently include in the case file a brief notation concerning the fact and terms of the agreement.

9-27.451 INDICTMENT AND PLEA PROCEDURES UNDER GUIDELINE SENTENCING

1. General Plea Procedures

The following procedures shall be adopted as to all pleas of guilty:

A. All negotiated plea agreements to felonies or misdemeanors negotiated from felonies shall be in writing and filed with the court. Thus any time a defendant enters into a negotiated plea, that fact and the conditions thereof will be memorialized and a copy of the plea agreement maintained in the office case file or elsewhere.

B. There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas, including those set forth in the Thornburgh Memos. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

C. The plea approval process will be part of the office evaluation procedure.

D. The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

2. Substantial Assistance Pleadings

A. Authority to File. Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

B. Recordkeeping. Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom Of Information Act considerations may suggest that a separate form showing the final decision be maintained.

C. Rule 35(b) Motions. The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on Motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

3. Enhancements of Drug Penalties Based on Prior Convictions

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. See, e.g., 21 U.S.C. Secs. 841(b)(1)(A), (B), and (C), 848(a), 960(b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. Sec. 851.

For the purposes of applying the rules of the Thornburgh memoranda, every prosecutor should regard the filing of an information under 21 U.S.C. Sec. 851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. Sec. 851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are those found in Thornburgh I. Such exceptions to the requirements that enhancement pleadings be filed are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Consistent with Thornburgh I, such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement, (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence, and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

4. Firearm charges pursuant to Title 18 United States Code Sec. 924(c).

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code Sec. 924(c).

THORNBURGH MEMORANDUM — MARCH 13, 1989

SUBJECT: Plea Bargaining Under The Sentencing Reform Act

In January, The Supreme Court decided *Mistretta v. United States* and upheld the sentencing guidelines promulgated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Act was strongly supported by the Department of Justice, and the Department has defended the guidelines since they took effect on November 1, 1987. Under these guidelines, it is now possible for federal prosecutors to respond to three problems that plagued sentencing prior to their adoption: 1) sentencing disparity; 2) misleading sentences which were shorter than they appeared as a result of parole and unduly generous "good time" allowances; and 3) inadequate sentences in critical areas, such as crimes of violence, white collar crime, drug trafficking and environmental offenses. It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve.

This memorandum cannot convey all that federal prosecutors need or should want to know about how to use the guidelines, and it is not intended to invalidate more specific policies which are consistent with this statement of principles and may have been adopted by some litigating divisions to govern particular offenses. This memorandum does, however, set forth basic departmental policies to which all of you will be expected to adhere. The Department consistently articulated these policies during the drafting of the guidelines and the period in which their constitutionality was tested. Compliance with these policies is essential if federal criminal law is to be an effective deterrent and those who violate the law are to be justly punished.

Plea Bargaining

Charge Bargaining

Charge bargaining takes place in two settings, before and after indictment. Consistent with the Principles of Federal Prosecution in Chapter 27 of Title 9 of the United States Attorneys' Manual, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

Whether bargaining takes place before or after indictment, the Department policy is the same: any departure from the guidelines should be openly identified rather than hidden between the lines of a plea agreement. It is inevitable that in some cases it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to indictment, the prosecutor bargained in conformity with the Department's policy. The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

Sentence Bargaining

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified guideline range. This means that when a guideline range is 18-24 months, you have discretion to agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, you may agree to recommend a downward adjustment of two levels for acceptance of responsibility if you conclude in good faith that the defendant is entitled to the adjustment.

Second, you may seek to depart from the guidelines. This type of sentence bargain always involves a departure and is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

Readily Provable Charges

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. It would serve no purpose here to seek to further define "readily provable." The policy is to bring cases that the government should win if there were a trial. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important for you to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will

mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system. For example, approval to drop charges in a particular case might be given because the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

To make guidelines work, it is likely that the Department and the Sentencing Commission will monitor cases in which charges are dropped. It is important, therefore, that federal prosecutors keep records justifying their decisions not to go forward with readily provable offenses.

Departures Generally

In Chapter 5, Part K of the guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Some depart upwards and others downwards. Moreover, 5K2.0 recognizes that a sentencing court may consider a departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part K, approval of United States Attorneys or designated supervisory officials is required, after consultation with the concerned litigating Division. This approval is required whether or not a case is resolved through a negotiated plea.

Substantial Assistance

The most important departure is for substantial assistance by a defendant in the investigation or prosecution of another person. Section 5K1.1 provides that, upon motion by the government, a court may depart from the guidelines and may impose a non-guideline sentence. This departure provides federal prosecutors with an enormous range of options in the course of plea negotiations. Although this departure, like all others, requires court approval, prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations.

Stipulations of Fact

The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a

prosecutor has joined, it is desirable for the prosecutor to object to the report or to add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, section 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of section 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence.

Written Plea Agreements

In most felony cases, plea agreements should be in writing. If they are not in writing, they always should be formally stated on the record. Written agreements will facilitate efforts by the Department and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the guidelines. Such agreements also avoid misunderstandings as to the terms that the parties have accepted in particular cases.

Understanding the Options

A commitment to guideline sentencing in the context of plea bargaining may have the temporary effect of increasing the proportion of cases that go to trial, until defense counsel and defendants understand that the Department is committed to the statutory sentencing goals and procedures. Prosecutors should understand, and defense counsel will soon learn, that there is sufficient flexibility in the guidelines to permit effective plea bargaining which does not undermine the statutory scheme.

For example, when a prosecutor recommends a two-level downward adjustment for acceptance of responsibility (e.g., from level 20 to level 18), judicial acceptance of this adjustment will reduce a sentence by approximately 25%. If a comparison is made between the top of one level (e.g., level 20) and the bottom of the relevant level following the reduction (e.g., level 18), it would show a difference of approximately 35%. At low levels, the reduction is greater. In short, a two level reduction does not mean two months. Moreover, the adjustment for acceptance of responsibility is substantial, and should be attractive to defendants against whom the government has strong cases. The prosecutor may also cooperate with the defendant by recommending a sentence at the low end of a guideline range, which will further reduce the sentence.

It is important for prosecutors to recognize while bargaining that they must be careful to make all appropriate Chapter Three adjustments-e.g., victim related adjustments and adjustments for role in the offense.

Conclusion

With all available options in mind, and with full knowledge of the availability of a substantial assistance departure, federal prosecutors have the tools necessary to handle their caseloads and to arrive at appropriate dispositions in the process. Honest application of the guidelines will make sentences under the Sentencing Reform Act fair, honest, and appropriate.

THORNBURGH MEMORANDUM — JUNE 16, 1989

SUBJECT: Plea Bargaining in Cases Involving Firearms

On May 15, 1989, the President outlined a comprehensive program to combat violent crime. In it he noted that to ensure the objective that those who commit violent crimes are held fully accountable, plea bargaining procedures must be uniformly and strictly applied. Accordingly, he has directed me to issue and fully implement guidelines for federal prosecutors under the Sentencing Reform Act to ensure that federal charges

always reflect both the seriousness of the defendant's conduct and the Department's commitment to statutory sentencing goals and procedures. This means that, in all but exceptional cases such as those in which the defendant has provided substantial assistance to the government in the investigation or prosecution of crimes by others, federal prosecutors will seek conviction for any offense involving the unlawful use of a firearm which is readily provable. This will implement the congressional mandate that mandatory minimum penalties be imposed by the courts upon violent and dangerous felons.

As you recall, in my March 13, 1989 memorandum to all federal prosecutors on the subject of plea bargaining, I stated (at pp. 2-3):

* * * The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines .

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct . Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

Department policy requires honesty in sentencing ; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions. (Emphasis added.)

On the subject of minimum mandatory penalties for violent firearms offenses, the Department's November 1, 1987 Prosecutors Handbook on Sentencing Guidelines provides (at p. 50):

. . . in no event is a . . . 18 U.S.C. 924(c) (minimum mandatory firearms) charge not to be pursued unless it cannot be readily proven or unless absolutely necessary to enable imposition of an appropriate sentence on someone who has rendered substantial assistance to the government, and then only with the consent of . . . the United States Attorney as to 18 U.S.C. 924(c) charges.

The specific affirmation of these policies by the President requires that you be especially vigilant about their full implementation in your district. Any questions about these matters will continue to be handled by the appropriate Assistant Attorney General.

9-27.500 OPPOSING OFFERS TO PLEAD NOLO CONTENDERE

9-27.510 OPPOSITION EXCEPT IN UNUSUAL CIRCUMSTANCES

A. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the (Assistant Attorney General with supervisory responsibility over the subject matter) U.S. Attorney concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest.

B. Comment

Rule 11(b), Federal Rules of Criminal Procedure, requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus, it is clear that a criminal defendant has no absolute right to enter a nolo contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr., in a departmental directive in 1953:

One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

For these reasons, government attorneys have been instructed for more than twenty-five years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with departmental approval. However, despite continuing adherence to this policy by attorneys for the government, and despite the continuing validity of the policy's rationale, the federal criminal justice system continues to suffer from misuse of nolo contendere pleas, particularly in white collar crime cases.

As federal prosecutors focus more of their attention on white collar crime activities, greater numbers of defendants seek to dispose of the charges against them by means of nolo pleas, and the frequency with which such pleas are accepted by the courts is increasing. The acceptance of nolo pleas from affluent white collar defendants, as opposed to other types of defendants, lends credence to the view that a double standard of justice exists. Moreover, even though a white collar defendant whose nolo plea is accepted may not be sentenced more leniently than one who is required to plead guilty, such a defendant often persists in his/her protestations of innocence, maintaining that his/her plea was entered solely to avoid litigation and save business expense.

The continued adverse consequences to the criminal justice system of the misuse of nolo pleas-diminished respect for law, impairment of law enforcement efforts, and reduced deterrence-warrant re-examination of the government's response to such pleas. Heretofore, it was believed that a posture of non-consent by government attorneys would prevent the acceptance of nolo pleas except in extraordinary cases. Now the forthright expression of opposition is required. Accordingly, as stated in paragraph A above, federal prosecutors should henceforth oppose the acceptance of a nolo plea, unless the (responsible Assistant Attorney General) U.S. Attorney concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest. Such a determination might be made, for example, in an unusually complex antitrust case if the only alternative to a protracted trial is acceptance of a nolo plea.

9-27.520 OFFER OF PROOF

A. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged.

B. Comment

If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself/herself as technically liable perhaps, but not seriously culpable.

9-27.530 ARGUMENT IN OPPOSITION

A. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.

B. Comment

When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b), Federal Rules of Criminal Procedure, to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

9-27.600 ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR COOPERATION

9-27.610 NON-PROSECUTION AGREEMENTS GENERALLY

A. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

B. Comment

1. In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted. However, because of his/her involvement, the person may refuse to cooperate on the basis of his/her Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

a. First, if time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify, and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

b. Second, the person may be willing to cooperate if the charges or potential charges against him/her are reduced in number or degree in return for his/her cooperation and his/her entry of a guilty plea to the remaining

charges. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct, government attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in USAM 9-27.430, *supra*, to the extent practicable.

c. The third method for securing the cooperation of a potential defendant is by means of a court order under 18 U.S.C. Secs. 6001-6003. Those statutory provisions govern the conditions under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self-incrimination. In brief, under the so-called "use immunity" provisions of those statutes, the court may order the person to testify or provide other information, but neither his/her testimony nor the information he/she provides may be used against him/her, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these "use immunity" provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his/her privilege against compulsory self-incrimination. (See USAM 9-23.000).

d. Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he/she will not be prosecuted at all for what he/she has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

USAM 9-27.610 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official.

2. Unavailability or Ineffectiveness of Other Means

As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him/her a potential subject of prosecution. Each of the other methods-seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order-involves prosecuting the person or, at least, leaving open the possibility of prosecuting him/her on the basis of independently obtained evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he/she testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he/she testifies, his/her testimony is apt to be far more credible than if it appears to the trier of fact that he/she is getting off "scot free". Similarly, if his/her testimony is compelled by a court order, he/she cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his/her testimony will have been forced from him/her, not bargained for.

In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a

reduction of charges, the delay involved in bringing him/her to trial might prejudice the investigation or prosecution in connection with which his/her cooperation is sought, and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, as where use of the procedures of 18 U.S.C. Secs. 6001-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious development of an investigation, or where compliance with the statute of limitations or the Speedy Trial Act precludes timely application for a court order.

Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

3. Public Interest

If he/she concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary to the public interest. This "public interest" determination is one of the conditions precedent to an application under 18 U.S.C. Sec. 6003 for a court order compelling testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in USAM 9-27.620, *infra*.

4. Supervisory Approval

Finally, the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a U.S. Attorney must seek the approval of the U.S. Attorney or a supervisory Assistant U.S. Attorney. Departmental attorneys not supervised by a U.S. Attorney should obtain the approval of the appropriate Assistant Attorney General or his/her designee, and should notify the U.S. Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with USAM 9-27.640, *infra*, concerning particular types of cases in which an Assistant Attorney General or his/her designee must concur in or approve an agreement not to prosecute in return for cooperation.

9-27.620 CONSIDERATIONS TO BE WEIGHED

A. In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

1. The importance of the investigation or prosecution to an effective program of law enforcement;
2. The value of the person's cooperation to the investigation or prosecution; and
3. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

B. Comment

This paragraph is intended to assist federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather,

they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

1. Importance of Case

Since the primary function of a federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he/she should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

2. Value of Cooperation

An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his/her part of the bargain. See *United States v. Carter*, 454 F.2d 426 (4th Cir.1972); cf. *Santobello v. New York*, 404 U.S. 257 (1971). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which the cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

3. Relative Culpability and Criminal History

In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law, in return for that person's cooperation, it is also important to consider the degree of his/her apparent culpability relative to others who are subjects of the investigation or prosecution, as well as his/her history of criminal involvement. Of course, it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agency or with other prosecuting authorities who may have an interest in the person or his/her associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he/she has previously been the subject of a compulsion order under 18 U.S.C. Secs. 6001-6003 or has escaped prosecution by virtue of an agreement not to prosecute. The latter information may be available by telephone from the Witness Records Unit of the Criminal Division.

9-27.630 LIMITING SCOPE OF COMMITMENT

A. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

1. Non-prosecution based directly or indirectly on the testimony or other information provided; or
2. Non-prosecution within his/her district with respect to a pending charge or to a specific offense then known to have been committed by the person.

B. Comment

The attorney for the government should exercise extreme caution to ensure that his/her non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he/she should, in the first instance, attempt to limit his/her agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it later appears that the person's criminal involvement was more serious than it originally appeared to be; second, it encourages the witness to be as forthright as possible since the more he/she reveals the more protection he/she will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of the testimony and transactions covered, bearing in mind the possible effect of his/her agreement on prosecutions in other districts. In *United States v. Carter*, 454 F.2d 426 (4th Cir.1972), the court held that a conviction in the Eastern District of Virginia on charges of forgery and conspiracy involving stolen Treasury checks must be vacated and the case remanded for an evidentiary hearing to determine whether, in a prior related investigation and prosecution in the District of Columbia involving stolen government checks, a promise had been made to the defendant by an Assistant U.S. Attorney for the District of Columbia that he would not be prosecuted in that district or elsewhere for any related offense if he would plead guilty to one misdemeanor count and cooperate with federal investigators in naming his accomplices. The court indicated that if the facts were as the defendant contended, then the conviction in the Virginia district would have to be reversed and the indictment dismissed. No issue of double jeopardy was involved. The effect of this decision is that a non-prosecution agreement by a government attorney in one district may be binding in other judicial districts even though the U.S. Attorneys in the other districts are not privy to, or aware of, the agreement.

In view of the *Carter* decision, it is important that non-prosecution agreements be drawn in terms that will not bind other federal prosecutors without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement should communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter.

Finally, the attorney for the government should make it clear that his/her agreement relates only to non-prosecution and that he/she has no independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his/her cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in USAM 9-21.000, *supra*.

9-27.640 AGREEMENTS REQUIRING ASSISTANT ATTORNEY GENERAL APPROVAL

A. The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his/her designee, when:

1. Prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or

2. The person is:

a. A high-level federal, state, or local official;

b. An official or agent of a federal investigative or law enforcement agency; or

c. A person who otherwise is, or is likely to become, of major public interest.

B. Comment

USAM 9-27.640 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his/her designee. Subparagraph (1) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his/her approval before prosecution is declined or charges are dismissed. See USAM 6-2.410, 6-2.420 (tax offenses); USAM 9-2.111 (bankruptcy frauds); USAM 9-2.132, 9-2.146 (internal security offenses); and USAM 9-2.158(5), 9-2.134 (air piracy). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end result in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense. Accordingly, attorneys for the government should obtain the approval of the appropriate Assistant Attorney General, or his/her designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (2) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his/her designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

9-27.641 MULTI-DISTRICT (GLOBAL) AGREEMENT REQUESTS

No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the U.S. Attorney(s) in each affected district(s) and/or the Assistant Attorney General of the Criminal Division.

(REQUESTING DISTRICT/DIVISION SHALL MAKE KNOWN TO ANY OTHER AFFECTED DISTRICT(S)/DIVISION):

(1) The specific crimes allegedly committed in affected district(s) as disclosed by the defendant. (No prosecution agreement should be made to any crime not disclosed by the defendant.)

(2) Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.

(3) The proposed agreement to be made to the defendant and the applicable sentencing guideline range.

9-27.650 RECORDS OF NON-PROSECUTION AGREEMENTS

A. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney, and a copy should be forwarded to the Witness Records Unit of the Criminal Division.

B. Comment

The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of *Brady v. Maryland*, 373 U.S. 83 (1965) and *Giglio v. United States*, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them.

A copy of each non-prosecution agreement should be sent to the Criminal Division's Witness Records Unit. The Witness Records Unit will then be able to identify persons who have been the subject of such agreements, as well as to provide federal prosecutors, on request, with copies of the types of agreements used in the past.

9-27.700 PARTICIPATING IN SENTENCING

9-27.710 PARTICIPATION GENERALLY

A. During the sentencing phase of a federal criminal case, and the initial parole hearing phase, the attorney for the government should assist the sentencing court and the Parole Commission by:

1. Attempting to ensure that the relevant facts are brought to their attention fully and accurately; and
2. Making sentencing and parole release recommendations in appropriate cases.

B. Comment

Sentencing in federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed and to aid the Parole Commission in its determination of a release date for a prisoner within its jurisdiction. In discharging these duties, the attorney for the government should, as provided in USAM 9-27.720 and 9-27.760, *infra*, endeavor to ensure the accuracy and completeness of the information upon which the sentencing and release decisions will be based. In addition, as provided in USAM 9-27.730 and 9-27.760, *infra*, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed and with respect to the granting of parole.

9-27.720 ESTABLISHING FACTUAL BASIS FOR SENTENCE

A. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

1. Cooperate with the Probation Service in its preparation of the presentence investigation report;
2. Review material in the presentence investigation report that is disclosed by the court to the defendant or his/her attorney;
3. Make a factual presentation to the court when:
 - a. Sentence is imposed without a presentence investigation and report;
 - b. It is necessary to supplement or correct the presentence investigation report;
 - c. It is necessary in light of the defense presentation to the court; or
 - d. It is requested by the court; and
4. Be prepared to substantiate significant factual allegations disputed by the defense.

B. Comment

1. Cooperation with Probation Service

To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(c)(2), Federal Rules of Criminal Procedure, the report should contain "any criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service; especially in a district where the Probation Office is overburdened, this may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he/she uses, however, the attorney for the government should bear in mind that since portions of the report may be shown to the defendant or defense counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

2. Review of Presentence Report

Rule 32(c)(3)(A), Federal Rules of Criminal Procedure, requires the court, upon request, to permit the defendant or his/her counsel to read and comment upon such portions of the presentence report as do not reveal diagnostic opinion, confidential sources of information, or information which if disclosed might result

in harm to the defendant or others. Pursuant to Rule 32(c)(3)(C), Federal Rules of Criminal Procedure, any material disclosed to the defendant or his/her counsel must also be disclosed to the attorney for the government. Consequently, if the defense inspects portions of the presentence report, the attorney for the government should not forego his/her opportunity to examine the same material. Such examination may reveal factual inaccuracies in, or omissions from, the report that should be corrected. And even if no inaccuracies or omissions appear, such an examination will enable the attorney for the government to assess the validity of any comments made by the defense and, under Rule 32(a)(1), Federal Rules of Criminal Procedure, to respond appropriately.

3. Factual Presentation to Court

In addition to assisting the Probation Service with its presentence investigation and reviewing the portions of the presentence report disclosed to the defense, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(a)(1), Federal Rules of Criminal Procedure, which permits the defendant and his/her counsel to address the court and states that "(t)he attorney for the government shall have an equivalent opportunity to speak to the court." It has been suggested that failure to permit the government to address the court after the defense presentation may necessitate a remand for resentencing in order to afford the government its opportunity to speak to the court. See *United States v. Jackson*, 563 F.2d 1145, 1148 (4th Cir.1977).

The need to address the court concerning the facts relevant to sentencing may arise in four situations: (a) when sentence is imposed without a presentence investigation and report; (b) when necessary to correct or supplement the presentence report; (c) when necessary in light of the defense presentation to the court; and (d) when requested by the court.

a. Furnishing Information in Absence of Presentence Report

Rule 32(c)(1), Federal Rules of Criminal Procedure, authorizes the imposition of sentence without a presentence investigation and report, if the defendant consents or if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing discretion. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward, when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence investigation and report (such as where a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the government take advantage of the opportunity afforded by Rule 32(a)(1), Federal Rules of Criminal Procedure, to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he/she may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

b. Correcting or Supplementing Presentence Report

As noted above, whenever portions of the presentence report are shown to the defense, the attorney for the government should take advantage of his/her opportunity to examine the same material. If he/she discovers any significant inaccuracies or omissions, he/she should bring them to the court's attention at the sentencing hearing, together with the correct or complete information.

c. Responding to Defense Assertions

Having read the presentence report prior to the sentencing hearing, the defendant or his/her attorney may dispute specific factual statements made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report, while stressing any favorable information and drawing all inferences beneficial to the defendant. Some

degree of selectivity in the defense presentation is probably to be expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the attorney for the government should respond by correcting factual errors in the defense presentation, pointing out facts and inferences ignored by the defense, and generally reinforcing the objective view of the defendant and his/her offense expressed in the presentence report.

d. Responding to Court's Requests

There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

4. Substantiation of Disputed Facts

In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross-examination or, if there is good cause for nondisclosure of his/her identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. See *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir.1978).

9-27.730 CONDITIONS FOR MAKING SENTENCING RECOMMENDATIONS

A. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

1. The terms of a plea agreement require him/her to do so; or
2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

B. Comment

USAM 9-27.730 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require him/her to do so, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e. , agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g. , probation, a fine, incarceration); for imposition of sentence under a specific statute (e.g. , the Youth Corrections Act, 18 U.S.C. Secs. 5005 et seq. , or the Narcotic Addict Rehabilitation Act, 18 U.S.C. Secs. 4251 et seq.); for a specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

1. Recommendations Required by Plea Agreement

Rule 11(e)(1), Federal Rules of Criminal Procedure, authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his/her part of the bargain or risk having the plea invalidated. See *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Santobello v. United States*, 404 U.S. 257, 262 (1971).

2. Recommendations Warranted by the Public Interest

From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his/her supervisor-the U.S. Attorney or a supervisory Assistant U.S. Attorney, or the responsible Assistant Attorney General or his/her designee.

In considering the public interest question, the prosecutor should bear in mind the attitude of the court towards sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If he/she has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he/she may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney believes that a term of imprisonment is plainly warranted and that, under all the circumstances the public interest would be served by his/her making a recommendation to that effect, he/she should make such a recommendation even though the court has not invited or requested him/her to do so. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant make full restitution for actual damage or loss caused by the offense of which he/she was convicted, that he/she participate in community service activities, or that he/she desist from engaging in a particular type of business.

9-27.740 CONSIDERATIONS TO BE WEIGHED IN DETERMINING SENTENCING RECOMMENDATIONS

A. In determining what recommendation to make with respect to the sentence to be imposed, the attorney for the government should weigh all relevant considerations, including:

1. The seriousness of the defendant's conduct;
2. The defendant's background and personal circumstances;
3. The purpose or purposes of sentencing applicable to the case; and

4. The extent to which a particular sentence would serve such purpose or purposes.

B. Comment

When a sentencing recommendation is to be made by the government-whether as part of a plea agreement or as otherwise warranted in the public interest-the recommendation should reflect the best judgment of the prosecutor as to what would constitute an appropriate sentence under all the circumstances of the case. In making this judgment, the attorney for the government should consider any factors that he/she believes to be relevant, with particular emphasis on the four considerations specifically set forth in USAM 9-27.740: the seriousness of the defendant's conduct; the defendant's background and personal circumstances; the purpose or purposes of sentencing applicable to the particular case; and the extent to which a particular sentence would serve such purpose or purposes. In this connection, the prosecutor should bear in mind that, by offering a recommendation, he/she shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

1. Seriousness of Defendant's Conduct

The seriousness of the defendant's conduct should be assessed not only with reference to the type of crime committed and the penalty provided for the offense in the abstract, but also in terms of factors peculiar to the commission of the offense in the particular case. Among such factors might be circumstances attending the commission of the offense that aggravate or mitigate its seriousness, such as: the age of the victim; the number of victims; the defendant's motivation and culpability; the nature and degree of harm caused or threatened by the offense, including the reparability or irreparability of any damage caused; the extent to which the defendant profited from the offense; the degree to which the offense involved a breach of special trust, particularly public trust; the complicity of the victim; and public concern generated by the offense.

2. Defendant's Background and Personal Circumstances

In formulating a sentence recommendation, the attorney for the government should always consider the defendant's criminal history, the degree of his/her dependence on criminal activity for a livelihood, and his/her timely cooperation in the investigation or prosecution of others. Beyond these factors, it may also be appropriate to consider the defendant's age, education, mental and physical condition (including drug dependence), vocational skills, employment record, family ties and responsibilities, roots in the community, remorse or contrition, and willingness to assume responsibility for his/her conduct.

3. Applicable Sentencing Purposes

The attorney for the government should consider the seriousness of the defendant's conduct, and his/her background and personal circumstances, in light of the four purposes or objectives of the imposition of criminal sanctions:

- a. To deter the defendant and others from committing crime;
- b. To protect the public from further offenses by the defendant;
- c. To assure just punishment for the defendant's conduct; and
- d. To promote the correction and rehabilitation of the defendant.

The attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand,

the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced primarily to deter others from engaging in similar conduct.

4. Relationship Between Sentence and Purpose of Sentencing

Having in mind the purpose or purposes sought to be achieved by sentencing in a particular case, the attorney for the government should consider the available sentencing alternatives in terms of the extent to which they are likely to serve such purpose or purposes. For example, if the prosecutor believes that the primary objective of the sentence should be to encourage the rehabilitation of the defendant, he/she may conclude that a term of imprisonment would not be appropriate. If, on the other hand, the primary purpose of the sentence is to incapacitate the defendant from committing additional crimes, then a substantial term of imprisonment might be warranted. And, in a case involving neither the need for rehabilitation nor for protection of the public from further criminal acts by the defendant, the objectives of deterrence and just punishment might best be achieved by a substantial fine, with or without a short period of imprisonment.

9-27.750 DISCLOSING FACTUAL MATERIAL TO DEFENSE

A. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court.

B. Comment

Due process requires that the sentence in a criminal case be based on accurate information. See, e.g., *Moore v. United States*, 571 F.2d 179, 182-184 (3d Cir.1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. See, e.g., *United States v. Perri*, 513 F.2d 572, 575 (9th Cir.1975); *United States v. Rosner*, 485 F.2d 1213, 1229-30 (2d Cir.), cert. denied, 417 U.S. 950 (1974); *United States v. Robin*, 545 F.2d 775 (2d Cir.1976). USAM 9-27.750 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

Endnotes

1. This article was updated in the latter part of 1998 with substantial research assistance from Brian Rademacher, an attorney in the Federal Public Defender office in Tucson, Arizona.

PRETRIAL RELEASE AND DETENTION

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I. Nature of Right To Be Released Pretrial

See U.S. v. Salerno, 481 U.S. 739 (1987); U.S. v. Edwards, 430 A.2d 1321 (D.C. 1981).

II. Purpose of the Act

- A. Primary purpose to de-emphasize use of money bonds and to provide flexible alternatives to judges setting high bail.
- B. Act further intended to eliminate practice of detaining dangerous defendants by setting of high bail. 18 U.S.C. § 3142(c)(2).

U.S. v. Orta, 760 F.2d 887, 890 (8th Cir. 1985) (*en banc*) (Act prohibits using high financial conditions to detain defendants); see U.S. v. Badalamenti, 810 F.2d 17 (2d Cir. 1987); U.S. v. Holloway, 781 F.2d 124 (8th Cir. 1986).

- C. Thus, the Act (18 U.S.C. § 3142(b)) expressly provides that a defendant shall be released on OR or PR unless;
 - 1. defendant represents a serious flight risk; or
 - 2. defendant presents a danger to the community.

Notes

- Court cannot detain merely if it determines that OR or PR will not prevent flight or danger to community; it must nonetheless consider other conditions. Orta, 760 F.2d at 890; 18 U.S.C. § 3142(a).
- Bad legislative history; Congress suggests if court believes monetary amount is necessary to ensure appearance and defendant cannot meet that amount, court may detain defendant. See U.S. v. Gotay, 609 F. Supp. 156, 158 (S.D.N.Y. 1985); U.S. v. Mantecon-Zayas, 949 F.2d 548 (1st Cir. 1991).

- Some courts have held that a court need not set bail in an amount defendant can easily make and may maintain financial conditions even if it results in detention. U.S. v. Szott, 768 F.2d 159 (7th Cir. 1985); U.S. v. Westbrook, 780 F.2d 1185 (5th Cir. 1986) (may maintain financial conditions and order detention only if no other conditions will assure defendant's presence); U.S. v. McConnell, 842 F.2d 105 (5th Cir. 1988). See U.S. v. Jessup, 757 F.2d 378 (1st Cir. 1985); U.S. v. Wong-Alvarez, 779 F.2d 583 (11th Cir. 1985); U.S. v. Gotay, 609 F. Supp. 156 (S.D.N.Y. 1985); U.S. v. Lemos, 876 F. Supp. 58 (D.N.J. 1995).
- Unclear who must shoulder burden of proving financial conditions cannot be met. Szott suggests defendant has burden, although it does not define burden and merely holds that a bare affidavit claiming lack of ability to meet financial conditions insufficient. U.S. v. Szott, 768 F.2d 159 (7th Cir. 1985).
- If defendant cannot meet financial conditions and appeals to district court, district court can order detention. U.S. v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc).
- If property is used to secure bond, government can't require property be unencumbered. U.S. v. Frazier, 772 F.2d 1451 (9th Cir. 1985).
- Some courts have expressed concerns about court policies re: property bonds if the policies prevent release. See U.S. v. Price, 773 F.2d 1526 (11th Cir. 1985).
- Government can obtain hearing on source of funds. § 3142(g)(4).

III. Procedural Aspects of the Act

A. Timing of Request for Detention

1. Government must request the defendant's detention at initial appearance. 18 U.S.C. § 3142(f).

U.S. v. Payden, 759 F.2d 202 (2d Cir. 1985); U.S. v. O'Shaughnessy, 764 F.2d 1035, vacated on reh'g as moot, 772 F.2d 112 (5th Cir. 1985); U.S. v. Holloway, 781 F.2d 124 (8th Cir. 1986); see U.S. v. Al-Azzawy, 768 F.2d 1141 (9th Cir. 1985). But see U.S. v. King, 818 F.2d 112 (1st Cir. 1987) (first appearance requirement subject to harmless error standard and is not to be interpreted overly literally); U.S. v. Medina, 775 F.2d 1398 (11th Cir. 1985) (delayed motion construed as motion to revoke release)

Court may reopen hearing if newly discovered evidence comes to Court's attention. 18 U.S.C. § 3142(f).

- New evidence, if proffered by Government, must not have been available at first hearing. U.S. v. Flores, 856 F.Supp. 1400 (E.D. Cal. 1994); see U.S. v. Holloway, 781 F.2d 124 (8th Cir. 1986) (new evidence must be exceptional to justify new detention hearing); U.S. v. Hare, 873 F.2d 796 (5th Cir. 1989) (court refuses to reopen hearing to allow family to testify - not new evidence). Accord U.S. v. Dillion, 938 F.2d 1412 (1st Cir. 1991).

Notes

- Entire issue of time requirements brought into question by U.S. v. Montalvo- Murillo, 110 S.Ct. 2072 (1990).

- If defendant not represented at initial appearance, court may order hearing within five days. U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985).

- District court may order detention hearing at initial appearance of defendant before it even if no request for detention made before magistrate. U.S. v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc).

- District court may revoke release even without Government request. U.S. v. Gebro, 948 F.2d 1118 (9th Cir. 1991).

- If defendant is arrested out of district or initially appears before a magistrate and case is transferred to another magistrate, "initial appearance" is when defendant appears in charging district. U.S. v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986); U.S. v. Valenzuela-Verdigo, 815 F.2d 1011 (5th Cir. 1987); U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986); U.S. v. Medina, 775 F.2d 1398 (11th Cir. 1985).

- Defendant entitled to bail hearing in arresting district even if charging district issues no bail warrant. U.S. v. Thomas, 992 F. SUPP. 782 (D. Virgin Is. 1998).

B. Grounds for request. 18 U.S.C. § 3142(f).

1. Government believes person poses a serious flight risk.

2. Government believes defendant will threaten witnesses, etc.

3. Person is charged with:

- a) a crime of "violence," which is defined by 18 U.S.C. § 3156(a)(4) as:

- (A) an offense that has as an element of the use, attempted use, or threatened use of physical force against the person or property of another;
- (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
- (C) any felony charged under sexual abuse or abuse of children statutes.
- b) an offense involving death penalty or life imprisonment;
- c) a drug offense involving penalty of ten years or more; or
- d) any felony after defendant has committed two or more crimes of violence or drug offenses.

Notes

- Some issue whether "crime of violence" is to be determined by looking at nature of crime or by facts of commission. See U.S. v. Hardon, 6 F. Supp.2d 673 (W.D. Mich. 1998) (categorical); U.S. v. Epps, 987 F. Supp. 22 (D. D.C. 1997)(facts); U.S. v. Carter, 996 F. Supp. 260 (W.D. N.Y. 1998)(categorical).
- Conspiracy to commit a violent crime probably qualifies. U.S. v. Mitchell, 23 F.3d 1 (1st Cir. 1994).
- To obtain detention, government must charge defendant with crime of violence. See U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); Contra U.S. v. Bess, 678 F. Supp. 929 (D. D.C. 1988).
- U.S. v. Byrd, 969 F.2d 106 (5th Cir. 1992) (case must involve violence);
- Possession of gun alone may not be crime of violence under § 3142. See U.S. v. Singleton, 182 F.3d 7 (D.C. Cir. 1999)(and cases cited therein.) Contra U.S. v. Dillard, 214 F.3d 88 (2d Cir. 2000); U.S. v. Spry, 76 F. Supp.2d 719 (S.D. W. Va. 1999). But see U.S. v. Reynolds, 956 F.2d 192 (Cir. 1992) (economic danger can be used to deny bail pending appeal).
- Unless defendant will intimidate witnesses or is a flight risk, detention not available if defendant charged with economic crime; must be crime identified above. U.S. v. Himler, 797 F.2d 156 (3d Cir. 1986). Accord U.S. v. Friedman, 837 F.2d 84 (2d Cir. 1988); U.S. v. Simon, 760 F. Supp. 495 (D. V.I. 1990). However, defendant can be ordered as part of

release order to stop activities which pose economic danger. U.S. v. Harris, 920 F. Supp. 132 (D.Nev. 1996).

- Danger alleged by the government must relate to federal case - unrelated allegation of danger to others insufficient. U.S. v. Ploof, 851 F.2d 7 (1st Cir. 1988); U.S. v. Byrd, 969 F.2d 106 (5th Cir. 1992).

- Prior arrests, not resulting in convictions, insufficient ground to base danger to community finding. U.S. v. Leyba, 104 F. SUPP.2d 1182, 1184 n.2 (S.D. Iowa 2000).

- Refusal to accept jurisdiction of court and generally making threats against others sufficient ground for detention. U.S. v. Ippolito, 930 F. Supp. 581 (M.D. Fla. 1996).

C. If request for detention is made by government, court shall order defendant detained until hearing is held. 18 U.S.C. § 3142(f); however, once hearing begins, court may release defendant. Id.

D. Continuance for hearing.

1. Temporary detention (18 U.S.C. § 3142(d)). Ten-day continuance allowed if the defendant:

- a) at time of offense, was on bail for a felony charge;
- b) is awaiting sentencing on any charge;
- c) is on parole or probation; or
- d) is an illegal alien;

AND

- e) the person poses a flight risk or danger to community.

Notes

- Unclear what burden is placed upon government to secure this continuance. See U.S. v. Buck, 609 F. Supp. 713 (S.D.N.Y. 1985).

- Ninth Circuit has held that ten-day continuance may not be used by the government as subterfuge to delay hearing. U.S. v. Al-Azzawy, 768 F.2d 1141 (9th Cir. 1985).

- Burden on defendant to show citizenship. 18 U.S.C. § 3142(d).

2. Absent temporary detention, government may only have three days, defendant can obtain five-day continuance. 18 U.S.C. § 3142(f).

Notes

- Weekends and holidays not included.
- Unclear whether government may get three days in addition to ten days provided by temporary detention. U.S. v. Al-Azzawy, 768 F.2d 1141 (9th Cir. 1985) (suggests three days improper after ten-day delay); U.S. v. Lee, 783 F.2d 92 (7th Cir. 1986) (ten-day request tolls time for a section 3142(f) hearing); U.S. v. Vargas, 804 F.2d 157 (1st Cir. 1986) (Gov. can request perm. detention anytime during ten-day temp. detention); U.S. v. Becerra-Cobo, 790 F.2d 427 (5th Cir. 1986) (same); U.S. v. Alatishe, 768 F.2d 364 (D.C. Cir. 1985) (same); U.S. v. Moncado-Pelaez, 810 F.2d 1008 (11th Cir. 1987); U.S. v. Daniels, 622 F. Supp. 178 (N.D. Ill. 1985) (if ten-day temporary properly requested, government can later seek § 3142(f) detention).
- Unclear whether three-day continuance request by government requires some justification; statute seemingly makes granting of request automatic. 18 U.S.C. § 3142(f); U.S. v. Lee, 783 F.2d 92 (7th Cir. 1986).
- During continuance, defendant "shall be detained." Also def. can be examined to determine narcotics addiction. § 3142(f)(2)(B).
- Further continuance virtually impossible to grant; must be based upon "good cause." U.S. v. Al-Azzawy, 768 F.2d 1141 (9th Cir. 1985) (defendant may not waive time; attorney conflicts are insufficient cause for continuance; court may not continue on its own motion); U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985) (convenience of court, attorney not good cause). But see U.S. v. Coonan, 826 F.2d 1180 (2d Cir. 1987) (five-day rule not mandatory when defendant in state custody); U.S. v. King, 818 F.2d 112 (1st Cir. 1987) (defendant's counsel can waive time limits - rule of reason applicable); U.S. v. Clark, 865 F.2d 1433 (4th Cir. 1989) (en banc) (same); U.S. v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986) (continuance permitted to obtain witnesses).
- No remedy for violation of time limits - Government is still free to seek detention. U.S. v. Montalvo-Murillo, 110 S. Ct. 2072 (1990).

IV. The Detention Hearing. 18 U.S.C. § 3142(f).

A. Standard for detention.

1. Flight risk by preponderance of evidence.

2. Danger to community by clear and convincing evidence.

U.S. v. Vortis, 785 F.2d 327 (D.C. Cir. 1986); U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985); U.S. v. Hazime, 762 F.2d 34 (6th Cir. 1985); U.S. v. Portes, 786 F.2d 758 (7th Cir. 1985); U.S. v. Orta, 760 F.2d 887 (8th Cir. 1985) (*en banc*); U.S. v. Motamedi, 767 F.2d 1403 (9th Cir. 1985).

Notes

- Court need not find that defendant poses both flight risk and danger. U.S. v. Askari, 608 F. Supp. 1045 (E.D. Pa. 1985).
- Defendant need not show that release conditions will be equivalent of jail; only need conditions that will reasonably assure defendant's presence. See Kin-Hong v. U.S., 926 F. Supp. 1180 (D. Mass. 1996).
- Clear and convincing evidence means proof that particular defendant actually poses a danger, not that defendant in theory poses a danger. U.S. v. Patriarca, 948 F.2d 789 (1st Cir. 1991).

B. Presumptions. 18 U.S.C. § 3142(e).

1. Rebuttable presumption that defendant shall be detained if:

- a) defendant has been convicted of violent crime, capital offense, drug offense, or any felony after committing two violent crimes/drug offenses;

AND

- b) offense was committed while defendant was on bail;

AND

- c) less than five years from conviction date/release date for offense described in a. above;

OR

- d) court has probable cause to believe that defendant has committed drug offense with penalty of ten years or more or is subject to prosecution under 18 U.S.C. § 924(c), § 956(a), or § 2332(b).

Notes

- Presumption does not apply unless defendant is charged with drug, gun, or sexual abuse offense. U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); U.S. v. Shaker, 665 F. Supp. 698 (N.D. Ind. 1987) (arson not presumption crime).
- Presumption in drug offense arguably intended to prevent flight. See generally U.S. v. Jessup, 757 F.2d 378, 395-98 (1st Cir. 1985) (remarks from hearings on Bail Reform Act).
- Single drug charge must exceed ten-year limit; cannot aggregate charges. U.S. v. Hinote, 789 F.2d 1490 (11th Cir. 1986).

2. Indictment alone represents probable cause.

U.S. v. Vargas, 804 F.2d 157 (1st Cir. 1986); U.S. v. Contreras, 776 F.2d 51 (2d Cir. 1985); U.S. v. Suppa, 799 F.2d 115 (3d Cir. 1986); U.S. v. Trosper, 809 F.2d 1107 (5th Cir. 1987); U.S. v. Hazime, 762 F.2d 34 (6th Cir. 1985); U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986); U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985).

3. Manner of establishing probable cause absent indictment.

Hearsay permissible provided court finds information reliable. U.S. v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985) (same); U.S. v. Portes, 786 F.2d 758 (7th Cir. 1985); But see U.S. v. Suppa, 799 F.2d 115 (3d Cir. 1986) (court expresses doubt that probable cause can be established by proffer); U.S. v. Delker, 757 F.2d 1390 (3d Cir. 1985) (admission of hearsay discretionary); U.S. v. Jeffries, 679 F. SUPP. 1114 (M.D. Ga. 1988) (court must establish reliability of hearsay evidence).

Note

- In addition to showing probable cause that defendant committed an offense involving the presumption, the defendant must be charged with such an offense as well. U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985). Contra U.S. v. Bess, 678 F. SUPP.929 (D. D.C. 1988).

C. Effect of presumption.

1. If presumption is invoked, defendant need only present some credible evidence showing defendant is not flight risk or danger to the community, e.g., defendant has burden of production only.

U.S. v. Alatishe, 768 F.2d 364 (D.C. Cir. 1985); U.S. v. Jessup, 757 F.2d 378 (1st Cir.

1985); U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); U.S. v. Perry, 788 F.2d 100 (3d Cir. 1986); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985); U.S. v. Hazime, 762 F.2d 34 (6th Cir. 1985); U.S. v. Portes, 786 F.2d 758 (7th Cir. 1985); U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985); U.S. v. Freitas, 602 F. Supp. 1283 (N.D. Cal. 1985); U.S. v. Moore, 607 F. Supp. 489 (N.D. Cal. 1985).

Notes

- Can use pretrial services report as "some credible evidence." See U.S. v. Nicholas, 681 F. SUPP. 527 (N.D. Ill. 1988) (uncorr. evid. re background rebuts presume; but bad looks at pros. represents a danger); U.S. v. Hare, 873 F.2d 796 (5th Cir. 1989) (court suggests that pretrial service report may rebut presumption).
- Use of electronic bracelet "arguably" rebuts presumption. U.S. v. O'Brien, 895 F.2d 810 (1st Cir. 1990); see Kin-Hong v. U.S., 926 F. Supp. 1180 (D. Mass. 1996); U.S. v. Leyba, 104 F. Supp. 2d 1182 (S. D. Iowa 2000).
- Can introduce evidence of polygraph to try to rebut presumption. U.S. v. Bellomo, 944 F. Supp. 1160 (S.D. N.Y. 1996).
- Can argue cross-examination of Gov. witnesses may rebut presumption. U.S. v. Gourley, 936 F. Supp. 412 (S.D. Tex. 1996).
- Evidence that def. was not "typical" drug dealer rebuts presumption. U.S. v. Giampo, 755 F. Supp. 665 (W. D. Pa. 1990).
- Jessup and Fortna hold that some credible evidence does not eliminate presumption; it still may be considered by court. See U.S. v. Jackson, 823 F.2d 4 (2d Cir. 1987).

2. If presumption is un rebutted, unclear whether detention mandated.

U.S. v. Volksen, 766 F.2d 190 (5th Cir. 1985) (un rebutted presumption enough); U.S. v. Alatishe, 768 F.2d 364 (D.C. Cir. 1985) (same); U.S. v. Suppa, 799 F.2d 115 (3d Cir. 1986) (same); U.S. v. Kouyoumdjian, 601 F. Supp. 1506 (C.D. Cal. 1985) (un rebutted presumption justified detention); U.S. v. Maktabi, 601 F. Supp. 607 (S.D.N.Y. 1985) (un rebutted presumption enough).

But see U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986) (can't detain on presumption alone unless there is proof of future dangerousness); see U.S. v. Jackson, 845 F.2d 1262 (5th Cir. 1988) (excellent decision holding presumption and general allegations of danger insufficient); U.S. v. Cox, 635 F. Supp. 1047 (D. Kan. 1986) (un rebutted presumption not enough); U.S. v. Jones, 614 F. Supp. 96 (E.D. Pa. 1985) (defendant did not rebut

presumption, but government failed to show clear and convincing evidence of danger); U.S. v. Jeffries, 679 F. SUPP. 1114 (M.D. GA 1988) (Government cannot rely on indictment alone; guns and drug charges not necessarily enough), U.S. v. Bell, 673 F. SUPP. 1429 (E.D. Mich. 1987) (hearsay may not satisfy clear/convincing evidence); U.S. v. Moore, 607 F. Supp. 489 (N.D. Cal. 1985) (clear and convincing standard remains even when presumption exists).

Notes

- Some courts have held hearsay may be enough to establish probable cause, but may not be sufficient to carry burden.

U.S. v. Motamedi, 767 F.2d 1403 (9th Cir. 1985); U.S. v. Hazzard, 598 F. Supp. 1442 (N.D. Ill. 1984).

D. Factors to be considered at detention hearing. 18 U.S.C. § 3142(g).

1. Nature of offense, including whether offense is violent or involves a narcotic drug.

See U.S. v. Yeaple, 605 F. Supp. 85 (M.D. Pa. 1985) (visual depiction of minors engaged in sexual conduct form of violence). U.S. v. Simon, 760 F. SUPP. 495 (D. V.I. 1990) (jury tampering not dangerous crime).

2. Weight of evidence.

Ninth Circuit holds that this is the least important factor because court cannot make pretrial determination of guilt. U.S. v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985).

3. History of defendant/characteristics.

4. Mental/ financial/ family ties/ employment/ criminal history/ record of appearances/ medical status.

See U.S. v. Scarpa, 815 F. Supp. 88 (E.D. N.Y. 1993) (def. with AIDS could be released to hospital if def. paid for care and for Marshal to guard him).

Request for psychiatric exam re: insanity defense not ground for revocation of release. U.S. v. Gomez-Borges, 91 F. SUPP.2d 477 (D. Puerto Rico 2000).

U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986) (can't rely on past indications of dangerousness alone).

Foreign nationality not necessarily enough to indicate flight risk. U.S. v. Motamedi, 767 F.2d 1403 (9th Cir. 1985); See U.S. v. Paterson, 780 F.2d 883 (10th Cir. 1986); U.S. v. Townsend, 897 F.2d 989 (9th Cir. 1990).

"Ties to community" means both community of arrest and community where defendant normally resides. U.S. v. Townsend, 897 F.2d 989 (9th Cir. 1990).

Ct. must hear testimony of family members if def. asks to present witnesses. U.S. v. Torres, 929 F.2d 291 (7th Cir. 1991).

5. Probation/parole status.

6. Nature of danger posed to community if defendant is released.

See U.S. v. Yeaple, 605 F. Supp. 85 (M.D. Pa. 1985)(possession of material involving minors poses threat to community); U.S. v. Cocco, 604 F. Supp. 1060 (M.D. Pa. 1985) (same). Contra U.S. v. Friedman, 837 F.2d 48 (2d Cir. 1988); U.S. v. Byrd, 969 F.2d 106 (5th Cir. 1992).

U.S. v. Moore, 607 F. Supp. 489 (N.D. Cal.1985) ("compelling" evidence that defendant committed drug offense insufficient to show danger to community).

7. Amount of time before trial commences.

See U.S. v. Gelfuso, 838 F.2d 358 (9th Cir. 1988)(Due Process requires case-by-case analysis); accord, U.S. v. Hare, 873 F.2d 796 (5th Cir. 1989). U.S. v. Colombo, 777 F.2d 96 (2d Cir. 1985) (may be a factor); accord U.S. v. Rios, 846 F.2d 167 (2d Cir. 1988).

U.S. v. Jackson, 823 F.2d 4 (2d Cir. 1987)(examine defendant's involvement in continuances); see U.S. v. Theron, 782 F.2d 1510 (10th Cir. 1986); U.S. v. LoFranco, 620 F. Supp. 1324 (N.D. N.Y. 1985); U.S. v. Acceturo, 783 F.2d 382 (3d Cir. 1986); U.S. v. Gato, 750 F. Supp. 664 (D.N.J. 1990) (Ct. orders release of defendants because of excessive delay).

But see U.S. v. Melendez-Carrion, 820 F.2d 56 (2d Cir. 1987) (19 month detention OK); U.S. v. Zannino, 798 F.2d 544 (1st Cir. 1986) (extended detention does not require release). U.S. v. Quartermaine, 913 F.2d 910 (11th Cir. 1990) (10 month delay OK).

E. Hearing procedure. 18 U.S.C. § 3142(f).

1. Defendant may testify, present information, present witnesses, cross-examine witnesses who appear.

See U.S. v. Davis, 845 F.2d 412 (2d Cir. 1988) (defendant entitled to hearing and to testify; cannot order detention on government allegations alone).

2. Ability of defendant to receive discovery under Rule 16, Brady material, and to issue subpoenas subject to discretion of court.

U.S. v. Lewis, 769 F. Supp. 1189 (D. Kan. 1991).

3. Either government or defendant can present information by proffer or through hearsay, as rules of evidence do not apply.

U.S. v. Lafontaine, 210 F.3d 125 (2d Cir. 2000); U.S. v. Smith, 79 F.3d 1208 (D. C. Cir. 1996); U.S. v. Martir, 782 F.2d 1141 (2d Cir. 1986) (government can use proffers); U.S. v. Cardenas, 784 F.2d 937 (9th Cir. 1986); See generally U.S. v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985) (use of hearsay). But see U.S. v. Hammond, 44 F. SUPP.2d 743 (D. Md. 1999) (Gov. proffer may be insufficient; court can order live testimony); U.S. v. Cabrera-Ortigoza, 2000 WL 1585081 (S. D. Cal. 2000) (court can order witnesses to appear).

Notes

- Crime Act of 1994 allows victim in sex cases to be heard re: danger.
- Good language re: fact that hearing should be meaningful. U.S. v. Hernandez, 747 Supp. 846 (D. P.R. 1990).
- Evidence of danger should involve quantifiable, objective evidence. U.S. v. Motamedi, 767 F.2d 1403, 1407 (9th Cir. 1985).
- Hearsay may be insufficient for government to carry burden. (See above).
- Illegally seized evidence can be admitted at detention hearing. U.S. v. Viers, 637 F. Supp. 1343 (W.D. Ky. 1986); See U.S. v. Angiulo, 755 F.2d 969 (1st Cir. 1985) (court can use electronic surveillance evidence even if defendant challenges legality).
- Factual representations of counsel are inadmissible. U.S. v. Yeaple, 605 F. Supp. 85, 87 (M.D. Pa. 1985) (nature of ruling here unclear).
- Defendant apparently has right to call government agents who testified re: probable cause if they will testify about weight of evidence. U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985); See U.S. v. Perry, 788 F.2d 100 (3d Cir. 1986) (defendant afforded right to call adverse witnesses).

- Defendant may be required to make proffer as to testimony of "government witnesses" before calling them. U.S. v. Cabrera-Ortigoza, 2000 WL 1585081 (S. D. Cal. 2000). U.S. v. Edwards, 430 A.2d 1321, 1338 (D.C. 1981) (District of Columbia Detention Act); U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987) (conditional right to call adverse witnesses).
- See U.S. v. Delker, 757 F.2d 1390, 1398 n.4 (3d Cir. 1985) (court not required to address issue when confrontation of witnesses appropriate but recognizes problem).
- Cases in other contexts suggest that due process requires that def. be allowed to confront and cross-examine agents. See U.S. v. Bell, 785 F.2d 640 (8th Cir. 1986); U.S. v. Zentgraf, 20 F.3d 906 (8th Cir. 1994).
- U.S. v. Shakur, 817 F.2d 189 (2d Cir. 1987) (court indicates that inability to cross-examine undermines integrity of fact finding process).
- Conclusory proffer by government may be sufficient - defendant must make some challenge to proffer in order to require government to support request for detention with specific allegation/evidence. U.S. v. Martir, 782 F.2d 1141 (2d Cir. 1986).
- Unclear whether in camera submissions appropriate. Some courts have held this to be improper absent extraordinary circumstances. U.S. v. Acceturro, 783 F.2d 382 (3d Cir. 1986); U.S. v. Leon, 766 F.2d 77, 80 n.3 (2d Cir. 1985). Contra U.S. v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985); U.S. v. Terrones, 712 F. Supp. 786 (S. D. Cal. 1989).
- No logical reason why proffer from defendant that government allegations are false won't satisfy burdens; however, it may be malpractice to actually put defendant on stand. U.S. v. Frappier, 615 F. Supp. 51 (D. Mass. 1985); U.S. v. Ingnaham, 832 F.2d 229 (1st Cir. 1987) (statements by defendant at det. hearing admissible at trial). But see U.S. v. Perry, 788 F.2d 100 (3d Cir. 1986) (court should give defendant use immunity to protect 5th Amendment right). See U.S. v. Parker, 848 F.2d 61 (5th Cir. 1988) (no Fifth Am. problem with Act).
- Unclear whether counsel's statement is admissible at trial - informal statements during bail negotiations not admissible. U.S. v. Valencia, 826 F.2d 169 (2d Cir. 1987).
- If prejudice to defendant is possible, bail hearing may be closed to public. U.S. v. Gotti, 753 F. Supp. 443 (E.D. N.Y. 1990).
- If defendant asks to call witnesses, ct. cannot force proffer instead. U.S. v. Torres, 929 F.2d 291 (7th Cir. 1991).
- Under 18 U.S.C. § 2518(9), defendant entitled to wiretap application and order if evidence

of taps to be introduced at hearing. U.S. v. Salerno, 794 F.2d 64 (2d Cir. 1986), rev'd on other grounds, 107 S. Ct. 2095 (1987); see In re Boston Globe, 729 F.2d 47 (1st Cir. 1984).

F. Detention alternatives/release conditions. 18 U.S.C. § 3142(c).

1. Stay in custody of person.
2. Maintain employment.
3. Stay in school.
4. Not associate with others.
5. Not contact victim/witnesses.
6. Abide by curfew.
7. Not possess firearms.
8. Not use alcohol/drugs.
9. Participate in drug treatment program.
10. Post bond.
11. Go to jail after work.

Notes

- These conditions must be considered before detention ordered. U.S. v. Orta, 760 F.2d 887, 890 (8th Cir. 1985).

- Conditions for release need not guarantee safety or presence, but need only "reasonably assure" both. 18 U.S.C. § 3142(e). U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985); U.S. v. Orta, 760 F.2d 887 (8th Cir. 1985) (en banc).

- Ability to flee not sufficient to justify detention. U.S. v. Himler, 797 F.2d 156 (3d Cir. 1986).

- Cannot order defendant to undergo psychiatric examination to determine dangerousness, although psychiatric treatment may be a condition of release. U.S. v. Martin-Trigona, 767 F.2d 35 (2d Cir. 1985).

- Court can order defendant to refrain from engaging in some employment activities to protect community. U.S. v. Harris, 920 F. Supp. 132 (D. Nev. 1996).

G. If defendant is ordered detained, court must issue an order explaining detention. If defendant is released, court must set forth the conditions of release.

U.S. v. Westbrook, 780 F.2d 1185 (5th Cir. 1986) (order must make specific factual findings); see U.S. v. Quinones, 610 F. Supp. 74 (S.D.N.Y. 1985) (failure of magistrate

to enter written order resulted in defendant's release); but see U.S. v. Peralta, 849 F.2d 625 (D.C. Cir. 1988) (transcript of ruling sufficient).

- H. If defendant detained conditions of confinement must not be punitive, danger defendant poses must be to community, not other inmates.

U.S. v. Gotti, 755 F. Supp. 1159 (E.D. N.Y. 1991).

- I. Defendant can be temporarily released in marshal's custody to work on defense. § 3142(I)(4).

V. Revocation of Release Order. 18 U.S.C. § 3148(b).

- A. Court may revoke prior release order if:

1. There is probable cause to believe that the defendant has committed a new offense or there is clear and convincing evidence that defendant has violated condition of release,

AND

2. After review of factors in section 3142(g), court determines that release is inappropriate.

- B. If defendant is charged with a felony while on release, rebuttable presumption arises that defendant should not be released.

Notes

See U.S. v. Aron, 904 F.2d 221 (5th Cir. 1990) for general discussion of § 3148. See also U.S. v. Wilson, 820 F. Supp. 1031 (N.D. Tex. 1993).

- It is clear that bail cannot be revoked automatically if defendant is charged with new offense, because section 3148(b) requires court to examine factors in section 3142(g) before deciding whether to detain defendant. If court attempts to detain defendant on basis of finding that there is probable cause to believe that defendant committed new offense, argue that this is denial of bail without a hearing and is unconstitutional. See Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), vacated as moot sub nom., Murphy v. Hunt, 455 U.S. 478 (1982).

- See U.S. v. Santiago, 826 F.2d 499 (7th Cir. 1987) (defendant need not be convicted of new crime to revoke - probable cause enough).

- Court may revoke release order if circs. change; denial of supp. motion sufficient. U.S. v. Peralta, 849 F.2d 625 (D.C. Cir. 1988).

VI. Review of Detention Order. 18 U.S.C. § 3145.

- A. Either side may seek review of order before district court, although magistrate may reconsider order. 18 U.S.C. § 3142(f) (hearing may be reopened if new information becomes available); see U.S. v. Leon, 766 F.2d 77, 80 (2d Cir. 1985).

Notes

- Unclear whether government can keep defendant detained while it seeks review of release order; oftentimes governed by local rule.
- Review in out-of-district cases must be sought in charging district, not district of arrest. U.S. v. Evans, 62 F.3d 1233 (9th Cir. 1995); U.S. v. Torres, 86 F.3d 1029 (11th Cir. 1996). But see U.S. v. Xulam, 84 F.3d 441 (D.C. Cir. 1996) (D.C. Cir. reviews appeal even though defendant charged in California; no discussion of jurisdiction issue). See also U.S. v. Thomas, 992 F. SUPP.782 (D. V.I. 1998) (court hears appeal).

- B. Review must be undertaken promptly. 18 U.S.C. § 3145(b).

Notes

- 30 day delay not "promptly" - defendant ordered released on conditions. U.S. v. Fernandez-Alfonzo, 813 F.2d 1571 (9th Cir. 1987).
- 2 month delay may not be "promptly," but Fifth Circuit refuses to release defendant because no remedies are contained in statute. U.S. v. Barker, 876 F.2d 475 (5th Cir. 1989).

- C. Standard of review in district court is generally held to be de novo.

See U.S. v. Leon, 766 F.2d 77 (2d Cir. 1985); U.S. v. Delker, 757 F.2d 1390 (3d Cir. 1985); U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985); U.S. v. Maull, 773 F.2d 1479 (8th Cir. 1985) (*en banc*); U.S. v. Koenig, 912 F.2d 1190 (9th Cir. 1990); U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985); U.S. v. Ramey, 602 F. Supp. 821 (E.D. N.C. 1985).

- D. Unclear whether defendant entitled to a new hearing. Courts have generally held parties are allowed to submit additional evidence.

See U.S. v. Delker, 757 F.2d 1390 (3d Cir. 1985) (district court may conduct new evidentiary hearing); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985); U.S. v. Allen, 605 F. Supp. 864, 867 (W.D. Pa. 1985); U.S. v. Askari, 608 F. Supp. 1045 (E.D. Pa. 1985); see U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987) (no right to complete de novo hearing before district court).

Notes

- U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985) requires district court to undertake independent fact finding; however, if no new evidence presented dist. court may adopt magistrate's findings. U.S. v. King, 849 F.2d 485 (11th Cir. 1988).
- District court should consider facts independently, and no deference should be given to Magistrate's legal conclusions. U.S. v. Koenig, 912 F.2d 1190 (9th Cir. 1990).

E. Appeal may be made to circuit court by either party. 18 U.S.C. § 3145(c).

1. Notice of appeal by defendant must be filed within ten days.
2. Appeal must be heard on expedited basis.

U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985).

3. Usually handled as a motion.

U.S. v. Perdomo, 765 F.2d 942 (9th Cir. 1985).

4. Standard of review unclear.

a) Clearly erroneous standard.

U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985); U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985).

b) Supported by proceedings below.

U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985); U.S. v. Barker, 876 F.2d 475 (5th Cir. 1989) (abuse of discretion standard is same as "supported by proceedings below").

c) Mixed review.

U.S. v. O'Brien, 895 F.2d 810 (1st Cir. 1990); U.S. v. Hazime, 762 F.2d 34 (6th Cir.

1985); U.S. v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc); U.S. v. Motamedi, 767 F.2d 1403 (9th Cir. 1985);
U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985).

d) De novo.

U.S. v. Delker, 757 F.2d 1390 (3d Cir. 1985).

VII. Bail Pending Appeal Or After Conviction. 18 U.S.C. § 3143.

- A. Change in presumption after conviction: defendant shall be detained unless guidelines indicate probation is possible or s/he demonstrates by clear and convincing evidence that s/he is not a flight risk/danger, unless crime is crime of violence or drug crime. Then release is possible only if (1) ct. plans to grant Rule 29 motion or new trial; or (2) Gov. recommends no time; and (3) ct. finds by clear/conv. evidence. def. is not flight risk or danger.

Notes

- Bail pending supervised release revocation governed by § 3143. U.S. v. Loya, 23 F.3d 1529 (9th Cir. 1994).

- Be careful; voluntary surrender may not be authorized. See U.S. v. Mostrom, 11 F.3d 93 (8th Cir. 1993).

- B. Release pending appeal: Defendant must be detained if convicted of violent/drug offense unless except circs shown. See below. Otherwise, def. can be released only if s/he shows by clear/convincing evidence that def. not flight risk/danger and that appeal will raise "substantial issue of law" resulting in reversal, new trial, sentence of probation, or reduced term less than amount def. has spent in custody.
- C. General interpretation of section 3143(b) is that defendant need only show that issue raised is novel or not clearly controlled by precedent, and that if the defendant is successful on appeal, conviction will likely be reversed.

U.S. v. Perholtz, 836 F.2d 554 (D.C. Cir. 1987); U.S. v. Randell, 761 F.2d 122 (2d Cir. 1985); U.S. v. Miller, 753 F.2d 19 (3d Cir. 1985); U.S. v. Valera-Elizondo, 761 F.2d 1020 (5th Cir. 1985); U.S. v. Bilanzich, 771 F.2d 292 (7th Cir. 1985); U.S. v. Powell, 761 F.2d 1227 (8th Cir. 1985) (en banc); U.S. v. Handy, 761 F.2d 1279 (9th Cir. 1985); U.S. v. Affleck, 765 F.2d 944 (10th Cir. 1985); U.S. v. Giancola, 754 F.2d 898 (11th Cir. 1985).

Notes

- § 3145(c) allows ct. to release any def. on appeal if def. shows exceptional circs. U.S. v. Herrera-Soto, 961 F.2d 645 (7th Cir. 1992); U.S. v. DiSomma, 951 F.2d 494 (2d Cir.

1991); U.S. v. Carr, 947 F.2d 1239 (5th Cir. 1991); U.S. v. Jones, 979 F.2d 804 (10th Cir. 1992); U.S. v. Cantrell, 888 F. SUPP. 1055 (D.Nev. 1995) (good discussion of exceptional circs); U.S. v. Burnett, 76 F. SUPP.2d 846 (E. D. Tenn. 1999).

- This applies as well to defs. who are convicted but are awaiting sentencing. U.S. v. Carr, 947 F.2d 1239 (5th Cir. 1991); U.S. v. Kinslow, 105 F.3d 555 (10th Cir. 1997).

- Bail Reform Act does not apply to bail pending appeal from probation violation or supervised release violation - exceptional circumstances rule applies. U.S. v. Bell, 820 F.2d 980 (9th Cir. 1987); See U.S. v. Lacy, 643 F.2d 284 (5th Cir. 1981); U.S. v. Dansker, 561 F.2d 485 (3d Cir. 1977); U.S. v. Lodhi, 21 F.3d 607 (5th Cir. 1994) (supervised release); U.S. v. Matt, 41 F.3d 1281 (9th Cir. 1994) (habeas/§ 2255 collateral attack); Parretti v. U.S., 112 F.3d 383 (9th Cir. 1997) (extradition).

- Dist. Court maintains jurisd. even when case is on appeal. See U.S. v. Krzyski, 857 F.2d 1089 (6th Cir. 1988); U.S. v. Queen, 847 F.2d 346 (7th Cir. 1988).

VIII. General Notes

- A. Failure to inform defendant of enhanced penalties under § 3147 for crimes committed while on release may preclude these penalties. U.S. v. DiCaro, 852 F.2d 259 (7th Cir. 1988); U.S. v. Cooper, 827 F.2d 991 (4th Cir. 1987); U.S. v. Onick, 889 F.2d 1425 (5th Cir. 1989). *contra* U.S. v. Lewis, 991 F.2d 322 (6th Cir. 1993); U.S. v. Di Pasquale, 864 F.2d 271 (3d Cir. 1988); U.S. v. Bozza, 132 F.3d 659 (11th Cir. 1998). Notice need not be oral, but can be on written release form. U.S. v. Night, 29 F.3d 479 (9th Cir. 1994).
- B. Be careful of issues regarding credit for time in detention; See Reno v. Koray, 115 S. CT. 2021 (1995); Rodriguez v. Lamer, 60 F.3d 745 (11th Cir. 1995).
- C. Bail bond may be forfeited if defendant fails to appear or violates other conditions of bond. U.S. v. Dunn, 781 F.2d 447 (5th Cir. 1989); U.S. v. Santiago, 826 F.2d 499 (7th Cir. 1987); U.S. v. Patriarca, 948 F.2d 789 (1st Cir. 1991); U.S. v. Vaccaro, 51 F.3d 189 (9th Cir. 1995); U.S. v. Dudley, 62 F.3d 1275 (10th Cir. 1995); U.S. v. Gigante, 85 F.3d 83 (2d Cir. 1996).

REPRESENTATION IN MULTI-DEFENDANT CASES

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“[C]onspiracy, that darling of the modern prosecutor’s nursery.”

-- Learned Hand
Harrison v. United States,
7 F.2d 259, 263 (2d Cir. 1925)

I. Severance

A. Rule 8. Joinder of Offenses and of Defendants

1. Rule 8(a) Joinder of Offenses

(a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

a. Rule 8(a) is concerned with joinder of offenses committed by single defendant.

b. Rule 8(a) is concerned with 3 circumstances under which government may join offenses against a defendant:

(1) offenses are of same or similar character

(a) *United States v. Lewis*, 626 F.2d 940, 944-45 (D.C. Cir. 1980) (possession, possession with intent to distribute, & distribution of drugs)

(b) *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980) (theft of foreign currency & Hobbs Act violation)

(c) *United States v. Harris*, 635 F.2d 526, 527 (6th Cir. 1980) (joinder of mail offenses)

(d) *United States v. Koen*, 982 F.2d 1101, 1110 (7th Cir. 1992) (embezzlement, mail fraud & arson)

(e) *United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994) (small gun & sawed-off shotgun)

(f) *United States v. Shearer*, 606 F.2d 819, 820-21 (8th Cir. 1979) (armed robbery)

- (g) *United States v. Bronco*, 597 F.2d 1300, 1301 (9th Cir. 1979) (conspiracy to sell counterfeit money, possession and passing of counterfeit money)
 - (h) *United States v. Tillman*, 470 F.2d 142, 143 (3d Cir. 1972) (sale of cocaine & sale of heroin)
 - (2) offenses are based on same act or transaction
 - (3) offenses are based on two or more acts or transactions connected together or constituting parts of common scheme or plan
 - (a) *United States v. DeBordez*, 741 F.2d 182, 184 (8th Cir. 1984) (offenses involving bank robberies)
 - (b) *United States v. Rainier*, 670 F.2d 702, 708-09 (7th Cir. 1982) (Travel Act & perjury)
 - (c) *United States v. Eades*, 615 F.2d 617, 624 (4th Cir. 1980) (entry onto military base w/intent to commit theft & two assault charges)
 - (d) *United States v. Armstrong*, 621 F.2d 951, 953-54 (9th Cir. 1980) (bank robberies)
 - (e) *United States v. Jordan*, 602 F.2d 171, 172 (8th Cir. 1979) (possession of stolen mail)
- 2. Rule 8(b) Joinder of Defendants
 - (b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
 - a. Joinder is proper only if all offenses arose out of same series of transactions.
 - (1) *United States v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1977)
 - (2) *United States v. Ford*, 632 F.2d 1354, 1371 (9th Cir. 1980)
 - b. Offenses charged in single indictment are severable if (1) they are not part of the same act or transaction or (2) they are not part of the scheme or plan.
 - (1) *United States v. Sarkisian*, No. 98-1241 (9th Cir. 12/3/99) (car theft and extortion charges not logically connected)
 - (2) *United States v. Moser*, 123 F.3d 813, 827-828 (5th Cir. 1997)
 - (3) *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980)
 - (4) *United States v. Forrest*, 623 F.2d 1107, 1114-15 (5th Cir. 1980)
 - (5) *United States v. Park*, 531 F.2d 754, 761 (5th Cir. 1976)

3. Rules 8(a) and 8(b) mutually exclusive.
 - a. 8(a) applies only to offenses against a single defendant
 - b. 8(b) applies when more than one defendant is charged
 - (1) eliminates joinder of offenses of same or similar character
 4. Prejudice
 - a. Defendant must show that misjoinder resulted in “actual prejudice”
 - b. *United States v. Sarkisian*, No. 98-10241 (9th Cir. 12/3/99); *United States v. Lane*, 474 U.S. 438, 446 (1986)
 5. Preservation
 - a. No need to renew Rule 8 motion for misjoinder at close of evidence because Rule 8 motions present questions of law
 - b. In this way Rule 8 motions are different from Rule 14 motions which must be renewed
 - c. *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990)
- B. Rule 14. Relief from Prejudicial Joinder
- If it appears that a defendant or the government (!) is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to court for inspection in camera any statements or confessions made by the defendants to which the government intends to introduce in evidence at trial.
1. Prejudice from Joinder of Defendants
 - a. Defendant must show that prejudice outweighs interests of judicial economy & efficiency
 - (1) Primary concern is whether jury will be able to segregate evidence applicable to each defendant and follow in limine instructions as they apply to each defendant
 - (2) District court’s discretion over severance motions is extremely wide
 - (3) *United States v. Sarkisian*, No. 98-10241 (9th Cir. 12/3/99); *United States v. Vaccaro*, 816 F.2d 443, 448 (9th Cir. 1987)
 - b. On appeal defendant must show that district court abused its discretion in denying severance
 - (1) The prejudice must be so great that it denied defendant’s right to a fair trial
 - (a) *United States v. Saleme*, 152 F.3d 88, 115 (2d Cir. 1998)
 - (b) *United States v. Wellington*, 754 F.2d 1457, 1466 (9th Cir. 1985)
 - (c) *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980)

- (d) *United States v. Mariscal*, 939 F.2d 884, 885 (9th Cir. 1991)
 - (e) *United States v. Douglass*, 780 F.2d 1472, 1478 (9th Cir. 1986)
 - (g) *United States v. Sarkisian*, No. 98-10241 (9th Cir. 12/3/99)
- c. Prejudice can result from trying unconnected offenses when there are multiple defendants
 - (1) *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971)
- d. Bruton prejudice
 - (1) Codefendant's confession implicates a defendant. The non-confessing defendant has right to exclude the confession, to a redacted confession, or to severance. Introduction of non-redacted confession violates the non-confessing defendant's sixth amendment confrontation right
 - (a) *Bruton v. United States*, 391 U.S. 123, 124 (1968)
 - (b) *Tennessee v. Street*, 471 U.S. 409, 412-418 (1985) (The Confrontation Clause is not violated when an accomplice's confession is introduced solely for rebuttal purposes)
 - (c) *Cruz v. New York*, 481 U.S. 186 (1987) (S. Ct. held that when a non-testifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, then the Confrontation Clause bars its admission at their joint trial even if the jury is instructed not to consider it against the defendant and even if the defendant's own confession is admitted against him)
 - (d) *Lee v. Illinois*, 476 U.S. 530 (1986) (Codefendants' confessions in murder were consistent in some respects but not identical in all materials respects. The confessions, therefore, did not "interlock" and were presumptively unreliable. Introduction of the confessions at a joint bench trial violated the Confrontation Clause)
 - (e) *Gray v. Maryland*, 118 S. Ct. 1151 (1998) (Bruton rule extends to redacted confessions in which name of defendant is replaced with obvious indication of deletion, such as blank space, word "deleted" or similar symbol)
 - (f) *Lilly v. Virginia*, 144 L.Ed. 2d 117 (1999) recognized

the importance of confrontation, and so renewed the emphasis on reliability and trustworthiness as a prerequisite for hearsay admission. Court bars use of non-testifying codefendant confessions under an admission theory of being against penal interests. Confrontation trumps this hearsay exception as residual trustworthiness. *Cf. United States v. Boone*, ___F.3d___ (9th Cir. 2000) (hearsay allowed because no police custody and statements made to third party); *United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000) (same); *United States v. Papajohn*, 212 F.3d 1112 (8th Cir. 2000) (defendant not arrested for crime).

- (g) *Toolate v. Borg*, 828 F.2d 571, 572-73 (9th Cir. 1987)
- (h) *United States v. Sherlock*, 865 F.2d 1069, 1079-81 (9th Cir.), *amended*, 962 F.2d 1349 (9th Cir. 1989) (Two defendants, Sherlock and Charley, were tried jointly. Charley gave statements implicating Sherlock. A government investigator testified about Charley's statement implicating Sherlock. Sherlock's lawyer was able to impeach Charley (apparently during the government investigator's testimony) with Charley's prior assault conviction. District court cautioned the jury after the investigator's testimony. Jury instructions, given before closings, repeated the post-testimony caution. Prosecutor emphasized in closing that Charley's statement implicating Sherlock buttressed the government case against Sherlock. The Ninth Circuit found that the case violated fundamental conceptions of justice and fair play. The joint trial was so manifestly prejudicial that the district court abused its discretion in denying the severance motion.)
- (i) *United States v. Edwards*, No. 97-2935 (8th Cir. 10/30/98) (extensive editing and replace provisions insuff.); *United States v. Walker*, 148 F.3d 518 (5th Cir. 1998)).
- (j) *Bruton* subject to harmless error analysis, *United States v. Gillam*, 167 F.3d 1273 (9th Cir. 1999)
- (k) *United States v. Sauza-Martinez*, No. 98-50770 (9th Cir. July 6, 2000) (where co-defendant's prejudicial hearsay statements against another are admitted for impeachment purposes, court must give limiting

instructions).

e. Inconsistent Defense Prejudice

- (1) *Zafiro v. United States*, 506 U.S. 534 (1993)
 - (a) Court expresses a preference for joint trials.
 - (b) Mutually antagonistic defenses are not prejudicial per se. 113 S. Ct. at 938.
 - (c) Severance of properly joined defendant is properly only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendant or would prevent the jury from making a reliable judgment about guilt or innocence. 113 S. Ct. at 938.
 - (d) Court affirmed the Seventh Circuit's affirmance of the district court's denial of severance motions brought by each of four codefendants all of whom claimed that they had no knowledge about the drugs the police found and two of whom testified about their ignorance.
 - (e) *See generally United States v. Mayfield*, 189 F.3d 895 (9th Cir. 1999) (defendant entitled to severance when codefendant acts as second prosecutor with a mutually exclusive defense); *United States v. Gillam*, 167 F.3d 1273 (9th Cir.), *cert. denied* 120 S. Ct. 235 (1999) (opening argument without more does not create a mutually antagonistic defense); *United States v. Cruz, et al.*, 127 F.3d 791 (9th Cir. 1997) (defendant is entitled to severance for mutually antagonistic defenses only if core of defense is so irreconcilable with co-defendant's defense as to preclude acquittal).
- (2) *State v. Kinkade*, 140 Ariz. 91, 680 P.2d 801 (1984)
 - (a) Cited with approval by Justice Stevens in his concurrence in *Zafiro*.
 - (b) Severance is proper only when defenses are mutually exclusive. Defenses are mutually exclusive when the core of evidence offered by one defendant requires the jury to disbelieve the core of evidence offered on behalf of a codefendant.
- (3) Such defenses may suggest to the jury that they infer guilt from a codefendant's silence
- (4) *United States v. Harwood*, 998 F.2d 91 (2d Cir. 1993)
- (5) *Deluna v. United States*, 308 F.2d 140, 143-43 (5th Cir. 1962) (it is an attorney's duty to his client to comment on the codefendant's failure to testify, which would violate the non-testifying defendant's fifth amendment right against comments on

- silence)
- (6) *United States v. De Le Cruz-Bellinger*, 422 F.2d 723, 727 (9th Cir. 1970) (no per se rule of severance, defendant must demonstrate probably prejudice in presentation of his defense and show that defense would have benefitted by commenting on codefendant's refusal to testify)
 - (7) *United States v. Benz*, 740 F.2d 903 (11th Cir. 1984)
 - (8) *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) (defendants were prejudiced by mutually exclusive defenses when each defendant maintained that the other committed the assaults alone. Jury was unable to assess each defendant's innocence on individual and independent basis)
- f. Inability to call codefendant as witness prejudice
- (1) *United States v. Gaitan-Acevedo*, 148 F.3d 577, 588 (6th Cir. 1998)
 - (2) *United States v. Echeles*, 352 F.2d 892, 895 (7th Cir. 1965) (when a joint trial prevents a defendant from calling a codefendant as a witness to provide exculpatory testimony, because the codefendant to be called will exercise his or her fifth amendment privilege, district court should grant a severance to allow the codefendant's exculpatory testimony to be introduced at a separate trial)
 - (3) *United States v. Gay*, 567 F.2d 916, 918 (9th Cir. 1978)
 - (4) *United States v. Hernandez-Berceda*, 572 F.2d 680, 682 (9th Cir. 1978)
 - (5) Defendant must show
 - (a) that he would call codefendant in separate trial
 - (b) that codefendant would in fact testify
 - (c) that this testimony would be substantially exculpatory
 - (d) *United States v. Mariscal*, 939 F.2d 844, 885-86 (9th Cir. 1991)
 - (e) *United States v. Leichtman*, 742 F.2d 598, 605 (11th Cir. 1984)
 - (f) *United States v. Vigil*, 561 F.2d 1316, 1317 (9th Cir. 1977)
 - (g) *United States v. Cruz*, 536 F.2d 1264, 1268 (9th Cir. 1976)
 - (h) *United States v. Wood*, 550 F.2d 435, 438 (9th Cir. 1976)
 - (i) *United States v. Tham*, 948 F.2d 1107, 1112 (9th Cir. 1991), *amended*, 960 F.2d 1391 (9th Cir. 1991) (suggests that the exculpating codefendant's trial should

be held first when the only reason for severance is to facilitate the codefendant's testimony. Otherwise, severance would not accomplish its purpose.)

g. Speedy Trial Issues

- (1) Right to Speedy Trial for Severance. *United States v. Messer*, No. 96-50493 (9th Cir. 1999). Defendant's Speedy Trial rights violated when court continued trial until codefendant became available when government had decided to try codefendant on other charges in another venue.

2. Prejudice from joinder of offenses

- a. Defendant may become embarrassed or confounded in presenting separate defenses
 - (1) *Cross v. United States*, 335 F.2d 987, 991 (D.C. Cir. 1964) (defendant wanted to testify in defense of one count but not concerning another count)
- b. Jury may rely on evidence of one crime to infer a criminal disposition and find guilt
 - (1) *United States v. Lewis*, 787 F.2d 1318, 1321-22 (9th Cir. 1986), *modified*, 798 F.2d 1250 (9th Cir. 1989) (admission of other crimes in one count prejudiced defendant on other joint count when evidence was weak on second charge)
- c. Jury may cumulate evidence of various crimes
 - (1) *United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1985) (jury's inability to compartmentalize evidence)

3. Timing

- a. Must be brought before trial - Fed. R. Crim. P. 12(b)(5)
- b. Must be renewed at close of evidence other wise waived
 - (1) *United States v. Mathison*, 1998 WL 553183, --F.3d-- (8th Cir. 1998)
 - (2) *United States v. Davis*, 932 F.2d 752, 762 (9th Cir. 1991)
 - (3) *United States v. Restrepo*, 930 F.2d 705, 711 (9th Cir. 1991)
 - (4) *United States v. Free*, 841 F.2d 321, 324 (9th Cir. 1988)
 - (5) *United States v. Plache*, 913 F.2d 1375, 1378-79 (9th Cir. 1990) (motion pretrial, early in trial, and at close of government's case in chief ineffective to preclude waiver because defendant failed to renew the motion at the close of all of the evidence)
 - (6) *United States v. Feliz-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir. 1991) (no waiver despite failure to renew severance motion at close of all of the evidence because defendant had diligently pursued. However, defendant had sought relief under both Rule

8 and Rule 14, so it is not clear whether this case would be precedent when only Rule 14 relief is sought)

C. Misjoinder Because of Duplicitous Counts

1. There must be a separate count for each offense; it violates double jeopardy principles and due process to charge more than one offense in a single count.
 - a. *United States v. Droms*, 566 F.2d 361, 363 n. 1 (2d Cir. 1977)
 - b. *Reno v. United States*, 317 F.2d 499, 502 (5th Cir. 1963)
2. Challenge duplicitous counts by a pretrial motion to compel the government to choose the charge on which it will proceed.
 - a. *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985)
 - b. *Thomas v. United States*, 418 F.2d 567, 568 (5th Cir. 1969)

II. Co-Conspirators' Statements

A. Discovery of Co-Conspiracy and Codefendant Statements

1. *Brady* obligates government to disclose exculpatory statements.
2. Defense counsel should obtain non-exculpatory (to counsel's client) codefendants' statements from their attorneys. The court has discretion to order production of these statements if Jencks does not apply.
 - a. *United States v. Disson*, 612 F.2d 1035, 1037-38 (7th Cir. 1980)
 - b. *United States v. McMillen*, 489 F.2d 229, 231 (7th Cir. 1972)
3. Co-conspirator statements that the government will introduce at trial will be attributed to defendant. Thus, they are discoverable as defendant's statement.
 - a. Fed. R. Evid. 801(d)(2)(E)
 - b. *United States v. Thevis*, 84 F.R.D. 47, 55-56 (N.D. Ga. 1979)
 - c. *Dennis v. United States*, 384 U.S. 855, 873 (1966)
 - d. *United States v. Mays*, 460 F. Supp. 573, 581 (E.D. Tex. 1978)
 - e. *United States v. Agnello*, 367 F. Supp. 444, 448 (E.D.N.Y. 1973)
4. Jencks Act, however, overrides the government's obligation to produce co-conspirator statements if that co-conspirator will testify at trial for the government.
 - a. *United States v. Mills*, 641 F.2d 786, 789-90 (9th Cir. 1981)
 - b. *United States v. Percevault*, 490 F.2d 126, 131 (2d Cir. 1974)
5. Counsel should request a pretrial hearing on the admissibility of co-conspirators' statements because they may be outside the conspiracy's scope or excludable under Fed. R. Evid. 403.
6. Counsel should request a pretrial hearing to determine if the government can prove that a conspiracy exists and that the alleged co-conspirator statements are admissible.
7. Limiting instruction for impeachment purposes. *United States v. Souza-Martinez*, No. 98-50770 (July 6, 2000) (9th Cir.).

B. Confrontation Right Can Bar Hearsay Exceptions.

1. Constitutional right to confrontation can call into question codefendant statements

and coconspirator statements offered under other exceptions (such as being against penal interests or residual trustworthiness). *Lilly v. Virginia*, 144 L.Ed. 2d 117 (1999).

III. Joint Defense Issues

A. Conspiracy

1. General

a. 18 U.S.C. § 371 prohibits two or more from conspiring to defraud the United States or to commit any offense against the United States. These two forms of conspiracy are different.

(1) Conspiracy to commit any offense means conspiracy to commit a recognized federal crime

(a) Requires proof of an intent to commit the underlying substantive offense

i) *United States v. Martinez*, 806 F.2d 945, 946, 948 (9th Cir. 1986)

(b) Government may allege that the conspiracy existed to violate more than one substantive offense

i) Jury need only find that the conspiracy existed to commit only one of the alleged substantive offenses.

a) *United States v. Smith*, 891 F.2d 703, 709 (9th Cir. 1989), *amended*, 906 F.2d 385 (9th Cir. 1990)

ii) Jury should receive a particularized unanimity instruction telling it that it must be unanimous concerning the substantive offense that it finds to be the conspiracy's object.

a) *United States v. Castro*, 887 F.2d 988, 993 (9th Cir. 1989)

b) *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975)

(2) Conspiracy to defraud is a conspiracy to impede, impair, obstruct or interfere with some lawful government function.

(a) Requires proof of an agreement to interfere with some lawful government function regardless whether such interference is itself a separate substantive criminal offense.

i) *United States v. Shoup*, 608 F.2d 950, 959 (3d Cir. 1979)

(b) Conspiracy to defraud can reach loss of integrity of United States and its agencies and programs as well as

pecuniary or property loss

- i) *United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985)
- (c) *United States v. Cueto*, 151 F.3d 620, 635 (7th Cir. 1998) (intent, as well as agreement, may be inferred from circumstantial evidence concerning the relationship of the parties, their overt acts, and the totality of their conduct)
- (d) *Dennis v. United States*, 384 U.S. 855, 861 (1966)
- (e) *Haas v. Henkel*, 216 U.S. 462, 479-80 (1910)

2. Elements

a. Agreement

- (1) If the government cannot prove an agreement between two or more persons, there is no conspiracy regardless of the defendant's criminal intent.
 - (a) *United States v. Rubio-Villareal*, 927 F.2d 1495, 1499 (9th Cir. 1991), *aff'd en banc*, 967 F.2d 294 (9th Cir. 1992) (en banc)
 - (b) *United States v. Recio*, ___ F.3d ___ (9th Cir. 2000) (No. 99-30135) (driver hired at last minute and not involved in larger conspiracy).
- (2) If the only person with whom the defendant conspires is a government agent, then there is no conspiracy.
 - (a) *United States v. DeBright*, 742 F.2d 1196, 1196-99 (9th Cir. 1984)
- (3) The government can allege that some conspirators are unknown to the grand jury. If the indictment alleges unknown conspirators, the acquittal of all named conspirators but the defendant does not require reversal of the defendant's conspiracy conviction for failure to prove an agreement between two or more persons.
 - (a) *Lubin v. United States*, 313 F.2d 419, 423 (9th Cir. 1963)

b. Knowing Participation

- (1) Generally theories of defense revolve around whether the government can prove that the defendant knowingly joined a conspiracy rather than whether the conspiracy existed. Often amorphous evidence of knowing participation will suffice to sustain a conviction.
 - (a) *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988)
 - (b) *United States v. Mares*, 940 F.2d 455, 458-60 (9th

- Cir. 1991) (evidence that the defendant engaged in “counter-surveillance” before drug transaction sufficient to prove knowing participation), *but see Yossunthorn*, 167 F.3d 1267 (9th Cir. 1999).
- (c) *United States v. Idowil*, 1998 WL 71302, (3d Cir. 1998) (evidence was insufficient to show defendant knew of transaction’s ultimate purpose)
- (2) Generally the government is allowed to prove both the agreement and the defendants’ knowing participation in the agreement through circumstantial evidence and available inferences, particularly in drug cases.
- (a) *United States v. Pemberton*, 853 F.2d 730, 733 (9th Cir. 1988)
 - (b) *United States v. Baxter*, 492 F.2d 150, 163 (9th Cir. 1973)
- (3) Absent evidence the defendant acted to further the conspiracy, sympathy or approval of the conspiracy is insufficient for conviction.
- (a) *Roberts v. United States*, 416 F.2d 1216, 1220-21 (5th Cir. 1969)
 - (b) *United States v. Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973) (voluntary participation in acts with alleged co-conspirators and general knowledge of conspirators’ intention is insufficient to show knowing participation in the conspiracy)
 - (c) *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970)
 - (d) *United States v. Estrada-Macias*, No. 97-10115 (9th Cir. 7/12/00) (evidence of knowledge but not participation is insufficient)
- (4) Knowledge of the conspiracy, failure to inform authorities of conspiratorial activity, desire to see the conspiracy succeed, or presence at the scene of the substantive offense are insufficient to prove knowing participation.
- (a) *United States v. Gordon*, 580 F.2d 827, 835 (5th Cir. 1978)
 - (b) *United States v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977)
 - (c) *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974)
 - (d) *United States v. Bostic*, 480 F.2d 965, 968-69 (6th Cir. 1973)

- (e) *United States v. Sanchez-Mata*, 925 F.2d 166, 167-68 (9th Cir. 1991) (knowledge that drugs are present, without more, insufficient to prove knowing participation in conspiracy to distribute drugs)
 - (f) *United States v. Estrada-Macias*, No. 97-10115 (9th Cir. 7/12/00) (evidence of knowledge but not participation is insufficient)
 - c. Overt Act
 - (1) Most conspiracy statutes, including 18 U.S.C. § 371 require proof that one of the conspirators committed an overt act alleged in the indictment
 - (2) Drug conspiracies under 21 U.S.C. § 846 do not require proof that any conspirator committed an overt act
 - (a) *United States v. Shabani*, 115 S. Ct. 382 (1994). See generally Kevin Heller, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 Stan. L. Rev. 111 (1996).
 - (b) *United States v. Yossunthorn*, 167 F.3d 1267 (9th Cir. 1999) (“attempt” to possess with intent to distribute requires proof of a substantial step toward completion; surveillance of parking lot insufficient).
 - d. *Apprendi* elements. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). *Apprendi* requires allegations of specific elements of the conspiracy, such as drug quantities. See generally Jon Sands and Steve Kalar, *An Apprendi Primer: On the Virtues of a Doubting Thomas*, The Champion, Oct. 2000.
- 3. Pinkerton-Vicarious Liability
 - a. If one of the conspirators commits a substantive crime in furtherance of the conspiracy and this crime was “reasonably foreseeable, each conspirator can be vicariously convicted of this substantive offense as if he or she committed it or aided and abetted it.
 - (1) *Pinkerton v. United States*, 328 U.S. 640, 645 (1946)
 - (2) *United States v. Cantone*, 426 F.2d 902, 904 (2d Cir. 1970)
 - (3) *United States v. Alvarez*, 755 F.2d 830, 834-35 (11th Cir. 1985) (minor participant may be guilty of the conspiracy but not vicariously liable for substantive crimes)
 - (4) *United States v. Montgomery*, 150 F.3d 983, 996-997 (9th Cir. 1998) (reasonable foreseeability instruction need not be included in jury instruction)
 - (5) *United States v. Henson*, 123 F.3d 1226, (9th Cir. 1997) (a

- conspirator who joins a pre-existing conspiracy is bound by all that has gone on before in the conspiracy)
- (6) *United States v. Yossunthorn*, 167 F.3d 1267 (9th Cir. 1998) (countersurveillance actions are not a substantial step amounting to a conspiracy to attempt to possess and distribute drugs)
- 4. Venue
 - a. Lies in any district where an overt act was performed or through which a conspirator passed to accomplish an overt act.
 - (1) *United States v. Williams*, 536 F.2d 810, 812 (9th Cir. 1976)
 - 5. Aiding a conspiracy
 - a. In case law that defies logic and sense, defendants have been convicted of aiding and abetting a conspiracy by aiding or abetting acts in furtherance of the conspiracy. That is, the aiding and abetting acts other than the agreement itself.
 - (1) *United States v. Savinovich*, 845 F.2d 834, 838 (9th Cir. 1988)
 - (2) *United States v. Galiffa*, 734 F.2d 306, 309-10 (7th Cir. 1984)
 - 6. Defenses
 - a. Mere Presence
 - (1) Failure of proof on element of knowing participation.
 - (a) *United States v. Estrada-Macias*, No. 97-10115 (9th Cir. July 12, 2000) (awareness of conspiracy but not participation); *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980)
 - b. Withdrawal
 - (1) If the conspiracy statute requires an overt act, a defendant who joins but withdraws before an overt act is committed is immunized from liability for the conspiracy
 - (a) *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir. 1977)
 - (b) *United States v. Heathington*, 545 F.2d 972, 973 (5th Cir. 1977)
 - (2) Defendants who withdraw after an overt act are guilty of the conspiracy but not vicariously liable for substantive offenses committed after the withdrawal
 - (a) *Levine v. United States*, 383 U.S. 265, 266 (1966)
 - (3) Proof of withdrawal requires acts inconsistent with conspiratorial objective and communication to co-conspirators of the intention to withdraw.
 - (a) *United States v. U.S. Gypsum Co.*, 550 F.2d 115,

- 141 (3d Cir. 1977), *aff'd* 438 U.S. 422 (1978)
- (4) Even where withdrawal is not an available defense to conspiracy, because no overt act is necessary, withdrawal can be a bar to prosecution or conviction if it took the defendant's participation outside the limitations period.
 - (a) *United States v. Grimmett*, 150 F.3d 958 (8th Cir. 1998)
 - c. Multiple conspiracies proved, but single conspiracy alleged in indictment--variance between indictment and proof
 - (1) Conspiracy types
 - (a) *Kotteakos v. United States*, 328 U.S. 750 (1946) (government proved multiple conspiracies between spokes and hub but failed to prove the single conspiracy alleged; that is, the conspiracy represented by the rim surrounding the spokes)
 - (b) *United States v. Bruno*, 105 F.2d 921, 922-23 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) (single conspiracy represented by chain with supplies, middlemen and retailers who knew of each other although they had no contact beyond their level)
 - (c) *United States v. Cruz*, --F.3d--, 1997 WL 578418, (9th Cir. Sept. 19, 1997) (first conspiracy terminated by arrests and so attempt to deliver contraband was a second new conspiracy)
 - (2) Courts consider the determination whether a single or multiple conspiracy exists to be a jury question
 - (a) *United States v. Rivera-Santiago*, 872 F.2d 1073, 1079 (1st Cir. 1989)
 - (3) Rule 29 motion for acquittal exists if the government alleges a single conspiracy, proves a multiple conspiracy, and fails to prove venue for the conspiracy in which the defendant participated
 - (a) *United States v. Record*, 873 F.2d 1363, 1366 (10th Cir. 1989) (facts proven which result in statute of limitations having run)
 - (b) *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964)
 - (4) Other instances of prejudicial variance
 - (a) Co-conspirator statements admitted on basis of charged conspiracy would not have been admissible on proved multiple conspiracy
 - (b) Indictment insufficient to allow defendant to anticipate

- evidence against him or her
- (c) Indictment so vague that possibility of subsequent prosecution for same offense
- (d) Defendant was prejudiced by spillover of evidence from one conspiracy to another
 - i) *United States v. Jones*, 880 F.2d 55 (8th Cir. 1989) (no prejudice found)
 - ii) *United States v. Gorge*, 752 F.2d 749, 754 (1st Cir. 1985) (no prejudice found)
- (5) Prejudicial variance found as a matter of law
 - (a) *United States v. Jackson*, 696 F.2d 578, 582 (8th Cir. 1982)
 - (b) *United States v. Lindsey*, 602 F.2d 785, 786-87 (7th Cir. 1979)
 - (c) *United States v. Duran*, 189 F.3d 1021 (9th Cir. 1999) (prejudicial variance with two conspiracies but harmless).
 - (d) *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969)
- (6) Prejudicial variance in drug cases
 - (a) *United States v. Snider*, 720 F.2d 985, 989-90 (8th Cir. 1985)
 - (b) *United States v. Bertolotti*, 529 F.2d 149, 154-55 (2d Cir. 1975)
 - (c) *United States v. Duran*, 189 F.3d 1021 (9th Cir. 1999)
- d. Isolated Buyer and Seller
 - (1) Ordinary acts that by definition require two participants are not conspiratorial. Proof only of a buyer-seller relationship is not enough to convict one as a conspirator on drug conspiracy charges.
 - (a) *United States v. Rivera-Santiago*, 872 F.2d at 1082
 - (b) *United States v. Douglas*, 818 F.2d 1317, 1321 (7th Cir. 1987)
 - (c) *United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971)
- e. *Apprendi*. Elements related to conspiracy, such as drug quantity. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000)
- f. Statute of Limitations
 - (1) Defendant's acts fall outside statute of limitations. *United States v. Fuchs*, No. 98-10173 (9th Cir. July 6, 2000)

7. Co-conspirator Statements
 - a. Foundation Requirements - Fed. R. Evid. 801(d)(2)(E)
 - (1) Offering party must prove by preponderance of evidence that conspiracy existed involving declarant and non-offering party
 - (2) Statement must have been in furtherance of the conspiracy
 - (3) Statement must have been made in the course of the conspiracy
 - (4) These three foundational requirements are preliminary questions of fact governed by Fed. R. Evid. 104
 - (a) *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987)
 - (5) Government need not charge defendant with a conspiracy to invoke Fed. R. Evid. 801 (d)(2)(E)
 - (a) *Joyner v. United States*, 547 F.2d 1199, 1202 (4th Cir. 1977)
 - b. Existence of a conspiracy
 - (1) The alleged co-conspirator hearsay can be used to prove existence of the conspiracy and the defendant's and declarant's participation in the conspiracy.
 - (a) *Bourjaily*, 483 U.S. at 180
 - (2) District court is to give the alleged co-conspirator hearsay only such weight as its judgment and experience counsel
 - (a) *Bourjaily*, 483 U.S. at 181
 - c. In furtherance of the conspiracy
 - (1) As long as the declarant intended the statement to further the conspiracy, is unnecessary that it actually further the conspiracy.
 - (a) *United States v. Hamilton*, 689 F.2d 1262, 1269-70 (9th Cir. 1982)
 - (2) Must examine statement in context to determine whether declarant intended to further the conspiracy
 - (a) *United States v. Bibbero*, 749 F.2d 581 (9th Cir. 1984) (statement not in furtherance--only idle conversation)
 - (b) *United States v. Fielding*, 645 F.2d 719, 725 (9th Cir. 1981) (statements to impress undercover officer not in furtherance)
 - d. During course of conspiracy
 - (1) This period is what is necessary for accomplishment of the conspiracy's main aim
 - (a) *Krulewitch*, 336 U.S. 440, 442 (1949)
 - (2) Once conspiracy's central criminal purpose attained, may not infer subsidiary conspiracy to conceal merely because conspiracy kept secret

- (a) *Krulewitch*, 336 U.S. at 443-44
 - (3) Termination for any particular defendant occurs when his or her involvement ceases by withdrawal, indictment, or arrest
 - (a) *United States v. Smith*, 623 F.2d 627, 631 (9th Cir. 1980)
 - (b) *But see United States v. Williams*, 548 F.2d 228, 232 (8th Cir. 1977)
 - e. Order of proof
 - (1) Request pretrial hearing to determine the admissibility of co-conspirator hearsay
 - (a) *United States v. James*, 590 F.2d 575, 579 (5th Cir. 1979) (en banc)
 - (2) Government will attempt to have court admit the co-conspirator hearsay conditionally and allow the government to “connect it up” later. Courts are now leaning towards this procedure rather than a pretrial hearing.
 - (a) *United States v. William*, 837 F.2d 1009, 1014 n.8 (11th Cir. 1988)
 - (b) *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989)
- B. Jury Instructions
- 1. Mere Presence or Association
 - a. Mere participation in single deed with ignorance about scope or fact of a charged conspiracy insufficient to sustain conviction
 - (1) *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990)
 - b. No inference of guilty from mere presence at scene or proximity to contraband
 - (1) *United States v. Rodriguez*, 761 F.2d 1339, 1441 (9th Cir. 1985)
 - (2) *United States v. Manning*, 618 F.2d 45, 48 (8th Cir. 1980)
 - (3) *United States v. MacDougal-Pena*, 545 F.2d 833 (2d Cir. 1976)
 - (4) *United States v. Estrada-Macias*, No. 97-10115 (9th Cir. July 12, 2000) (individual living around defendant’s trailer known to manufacture methamphetamine insufficient)
 - c. Business or social association with conspirators does not support inference of guilt
 - (1) *United States v. Xheka*, 704 F.2d 974, 988-89 (7th Cir. 1983)
 - (2) *United States v. Terry*, 702 F.2d 299, 320 (2d Cir. 1983)
 - (3) *Ramirez v. United States*, 363 F.2d 33, 34 (9th Cir. 1966)

2. Conspiracy Instructions
 - a. Incomplete Agreement
 - (1) Although an agreement may be inferred from circumstantial evidence no conviction for guilt by association with conspirators.
 - (a) *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980) (evidence that defendant firmly insisted on conditions unacceptable to potential conspirators showed that defendant did not agree to commit crime absent fulfillment of the unacceptable conditions)
 - b. Withdrawal
 - (1) A defendant's participation is presumed to continue unless defendant affirmatively shows evidence of withdrawal, once evidence of withdrawal presented, jury should be instructed that the government must disprove withdrawal beyond a reasonable doubt.
 - (a) *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981)
 - c. Statute of Limitations
 - (1) Acts found outside a limitation period. *United States v. Fuchs*, No. 98-10173 (9th Cir. July 6, 2000)
3. *Apprendi* Issues. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) (any fact that increases prescribed maximum sentence must be submitted to jury and proved beyond a reasonable doubt); *see also United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (under *Apprendi*, drug quantities that increase statutory maximum must be determined by jury and proven beyond a reasonable doubt). Possible need for special verdict form or interrogatories for specific amounts for which each defendant for same and which jointly responsible. U.S.S.G. § 1B1.3.

IV. Cooperating Codefendants

- A. Joint Defense Agreements
 1. *See* Model Agreement
 2. *Hunydee v. United States*, 355 F.2d 183, 185 (1965) (when two or more persons who are subject to possible indictment in connection with same transactions make confidential statements to their attorneys, these statements, even though exchanged between attorneys, are within the attorney/client privilege to the extent they concern common issues and are intended to facilitate representation in subsequent proceedings)
 3. *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (common interest rule protects communications made when nonparty sharing clients's interests is present at confidential communication between attorney and client and nonparty need not be a party to the same pending lawsuit to have a common interest with

- the party seeking to protect the communications under the attorney/client privilege)
4. *United States v. McPartlin*, 595 F.2d 1321, 1335 (7th Cir. 1979) (codefendant's statements to defendant's investigator properly excluded as attorney/client privileged information because they were made in confidence to an attorney for codefendant for a common purpose related to both defenses)
 5. Government Responses to Joint Defense Agreements
 - a. Defendant's lawyer is precluded from cross-examining potential government witnesses because he or she obtained confidential information from the potential government witness through a joint defense agreement. The government's argument is that the joint defense agreement renders the parties' lawyers part of a de facto law firm and thus creates conflicts of interest.
 - b. *United States v. Anderson*, 790 F. Supp. 231 (W.D. Wash. 1992) (Anderson waived any potential conflicts resulting from the joint defense agreement)

V. Conflicting Defenses

- A. See discussion above of *Zafiro v. United States*, 113 S. Ct. 933 (1993)

VI. Relevant Conduct Issues - §1B1.3

- A. Defendants are vicariously liable for the acts of others if
 1. the others' acts were within the scope of "jointly undertaken criminal activity"
 2. the others' acts were in furtherance of the "jointly undertaken criminal activity"
 3. the others' acts within the scope of the "jointly undertaken criminal activity" were reasonably foreseeable
- B. Vicarious liability under "relevant conduct" is not coextensive with liability for the entire conspiracy or with possible *Pinkerton* liability in connection with the conspiracy
 1. Sentencing Guidelines §1B1.3 (Commentary) (Application Note 2(c)(6) and Application Note 2(c)(7))

VII. Safety Valve - 18 U.S.C. § 3553 and §5C1.2

Model Joint Litigation and Confidentiality Agreement

1. **Scope of Agreement.** This Joint Litigation and Confidentiality Agreement (“Agreement”) pertains to pending or future administrative, civil, or criminal investigation or proceedings by agencies or officers of the United States government concerning (the “Matter”).

2. **Common Interest in Defense and Applicability of Joint Defense Agreement.** The undersigned attorneys and their clients alike, anticipate that the nature of the Matter and the relationship among the clients will present various legal and factual issues common to the clients, thus making essential joint efforts in preparation for defense. The parties to this agreement believe there is a mutuality of interest in some issues that may relate to the common defense of the clients in the Matter. The attorneys joining this Agreement wish to work together on issues common to their clients without waiving applicable rules of privilege and confidentiality vis-a-vis potentially adverse parties.

It is the parties’ intention and understanding that (1) the fact that particular communications have been made between parties to this agreement, (2) the contents of such communications, and (3) any part of memoranda or other work product containing or referring to such communications shall remain confidential and protected from disclosure to any third party (a party not a signatory to this Agreement) by each client’s attorney/client privilege, each attorney’s work-product doctrine immunity from discovery production and the “joint defense doctrine” recognized in such cases as *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979); *Hunydee v. United States*, 335 F.2d 183 (9th Cir. 1965); and *Continental Oil Company v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964). As indicated in those cases, sharing of information for mutual benefit is not a waiver of applicable privileges or work product rules relating to discovery obligations. In other words, no sharing of information under this joint litigation agreement shall be deemed to be a waiver of any otherwise applicable privilege or rule of production or discovery.

3. **Each Client Understands He or She is Represented by His or Her Own Attorney Only.** Each client-signatory understands and acknowledges that the client is represented exclusively by the client’s own attorney(s) in this matter. While Attorneys representing other client-signatories to this Agreement have a duty to preserve the confidences disclosed to them pursuant to this Agreement, they will not act for any party other than their own clients in this Matter. In other words, each client understands and agrees that this Agreement itself does not and will not create any attorney/client relationship with any other client-signatory’s attorney(s). Each client-signatory expressly acknowledges that attorneys representing other client-signatories to this Agreement owe an uncompromising duty of loyalty to their own, respective client and to no other party.

4. **Agreement to Share Information.** To further the mutual interests of the clients, counsel and their respective clients agree:

- (a) to share and exchange among themselves and their clients, as each counsel

deems appropriate given the unique interests and concerns of his or her client, witness statements and interview summaries, memoranda of law, debriefing memoranda, factual summaries, transcript digests, documents, legal strategies, intelligence, confidences, and other secrets for the limited and restricted purpose of assisting counsel in protecting the rights and interest of their respective clients;

- (b) to mark all materials exchanged pursuant to this Agreement with the legend “*Confidential and privileged communication protected pursuant to joint litigation and confidentiality agreement.*”

5. **Agreement Not to Disclose to Third Parties.** Each signatory agrees he or she will not reveal to any third party any information received under this Agreement except as follows:

- (a) A party receiving joint litigation information may communicate that same information to a third party (a party not a signatory to this Agreement) only with the advance written consent of the attorney or party who contributed it to the joint litigation effort.
- (b) A party receiving joint litigation information may communicate that same information to another signatory to this agreement only with advance, explicit oral or written consent of the attorney of party who contributed it to the joint litigation effort.¹
- (c) A party receiving joint litigation information may communicate that same information pursuant to a compulsion order from a court of competent jurisdiction. Each party agrees that if it receives any summons, subpoena, or similar process, or request to produce information or materials which includes information or material received under this Agreement, it will immediately notify all other parties and provide not less than five days notice before production, to permit other parties to intervene. If five-days notice cannot be provided, because of the return date of the process, a party upon which the demand or

¹ This paragraph recognizes that certain parties may have greater common interests with some other parties on certain issues. For example, a corporation may have a greater interest in and need for joint litigation communications between its counsel and counsel for its employees than it would have with counsel for other companies participating in this Agreement. Under such circumstances, attorneys for various parties may choose to share information with some but not all parties to the Agreement. In every instance, it is the prerogative of the attorney contributing information to determine, based on his or her assessment of his or her client’s interest, to decide whether or to whom in the agreement information is disclosed. Similarly, this agreement does not preclude the contributing attorney from disclosing his or her own information with anyone.

request is made agrees to bring a motion to stay the proceedings to allow provision of five-days notice to other parties.

6. **Modification of Agreement -- Addition of New Parties.** Modification of this Agreement or addition of other parties as signatories to this Agreement requires that all parties execute a new Agreement.

7. **Sharing of Information Does Not Create Privilege Regarding Facts that are Not Otherwise Privileged.** The parties recognize and agree that facts and other information that are not otherwise privileged from disclosure shall not gain any privilege simply because such facts and other information may be shared in a joint defense communication. Although information may not be privileged, the joint defense and work product privileges do protect against disclosure of (a) the fact that particular joint litigation communications have been made among parties to this Agreement, (b) the contents of such joint litigation communications, and (c) any part of memoranda or other work product containing or referring to such joint litigation communications.

8. **Attorneys' Duty to Zealously Represent Their Own Clients.** The signatories understand and acknowledge that each attorney-signatory to this Agreement has an obligation to zealously represent his or her own client to the exclusion of all other interests. Thus, before the Matter concludes, each attorney may need to, and is free to take action that may be contrary to the interests of other signatories to this Agreement. These actions include, but are not limited to (a) advising a client to cooperate with the government, (b) generating and disclosing evidence or information to the government or third parties (apart from information protected by this Agreement), and (c) cross-examining other client-signatories at trial proceedings, should such client-signatories testify.

9. **No Party to this Agreement Has Agreed to Cooperate or Testify.** Each signatory represents that he or she has not entered into any cooperation arrangement with any agency of the United States government, agreement to testify as a witness on behalf of the federal government, or agreed to serve as an informant on behalf of the federal government with respect to the Matter in any investigation or administrative, civil, or criminal proceedings. This Agreement is not intended to prevent or inhibit any party from entering into cooperation arrangements with the government.

10. **Agreement to Notify of Cooperation Arrangement.** Any signatory that enters into a cooperation agreement with any governmental agency with respect to the Matter shall immediately notify all other signatories of that fact, and immediately withdraw from this Agreement. Upon withdrawal, the cooperating party and his or her attorney shall return all joint defense material to the attorneys who contributed it, including copies or summaries or excerpts of this joint defense material.

11. **Consent to Use Information Exchanged Pursuant to this Agreement.** Any client-signatory who enters into a cooperation arrangement with the government or who testifies in any civil, administrative or criminal proceeding arising from the Matter consents to any other signatory using for defense purposes any information or material contributed by the client or by his or her attorney. This

specifically permits use of contributed information or material in cross-examining the witness and permits presentation of the information or material by the defense at any point in the proceedings.

12. **Not an Agreement to Violate Any Law.** This Agreement in no way is intended to encourage or commit any violation of law or unlawful interference with any official proceeding or investigation. Each client-signatory acknowledges the explanation and understanding.

13. **Agreement Fully Explained.** Each attorney-signatory has fully explained the terms of this Agreement and is fully satisfied that the client understands the terms, agrees to abide by them, and that the attorney is authorized by the client to execute this Joint Litigation and Confidentiality Agreement.

14. **Substitution of Parties or Attorneys.** This Agreement shall automatically apply to substitute or associated counsel who may appear on behalf of any client-signatory. This Agreement shall not be subject to abrogation by any heir, assign, or other successor in interest to any party hereto. Nor shall such heir, assign, or successor in interest waive any privilege or doctrine with regard to information shared or among the parties to this Agreement.

15. **Right to Terminate Participation; Termination is Prospective Only.** Each signatory to this Agreement has the right to terminate his or her participation at any time. Termination shall be effective upon tendering written notice to each attorney-signatory and returning to each attorney-signatory the joint defense materials (and all copies, summaries or excerpts) received. Termination of a party's participation under this Agreement shall not operate as a waiver or authorize violation of this Agreement. A terminating party remains bound to maintain the confidentiality of information received under this Agreement.

**RULE 16 AND BEYOND – GETTING EVIDENCE AND INFORMATION FOR TRIAL:
RULE 17(C) SUBPOENAS, OPEN RECORDS ACT AND OTHER TOOLS**

Cynthia Hujar Orr
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Rule 16 Federal Rules of Criminal Procedure

Rule 16. Discovery and Inspection

- (a) Governmental Disclosure of Evidence.
 - (1) Information Subject to Disclosure.
 - (A) Statement of Defendant
 - (B) Defendant's Prior Record
 - (C) Documents and Tangible Objects.
 - (D) Reports of Examinations and Tests
 - (E) Expert Witnesses.

Court has inherent power of discovery beyond Rule 16

If the rules do not prohibit the discovery, Courts have discretion to exercise their inherent power to order discovery or provide it via local rule. *Cf. Wise v. Henkel*, 220 U.S. 556, 55 L.Ed. 581, 31 S.Ct. 599 (1911). *See also, U.S. v. Taylor*, 25 FRD 225 (D. NY 1960); *US v. The Honorable Sarah T. Hughes*, 413 F.2d 1244 (5th Cir. 1969), *vacated as moot sub nom, U.S. v. Gifford Hill American, Inc.*, 397 US 93 (1970).

Court has supervisory power over federal officials

Under its supervisory power, a court may direct a federal prosecutor or other official to produce discovery beyond Rule 16.

Rule 15 - Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.”

May not be taken of a party Defendant without the Defendant's consent

A deposition may not be taken of a party Defendant without the defendant's consent. Rule 15 (d)(1)

provides that “in no event shall a deposition be taken of a party defendant without that defendant’s consent.”

Ex parte deposition

Order compelling prospective government witness to give deposition under oath without the Government present for limited purpose of discovery was unauthorized, **absent evidence that Government had impeded defendants' ability to talk to witness or that witness ever did refuse to talk to defendants or their counsel**; there was nothing improper about witness' refusal to talk to defendants or their counsel unless government counsel was also present. Fed.Rules Cr.Proc. Rule 15(a), *In re United States*, 858 F.2d 153 (5th Cir. 1989).

Written Interrogatories

Depositions may be taken by written interrogatories. Rule 15 (d) provides that depositions “shall be taken and filed in the manner provided in civil actions.” Note, however, that this does not permit written interrogatories of the parties, only of witnesses. Rule 15 (g) allows taking of a deposition orally or upon written questions by agreement of the parties with the consent of the court.

Allowed under Exceptional Circumstances

The predecessor to Rule 15 allowed depositions upon a showing that a prospective witness may be unable to attend or prevented him from attending trial, where his testimony was material and where it was also necessary to take his deposition in order to prevent a failure of justice. A similar showing today would also warrant a deposition. However, the current rule allows depositions in “extraordinary circumstances” without defining that term. Some circumstances which have been found to be extraordinary include:

- Foreign National subject to deportation, imprisonment
- Ill health and inability to travel
- Impending death or advanced age

Admissibility

Rule 15 (e) allows use of the deposition at trial if the witness is unavailable, or the deposition may be admitted as an inconsistent statement of the witness, to impeach the witness or as the remainder of related testimony .

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, maybe used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a)¹ of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness’ deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

Rule 15 (e), Federal Rules of Criminal Procedure.

Deposition of Confined Material Witness

If a witness is detained pursuant to Section 3144 of title 18², United States Code, the court, on written motion of the witness and upon notice to the parties, may direct that the witness' deposition be taken. Rule 15 (a), Federal Rules of Criminal Procedure. Section 3144 pertains to confinement of a material witness.

Deposition to Record Prior Consistent Statement

Prosecutor may comment on the ability of the defendant to shape his testimony in light of his presence during trial testimony.

In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate--and indeed, given the inability to sequester the defendant, sometimes essential--to the central function of the trial, which is to discover the truth.

Portuondo v. Agard, 529 U.S. 61, 73, 120 S. Ct. 1119, 1127 (2000).

Unavailability

- Foreign National subject to deportation, imprisonment
- Ill health and inability to travel
- Impending death or advanced age

Admissibility

- Rule 15 (e) allows use of the deposition at trial if the witness is unavailable.
- Prior Inconsistent Statement
- Impeachment
- Remainder of related writing

Foreign Deposition

- Former 28 USC Section 644
- Preserved in Rule 27(c)³ of the Federal Rules of Civil Procedure
- Consular representative must confirm witness' willingness to appear voluntarily

Foreign Business Records

Foreign Business Records are admissible, after notice, under 18 U.S.C. Section 3505 if : A foreign certification attests that-

- Record made at or near time of occurrence of matters set forth, by a person with knowledge
- Record kept in regular course of regularly conducted business activity
- The activity made such a record as a regular practice

- And if not an original, the record is a duplicate

A motion opposing admissions shall be made and determined before trial or else the government waives the records' admissibility. If the government is the sponsoring party, you may object to admission of the records pursuant to the Fourth Amendment to the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure, due process clause contained in the Fifth Amendment, confrontation clause and compulsory process clauses as well as his rights to the effective assistance of counsel contained in the Sixth Amendment to the United States Constitution as well as his right to a fair trial guaranteed by both the Fifth and Sixth Amendments, 18 U.S.C. §3505(b), and Federal Rules of Evidence 403, 602, 801(c), 802, and 901. See Motion on Trial Prep Tool Box Disk.

RULE 17 – Subpoena

(a) For Attendance of Witnesses; Form; Issuance.

The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served

17(b) Defendants Unable to Pay.

The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense.

17(c) For Production of Documentary Evidence and of Objects

The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Showing for Pretrial Production

The Supreme Court established a four part test for showing a subpoena should issue under Rule 17(c) in *U. S. v. Nixon*, 418 U. S. 683, 699-700, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

1. Documents are evidentiary and relevant;
 2. That they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
 3. That the party cannot properly prepare for trial without such production and inspection in advance of the trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
 4. That the application is made in good faith and is not intended as a general 'fishing expedition.'
- See Motion on Trial Prep Tool Box Disk.

Ex parte Request Under 17 (c)

The Court in *U. S. v. Reyes*, 162 F.R.D 468, 470 (S.D.N.Y. 1995) recognized concerns for the attorney client privilege and work product doctrine, among other concerns, and held that 17(c) subpoena procedures could be conducted *ex parte*. See Motion on Trial Prep Tool Box Disk.

Discovery under 18 U.S.C. Section 2510 et seq.

The wiretap law at 18 U.S.C. § 2510 et seq. contains its own distinct discovery provision. It provides that "[t]he judge, upon the filing of a motion, may... make available to...person or his counsel for inspection such portions of the intercepted communications, applications and orders..." 18 U.S.C. 2518(8)(d) In addition, the statute requires production of documents related to the interception before the contents may be used at any hearing:

The contents of any wire, oral, or electronic communication intercepted...shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding...unless each party...has been furnished with a copy of the court order and accompanying application under which the interception was authorized...

18 U.S.C. 2518(9). See Motion on Trial Prep Tool Box Disk.

Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552 et seq.

[Attorney General Reno decided to] rescind[] a 1981 Reagan administration policy on the defense of agency actions in FOIA litigation... [ordering that the Justice Department] no longer defend an agency's decision to withhold information merely because there is a 'substantial legal basis' for doing so. Instead, Reno said, in deciding whether to defend a non-disclosure decision, the department will apply a presumption of disclosure.

Administration Tells Agencies to Tilt Toward FOIA Disclosure, 62 USLW 2246 (October 26, 1993).

Matters which may be obtained through the Freedom of Information Act are:**Government Manuals on training and procedure**

- Agency records
- Uses
- Non-DOJ Government Agency Records (RTC, FCIC)
- Habeas Discovery
- Impeachment or cross exam materials
- As you know, the amended FOIA requires reduction or waiver of search and/or copying fees when release of the requested information would be "in the public interest."

See Letters on Trial Prep Tool Box Disk.

A similar request may be made using the Texas Public Information Act. Texas Government Code Chapter 552. See Letter contained on Trial Prep Tool Box Disk.

28 CFR §16.21 et seq testimony of or documents from Government Agent or Official

28 CFR § 16.21 et seq. provide the proper procedure for subpoenaing a government agent, official and

documents duces tecum. See Letters and Affidavit on Trial Prep Tool Box Disk.

Endnotes:

1. Rule 804 (a), Federal Rules of Evidence states as follows:

(a) Definition of unavailability. Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

2. Section 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

3. "27(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony." Rule 27 (c), Federal Rules of Civil Procedure. The Note to Subdivision (c) of the Rule provides that: "This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, [former] § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method."

WIRETAPS, ATTACKING THEM, STEP BY STEP

Tim Finnegan

214 Duboce Avenue
San Francisco, California
(415) 861-3555

I. DISCOVERY RELATED TO WIRETAP MOTIONS

- A. Applications, Orders, Affidavits, Periodic Reports
- B. Call Logs
- C. Government Databases and Summaries
- D. PEN Registers
 - 1. Applications
 - 2. Databases
- E. Trap and Trace
- F. Number Search Studies
- G. Subscriber Data
- H. CI Criminal Histories
- I. Related Investigations

II. INVESTIGATION RELATED TO WIRETAPS

- A. Original Miscellaneous File
- B. Informants
- C. Phone Records
- D. Cell Phone Records
- E. Targets' Whereabouts

F. Subpoenas

G. Transcripts

III. MOTIONS ATTACKING STATUTORY COMPLIANCE

A. Strict Compliance - Giordano

B. Period of Interception - 2518(1)(d), 2518(5)

C. Sealing - 2518(8)(a)

D. Minimization - 2518(5)

E. DOJ Approval - 2518 (1)(a), 2516(1)(a)

F. Particularity - 2518(1)(b)

G. Prior Applications - 2518(1)(e)

IV. FRANKS MOTION

A. Probable Cause - 2518(3)(a), 2518(1)(b)

B. Necessity - 2518(1)(c), 2518(3)(c)

C. Informants

D. Related Investigations

1. State cases
Car stops
Searches
Hearing Testimony

2. TECS
NADDIS
FINCEN

E. Boilerplate

1. Investigation not really tried

2. Agent opinion

F. Reliability - Reeves and Hall

G. Financial Investigation - DOJ Publications

V. DEVELOPING ISSUES

A. Roving taps

B. Venue

C. E-mail

D. Disparate Impact - Selective Prosecution

**SAMPLE MOTION A
SURVEILLANCE
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,	)	Case No. CRXX-XXXXX XXX
	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION
	)	TO SUPPRESS EVIDENCE
	)	OBTAINED BY ELECTRONIC
	)	SURVEILLANCE FOR FACIAL
vs.	)	DEFICIENCY OF WIRETAP
	)	APPLICATIONS & ORDERS
	)	Date: May 18, 1999
VICTOR Xxxxx; et al.	)	Time: 2:00 p.m.
	)	Court: Hon. Sandra B. Armstrong
Defendants.	)	TIME EXCLUDED: 18 U.S.C.
_____	)	Section 3161(h)(1)(F), (J).

TO: THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ASSISTANT UNITED STATES ATTORNEY MARY POGIALES; ALL CO-DEFENDANTS AND THEIR COUNSEL:

PLEASE TAKE NOTICE that on May 18, 1999, at 2:00 p.m., or as soon thereafter as the matter may be heard before the above-entitled court, defendant Xxxxx, by his counsel, will move this Court for an order suppressing all evidence in this matter obtained by means of electronic surveillance. Defendant so moves pursuant to Title III, United States Code section 2510 et seq.

This motion is made on the grounds that the applications for Title III authorization for the wiretaps in this case were facially inadequate for the following reasons:

1. The application, and the resulting order, for the wiretaps on cell phone numbers 510-414-9741 and 916-718-2661 lacked particularity because they failed to specifically identify the facilities to be intercepted;
2. The application for the initial tap on cellular phone number 916-718-2661 was not properly authorized by the Attorney General or her designee, and the resulting order was therefore invalid;
3. The government violated Title III by recording telephone interceptions on lines 707-263-1691 and 916-718-2661 during periods for which the government did not have lawful authorization to intercept those lines.

4. The government failed to properly seal the wiretap recordings of telephone numbers 916-718-2661 and 707-263-1691 in a timely manner, and failed to seal other recordings at all.

Defendant's motion is supported by the attached memorandum of points and authorities, the records and files of this case, the exhibits filed in support of this motion, and such other evidence as the Court may receive at the hearing on this motion.

DATED: April 12, 1999.

Respectfully Submitted,

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No. CRXX-XXXXXX XXX
Plaintiff,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
vs.	)	MOTION TO SUPPRESS EVIDENCE
	)	OBTAINED BY ELECTRONIC
VICTOR Xxxxx; et al.	)	SURVEILLANCE
Defendants	)	
_____	)	

INTRODUCTION

Defendant Victor Nolasco-Xxxxx, by and through his counsel, submits the following memorandum of points and authorities in support of their motion to suppress all evidence obtained by unlawful electronic surveillance.¹ Defendants so move pursuant to 18 U.S.C. section 2518 (10)(a), which provides for suppression of evidence on the following grounds: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."

1

This motion only addresses the facial validity of the wiretap applications, affidavits and orders, as well as the government's compliance with the procedural requirements of Title III. The defense is not now prepared to proceed with a motion to traverse the wiretap affidavits pursuant to *Franks v. Delaware*. The defense application for funds for investigation relating to the traverse motion is pending before the Court, and the required investigation has not been completed.

From October 14, 1997 to March 6, 1998, the Drug Enforcement Administration (“DEA”) obtained judicial authorization to conduct a series of twenty telephonic surveillance interceptions (hereinafter “wiretaps”). These wiretaps were placed on the residential telephone lines of the defendants, and also on their cellular phones and pagers. This five-month series of wiretaps resulted in the interception of telephone conversations involving all of the defendants in this case.

This motion attacks the facial validity of the wiretap applications and orders. The first prong of the attack is that the order lacked sufficient particularity for it to be validly issued and executed. This insufficiency is related to the government’s failure to specifically identify subscribers of target facilities and the government’s failure to specify and specifically describe the facilities sought to be intercepted. In addition, this motion attacks the validity of the intercept orders based on the government’s failure to follow and comply with recognized requirements of Title III in obtaining and executing the wiretap orders discussed herein. Finally, by this motion defendant Xxxxx asserts that the government failed to seal several of the wiretap interceptions in a timely manner, and that this failure mandates suppression of those interceptions.

STATEMENT OF FACTS

A. Chronology of Wiretap Applications

The series of wiretap applications at issue in this case were filed in the Northern District of California in Misc. File. No. CR-97-362-MISC-TEH, the Honorable Thelton E. Henderson. Authorizations were also sought and obtained from Judge Charles A. Legge in a signed order on January 15, 1998; from Judge John G. Davies, United States District Court Judge for the Central District of California on November 25, 1997 (terminated December 25, 1997) and; and Judge Audrey B. Collins, United States District Court Judge for the Central District of California on February 18, 1998.²

The first wiretap authorization order was filed on October 14, 1997. It authorized interception of all communications on: 1) a residence telephone (707)226-9417, subscribed to by Sonia Guadalupe Zzzzz, at 2298 Clay Street, in Napa California;³ 2) a cellular phone (510)414-9741, subscribed to by Maria Aaaaaa, P.O. box 555427, Hayward, California and 3) a digital display pager (510) 892-6661, utilized by an unnamed subscriber⁴, for a period of thirty (30) days. See Exhibit 3. The affidavit in support

2

Antonio Yyyyyy and Rigoberto Zzzzz are named interceptees in that wiretap.

3

Interception on the residence phone (707) 226-9417 was terminated on November 3, 1997. Extensions were sought regarding the cellular phone and digital pager.

4

Although the order of interception identifies the subscriber as being unknown, the specific target

of the application alleged that these telephone facilities were used by Antonio Yyyyyy.

The second authorization was filed on October 31⁵, 1997 for a 30-day interception of all communications on cellular phone (916) 718-2661. See Exhibit 6⁶

The third authorization was filed on November 12, 1997 for a 30-day interception of all communications on (510) 604-2439, identified by electronic serial number ("ESN") E02D23FC, and subscribed to by Maria Aaaaaa , P.O. Box 555427, Hayward, California. See Exhibit 9.

The fourth authorization was filed on November 14, 1997. This authorization extended for a 30-day period the interception of all communications to and from cellular telephone (510) 414-9741 ESN D4E6E869, subscribed to by Maria Aaaaaa , P.O. Box 555427, Hayward, California and for electronic communications digital display pager numbers (510) 892-6661 and (707) 327-1208, subscribers unknown. See Exhibit 12^{7,8}

of interception was Antonio Yyyyyy, this digital pager being identified as being utilized by him. Agent James specifically chose not to determine who the subscriber to this digital pager was (See Affidavit of Douglas James in Support of Application dated October 14,1997 page 2:9; page 2 footnote 2, Exhibit 2)

⁵ Neither the Application requesting nor the Order authorizing interception of this cellular phone number identified its Electronic Serial Number or ESN. The James Affidavit dated October 31, 1997 identifies the ESN as D4E9519B, page 5:7, Exhibit 5.

⁶ Agent James failed to mention in his affidavit the identity of the subscriber of this cellular phone. James Affidavit October 31, 1998 Page 5, Bates 000518. This phone was given to Yyyyyy by the DEA on October 29, 1997. Exhibit 5, James Affidavit, page 25. However, the government revealed for the **first time** in its application for a sealing order for 68 cassette tape recordings that "The Drug Enforcement Administration applied for an Order from this Court authorizing the interception of wire communications occurring to and from (916) 718-2661 **subscribed to by the Drug Enforcement Administration in the name of an undercover agent**" (See Sealing Application January 21, 1998, page 2:17-21, Bates 000666. emphasis supplied) This information is noticeably absent from the October 31, 1997 submissions. See Exhibits 4, 5.

⁷ There is no justification contained in either the application or James affidavit for the identity of subscriber to these numbers being unknown.

⁸ Many of the subsequent applications contained copies of affidavits from earlier applications. In order to reduce the volume of paper associated with this motion, only the new documents in each application have been reproduced here in the exhibits. In addition, every page of documents produced by the government as discovery material has an index, or "Bates", number on the bottom

The fifth authorization was filed on December 15, 1997, extending for 30 days the interception of all communications on (510) 604-2439, ESN E02D23FC, subscribed to by Maria Aaaaaa , P.O. Box 555427, Hayward, California and on electronic communications digital pager number (510) 892-6661 used by Antonio Yyyyyy, and digital display pager number (707) 327-1208, used by Rigoberto Zzzzz.⁹ See Exhibit 18.

The sixth authorization was filed on January 15, 1998, for 30 days of interception of all communications on cellular phone (510) 604-2439, ESN E02D23FC, subscribed to by Maria Aaaaaa , P.O. Box 555427, Hayward, California, and on electronic communications digital pager number (510) 892-6661 allegedly used by Antonio Yyyyyy), subscriber unknown, and digital display pager number (707) 551-1126 (allegedly used by Rigoberto Zzzzz), subscriber unknown. This request and authorization continued and extended previous authorizations for wiretaps on those numbers¹⁰. See Exhibit 21.

The seventh authorization was filed on January 30, 1998, for interception of all communications on (707)263-1691, a new facility subscribed to by Jose G. Yyyyyy, 412 Avenue A, Lakeport California. See Exhibit 24.

The eighth authorization was filed on March 6, 1998, for 30 days of interception of all communications on the residence phone (707)263-1691, subscribed to by Jose G. Yyyyyy, 412 Avenue A, Lakeport California; cellular phone (707) 489-7138, ESN 22302761137, subscribed to by Jose Garcia , P.O. Box 1008, Middletown, California, and electronic communications digital pager number (510) 892-6661 used by Yyyyyy. See Exhibit 27.

DEA Agent Douglas D. James was the case agent for the investigation. He prepared an affidavit

of the page. However, as the government did not bates number the applications and attendant documents in any sort of chronological order, the defense will cite the documents by their original page numbers.

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In each of these subsequent applications, Agent James continues to assert that the subscribers to the two(2) digital pager display numbers are unknown, although he identifies the (510) 892-6661 as the “target pager” used by Yyyyyy and the (707) 551-1126 as Zzzzz’s pager used by Rigoberto Zzzzz. See James Affidavit December 15, 1997 page 2:6-12, Bates 000336. Curiously, Agent James asserts that his affidavit is in support of an application for **original interception** of (707) 551-1126 although James had sought and received previous authorization for interception of this number in the November 14, 1997 affidavit, application. See James Affidavit November 14, 1997. Page 2, Exhibit 11.

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This authorization was reviewed and signed by Judge Legge. The affidavit in support contains no explanation of why the need for the interception of a different pager number was sought.

in support of each application.

The following chart summarizes each wiretap application, Department of Justice authorization, order and sealing order by date and, where relevant, time (**BOLD** = first application for each facility, parentheses contain listed subscriber):

APPLICATION	AUTHORIZATION	ORDER	SEALED
10/14/97 7072269417 (Zzzzz) 5104149741 (Aaaaaa) 5108926661(Pager)	10/10/97 12:01 p.m. 7072269417 (Zzzzz) 5104149741 (Aaaaaa)	10/14/97 10:24 a.m. 7072269417 (Zzzzz) 5104149741 (Aaaaaa) 5108926661 (Pager)	11/4/97 7072269417 (Zzzzz)
10/31/97 9167182661 (None)	10/31/97 3:36 p.m. (PST) 11/3/97 <i>FILED</i> 9167182661 (DEA)	10/31/97 1:42 p.m.(PST) 9167182661 (None) 11/3/97 - <i>AUTH FILED</i>	1/21/98 9167182661
11/10/97 5106042439 (Aaaaaa)	11/10/97 4:28 p.m. (PST) 5106042439 (Aaaaaa)	11/10/97 5:35 p.m. (PST) 5106042439 (Aaaaaa)	2/18/98 <i>NO ORDER</i> 5106042439 (Aaaaaa)
11/13/97 5104149741 (Aaaaaa) 7073271208(Pager) 5108926661 (Pager)	11/13/97 2:49 p.m. (PST) 5104149741 (Aaaaaa)	11/13/97 3:50 p.m. (PST) 5104149741 (Aaaaaa) 7073271208 (Pager) 5108926661 (Pager)	12/15/97 <i>NO ORDER</i> 5104149741 (Aaaaaa)
12/4/97 9167182661 (None)	12/4/97 12:20 p.m. (PST) 9167182661 (DEA)	12/4/97 5:00 p.m. (PST) 9167182661 (None)	1/21/98 9167182661
12/15/97 5106042439 (Aaaaaa) 5108926661 (Pager) 5105511126(Pager)	12/11/97 3:12 p.m. (PST) 5106042439 (Aaaaaa)	12/15/97 11:45 a.m. 5106042439 (Aaaaaa) 5108926661 (Pager) 5105511126 (Pager)	2/18/978 <i>NO ORDER</i> 5106042439 (Aaaaaa)
1/15/98 5106042439 (Aaaaaa) 5108926661 (Pager) 5105511126 (Pager)	1/14/98 3:33 p.m. (PST) 5106042439 (ESN/Zac)	1/15/98 2:00 p.m. 5106042439 (ESN/Zac) 5108926661 (Pager) 5105511126 (Pager)	2/18/98 <i>NO ORDER</i> 5108926661 (Pager) 5105511126 (Pager)
1/30/98 7072631691 (None)	1/29/98 2:45 p.m. 7072631691 (J. Card)	1/30/98 9:45 a.m. 7072631691 (J. Card)	3/13/98 <i>NO ORDER</i> 7072631691 (J. Card)
3/6/98 7072631691 (J. Card.) 7074897138 (J. Garcia) 5108926661 (Pager)	3/6/98 7072631691 (J. Card.) 7074897138 (J. Garcia)	3/6/98 8:35 a.m. 7072631691 (J. Card.) 7074897138 (J. Garcia) 5108926661 (Pager)	3/13/98 7072631691 (J. Card.) 7074897138 (J. Garcia) 5108926661 (Pager)

B. The Applications for the Wiretaps on the DEA Cell Phone.

The government's initial application (submitted October 31, 1997) for the wiretap on telephone facility 916-718-2661 indicated that the target facility was a cellular phone, and identified the target cell phone by its then assigned telephone number. See Exhibit 4. Neither the application for the cell phone tap nor the affidavit in support thereof identified the target cell phone by either the electronic serial number or mobile identification number of the phone. See Exhibits 4, 5.

The application also did not include any document indicating that an appropriate official from the office of the attorney general had authorized the application and proposed wiretap. See Exhibit 4. And in fact no such authorization had issued from the Department of Justice. However, rather than rejecting the application, the reviewing court issued an order authorizing the wiretap in anticipation of the investigators obtaining proper authorization from Washington. At the bottom of the proposed order the reviewing court added, in holographic form, the following clause: "This order is not to be executed unless or until formal written approval is received from the U.S. Attorney General or her designee." Exhibit 6. The reviewing court added the same language to the corresponding order to service providers. See Exhibit 6.

The investigating agents apparently did not receive authorization from the Department of Justice for the wiretap until at least 3:36 p.m. on October 31, 1997, as the facsimile line on the top of the authorization letter indicates that it was delivered at 6:36 p.m., Eastern time, on October 31st. See Exhibit 4. The government began intercepting calls on the 916-718-2661 line at approximately 3:35 p.m. on October 31, 1997. See Exhibit 27. The government did not deliver the authorization letter to the reviewing court or file the letter until November 3, 1997. See Exhibit 6.

The initial authorization for the tap on the 916-718-2661 line expired on November 29, 1997. However, the government continued to intercept calls over that line on November 30, 1997. See Exhibit 28. On December 4, 1997, the government sought and received an order renewing the wiretap on the 916-718-2661 line. See Exhibit 13. The December 4, 1997 authorization, for thirty days of interception, terminated on January 2, 1998. The government did not renew the order for the tap on the 916-718-2661 line after the December 4th order expired. The tapes were sealed by court order on January 21, 1998, three weeks after the final authorization terminated. See Exhibit 15.

C. The Applications for the Wiretaps on Jose Yyyyyy' Phone.

The government submitted its first application for a wiretap on telephone facility 707-263-1691 on January 30, 1998. The application identified the phone subscriber as Jose Yyyyyy, and specified the single facility to be tapped as being located at 412 Avenue A, Lakeport, California. See Exhibit 22.

The resulting order authorized thirty days of interception on the 707-263-1691 line. See Exhibit

24. The government began intercepting calls on that line on January 30, 1998, and continued intercepting calls over the 707-263-1691 line through March 1 and 2, 1998. See Exhibit 30.

The government applied for and received a second order authorizing a wiretap on line 707-263-1691 on March 6, 1998. See Exhibits 25, 27. The second application included two additional phone lines to be intercepted, and named two new interceptees. See Exhibit 25.

The government has not disclosed any order of court indicating that the wiretap recordings of line 707-263-1691 were ever sealed.¹¹ However, a DEA report relating to the wiretap tapes indicates that an agent placed the tapes in a sealed box on March 13, 1998, two weeks after the first wiretap authorization expired. See Exhibit 27.

ARGUMENT

I. THE WIRETAP ORDERS LACKED PARTICULARITY BECAUSE THEY FAILED TO ADEQUATELY SPECIFY THE FACILITIES TO BE INTERCEPTED.

A. The Particularity Requirement.

Wiretap and electronic surveillance activities are subject to the Fourth Amendment, which requires that warrants be issued only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See Berger v. New York, 388 U.S. 41, 54-55 (1967). In the case of wiretap applications and orders, as the Supreme Court noted in Berger, "the need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great..." Id. at 56. The reason, of course, is the especially intrusive nature of electronic surveillance, which invades not only the privacy of the "suspect" but also the constitutionally protected privacy of third parties who may have confidential conversations over the tapped telephones on subjects wholly unrelated to the suspected criminal activity.

In United States v. Sandoval, 550 F.2d 427 (9th Cir.1976), the court found that Title III guards against unwarranted electronic surveillance excursions to "get everyone." Fishing expeditions are precluded by "an affidavit with 'specifics' and not mere conclusions, the requirements of probable cause, and by the necessity of obtaining judicial review by an impartial magistrate." Id. at 431.

The requirement of particularity is both a constitutional and statutory prerequisite. By statute, each order authorizing the interception of oral and wire communications must specify the identity of the persons whose communications are to be intercepted, the nature and location of the communications

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As the court clerk's miscellaneous filed containing the wiretap applications, affidavits, orders and periodic reports remains sealed, the defense cannot ascertain whether any sealing orders are contained in that file.

facilities as to which authority to intercept is granted, a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates. 18 U.S.C. §§2518(4)(a), (b), & (c). Overly broad or vague descriptions of the communications to be intercepted do not meet this particularity requirement. See e.g., *United States v. Leisure*, 844 F.2d 1347, 1356 (8th Cir.1988). Accordingly, the Fourth Amendment requires that the government show that it has probable cause to believe that a specific crime has been or is being committed before it may invade constitutionally protected areas and this particularity requirement is only satisfied if a wiretap order identifies (1) the telephone line to be tapped and (2) the particular conversations to be seized. *United States v. Carneiro*, 861 F.2d 1171, 1178 (9th Cir. 1988). Once a wiretap order complies with the requirements of the Fourth Amendment and Title III, it may be formulated in a manner broad enough to allow interception of any statements concerning a specific pattern of crime. *Id.* at 1179; see also *United States v. Licavoli*, 604 F.2d 613, 620 (9th Cir.1979).

B. In Order to Satisfy the Specificity Requirement, Cellular Phones Must Be Identified by Their Electronic Serial Number or Mobile Identification Number.

As technology has changed since the enactment of Title III in 1968, The Congress has amended the wiretap statutes to reflect the emergence of cellular phones as a common form of electronic surveillance. The courts have also attempted to apply the particularity requirements of Title III to the emerging cell phone technology. In so doing the federal courts have concluded that in order satisfy the particularity requirements set forth in section 2518(1)(b)(ii) and 2518(4)(b), the application and resulting wiretap order must identify a cellular phone facility by its electronic serial numbers (“ESN” and “MIN”).

A cellular telephone obviously is not fixed to a certain location. The only way to specify a particular cellular phone is by referring to identifiers that are unique to a specific physical cell phone - the electronic serial number or mobile identification number of each phone. The telephone number that may be assigned to a given cell phone at any particular time is not necessarily unique to the physical phone facility, as each cell phone may be assigned a new telephone number by the mere stroke of a computer key by the cell phone service provider. See *United States v. Watson*, 118 F.3d 1315 (9th Cir. 1997)(“Each cellular phone manufactured is assigned an electronic serial number (‘ESN’), similar to the vehicle identification number found on every car’s dashboard. When a cellular telephone is connected to a service provider, it is also assigned a mobile identification number (‘MIN’). The combination of these two numbers identifies the cellular phone user, as it is programmed into a memory chip in the phone to obtain service.”)

The Second Circuit’s decision in *United States v. Goodwin* examined the “roving” wiretap provisions set forth in the newly amended section 2518(11) and the specificity required for wiretaps on cellular telephones. See *United States v. Goodwin*, 141 F.3d 394 (2nd Cir. 1997). In the *Goodwin* case a defendant argued that “a cellular phone has no fixed location, and that it therefore would be impossible for the government or the district court to specify the facility from which or the place where the communication was to be intercepted.” *Id.* at 403. The defendant thus asserted that all wiretap applications and orders for interception of cellular phone communications must satisfy the higher

requirements for “roving” wiretaps set forth in section 2518(11). Id. The Second Circuit rejected this argument and noted that the government’s wiretap applications, and the resulting orders, satisfied the particularity requirements of Title III because they “specifically identified the facilities to be tapped by their telephone numbers and by their electronic serial numbers.” Goodwin, 141 F.3d at 403; see also United States v. Fort, 1994 U.S. Dist. LEXIS 8246 (N.D.Ill. June 13, 1994)(“The court finds that the intercept order adequately specifies the particular telephone to be monitored . . . , identified by electronic serial number 8709D9AB. . .”)

The first wiretap application in this case, and the resulting order authorizing interception of calls over cell phone number 510-414-9741, did not identify the facility to be intercepted by either the ESN or MIN. See Exhibits 1, 3. The application and order thus failed to identify a specific cell phone facility, and violated the particularity requirements set forth in section 2518(1)(b)(ii) and 2518(4)(b). The first application for authorization on cellular phone facility 916-718-2661 similarly failed to identify the cell phone to be tapped by either its ESN or MIN. See Exhibits 4, 6. Moreover, the application and order for the tap on 916-718-2661 did not even identify the subscriber to the phone facility. See Exhibits 4, 6. That order also ran afoul of Title III’s particularity requirements.

Other language in the orders at issue, as well as the government’s actions in submitting other applications in this case, clearly indicate the government was aware that a lawful wiretap application for interception of a cell phone facility must specify the phone by a unique identifier, not just the cell phone number. For example, the order authorizing interception of calls over cellular phone number 510-414-9741 allowed the government to intercept telephone calls over “any subsequent numbers assigned to the same Electronic Serial Number as (510) 414-9741,” yet did not identify the Electronic Serial Number to which the order referred and which the government was thereby authorized to intercept. See Exhibit 3 (at p.4 of order). The order for the tap on 916-718-2661 included identical language. See Exhibit 6. That the government was aware that it need specify the cell phone facilities by their ESN or MIN is particularly evident in light of the fact that the second application for interception of cell phone number 510-414-9741 (November 13, 1997) identified the facility by its ESN. See Exhibit 10.

The government’s identification of the cell phone facilities by telephone number is not sufficient, as the number is fungible, not related to any particular physical phone facility, and does not identify the privacy interest area to be invaded by the wiretap order. Cf. United States v. Feldman, 606 F.2d 673, 676 (6th Cir. 1979) (inadvertent interception of an unlisted phone number at a facility particularly described by physical location did not violate Title III). Absent a specific description of the cell phone facilities to be intercepted, the wiretap applications and resulting orders were facially invalid, and the calls recorded pursuant to the orders must be suppressed pursuant to 18 U.S.C. section 2518 (10)(a).

II. THE WIRETAP ORDER FOR TELEPHONE FACILITY 916-718-2661 WAS INVALID BECAUSE THE GOVERNMENT HAD NOT OBTAINED AUTHORIZATION TO INTERCEPT THAT FACILITY WHEN IT SUBMITTED THE APPLICATION

The government submitted the application for the wiretap on the DEA cell phone prior to obtaining authorization from the Department of Justice for the electronic interception of that facility. In response the reviewing court issued an order authorizing the wiretap, but contingent upon the government receiving authorization from the Department of Justice. The court's order authorizing the wiretap on the DEA cell phone thus violated a core provision of Title III, and was unlawful on its face.

A. The Requirement of Attorney General Authorization

Title III specifically limits the circumstances under which a prosecutor may submit an application for a wiretap order:

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made. . .

18 U.S.C. § 2516. In *United States v. Giordano* the Supreme Court analyzed the legislative history of Title III, and concluded that the statutory requirement of pre-approval by the Attorney General or Assistant Attorney General was an indispensable prerequisite for a valid wiretap application:

The purpose of the legislation, which was passed in 1968, was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in § 2516. Judicial wiretap orders ***must be preceded by applications containing prescribed information***, § 2518 (1). The judge must make certain findings before authorizing interceptions, including the existence of probable cause, § 2518 (3). . .

The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. . . The Act plainly calls for the ***prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop.*** The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order.

The legislative history of the Act supports this view. As we have indicated, the Act was passed in 1968, but the provision of § 2516 requiring approval of applications by the Attorney General or a designated Assistant Attorney General dates from 1961, when a predecessor bill was being considered in the 87th Congress. Section 4(b) of that bill, S. 1495, which was also aimed at prohibiting all but designated official interception, initially provided that the "Attorney General, or any officer of the Department of Justice or any United States Attorney specially designated by the Attorney General, may authorize any investigative or law enforcement officer of the United States or any Federal agency to apply to a judge" for a wire interception order. Hearings on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 5 (1961). Under that phraseology, the authority was centered in the Attorney General, but he could empower any officer of the Department of Justice, including United States Attorneys and the Executive Assistant, to authorize applications for intercept orders. At hearings on the bill, the Assistant Attorney General in charge of the Criminal Division stated the views of the Department of Justice, and the Department later officially proposed, that the authority to approve applications be substantially narrowed so that the Attorney General could delegate his authority only to an Assistant Attorney General. The testimony was:

‘This is the approach of S. 1495, with which the Department of Justice is in general agreement. The bill makes wiretapping a crime unless specifically authorized by a Federal judge in situations involving specified

crimes. *As I understand the bill, the application for a court order could be made only by the authority of the Attorney General or an officer of the Department of Justice or U. S. Attorney authorized by him. I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any assistant Attorney General whom he may designate.* This would give greater assurance of a responsible executive determination of the need and justifiability of each interception.’ Id., at 356..

United States v. Giordano, 416 U.S. 505, 514-17 (1974)[emphasis added][footnotes omitted].

Clearly it was the intent of The Congress to require that the Attorney General or her particular designee review and approve each wiretap application before the application is submitted to the magistrate, and that proof of the Attorney General’s review and approval be a precondition to the reviewing court’s issuance of a wiretap order. The application in this case violated Title III because it was made by investigative personnel, without the Attorney General’s approval. The investigating officials effectively removed the reviewing court from the process of screening the application for high level Department of Justice approval by delegating review of proper section 2516 authorization back to the investigating officials. For the order did not require that the government again submit the application to the reviewing court once proper authorization was obtained. And in fact the investigating officials initiated interception of telephone calls under the order four days prior to submitting the Attorney General’s formal authorization of the tap to the reviewing court. See Exhibits 6, 28.

In addition, it appears that the government executed the wiretap order before receiving authorization from the Attorney General. The government began recording telephone calls over the wiretap some ten minutes before the Attorney General’s office delivered the approval letter to the U.S. Attorney’s office in San Francisco. See Exhibit 28. More importantly, the government must have delivered the order to the cell phone service provider, and the service provider must have acted on the order, long before the government started recording at 3:25 p.m. on October 31, 1997. Just before the U.S. Attorney’s office received the authorization letter, the tap was in place and activated. This means that the order to the service providers must have been delivered hours earlier, and that the service providers acted on the order prior to the government receiving the authorization from the Attorney General.

B. The “Anticipatory Warrant” Exception to the Fourth Amendment Warrant Requirement Does Not Apply to Title III Orders.

It is not disputed that a search warrant that anticipates the happening of some contingency to effectuate the warrant satisfies the requirement of the Fourth Amendment. See United States v. Hotal, 143 F.3d 1223 (9th Cir. 1998). However, the contingency must relate to some event that establishes probable cause for the search:

Probable cause for anticipatory warrants is contingent on the occurrence of certain expected or ‘triggering’ events, typically the future delivery, sale, or purchase of contraband. Therefore, in making the probable cause determination, the magistrate must ‘take into account the likelihood that the triggering events will occur on schedule and as predicted.’ *Ricciardelli*, 998 F.2d at 11. If the triggering events do not occur, the anticipatory warrant is void. See *Garcia*, 882 F.2d at 702 (‘An anticipatory warrant, by definition, is a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void.’).

In addition to taking into account the likelihood that the triggering events will occur, the magistrate must also determine the likelihood that, after the triggering events have occurred, the contraband will be at the designated place when searched. As with all warrants, probable cause to support an anticipatory warrant ‘does not exist unless a sufficient nexus between the [contraband] and the place to be searched exists.’ *Dennis*, 115 F.3d at 530.

United States v. Rowland, 145 F.3d 1194, 1201 (10th Cir. 1998). The Seventh Circuit reached a similar conclusion in *United States v. Dennis*:

Conditions Precedent Anticipatory warrants differ from other search warrants in that they are not supported by probable cause to believe that contraband exists at the premises to be searched at the time they are issued. In fact, a court issues an anticipatory warrant with the knowledge that contraband does not presently exist at the location to be searched. See *Leidner*, 99 F.3d at 1425. However, at the time a court issues an anticipatory warrant, probable cause exists to believe that contraband will be located at the premises to be searched after certain events transpire. *Id.* Thus, conditions precedent to the execution of an anticipatory warrant are integral to its validity. As the Second Circuit explained, probable cause to uphold an anticipatory search warrant exists when a government official presents independent evidence indicating that delivery of contraband will, or is likely to, occur and when the magistrate conditions the warrant on that delivery. *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989).

United States v. Dennis, 115 F.3d 524, 528 (7th Cir. 1997).

Implicit in the numerous appellate court rulings upholding anticipatory warrants is the courts' acknowledgment that probable cause that movable evidence is located in a specific location may be transient, and that circumstances may prevent the government from presenting the magistrate beforehand with the exact time when the evidence will be found at a certain location. This is not the case with the requirement that Title III applications be approved by the attorney general or her designee.

There is no exigency that would prohibit the government from obtaining the Attorney General's authorization for a wiretap well in advance of submitting the wiretap application. The process of drafting and conducting internal Department of Justice wiretap applications takes months. The government always knows well in advance when it will submit a particular wiretap application. There is no excuse for failing to obtain the required authorization under section 2516.

III. THE GOVERNMENT INTERCEPTED CALLS WITHOUT COURT ORDERS AUTHORIZING THE INTERCEPTIONS

Each of the wiretap orders in this case authorized the government to intercept phone calls or pager transmissions for a period of thirty days. On two occasions the government continued recording telephone calls after the thirty day order expired, even though the government had not yet obtained a renewal of the wiretap order. All of the calls recorded without the proper court authorization must be suppressed.

18 U.S.C. section 2518(5) provides that an order authorizing interception of telephone calls under Title III must terminate by its own terms no later than thirty days after the order issues. In a 1986 amendment to section 2518(5), The Congress specified that "such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order. . ." 18 U.S.C. § 2518(5).

On October 31, 1997, the reviewing court issued an order authorizing the government to intercept calls over telephone number 916-718-2661. See Exhibit 6. The government began intercepting calls pursuant to the order at about 3:25 p.m. on October 31st. See Exhibit 28. The thirty day order expired on November 29, 1997 (one day in October plus twenty nine days in November). The government did not obtain another order authorizing interception of line 916-718-2661 until December 4, 1997, at about 5:00 p.m. See Exhibit 14. However, the government intercepted calls over the line on November 30, 1997, the day after the first order expired. See Exhibit 29.

The government obtained an order authorizing interception of line 707-263-1691 on January 30, 1998, and began intercepting calls over that line at about noon on the 30th. See Exhibit 24, 30. The thirty day interception order terminated on February 28, 1998 (two days in January and twenty-eight in February). The government did not obtain another order for interception of that line until March 6, 1998. However, the government intercepted phone calls over line 707-263-1691 on March 1 and March 2, 1998, without the authorization from the court. See Exhibit 30.

On November 10, 1997, at approximately 5:35 p.m., the court issued an order authorizing the government to intercept phone calls over line 510-604-4239. The government began intercepting calls pursuant to the order the same day. See Exhibit 9. The order was valid for a period of thirty days, and terminated on December 9, 1997 (twenty-one days in November and nine days in December). See Exhibit 9. Though the order expired on November 9, 1997, the government continued intercepting calls over line 510-604-4239 on December 10, 1997. See Exhibit 31.

IV. 18 U.S.C. SECTION 2518(8)(a) REQUIRES THE SUPPRESSION OF THE WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTED BY THE GOVERNMENT WHERE THE GOVERNMENT FAILED TO IMMEDIATELY SEAL THE RECORDINGS.

A. Introduction

Section 2518(8)(a) requires the government to record Title III interceptions and to present all such recordings to the authorizing judge for sealing under the court's direction, "immediately upon the expiration of the period of the order, or extensions thereof."¹² This sealing provision was deemed so important to maintaining the integrity of electronic surveillance, that Congress made it a prerequisite to the government's use of the recordings or of "evidence derived therefrom." 18 U.S.C. section 2518(8)(a). In other words, when the government fails to comply with the sealing requirements of the statute, the defendant is entitled to suppression of the evidence without any showing of prejudice. Id.

As demonstrated below, The agents in the Yyyyyy investigation violated section 2518(8)(a) by failing to properly seal the wiretap recordings of telephone facilities 707-263-1691 and 916-718-2661. Accordingly the contents of all the interceptions, and all the evidence derived therefrom must be suppressed.

B. The Sealing Requirement.

Section 2518(8)(a) sets out the provisions of Title III intended to protect the integrity of the information obtained by otherwise lawful electronic surveillance. First, the subsection requires that "[t]he contents of any [intercepted] wire, oral or electronic communication ... be recorded." Second, the subsection requires that "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings ... shall be sealed" under the directions of the court which authorized the

¹² Title III establishes procedures and safeguards for three kinds of electronic surveillance: the interception of telephone or wire communications (i.e., wiretaps); the interception of oral communications via a hidden microphone (i.e., a bug, or electronic eavesdropping); and the interception of electronic messages conveyed to a digital display pager, or other similar device. 18 U.S.C. sections 2510(1), 2510(2), 2510(12) and 2511. The recording and sealing requirements of section 2518(8)(a) expressly apply to each and every kind of electronic surveillance authorized by the provisions of Title III.

interceptions. Finally, the subsection mandates the suppression of the contents of the recordings, "or evidence derived therefrom," unless the court finds "[t]he presence of the seal ... or a satisfactory explanation for the absence thereof."

In United States v. Ojeda Rios, 875 F.2d 17 (2d Cir. 1989) (Ojeda Rios I), the government appealed from an order suppressing certain electronic surveillance evidence because the government had neither immediately sealed the recordings, nor provided a satisfactory explanation for the delays. In that case, the government obtained Title III authorization for the suspect's residence in Levittown. The suspect moved. Thereafter, the government obtained an authorization for the suspect's new residence in El Cortijo and discontinued interception at Levittown, but delayed sealing the Levittown recordings until all subsequent authorizations expired, a delay of approximately 100 days. The Second Circuit emphasized the importance of the sealing requirement of section 2518(8)(a), stating that it "is no mere technical requirement," but that it embodies a matter of "fundamental concern underlying the electronic surveillance statutes, Title III." Id. at 17. Thus, the Second Circuit held that Congress' intent to make suppression the remedy for violations of the statute applied to the sealing requirements of Section 2518(8)(a). Id. at 18.

Turning to the question whether the suppression remedy applies to delays in sealing just as to the failure to seal, the Second Circuit reaffirmed its holding in United States v. Gigante, 538 F.2d 502 (2d Cir. 1976), that it did. "Any other interpretation 'would completely undercut the statutory purpose of protecting the integrity of the tapes.'" Ojeda Rios I, 875 F.2d at 20 [citations omitted]. Finding the sealing requirement to be a central safeguard in the statute's "scheme to prevent abuses," the court held that sealing delays could not be excused simply by proof of the physical integrity of the tapes. Id. at 21. By the same token, the court ruled that the government's good faith was not a basis for avoiding suppression. Id. at 23.

In United States v. Ojeda Rios, 495 U.S. 260 (1990) (Ojeda Rios II), the Supreme Court affirmed the Second Circuit's holding that section 2518(8)(a) applies to delays in sealing (as well as to failures to seal.) The Court emphasized the congressional intent "to insure the reliability and integrity of evidence obtained by means of electronic surveillance. Id. at 263. Considering the question of what constitutes a "satisfactory explanation" under the statute, the Court affirmed the opinion of the Second Circuit, and disapproved those cases in other circuits which had held that proof of the physical integrity of the tapes, and the absence of bad faith, were a satisfactory explanation for delays in sealing. Id. at 265; see also United States v. Quintero, 38 F.3d 1317, 1324 (3rd Cir. 1994) (violation of sealing statute requires suppression regardless of government's proof that tapes were stored pursuant to exacting safeguards designed to preserve integrity of tapes).

The Court in Ojeda Rios II disagreed with the Second Circuit on one point, and one point only: whether a government attorney's misunderstanding of the law might both explain and excuse a lengthy delay in sealing. Id. at 266-267. Remanding the case to the district court for further hearings, the Court held that the U.S. Attorney's reliance on Second Circuit precedent could justify the government's failure to seal the tapes immediately upon expiration of the first wiretap.

In order to apply the sealing provisions of section 2518(8)(a) in accord with the principles articulated by the Second Circuit in Ojeda Rios I and affirmed by the Supreme Court in Ojeda Rios II, it is necessary to define two additional terms: "immediately" and "extensions." Delays in sealing cannot be defined without reference to "immediately." The Ninth Circuit had adopted the rule that "immediately sealing" means "within one or two days" and that "any delay beyond that certainly calls for explanation." United States v. Pedroni, 958 F.2d 262, 265 (9th Cir. 1992)(sealing delay of 14 days); see also United States v. Vasquez, 605 F.2d 1269, 1278 (2d Cir. 1979), cert. denied, 444 U.S. 981 (1979)(six sealing delays ranging from 7 to 13 days). Thus, in every instance where there has been a delay greater than two days between "the expiration of the period of the order, or extensions thereof," and the sealing of the recordings, neither "the contents of any wire, oral or electronic communication [n]or evidence derived therefrom" can be admitted into evidence unless the government has provided "a satisfactory explanation" for the delay. Vasquez, 605 F.2d at 1274; accord, Pedroni, 958 F.2d at 265.

The threshold question for evaluating delays in the sealing of Title III recordings is often whether an authorization has been extended. Whenever the government obtains a number of different Title III authorizations in the course of one or more related investigations, as in the instant case, application of the sealing requirements of section 2518(8)(a) requires a careful definition of the term "extension," as in the phrase, "orders, or extensions thereof." The Second Circuit confronted the issue squarely in the Vasquez case.

In Vasquez the defendant argued that the government had failed to seal certain Title III wiretap recordings immediately upon the expiration of the order, or extensions thereof, and that the contents of those recordings were admitted into evidence in violation of section 2518(8)(a). During the underlying investigation, wire communications to and from eight different phone lines were intercepted pursuant to court orders. More than once in the course of the investigation, a court order authorizing interception of one group of telephone lines was followed by an order authorizing interception of some, but not all, of the telephones included in the prior order. These facts required a careful determination of which authorizations had expired, and which had been extended, by the succession of orders. The Vasquez court concluded:

that the term 'extensions,' as used in the phrase 'period of the order, or extensions thereof' is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the **same telephone**, the **same premises**, and **substantially the same persons**.

Vasquez, 605 F.2d at 1278 [emphasis added][citations omitted]. Thus, under Vasquez, section 2518(8)(a)'s sealing requirement applies any time there is a substantial change in the persons whose conversations can be lawfully intercepted over a particular telephone. Id.; see also United States v.

Principie, 531 F.2d 1132 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977)¹³; United States v. Carson, 969 F.2d 1480, 1488 (3rd Cir. 1992)(new wiretap order is only an “extension” of prior order if the new order authorizes interception of the “same subjects, at the same location” as first order).

The Supreme Court discussed the rule from *Vasquez in Ojeda Rios*, when it noted that the Second Circuit had consistently held that a subsequent wiretap authorization constituted an “extension” for the purposes of the sealing statute when ‘an intercept is of the same premises and involves substantially the same persons. . .’ Ojeda Rios II, 495 U.S. at 266 (citing United States v. Scafidi, 564 F.2d 633, 641 (2nd Cir. 1977)).

D. The First Thirty-Day Wiretap On Jose Yyyyyy’ Phone Was Not Sealed In A Timely Manner.

On January 30, 1998, the government obtained a court order authorizing the wiretap on facility 707-263-1691 This authorization terminated on February 28, 1998. See Exhibit 24.

On March 6, 1998, the court issued a new order that again authorized interception on facility 707-263-1691, and interception of two different subjects, Cecilia Rodriguez and Johnnie Lee Mathies, and two different locations, 707-489-7138 and 510-892-6661. See Exhibit 27. The order thus authorized the government to resume interception of Jose Yyyyyy’ phone a week after the government terminated the prior tap. In addition to authorizing the interception of two new facilities, the order also named two new targets as anticipated interceptees on Jose Yyyyyy’ phone. See Exhibit 27.

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Any argument that the holding in United States v. Principie, 531 F.2d 1132 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977) supports the theory that the March 6, 1998, order was an “extension” of the January 30, 1998, wiretap authorization would be misplaced. In a subsequent Second Circuit decision the Court of Appeals examined a similar argument by the government, that was also based on the holding in *Principie*, and held:

Principie was an opinion authored by one member of this panel and concurred in by another. We note that it had nothing to do with the statutory provision at issue here [the sealing statute]. In *Principie* we were concerned only with the requirement of providing notice to persons o

The requirement of giving inventory notice, unlike the unlike the sealing requirement, does not go to the underlying integrity of the tapes. . .We conclude that the location of a wiretap or other electronic surveillance is not an optional factor to be discarded on a flexible basis when the targets and crimes are similar of the same.

United States v. Ojeda Rios, 875 F.2d 17, 22 (2d Cir. 1989).

Because the March 6 order did not authorize interception of substantially the same people and locations, the March 6, 1998, order was not an extension of the January 30, 1998, authorization. Vasquez, 605 F.2d at 1278; see also United States v. Vastola, 915 F.2d 865, 874 (3d Cir. 1990); United States v. Carson, 969 F.2d 1480, 1488 (3d Cir. 1992). Since the recordings made pursuant to the order of January 30, 1998, were not sealed until March 13, 1998 (See Exhibit 27), after an unexplained delay of thirteen days, those recordings, and all evidence derived therefrom, must be suppressed pursuant to the provisions of section 2518(8)(a), unless the government provides this Court with a factually correct and legally satisfactory explanation. Ojeda Rios II, 495 U.S. at 262-265; Pedroni, 958 F.2d at 265.

D. The First and Second Thirty Day Wiretaps on the DEA Phone Were Not Timely Sealed.

Assuming that the second court order authorizing interception of telephone calls over the DEA cell phone was an extension of the first order, the court's authorization for the tap terminated on January 2, 1998. The tapes were not sealed until January 21, 1998. See Exhibit 15. This delay of nineteen days between the end of the wiretap and the sealing of the tapes requires explanation and legal justification. If the government cannot provide such justification, the recordings must be suppressed.

E. The Interceptions of Telephone Numbers 510-604-2439, 510-414-9741, and pager number 510-551-1126 Were Never Sealed.

The government has not disclosed sealing orders for the wiretap interceptions on these telephone lines. The defense therefore asserts that the tape recordings of the interceptions on these lines were never lawfully sealed.

F. Conclusion.

The government must provide this Court with a factually correct and legally satisfactory explanation for the nineteen day delay in sealing the recordings of 916-718-2661, and for either the complete failure to seal the recordings of facility 707-263-1691, or the thirteen day delay in doing so. If the government fails to provide a satisfactory explanation of its failures to properly and timely seal the recordings, the recordings, and all evidence derived therefrom, must be suppressed. In addition, the Court should require the government to produce evidence indicating that the remaining wiretap interceptions, for which the government has not produced sealing orders, were lawfully sealed in a timely manner.

CONCLUSION

For the foregoing reasons the wiretap applications and orders are facially invalid, and the interceptions obtained by those orders must be suppressed.

Dated: April 12, 1999

Respectfully Submitted,

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TO: THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ASSISTANT U.S. ATTORNEYS REBECCA HARDIE AND LAUREL BEELER.

Dated: July 28, 2000.

[CAPTION]

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION TO SUPPRESS WIRETAP
EVIDENCE; MOTION FOR FRANKS HEARING**

INTRODUCTION

The government charged thirteen individuals in a broad conspiracy to possess and distribute cocaine. The targets of the investigation were all allegedly members of a large scale narcotics trafficking organization headed by Anecto Orozco. In investigating this case, the government utilized numerous informants, surveillance, PEN register and other telephone record data, search warrants, and controlled narcotics purchases. However, in wiretap applications it submitted, the government repeatedly minimized and misrepresented to the Court the investigative alternatives available and the likelihood of their success.

The defense now seeks an evidentiary hearing on the veracity of the affidavits submitted by the government in support of the wiretap applications, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). Once the material misstatements and omissions contained in the wiretap applications are corrected, the affidavits fail to contain a showing of requisite necessity sufficient to justify the wiretaps, and all evidence derived therefrom must be suppressed.

STATEMENT OF FACTS

This case centers on the government's investigation of the Northern California activities of the putative "Orozco organization", allegedly headed by Los Angeleno Anecto Orozco. On July 11, 1997, DEA Special Agent Neal Christensen submitted an affidavit to the United States District Court for the Northern District of California (Judge Armstrong) in support of proposed wiretaps on two telephone facilities allegedly used by members of the Orozco organization. See Affidavit of Neal Christensen In Support Of An Application, No. CR-97-3038-MISC-SBA, July 11, 1997, attached hereto as Exhibit A (hereinafter "Affidavit"). Only July 11, 1997, Judge Armstrong issued an order authorizing wiretaps on telephone facilities 510-444-0833 [Mike's Body Shop in Oakland], and 510-517-2645 [Defendant Luis Garcia's cellular phone]. The listed targets of the initial wiretap were Anecto Orozco, Luis Garcia, Ana Ramirez, Carmen Flores and Jose Orona.

In his Affidavit, agent Christensen described the history of the investigation of the supposed Orozco organization, and why he believed usual methods of investigation had either been tried and failed, or could not be expected to succeed if tried. As further explained below, Agent Christensen's representations regarding alternate methods of investigation available to the government, and their chance of achieving the goals of the investigation, were not accurate.

I. THE STATED GOALS OF THE INVESTIGATION

The Affidavit stated that, through the wiretaps, the government hoped to obtain evidence concerning:

the dates, times, places, schemes, and methods for selling, buying, possessing, concealing, importing, and distributing controlled substances; the identities of participants in the conspiracy, involving accomplices, co-conspirators, and aiders and abettors; the places of operations, the source of supply of illegal drugs, and the location of financiers, managers and supervisors of this drug importation and distribution operation; the existence and location of records relating to the above offenses; and the location and disposition of the proceeds from the above activities.

Affidavit at p.5, ¶ 5(D).

II. THE AFFIANT'S STATEMENTS AS TO WHY THE WIRETAPS WERE NECESSARY.

In Section VI of the affidavit, entitled "Necessity", the affiant states:

Based upon my training and experience, as well as the training and experience of other TFAs of the ACDETF, S/As of the DEA, the FBI, state and local officers, and based on all the facts set forth herein, I believe that the interception of wire communications over the target telephone numbers is the only available technique that is likely to secure the evidence necessary to prove beyond a reasonable doubt that LUIS SANCHEZ GARCIA and other individuals as yet unknown, are engaged in the importation and distribution of narcotics, as well as to identify their sources of supply, sources of funds and distribution of funds, which cannot be achieved using traditional investigative techniques.

Affidavit at p.42, ¶ 118.

The Affidavit went on to describe seven traditional investigative alternatives to wiretaps that had been "tried and have failed, reasonably appear to be unlikely to succeed if they are tried in the future, or are too dangerous to employ." Affidavit at p.42, ¶ 119. These methods included physical surveillance, grand jury subpoenas, undercover agents, informants, telephone record searches and surveillance, informant and "buy-bust" techniques. Affidavit at pp. 42-50. Again, as set forth below, the Affidavit seriously misrepresents the extent to which these alternatives had already been pursued and garnered success, the likelihood that they would yield further evidence and information in the future, and their danger.

A. Physical Surveillance

The affiant indicated that “surveillances [sic] have been conducted at Mike's Body Shop, 1101 7th Avenue, Oakland, California, a business owned by Garcia, in order to try and identify persons involved in the GARCIA cocaine trafficking organization . . . despite gathering intelligence from undercover conversations during some of the above surveillances, the physical surveillances themselves did not yield any significant information.” Affidavit at p.42. According to the Affidavit, this was because:

[Physical surveillance,] if not used in conjunction with other techniques, including wire surveillance, is of limited value. Physical surveillance has not succeeded in gathering sufficient evidence of the extent of criminal activity under investigation. Physical surveillance of the alleged conspirators has not established conclusively the elements of the violations and has not and most likely will not establish conclusively the identities of various coconspirators. In addition, continued surveillance is not expected to enlarge upon information now available; rather, such prolonged or regular surveillance of the named interceptees would most likely cause them to become more cautious in their illegal activities, to flee to avoid further investigation and prosecution, to threaten the safety of an informant(s), undercover agents, and surveillance agents, or to otherwise compromise the investigation . . .

Physical surveillance is also unlikely to establish conclusively the roles of the named conspirators, because as-yet unidentified coconspirators are believed to be in Mexico. Physical surveillance is also unlikely to identify additional coconspirators, or otherwise to provide admissible evidence in regard to this investigation, because the subjects are currently using counter-surveillance techniques, such as erratic driving behavior, to discourage law enforcement from following them, it is not possible to determine the full nature and scope of the conspiracy through physical surveillance alone, and further surveillance would only serve to alert the suspects of law enforcement interest in their activities and compromise the investigation.

Affidavit at pp. 44-45, ¶¶ D, E.

The affiant also asserted that on at least one occasion, June 4, 1997, Andres Orona had "made" (noticed surveillance agents following him) surveillance at Mike's Body Shop. Affidavit at p. 43. The affiant then stated that he believed that Orona thereafter refused to meet with an undercover agent. Affidavit at p.43. In fact, as set forth below in section III C of this brief, the government had ascertained far more information and evidence by utilizing physical surveillance than set forth in the Affidavit.

B. Grand Jury Subpoenas

The Affidavit opined:

that issuing grand jury subpoenas to the named interceptees and any associates would result in requests for immunity and/or disclosure of the investigation to other confederates. Such grants of immunity might foreclose prosecution of the most culpable members of this conspiracy and could not necessarily ensure truthful testimony. In addition, the service of grand jury subpoenas would only alert the named interceptees and their associates to the existence of this investigation, causing them to become more cautious in their activities, to flee to avoid further investigation or prosecution, to possibly threaten the lives of any informant(s) or undercover agents that might be working in this investigation, or to otherwise compromise the investigation.

Affidavit at p.45, ¶ 121.

C. Undercover Agents

The affiant acknowledged that Task Force Agent Richard Ureste had been introduced to Jose Orona and Luis Garcia, and had the opportunity to discuss possible cocaine transactions with them. Affidavit at p. 46, ¶ 122. However, the affiant asserted that “nothing that TFA Ureste has spoken about with ORONA has developed any information which would lead to the source of supply for the cocaine or other persons involved in the conspiracy.” Affidavit at p. 46, ¶ 122. The affiant went on to note that he believed:

that there is no undercover agent who can fully infiltrate this organization at a level high enough to identify all members of the conspiracy and their sources of supply or otherwise satisfy the goals of this investigation. Based on the undercover efforts thus far in this investigation, I believe that members of this organization will deal only with known or established narcotics traffickers, known from prior, or with an established track record in the narcotics business.

Affidavit at p. 46, ¶ 123. Again, this opinion is without support and refuted, as more fully explained below, by the fact that TFA Ureste was able to garner valuable evidence, in conjunction with the use of informants and physical surveillance, yet apparently no other undercover agents were utilized.

D. Interviews of Subjects or Associates

According to the affiant, “[o]n April 26, 1997, there were seven persons arrested during the service of the state search warrants. Due to time constraints and language barriers, none of the arrestees were interviewed on that date. By the time arrangements had been made for an interpreter, the arrestees had retained attorneys, and therefore were not interviewed.” Affidavit at p. 46, ¶ 124.

The agent then offered his opinion:

that interviews of the subjects or their known associates would produce insufficient

information as to the identities of all of the persons involved in the conspiracy, the source of the financing, the locations of narcotics, records, currency, etc., and other pertinent information regarding the named crimes.

Affidavit at pp. 46-47, ¶ 125. Again, only the conclusory opinion of the affiant is offered, despite the fact that this alternative source of potential information was not even tried.

E. Search Warrants

The Affidavit admits that “[s]tate search warrants have been executed in this investigation and have yielded a considerable quantity of narcotics and currency. They have also identified persons locally, in the San Francisco Bay Area, in control of the cocaine and/or distribution of the cocaine at the time of the seizure.” Affidavit at p.47, ¶ 126. Yet these searches, according to the affiant, had not “yielded documents which reveal the total scope of the illegal narcotics smuggling operation, and the identity of the conspirators of this organization.” Affidavit at p.47, ¶ 126. The affiant therefor concluded that “search warrants executed at this time would be more likely to compromise the investigation,” than result in the discovery of valuable evidence. Affidavit at p.47, ¶ 126. The representations contained in the Affidavit regarding information yielded as a result of the execution of search warrants omitted material information and misleadingly minimized the usefulness of this method on investigation.

F. Pen Register/Telephone Records

The affiant noted that the government had installed PEN registers and used telephone toll record searches on the two target phones. Affidavit at p.48, ¶ 127. The affiant stated, however, that he believed that further employment of telephone records searches would not be useful because such searches “do not record the identities of the parties to the conversation, and cannot identify the nature or substance of the conversation, or differentiate between legitimate telephone calls and telephone calls for criminal purposes. . .”, and “cannot identify the source or sources of the controlled substances nor can it establish proof of a conspiracy.” *Id.*

G. Buy-Bust Technique

The affiant asserted that a “buy-bust” operation on one of the targets would not likely to work because, “there is no assurance that the coconspirator would, in fact, agree to cooperate with the investigators and therefore, a serious risk of compromising the investigation would arise.” Affidavit at p.49, ¶ 129.

H. Informants

The affiant did not specifically discuss why informants could not be used to infiltrate and expose the Orozco organization. See Affidavit. However, the Affidavit contains representations about CI-3:

Although CI-3 has been able to purchase cocaine from Garcia through Orona, I believe that CI-3 is unable to infiltrate this organization at a level high enough to identify all members of the conspiracy and their sources of supply or otherwise satisfy the goals of this investigation.

The controlled purchase of cocaine that CI-3 made in this investigation occurred at Garcia's business, Mike's Auto Body. If CI-3 would make further purchases of cocaine from this organization, they could and probably would occur at Mike's Auto Body, where the conspirators feel comfortable dealing cocaine. Mike's Auto Body does have legitimate customers. If surveillance units are watching the business during the purchase of cocaine by CI-3, it would be extremely difficult to differentiate between legitimate customers and identify the person(s) who would deliver the cocaine to the shop, in order to identify and/or follow these individuals to identify narcotics stash locations.

Based on my training and experience, interviews of informants and speaking with persons who traffic in narcotics, I believe that persons who traffic in narcotics "guard" their sources of supply for the following reasons. Persons who traffic in narcotics do so to make money. Persons who traffic in narcotics also deal mainly with known or established customers, as evidenced by Orona's reluctance to sell cocaine to TFA Ureste.

Garcia's source of supply would not know CI-3, and probably would be reluctant to deal with CI-3. I believe that Garcia would not give CI-3 the phone number or identity of Garcia's source of supply of cocaine, because that could mean two things to Garcia. First, Garcia would be losing a customer to Garcia's source if CI-3 were to deal with Garcia's source directly, and would not make any money from selling cocaine to CI-3. Second, this could potentially create competition for Garcia, because CI-3 would potentially be able to deal cocaine on Garcia's level.

It is my opinion that a buy-bust approach, or any other overt investigative technique, would not be effective in achieving the goals of this investigation.

Affidavit at p. 50, ¶¶ 132-33.

While the agent did not specifically discuss why informants in general could not be utilized to penetrate the "Orozco organization", the affidavits did reflect considerable information gleaned from informants. The informants utilized in the Carvajal investigation, as reflected in the affidavits, included:

1. CI-1.

CI-1 is Felicitas Vargas. According to the affiant, the government developed CI-1 as an informant as a result of the September 16, 1996 arrest of Antonio Huerta-Sandoval, Frank Ortega and

Felicitas Pineda-Vasquez. See Affidavit, at p.11. At the time of her arrest, CI-1 had worked for the Anecto Orozco organization for more than two years, and was able to identify many of the people who allegedly ran the Bay Area operations of the Orozco organization. See Affidavit at p.12.

CI-1 provided information in the search warrant affidavit for the search of the Lilac Circle house. See Affidavit at pp. 26-29. The search of the Lilac Circle address, and several cars observed leaving that address, resulted in the seizure of narcotics, telephones, and alleged “pay-owe sheets” showing accounting entries for narcotics transactions involving defendant Garcia. See Affidavit at pp. 25-29. The indictment in this case lists acts related to the search at Lilac Circle as overt acts 1 and 2 in support of Count 1.

2. CI-2.

CI-2 began providing information on defendant Luis Garcia in September of 1996. Affidavit at p.16. CI-2 informed the agents that Garcia was the owner of Mike’s Body Shop, the location of the first telephone tapped in this case, and that Garcia was selling cocaine out of Mike’s. Id

On November 13, 1996, CI-2 brought undercover agent Richard Ureste to Mike’s to introduce the agent to Garcia and other alleged members of the Orozco organization. See Affidavit at p.16. During this visit, Ms. Vasquez and the agent made a controlled purchase of a half-ounce of cocaine from Garcia and an unidentified person. Id. CI-2 and officer Ureste conducted subsequent negotiations with Garcia for another purchase of cocaine, but the transaction did not materialize because CI-2 allegedly stopped cooperating with the government. Id. at p.17.

3. CI-3.

CI-3 began giving the government information regarding defendants Garcia and Jose Orona in February of 1997. Affidavit at p.17. CI-3 told the government that Garcia owned Mike’s Body Shop. He also arranged to introduce agent Ureste to Garcia and Orona so that agent Ureste could purchase cocaine from them in controlled buys.

Between February and June of 1997, CI-3, agent Ureste, and defendants Garcia and Orona conducted a series of negotiations at Mike’s Body shop and over the business phone at Mike’s. See Affidavit at p.18. During the course of these negotiations defendant Orona told agent Ureste about some of the Orozco organization cocaine smuggling methods. Id. The negotiations culminated in CI-3’s controlled purchase of a half-kilogram of cocaine from defendants Garcia and Orona on June 21, 1997. Id. at pp. 20-24. The negotiations between CI-3 and Orona and Garcia, and the eventual cocaine transaction, are charged in the indictment as overt acts 4 through 8 in support of Count 1. See Indictment No. CR97-40168 DLJ.

4. CI-4.

San Diego area DEA agents developed CI-4 as an informant in 1994. See Excerpt of Affidavit of DEA Special Agent Renee Babic In Support of Application, July 21, 1997 (United States District Court for the Southern District of California), attached as Exhibit B. CI-4 met with Anecto Orozco and sold him (for \$50,000) fraudulent immigration papers. Id. After the immigration papers transaction, CI-4 continued to speak with Orozco about various criminal enterprises, until at least June of 1997. Id.

5. CI-0.

CI-0 was an informant for the Alameda County Narcotics Task Force of the DEA in 1993. Affidavit at p. 14. CI-0 introduced Task Force agent Ruiz to defendant Garcia in April of 1993. Id. Agent Ruiz and CI-0 subsequently negotiated with defendant Garcia, over a period of months, regarding possible cocaine transactions, but did not complete a deal Id. at p.15.

III. THE INFORMATION AND EVIDENCE ACTUALLY KNOWN TO THE GOVERNMENT AS A RESULT OF ITS INVESTIGATION.

The Affidavit omits a wealth of information which had been gathered by the government prior to submission of the wiretap application. In fact, the government was in possession of far more evidence, obtained through the use of traditional methods of investigation, than set forth in the Affidavit. The material omissions, if they had been considered by the Court in conjunction with the Affidavit, would have vitiated requisite necessity for the wiretaps.

During the course of this investigation, prior to the initiation of the wiretaps, the government searched several houses associated with the Orozco organization's narcotics business, including 20138 Forest Avenue (Castro Valley), 3745 Lamoureux Street (San Leandro), and 145 Lilac Circle (Hercules) and 111 Eureka Street (Concord). At these locations the government seized cocaine and drug related indicia that implicated the higher level members of the Orozco organization. The government also arrested numerous members of the Orozco organization upon searching the "stash house" locations. The majority of the facts surrounding these searches and arrests were not provided to the reviewing court in the Affidavit.

In addition, the government learned that Mike's Body Shop and Pancho's Body Shop, two businesses in Richmond, were being used by the Orozco organization as sites for cocaine trafficking. Through confidential informants, the government was able to contact the organization members who worked at the body shops, to introduce undercover agents to the conspirators, and to arrange cocaine transactions involving the informants, the undercover agents, and the alleged conspirators.

Further, the discovery reflects that the government utilized an additional informant in its investigation, other than the informants proffered to the reviewing court in the wiretap affidavits as CI-1 through CI-4.

The government reports on CI-1 and the additional informant, hereinafter known as “Informant X”, indicate that these informants were highly placed members of the cocaine trafficking conspiracy, possessed of specific knowledge of the organization’s daily cocaine trafficking and money laundering activities. These informants provided the government with detailed advance knowledge of the departures and arrivals of “load cars” from Los Angeles, the identities and activities of the conspirators, and the location and content of the organization’s “stash houses”. Informant X even assisted the government in procuring additional informants by providing intelligence that led to the development of Ms. Vasquez. Despite Informant X’s obvious access to the organization’s inner secrets, and the value of the information provided by Informant X, the government did not even mention this informant in the wiretap affidavits. If the wiretap motions are to be determined fairly, the Court must afford the defense the opportunity to investigate Informant X to determine whether the government could in fact have satisfied the goals of their investigation with the assistance of Informant X.

A. Informant X.

Though the government did not mention Informant X in the wiretap affidavits, it was Informant X who provided, either directly or indirectly, the majority of the information contained in the initial wiretap affidavit. Informant X displayed a detailed knowledge of the Orozco organization, and his/her information led to the cocaine seizures in Castro Valley and San Leandro, as well as the development of Ms. Vasquez. See Affidavit of Task Force Agent Kendall Won in Support Of An Application For A Search Warrant for 20138 Forest Avenue, September 24, 1996 (Alameda County Superior Court) (hereinafter “Won Affidavit”), attached as “Exhibit C”.

Informant X told the task force agents that Anecto Orozco was involved in trafficking cocaine from Los Angeles to the Bay Area. See Won Aff. at p.4. On September 16, 1996, Informant X informed the agents that one of Orozco’s “load cars” would be traveling the next day from Los Angeles to a “stash house” in Castro Valley, and described the car and its occupants specifically. Id. Informant X then led the agents to the “stash house, located at 20138 Forest Avenue, Castro Valley. Id. This information led to the government’s search of the Forest Avenue house, the seizure of fifty kilograms of cocaine and the load car, the attendant arrests of Frank Ortega, Felicitas Pineda-Vasquez and Antonio Huerta-Sandoval, and the development of Ms. Vasquez as a confidential informant.

Shortly after the search and arrests at the Forest Avenue stash house, Informant X told the task force agents that he/she knew of several other stash houses and load cars utilized by the Orozco organization. See Affidavit of Task Force Agent Kendall Won in Support Of An Application For A Search Warrant for 3745 Lamoureux Street, October 14, 1996 (Alameda County Superior Court) (hereinafter “Second Won Affidavit”), attached as “Exhibit D”, at p.4. Informant X informed the agents that the Orozco organization used houses located at 1712 Grand Avenue and 3745 Lamoureux Street, in San Leandro, as stash houses for cocaine and money. Id. Informant X also identified two additional load cars. Id. This information led to a search of the Lamoureux Street house and a related load car, and the arrest of several additional supposed Orozco organization members.

The government utilized Informant X to obtain search warrants for the stash houses located at 20139 Forest Avenue (Castro Valley) and 3745 Lamoureux Street (San Leandro), to identify the stash house located at 1712 Grand Avenue (San Leandro)¹, and to identify and arrest couriers Ana-Maria Herrera Cruz and Sergio Sandoval. Ms. Cruz was arrested in a “load car” after Informant X described the car to the agents, and told the agents when the car would be leaving the Grand Avenue stash house for Los Angeles. See Exhibits D, and F (CHP report on Cruz car stop).² Ms. Cruz is an unindicted coconspirator in this case, and was intercepted numerous times over the wiretapped telephone lines. See Excerpt of the Affidavit of Gloria Zaborowski, October 1, 1997 (the “master search warrant affidavit” in the Carvajal case), attached as Exhibit G. Exhibit F also reveals that Ms. Cruz worked at the Alta Mar Restaurant in Oakland, which is owned by defendant Israel Rodriguez, and was identified by the government in its investigation of this case as a location for narcotics dealing, and was frequently mentioned during the wiretap. Informant X was so highly placed in the Orozco organization that he was able to tell the agents, prior to the initiation of the surveillance on 20139 Forest Avenue house, that the load car was a light blue four door Mercedes, with a Hispanic male driver and Hispanic female passenger, and the times that the car would be leaving Los Angeles and arriving in Castro Valley. See Exhibits C and D.

The government also used Informant X to locate a suspected narcotics courier for the Orozco Organization in San Leandro (apparently at the Orozco’s organization’s “stashhouse” at 15203 Andover Street), and follow her to Poncho’s Auto Body shop in San Pablo. See Excerpt of Reporter’s Transcript of Proceedings, People v. Murillo et al, Alameda County Municipal Court, No. 321321A-F, June 30, 1997 (testimony of agent Neal Christensen, the Carvajal wiretap affiant), attached as Exhibit H. Pancho’s Auto Body is a location associated with the Orozco organization’s Bay Area cocaine distribution. See Exhibit A at ¶¶ 25, 27, 28. The agents then followed the “load car” south to Santa Clara County, where the federal agents requested that the California Highway Patrol stop the car. The stop and subsequent search of the car yielded approximately \$500,000.00 in currency hidden in a secret compartment, and the arrest of the two occupants of the car. See Exhibit I.³

None of the above information concerning Informant X appeared in the wiretap affidavit. And the government did not reveal Informant X’s existence to the defense. All of the above information was

¹ This house was also identified by Felicitas Vasquez. See Exhibit E.

² These reports were not disclosed by the government in this case. The defense obtained the reports through defense investigation of related state criminal cases.

³ Of course the local law enforcement reports on the stops of both load cars were written in a manner that concealed the fact that the federal task force asked for the stops, and that the stops were based on the informants’ identifications of the load vehicles. These reports were not disclosed by the government in this case. The defense obtained the reports through defense investigation of related state criminal cases.

discovered through investigation of the state court cases relating to the arrest of Felicitas Vasquez and the Sandovals.

B. CI-1 - Felicitas Vasquez

CI-1 is Felicitas Vasquez, the woman who drove the Blue Mercedes load car containing 50 kilograms of cocaine to the Forest Avenue house. Ms. Vasquez was a highly placed member of the Orozco organization who provided the agents with detailed and current information regarding the alleged narcotics trafficking activities included in the Count One conspiracy. Ms. Vasquez was arrested as she participated in the transportation of fifty kilograms of the Orozco organization's cocaine from Los Angeles to the Bay Area. She immediately expressed her willingness to cooperate. See Exhibit E. During interviews conducted between November of 1996 and February of 1997, Ms. Vasquez provided the following assistance to the government (See DEA 6, November 11, 1996, attached herewith as Exhibit E.⁴; DEA 6 reports, January 21 and February 7, 1997, attached as Exhibit E.⁵).

Ms. Vasquez informed the agents that the organization was headed by Anecto Orozco, who controlled the day to day operations from Yahualica, Mexico, by cellular phone. Ms. Vasquez provided the government with intricate details of the organization's "load car" method of transporting cocaine from Los Angeles to the Bay Area, including the people who drove the cars, the routes they drove, the hours of the day when they left on the smuggling trips, the locations where the cars were loaded and unloaded, and the conspirators who oversaw the loading and unloading of the cocaine. She informed the agents that Anecto Orozco transported one to four loads of twenty to fifty kilograms per month from Los Angeles to the Bay Area for distribution. She indicated that the cocaine was transported in "load cars" equipped with hidden compartments in the dashboards, and that the funds collected for the cocaine were returned to Los Angeles in the same load cars. Ms. Vasquez told the agents about four specific load cars, and identified these cars by make, model, year and color. Ms. Vasquez also told the agents how the organization used cellular telephones to arrange these smuggling trips, and the code words used by the organization members while making the smuggling arrangements.

Ms. Vasquez provided the agents with the locations, including specific street addresses and cross-street locations, of four houses in the Los Angeles area where the cocaine was stored and the cars were loaded. These locations included houses in Anaheim, Paramount City and Moreno Valley, and Northridge, California. Vasquez also detailed for the agents how the couriers would travel to these stash houses, check into nearby hotels, then use cellular phones to call the leaders of the organization before proceeding to the stash house to load or unload the vehicle.

⁴ These reports were not disclosed by the government in this case. The defense obtained the reports through defense investigation of related state criminal cases.

⁵ These reports were not disclosed by the government in this case. The defense obtained the reports through defense investigation of related state criminal cases.

Ms. Vasquez identified the people who operated these Los Angeles area “stash houses” and specified several businesses at which these load car supervisors worked. The Los Angeles suppliers included Orozco, Juan Oropeza (also known as “Compa”, who she identified from a photo), Ignacio Cardona, Manolo Sanchez, Fernando Sanchez, and Ernesto Limon Gutierrez (“Topo”). Ms. Vasquez also provided specific information about where these subjects could be found, including information about their residences, the cars they drove, and business they owned and operated.

Ms. Vasquez also identified Topo Limon Gutierrez as a person who transported money for Orozco, from Orozco’s Bay Area locations to his suppliers in the Los Angeles area. These suppliers included Oropeza and other unidentified sources.

Ms. Vasquez also identified, by specific location, several Bay Area “stash houses” being utilized by the Orozco organization to store and distribute cocaine. Ms. Vasquez told the agents that the Orozco organization used a house on Grand Street, in Oakland, as a stash house location. She stated that Frank Ortega operated this stash house. Ms. Vasquez also told the agents about a stash house located near Washington Street, San Leandro. Though she did not know the specific address of the house, she indicated that she could point it out to the agents. This house was controlled by Fernando Sanchez. The third location identified by Ms. Vasquez was a stash house located near the corner of Hays and Castro Streets in San Leandro. She stated that this house was operated by Hugo Sanchez.

Ms. Vasquez identified a person who worked at a property management company in the Oakland area who laundered money and rented properties for the Orozco organization, and another person who obtained false identification for the organization members through their job at the Walnut Creek DMV office.

On July 14, 1997, the government used Ms. Vasquez to identify Anecto Orozco’s voice on a wiretap recording from the Carvajal tap.

Though it was not mentioned in the wiretap affidavit, the search warrant submitted to the state court for the warrant on the stash house located at 145 Lilac Circle included information from Felicitas Vasquez.⁶ See Affidavit of DEA Task Force Agent Neal Christensen In Support Of An Application For A Search Warrant For 145 Lilac Circle, April 26, 1997 (Contra Costa Superior Court), attached herewith as “Exhibit J”, at p.18. This in turn led to the seizure of valuable evidence at the Lilac Circle house, as well as the traffic stop of Martin Murillo as he drove a car loaded with seven kilograms of cocaine away from 145 Lilac. See Affidavit at pp. 24-26. Though the affiant told the court that searches had been conducted and evidence had been seized, he did not apprise the reviewing court of the fact that

⁶ In the defense motion for informant disclosure, the defense alleged that there existed a second unnamed informant, whom the defense referred to as “The Lilac Informant”. At the hearing on the motion, however, the government informed the Court and the defense that “The Lilac Informant” was actually CI-1.

these searches and seizures were the result of information supplied by informants.

C. The Government's Use of Surveillance.

Likewise, the Affidavit failed to inform the Court that the government had successfully gathered much evidence through the use of physical surveillance. While government stated to the reviewing court that “[p]hysical surveillance is also unlikely to identify additional coconspirators,” in fact the government had already utilized physical surveillance to identify Carmen Flores, Ana Rodriguez, Maximo Lopez, Francisco Villapando and Rafael Martin as coconspirators of the Orozco organization members. See Extension Application, No. CR-96-256-MISC-PJH, December 4, 1996, attached as “Exhibit K.” (A PEN register application submitted in the course of the Rafael Martin investigation). On March 22, 1996, federal agents established surveillance at the home of Rafael Martin, an Oakland area drug trafficker. The agents subsequently observed Martin meet with Ronald Reed, another alleged drug trafficker, who delivered to Martin a black duffel bag containing \$125,000 in cash. Id.

The surveillance continued until Francisco Villapando, Martin's cocaine supplier, arrived and Martin's house and retrieved the black duffel bag. Id. The agents then followed Villapando to a residence located at 2217 Foothill Boulevard in Oakland, where Villapando delivered the black bag to an unidentified male. Id. The unidentified male then drove to a parking lot in Oakland where he delivered the black duffel bag to Orozco organization member Maximo Lopez. Id. Lopez was then followed to 2334 Hughes Avenue, Oakland, an address associated with Orozco/Carvajal target Luis Garcia. See Affidavit, at ¶ 74.

The government corroborated this surveillance investigation with PEN register data that showed numerous calls between 2334 Hughes Avenue and 2217 Foothill Boulevard, and putative Orozco organization member Carmen Flores. Ms. Flores worked at Yoyi's flowers, along with alleged Orozco organization member Ana Rodriguez. Ms. Rodriguez is the wife of Carlos Valeria, who was arrested in the Rafael Martin case engaging in a cocaine transaction with Francisco Villapando.

Though the affiant told the court that FBI Special Agent Segovia (the Martin case agent) had initiated an investigation involving Carmen Flores, Ana Rodriguez and Maximo Lopez (See Affidavit At pp.41-42, ¶¶ 112-117), the affiant omitted the information about how the government discovered, through surveillance, that Rafael Martin, Ronald Reed and Francisco Villapando were involved in cocaine trafficking with the Orozco organization.

The agents were also able to use surveillance to implicate targets Luis Garcia and Andres Orona. On June 21, 1997, the investigating agents employed surveillance during the course of CI-3's controlled purchase of narcotics from Andres Orona and Luis Garcia. On that day CI-3 met with Orona at a restaurant, then went with Orona to Mike's Body Shop, where the transaction took place. See DEA-6 Report, July 15, 1997, attached herewith as Exhibit L. The agents were able to observe and videotape the meeting between CI-3 and Orona, and to conduct surveillance at both the restaurant and Mike's Auto

Body while the transaction took place.⁷ Id. The subjects did not employ any counter-surveillance tactics during the controlled exchange. Id.

D. The Los Angeles Investigation

Beginning in 1996, the Los Angeles office of the DEA began investigating a large scale cocaine trafficking organization that included Anecto Orozco, Ernesto Limon Gutierrez and two coconspirators named Jaime Rubacalva and Roger Maciel. See Wiretap Affidavit of SA Renee Babic, attached herewith as Exhibit B. Agent Babic's affidavit included extensive information from Felicitas Vasquez, who Babic also called "CI-1." Id.

By late June of 1997, the Los Angeles investigation had revealed that Jaime Rubacalva was the supplier for Roger Maciel, and that Rubacalva was supervised by Anecto Orozco and Ernesto Gutierrez. Id., at p.12, ¶ 24.

The L.A. investigation included the use of PEN registers on several telephones used by Rubacalva and Orozco. These PEN recorded numerous calls over the Orozco organization's cellular phones to telephone numbers in Northern California. See Id., at p.21, ¶ c. The PEN registers also revealed numerous contacts between the target Orozco organization phones and known cocaine trafficking locations in the Los Angeles area (See Id., at pp. 20-24), and Luis Garcia's cellular phone in Oakland. See Id., at p.25, ¶ j.

The PEN registers installed by the DEA also revealed that Orozco and Rubacalva had used the target cell phone to place numerous calls to a suspected large scale narcotics trafficker in Moreno Valley, Omar Camacho. See Exhibit B, at p.23, ¶ g. Felicitas Vasquez had previously identified one of the Orozco organization's stash house as located in Moreno Valley.

In the course of the Los Angeles investigation the government also used physical surveillance to confirm much of the information provided by Felicitas Vasquez. The surveillance information is memorialized in the Affidavit of DEA. Special agent Renee Babic in support of the Central District criminal complaint against Orozco, Gutierrez and others. See Affidavit of Renee Babic, Complainant, Criminal Complaint No. 97-2112, U.S. District Court for the Central District of California, September 18, 1997 (hereinafter "Babic Affidavit"), attached hereto as Exhibit M.

The Babic Affidavit indicates DEA. agents followed members of the so-called "Orozco organization" as they made a series of cocaine deliveries and pickups in the Los Angeles area. See

⁷ In describing this transaction, the affiant stated: "If surveillance units are watching the business during the purchase of cocaine by CI-3, it would be extremely difficult to differentiate between legitimate customers and identify the person(s) who would deliver the cocaine to the shop." Affidavit at p.50.

Exhibit M at pp. 9-30. By following the subjects and monitoring PEN register data, the Los Angeles agents identified the following locations as storage and/or distribution locations for the Los Angeles branch of the Orozco organization: 9861 lemon Court, Fontana; 15820 East Silvergrove Drive, Whittier; 1625 Indian Hill Drive, Pomona; 7512 Donna Avenue, Northridge; 13447 Ninebark Street, Moreno Valley; and Olympic Auto Sales, 5006 Olympic Boulevard, Los Angeles. See Exhibit M. These locations appear to closely match the locations described by Ms. Vasquez in her debriefings. See Exhibit E.

When Felicitas Vasquez was arrested in Castro Valley, while delivering 50 kilograms of cocaine from Los Angeles to the Northern California targets, she had in her possession a business card from Ignacio DeLaVeaga of Olympic Auto Sales in Los Angeles. See Exhibit N. Frank Ortega, who was also arrested with Vasquez, also possessed a business card from Olympic Auto Sales upon his arrest. See Exhibit N. During the course of surveillance of the L.A. Area Orozco suspects, the Los Angeles DEA observed the “Orozco organization” suspects frequenting Olympic Auto. See Exhibit M at p.29.

E. Other Relevant Investigation.

The government had also discovered, yet failed to disclose in the Affidavit, that Ana Ramirez had been previously intercepted on a wiretap in the Northern District of California. On March 21, 1995, the government (by Assistant U.S. Attorney Katharine A. Bostick) submitted an application seeking authorization to institute a wiretap on telephone line (510) 535-0748. The government’s application indicated that the telephone line was subscribed to by Jose Rodriguez-Robles, and located at 1947 Crosby Ave., Oakland, California. See Excerpt of March 21, 1995 wiretap application, attached as “Exhibit O.”⁸ During the course of the Orozco/Carvajal investigation, defendant Ana Ramirez resided at 1947 Crosby Street. See Affidavit, at ¶ 75.

During the Robles tap, a woman named “Ana” was intercepted on numerous occasions speaking on the phone located at 1947 Crosby Street. See Excerpts of Government Wiretap Transcripts, United States v. Robles et al, Case No. CR-95-40093-DLJ, attached herewith as “Exhibit P.” The Robles investigation, and the prior tap at 1947 Crosby Street, led to the identification of numerous individuals conducting cocaine trafficking activity of 1947 Crosby. The criminal case arising from that investigation was prosecuted before this Court.

The Robles investigation eventually led to Sigifredo Robles’ arrest, conviction and agreement to cooperate with the DEA. During the course of his cooperation beginning in April of 1997 (two months prior to the Carvajal wiretaps), Robles provided the government information about numerous Oakland area narcotics traffickers and locations, including Montes Auto Body and Francisco and Rodrigo

⁸ The affiant did inform the court that Luis Garcia had been intercepted on the 1995-96 Rodriguez-Robles tap. See Affidavit at ¶ 135.

Montes.⁹ See Exhibit Q.

The government also indicated that Defendant Luis Garcia had been intercepted in the course of the Robles wiretap. See Affidavit (Exhibit A). In these calls spoke with Jose Ventura-Bretado, one of the primary defendants in the 1995-96 Robles case, about cocaine purchased by Garcia from the Robles organization. Furthermore, the Robles investigation revealed frequent telephone contact between the Robles defendants and Pancho's Auto Body, Mike's Auto Body, and the Alta Mar Restaurant. See Excerpt of PEN register data, U.S. v. Robles et al, attached as Exhibit T. Finally, the wiretap in the Robles case included numerous "pertinent" calls between the Robles suspects about Anecto Orozco, who the Robles suspects called "Mario".

F. The Stash House Searches.

The government informed the reviewing court that its agents had searched the houses on Forest Ave. and Lilac St., and told the court that certain documents found inside those houses implicated Luis Garcia, Ana Ramirez and Carmen Flores. The affiant did not tell the court about the information gathered from these searches regarding the Los Angeles branch of the Orozco organization.

When the agents searched the stash houses located at 16th Street in Richmond, Eureka Lane in Concord, Lilac Circle in Hercules, and Lamoureux Street in San Leandro¹⁰, they located address books with Los Angeles area telephone numbers for "Compa" (who Vasquez had previously described as a cocaine source for the Orozco organization), "Topo" Gutierrez (who Vasquez had identified as one of Orozco's primary associates in L.A.), "Manolo" (who Vasquez had identified as Manolo Sanchez, Fernando Sanchez's brother), "Huero" (who Vasquez had identified as Juan Oropeza), "Manotas" (who Vasquez had identified as Fernando Sanchez)¹¹, "Felis" (Felicitas Vasquez herself) and numerous other telephone numbers in the Los Angeles area. See Excerpts of DEA-6 Reports, attached hereto as Exhibit R.¹²

⁹ Montes Auto and Rodrigo and Francisco Montes were involved in numerous "pertinent" calls in the course of the Carvajal wiretaps. The government will undoubtedly assert at trial the Montes brothers were cocaine customers of Orozco and his associates.

¹⁰ Again, these searches were the result of information provided by Informant X.

¹¹ Ms. Vasquez had informed the agents that load cars were often taken to Fernando Sanchez' home in Pomona, California, but was unable to specify the exact location. It is unknown whether the telephone numbers for Sanchez located during these searches were numbers located in Pomona.

¹² These documents are drawn from the DEA-6 reports on the search returns from the addresses described supra. These documents were again retrieved by defense investigators from the state court case files, and were not disclosed in discovery in this case.

The searches also revealed ticket receipts, under the name Salvador Villegas, for travel to and from San Diego, Oakland and Tijuana, and a card from a Motel 6 in Anaheim. See Id. Ms. Vasquez had informed the agents that Mr. Villegas Torres was a money courier for Orozco, and that load car drivers would stay at a motel in Anaheim before proceeding to the Orozco organization's stash house there.

Finally, when Antonio Sandoval was arrested during the search of the stash house located on 16th Street in Richmond, he possessed indicia listing his address as 741 Wilson Street, Pomona, California. This exact same address was listed on a DMV printout for Martin Murillo found in the house during the search. Mr. Murillo was the driver of the load car that was stopped on April 26, 1997, as it left the house at 145 Lilac Circle. See Affidavit, at pp. 25-26.

G. Prior Investigation of Anecto Orozco.

In 1994 the government arrested Mr. Orozco in connection with a cocaine trafficking incident and questioned him regarding his involvement in a large transaction.¹³ See DEA 6 Report of Investigation, April 1, 1994, attached hereto as Exhibit S. At that time Mr. Orozco informed the agents that "El Topo" (aka Ernesto Limon Gutierrez) lived at a house at 2242 Coloma Street, Oakland, with suspect Francisco Mercado. Orozco also informed the agents that his sister-in-law was named Delia, and that Delia's brother was known as "El Huero".

ARGUMENT

I. THE REQUISITE NECESSITY REQUIREMENT

Title 18 U.S.C. §2518(1)(c) provides that each application for a wiretap authorization shall include:

A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Title 18 U.S.C. §2518(3)(c) further provides that, in issuing a wiretap authorization order, the district court must determine whether:

Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

¹³ The case against Orozco was ultimately dismissed with prejudice due to the outrageous misconduct of one of the investigating DEAD agents.

These two sections constitute the requisite necessity requirement for granting a wiretap order. United States v. Giordano, 416 U.S. 505, 515 (1990). Section 2518(1)(c) was promulgated “to prevent the government from making general allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation.” United States v. Ippolito, 774 F.2d 1482, 1486 (9th Cir. 1985).

The requisite necessity requirement ensures that “wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.” United States v. Kahn, 415 U.S. 143, 153, n. 12 (1974). The wiretap affidavit must therefore show with specificity why, in this particular investigation, ordinary means of investigation have failed or will fail. United States v. Simpson, 812 F.2d 1462, 1472 (9th Cir. 1987).

The utmost scrutiny must be exercised to determine whether the wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial supervision. United States v. Kalustan, 529 F.2d 585, 589 (9th Cir. 1976).

For all of these reasons, the necessity showing is material to the issuance of a wiretap order and is subject to the rule espoused in Franks v. Delaware, 438 U.S. 154 (1978); United States v. Ippolito, 774 F.2d at 1484-85 (wiretap suppression based upon law enforcement's failure to disclose facts that informant willing to testify and had potential for uncovering conspiracy under investigation).

II. THE PRINCIPLES FOR SUPPRESSION UNDER FRANKS v. DELAWARE.

In Franks, the United States Supreme Court recognized the constitutional right to challenge the truthfulness of statements contained in a search warrant affidavit. Under Franks, the Court must hold an evidentiary hearing Franks upon a substantial preliminary showing that (1) a false statement was included in the affidavit; (2) the false statement was made knowingly and intentionally, or with reckless disregard for the truth; and (3) the allegedly false statement was necessary to the finding of probable cause. Franks, 438 U.S. at 155-156; see also United States v. Johns, 851 F.2d 1131, 1133-34 (9th Cir. 1988). If the defendants ultimately establish these elements by a preponderance of the evidence, the Court must void the wiretap and suppress the fruits thereof. Franks, 98 S. Ct. at 2676.¹⁴

¹⁴ In order to support a finding of probable cause for a wiretap on a particular telephone line the government must set forth sufficient evidence (1) that an individual is committing, has committed, or is about to commit specified offenses [18 U.S.C. §2518(3)(a)]; (2) that communications relevant to that offense will be intercepted through the wiretap [18 U.S.C. §2518(3)(b)]; and (3) that the individual who is the focus of the wiretap investigation will use the tapped telephone [18 U.S.C. §2518(3)(d)]. See generally, United States v. Meling, 47 F.3d 1546, 1551 (9th Cir.1995); United States v. Brown, 761 F.2d 1272, 1275 (9th Cir.1985). A link between the individual, the telephone and the offense, therefore, must be established. See United States v. James, 494 F.2d 1007, 1020 (D.C. Cir.), cert. denied sub. nom., Jackson v. United States and Tantillo v. United States, 419 U.S. 1020 (1974).

Franks also protects against information omitted from search warrant affidavits:

The use of deliberately falsified information is not the only way by which police officers can mislead a magistrate when making a probable cause determination. By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning.

United States v. Stanert, 762 F.2d 775, 780 (9th Cir. 1985). A Franks hearing is warranted upon a substantial preliminary showing that: (1) the affiant omitted information from the search warrant affidavit; (2) the affiant intended the omission of information to mislead the Court or made the omissions in reckless disregard of the misleading effect; and (3) the Court would not have authorized the wiretap had the omitted information been included.¹⁵ United States v. Hernandez, 80 F.3d 1253, 1260 (9th Cir. 1996); United States v. Tham, 960 F.2d 1391, 1395 (9th Cir. 1992). Intent or recklessness may be inferred from the fact of the omission itself where the omitted information is "clearly critical" to the determination before the Court. See e.g., United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980). Defendants may, upon the substantial showing outlined above, request an evidentiary hearing to develop the factual basis for suppression of the wiretap evidence.¹⁶ At this stage, defendants need not present "clear proof of a deliberate or reckless omission [or false statement]. . . [A]ll that is required is that the defendant make a substantial showing. . . ." Stanert, 762 F.2d at 780-82.

The reviewing court must review de novo the original decision to issue the warrant. United States v. Elliott, 893 F.2d 220, 222 (9th Cir. 1990). De novo review is appropriate because the probable cause and necessity questions "turn[] on the consequences of a fraud on the issuing magistrate. . . ." Id.¹⁷

¹⁵ After eliminating false information and/or adding omitted information, the court must consider the "totality of the circumstances," under Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 2328 (1983), to determine whether or not probable cause has been established. United States v. Dozier, 844 F.2d 701, 706 (1988).

¹⁶ The Court has already found, in its order on Defendants' motion for disclosure of the informants' identities, that "[g]iven the evidentiary difficulties facing the defendants at this stage, the Court finds that defendants have made a sufficient showing [of material misrepresentations in the wiretap affidavits] for an limited evidentiary hearing on this issue." Order, No. CR-97-40168-DLJ, January 26, 1999, at p.7.

¹⁷ A misstatement or omission by a government official other than the affiant may also be a basis for suppression under Franks. United States v. DeLeon, 979 F.2d 761, 764 (9th Cir. 1992); United States v. Roberts, 747 F.2d 537, 546 n.10 (9th Cir. 1984). Because the magistrate must independently evaluate the affidavit, "the police cannot insulate one officer's deliberate misstatements

In United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985), the Ninth Circuit set forth the procedure to be followed to resolve the factual issues related to probable cause and necessity.¹⁸ With regard to false statements, the reviewing court must delete the false statement from the original affidavit and insert in its place its truthful counterpart. Id. at 774 F.2d 1486. With regard to material omissions, the reviewing court must "delete false or misleading statements and insert the omitted truths revealed at the suppression hearing." Id. at 1487, fn. 1. After employing this "cut and paste" procedure, the reviewing court should reevaluate the modified affidavit to determine whether it establishes probable cause and requisite necessity for the wiretap. The modified affidavit must allege and establish "specific circumstances" or it fails to meet the Franks standard.¹⁹ Defendants submit that Ippolito should guide this Court's evaluation of the instant Franks challenge.

A warrant that violates Franks is not entitled to the grace of the "good faith" exception enunciated in United States v. Leon. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 3421 (1984); Colkley, 899 F.2d at 300. But see United States v. Mendonsa, (Good faith exception applies where omissions from warrant were "immaterial") .

III. THE AFFIANT OMITTED AND MISSTATED MATERIAL FACTS REGARDING THE USEFULNESS OF THE INFORMANTS.

The government makes a material omission when it fails to inform the reviewing court of the availability of an informant who has access to the "inner circle" of a conspiracy.

In Ippolito, for example, the court found the wiretap application there at issue deficient where the government failed to inform the issuing court of an informant "who was both willing to testify and had great potential for uncovering the entirety of the conspiracy under investigation." Ippolito, supra., pp. 1486-1487. This informant:

merely by relaying it through an officer-affiant personally ignorant of its falsity." DeLeon, 979 F.2d at 764 (citing Calisto, 838 F.2d at 714) .

¹⁸ Ippolito concerned a challenge to requisite necessity. The defendants claimed, and the Court found, that the government had mislead the issuing judge regarding the willingness of an informant to uncover evidence of a drug conspiracy using conventional techniques and to testify regarding his/her observations. 774 F.2d at 1485.

¹⁹ The modified affidavit "must allege specific circumstances that render normal investigative techniques particularly ineffective . . . to prevent the government from making general allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation in which a wiretap is sought." Ippolito, 774 F.2d at 1486. "Therefore, if, after the modification of the affidavit in this case, there is no longer the requisite specificity, suppression should be ordered." Id.

was a former close associate of Ippolito, was involved in the plan to obtain a boat to move drugs from Colombia to the west coast, had been asked by Ippolito to run his operation, and had already met a couple of the members of the conspiracy and would probably meet more if he went to Colombia as requested by Ippolito. . . .

Ippolito, supra., p. 1487, fn.2.

In this case the affiant failed to inform the Court that CI-1, Felicitas Pineda Vasquez, had provided the agents with detailed information about the organization's stash houses in the Los Angeles area, and identified coconspirators in the Los Angeles area and the roles these coconspirators played in the organization. The government also failed to inform the Court that immediately following the Castro Valley bust, Ms. Vasquez supplied the agents with detailed information about the organization's Bay Area stash house locations.

The affiant completely failed to advise the reviewing court about Informant X, who is not mentioned in any of the wiretap affidavits. The affiant's failure to advise the Court about the information provided by Informant X was undeniably reckless, as Informant X provided the agents with detailed advance knowledge of the organization's Bay Area stash houses. X's information led directly to numerous searches and arrests, and the seizure of evidence from which the government developed even more investigative leads.

The affiant also completely failed to inform the reviewing court of the information gleaned during the course of the Robles investigation. By omitting the factual connection between the Robles case and the Orozco/Carvajal targets, the affiant also failed to apprise the court that the lead defendant in the prior case, Sigifredo Robles, was an available informant who could have been employed in the Orozco investigation.

Though the affiant mentioned the concurrent Los Angeles investigation of Orozco, Gutierrez and their associates, the affiant omitted the crucial factual information obtained by the Los Angeles DEA. This information included the locations of numerous cocaine storage and shipping locations in Los Angeles, as well as the identities of many of the Orozco organization members who ran the L.A. distribution branch of the "Orozco organization".

Finally, the affiant misrepresented CI-3's ability to arrange cocaine transactions with conspirators Luis Garcia and Jose Orona.

A. Misrepresentations Regarding Felicitas Vasquez (CI-1).

To begin, the affiant did not inform the reviewing court that Ms. Vasquez was in fact CI-1. Though the affiant told the Court about the agents seizure of fifty kilograms of cocaine in Castro Valley, and the central role that Felicitas Vasquez played in that transaction, the affiant never informed the reviewing court that Ms. Vasquez cooperated with the agents, much less described the detailed nature

of the information she provided.

Felicitas Vasquez provided the government with detailed information about the Orozco organization's sources of supply and stash house locations in the Los Angeles area, as well as the identities of a number of high level members of the organization who operated in L.A. The details of Ms. Statements regarding the Los Angeles operations of the Orozco organization were confirmed by DEA surveillance and related investigation in the L.A. area. The affiant did not inform the reviewing court of these facts.

Ms. Vasquez also provided the agents with detailed information about several houses in the Bay Area utilized by the organization as distribution cocaine centers, and identified several of the people who ran operated these houses. While the affiant did inform the court that CI-1 had identified some of these Bay Area coconspirators, the affiant did not set forth all of the Bay Area conspirators identified by Ms. Vasquez, and failed to mention all but one (145 Lilac Street) of the Bay Area stash house locations she described.²⁰

B. Misrepresentations and Omissions Regarding Informant X.

All of the information provided by informant X was omitted from the wiretap affidavit because the affiant did not even acknowledge to the reviewing Court that Informant X existed, much less that he had been providing the agents with advanced and detailed knowledge about the Orozco organization's Bay Area stash house locations and load car deliveries.

In opposing the defense motions for disclosure of Informant X's identity, the government argued that Informant X had not provided information that was relevant to the federal wiretap investigation. However, this argument is belied by the nature of the information provided by Informant X, the evidence seized during the searches of the houses identified by X, and the agents' own statements. For example, in the initial wiretap affidavit the government said of the above described searches, "[s]tate search warrants have been executed **in this investigation** and have yielded a considerable quantity of narcotics and currency." Affidavit, at ¶ 126 (emphasis added.)

The information provided by Informant X was undeniably material to the reviewing court's determination of the necessity issue. X was a highly placed member of the Orozco organization, possessed of specific and advanced knowledge of the organization's activities. X's cooperation also enabled the agents to conduct numerous searches, during which they seized much valuable evidence

²⁰ Oddly, the wiretap affidavit indicates that Ms. Vasquez identified Pancho's Auto Body as a Bay Area distribution location for the Orozco organization, while the DEA 6 interview reports regarding Ms. Vasquez do not mention Pancho's at all. Thus, the only information reported by the affiant that allegedly came from Ms. Vasquez is the one location missing from the extensive list of locations described by Ms. Vasquez during her interviews.

concerning the Orozco group's membership and activities. The reviewing court should have been told of this information.

According to the government, the goals of the investigation that could not be fulfilled through traditional investigatory resources such as informants, were to identify the locations used by the Orozco organization to traffic cocaine, the people who participated in these acts, and the roles the various conspirators played. In addition, the affiant told the court that the government had been unable to ascertain locations to search and gather evidence. Clearly the informants fulfilled many of these goals. By omitting and misstating the detailed information supplied by the informants the, Government materially, and intentionally or recklessly, misled the reviewing court on the issue of requisite necessity.

IV. THE AFFIANT MISSTATED AND OMITTED MATERIAL FACTS REGARDING THE GOVERNMENT'S USE OF SURVEILLANCE.

By failing to inform the reviewing court of the Los Angeles and Richmond area surveillance episodes, the affiant omitted the fact that surveillance led to the identification of several Orozco organization customers, the organization's means of gathering and distributing drug proceeds (one of the stated goals of the investigation), and the locations used in the course of the organization's trafficking activity.

Telling the court that surveillance of CI-3's controlled contacts with Luis Garcia and Andres Orona would be useless, "if" the government chose to employ surveillance, was an affirmative misstatement. In fact the agents did use surveillance in conjunction with CI-3's controlled buy (including video), and the surveillance was quite successful. The targets did not use "counter surveillance techniques", and the affiant's pretending otherwise constituted an intentional deception of the court designed to downplay the assistance that CI-3 might provide.

Other than the affiant's discounting of the government's ability to conduct surveillance of CI-3's meetings with the targets, the only other statements by the affiant as to why CI-3 could not further penetrate the organization was his conclusory allegation that he believed CI-3 could not do so. See Affidavit, at p.49, ¶ 130.

Through surveillance and PEN registers the Los Angeles investigators confirmed much of the information provided by Felicitas Vasquez regarding the locations where Orozco's L.A. associates conducted their narcotics trafficking. The Los Angeles agents followed suspects, and vehicles believed to be "load cars" to houses in Moreno Valley, Northridge, Anaheim and Downey, California. Each of these locations was described by Ms. Vasquez, from personal knowledge, as sites where Orozco stored and shipped cocaine. At least two of the locations described by Ms. Vasquez, 904 N. Fairview Street in Anaheim and 13447 Ninebark Street in Moreno Valley, were the center of much of the suspect activity observed by the Los Angeles agents.

The affiant's recitation of boilerplate excuses regarding why the agents could not use surveillance

to investigate the Orozco organization materially deceived the reviewing court. In fact the government employed surveillance, in both Los Angeles and the Bay Area, to obtain incriminating evidence and to identify members of the putative “Orozco organization”. The intelligence gathered during surveillance was often corroborated by the informants, such as Felicitas Vasquez and CI-3. By failing disclose these facts to the reviewing court, the informant misled the court regarding necessity for the Carvajal wiretap.

VI. THE AFFIANT MISSTATED AND OMITTED MATERIAL INFORMATION ABOUT THE PRIOR WIRETAP INVESTIGATION OF THE ROBLES CASE SUSPECTS AND 1947 CROSBY STREET.

According to the affiant, Ana Ramirez, who resided at 1947 Crosby Street, was one of the primary targets of the Orozco/Carvajal investigation. Though the government had previously conducted a prior investigation of Sigifredo Robles and his associates, that included a wiretap at 1947 Crosby, during the course of which Ms. Ramirez’ calls were intercepted, the affiant did not reveal the prior investigation to the reviewing court.

In the course of the Robles investigation the government identified Mike’s Auto Body, Pancho’s Auto Body and the Alta Mar Restaurant as businesses associated with the Robles organization’s narcotics trafficking activities. Though these business were key locations in the Orozco/Carvajal investigation, the affiant did not tell the Court that the government had already gathered significant evidence concerning these locations. Most importantly, the affiant failed to tell the reviewing court that one of the lead suspects from the prior investigation had agreed to cooperate with the government against Oakland area narcotics traffickers.

The materiality of these omissions is clear. By omitting the information concerning the obvious link between the Robles case and the Carvajal investigation, the affiant pretended that the government had no available informants who could provide information on Orozco and his associates, or the locations where the Orozco suspects did business in the Oakland area, while in fact a high level informant was ready to provide the government with information about Montes, Orozco and other suspects in the Orozco/Carvajal investigation.

VII. THE AFFIANT MADE MATERIAL MISSTATEMENTS ABOUT THE EVIDENCE OBTAINED THROUGH SEARCHES.

The affiant’s statement to the reviewing court that searches had not “yielded documents which reveal the total scope of the illegal narcotics smuggling operation, and the identity of the conspirators of this organization” (Affidavit at p.47, ¶ 46) was simply false. The searches of the Eureka, Lamoreux, Lilac, 16th Street and Forest locations resulted in or confirmed the identification of numerous coconspirators in both Northern and Southern California.

The “stash house” searches revealed numerous telephone numbers in the Los Angeles area for suspects who Felicitas Vasquez identified as members of the L.A. branch of the “Orozco organization”.

By comparing these documents to the information gathered through the use of PEN registers and surveillance by the Los Angeles DEA agents, the government could have confirmed that numerous specific houses and businesses in Los Angeles were being used by the “Orozco organization” to ship cocaine to the Bay Area suspects. It appears that this was not done because the Los Angeles and Northern California federal agents failed to share information from their respective investigations.

The importance of the factual intersection of the Los Angeles and Bay Area stash houses, and the suspects who worked at these locations, is clear. The wiretap affiant in the Carvajal case represented to the reviewing court that the government needed a wiretap in order to find “the places of operation” of “the sources of supply” for the Orozco organization (See Exhibit A at p.5), the government had already obtained, through traditional investigation, all of the information it needed to locate these “places of operation.” The affidavit thus omitted crucial information regarding the government’s ability to identify the locations used by the suspects to store and ship cocaine from Los Angeles to the Bay Area.

VIII. THE AFFIANT DID NOT INFORM THE COURT THAT THE GOVERNMENT CONDUCTED NO FINANCIAL INVESTIGATION PRIOR TO APPLYING FOR THE TAP.

One of the stated goals of the Orozco investigation was to discover how the supposed “organization” gathered and disposed of the funds generated by narcotics trafficking. (See Exhibit A at pp. 5, 42) While the affiant told the reviewing court that the government could not use Grand Jury subpoenas to fulfill the several goals of the investigation, in fact several valuable sources of valuable financial investigation were never employed by the agents in this case. The agents did not use the FINCEN system, IRS records, or any other of the database sources they could have employed to attempt to track the Orozco organizations disposition of funds.

There was no financial investigation as part of this investigation, either of the individual targets or of the several businesses known by the government as locations where the “Orozco organization” conducted its cocaine business (Mike’s Auto, Pancho’s Auto, Alta mar Restaurant, Olympic Auto Sales etc.). It is relatively obvious that it would have been easier to find a plausible basis to conduct a financial investigation of these businesses and individuals. The mighty FBI and DEA and the powers of an OCDETF investigation surely could utilize the resources of the FINCEN system, the IRS, and other state and federal agencies. The federal government has vast powers to independently conduct financial investigations, as noted within the attached excerpt from a Department of Justice Manual on investigatory tools available in money laundering investigations. See Exhibit U. Here, the agents failed to employ any of these tools and no financial investigation was conducted.

In sum, the government misrepresented that it employed traditional means of financial investigation prior to its application for a wiretap. The affiant’s statements to the reviewing court as to why the wiretaps were necessary to discover how the Orozco organization disposed of funds therefore omitted and misstated material information regarding the true lack of prior investigation.

VIII. THE AFFIANT OMITTED MATERIAL INFORMATION ABOUT OROZCO'S PRIOR ARREST.

The Los Angeles area investigation of Orozco clearly pointed to Ernesto "Topo" Limon-Gutierrez as one of Orozco's primary "workers". In addition, Felicitas Vasquez informed the agents that Gutierrez ran Orozco's distribution operations in the Los Angeles area.

Though the affiant claimed that a wiretap was necessary in order to identify Anecto Orozco's cocaine distributors, the affiant failed to mention that Orozco himself had previously identified as one of his associates. In 1994, when the DEA arrested Orozco on cocaine trafficking charges, Orozco agreed to speak to the arresting officers immediately following his arrest. During the questioning the agents asked Orozco about several suspects who had been observed with him, at a suspected "stash house" (2242 Coloma St., Oakland) immediately prior to Orozco's arrest. Orozco told the agents that one of the suspects was "El Topo", who lived at 2242 Coloma. See Exhibit S.

Thus, long before the affiant in the Carvajal case asserted that a wiretap was necessary to identify the people who distributed cocaine for Anecto Orozco, Orozco himself had identified one of his long standing "workers" and told the DEA where the worker lived. When "El Topo" Gutierrez surfaced three years later in the Carvajal case, the government already possessed important evidence linking him to Orozco. And once again, the reviewing court should have been told of such key factual details, rather than misled by boilerplate allegations about how a wiretap was necessary in order to find and identify Orozco's elusive associates.

CONCLUSION

At the stage the defense need not even prove by a preponderance of the evidence that the questioned statements are false. To warrant a Franks hearing, the defense need only make a "substantial showing" that the affidavit contained material misstatements or omissions. See, e.g., Franks, 438 U.S. at 155-56.

Defendants submit that the foregoing constitutes an initial showing that the affiant omitted or misstated information that was material to the reviewing court's necessity analysis. An evidentiary hearing is therefore warranted.

Dated: July 28, 2000.

Respectfully Submitted,

WIRETAPS – SAMPLE DISCOVERY LETTER

December 16, 1998

The United States Attorney
Northern District of California
450 Golden Gate Avenue, 11th Floor
San Francisco CA 94102

RE: UNITED STATES v XXXXXX XXXX, et al.,
CR XX-XXXXX XXX

Dear Mr. Laettner:

Please consider the following Mr. Ruiz's formal discovery requests in this case. This letter shall serve as our request for the DEA PEN/calls database utilized in this case. The government has obviously chosen to compile the information relating to intercepted conversations into a database because of the enormity of the information which needs to be organized, indexed, searched and analyzed. Such a database, for instance, was apparently used to produce the "Pertinent Call List" already disclosed in this case.

The defense has the same need for efficient access to this information. If the government's database for the storage of the wiretap information in this case is not received, each defendant will have to take the hard-copy information that you have given us and compile a database on our own. As you know, defense counsel in this case have been appointed under the provisions of the Criminal Justice Act, and as such, the cost to the government of such an undertaking will be enormous (as well as time consuming). We are not requesting any privileged information. Nor are we seeking the government's entire database, or work-product. Instead, we seek the information which you already have in a useable format. Of course, the information contained on the database, such as the information on the monitoring logs, the ten-day periodic reports, the list of coded words and phrases, a breakdown by named-defendants of all of the telephone calls in which he or she participated, will have to be turned over to the defense in paper format.

In other words, we are seeking a "subset" of that information referring to each intercepted conversation which will be provided to the defense. My understanding of database programs, is that they offer the ability to receive selected fields of information from each record contained in the database. This process can be done in a few hours as compared to the months that would be required to reconstruct a database from the logs.

In addition to the above, please provide to the defense the PEN register, the trap and trace, number search study, and subscriber information gathered during the investigation of this case. Once again, the only way that the defense can sort and search this information will be in database format. Boxes and boxes of paper will make this information virtually useless, yet the information is imperative to the defense, especially

since the government chose to utilize this form of surveillance for approximately two years. As is the case of the database of intercepted conversations, a subset of the government's database (containing no work-product or privileged information) is all that we are requesting.

The defense also requests that the government disclose the results of any triangulation or other positional signal investigation that was conducted in this case by either law enforcement agencies

Last, it is anticipated that the government will be producing transcripts of intercepted conversations. In order to avoid the unnecessary expense of copying and the expense (and time) of having to re-type them, we would request electronic copies of these transcripts as word-processing files on diskettes (as well as paper copies) which I will be glad to provide.

It is hoped that we can work together to make sure that the information is transferred in a format that can be efficiently used. In order to accomplish this, we would need to know if the government has used a commercially available database manager to compile these databases. If some proprietary database application was used, then it is crucial to discuss the format of the file to be provided to the defense, so that we can plan to convert these files to a format useable by the database manager we select. Similarly, with respect to word processing files (transcripts of intercepted conversations) copies of formatted files (i.e., WordPerfect or Microsoft Word) might be best.

The defense hereby requests the following:

1. All discovery to be bates stamped by the government in order to allow easy distribution and referencing by all parties; where possible, we are requesting both paper copies and the information on computer diskettes in readable formats. The electronic format will save hundreds of hours of work and thousands of dollars in cost.
2. With regard to the wiretaps and extensions, please provide all the wiretap taps, affidavits, applications, orders and all appendices attached to these documents for this and related investigations. Thus, if any of these defendants are interceptees on any of the other Alcazar wiretaps, please provide the above-described documents for those wiretaps, as well.

In addition, in relation to the wiretap, please provide:

- A. All monitoring logs, synopsis reports (if applicable), and ten-day periodic reports.
- B. A list of "Coded Words and Phrases" which the government claims refers to drug or money communications.
- C. A list of pertinent calls as determined at the time of the interception.
- D. A breakdown by named-defendants of all of the telephone calls in which he or she

participated.

- E. Additionally, please provide all inventory orders, inventories and reports or service thereof. Additionally, for those calls which have been transcribed, please provide the transcripts. With regard to any "consensual recordings", all orders underlying documentation purport to authorize such consensual recordings pursuant to Attorney General's Order No. 556-74.
 - F. All sealing orders contained in the miscellaneous files filed pursuant to title 18 U.S.C. §2518(8)(a). Likewise, we are requesting the orders authorizing unsealing of these files, and any orders authorizing dissemination of the contents of the files to local agencies under § 2517.
 - G. All of the incident reports, logs, notes or records (for example, DEA 6's and FBI 302's) which memorialize the government's use in this case of "normal investigative procedures" as described in the wiretap affidavits. This request includes, but is not limited to, interviews with cooperating witnesses and informants, all reports of surveillance relating to this case, reports of any efforts to introduce informants or undercover agents into the alleged organizations, reports memorializing the government's attempt to discover the members of this organization and its methods of operation, and reports of all attempts to set up controlled purchases and sales of methamphetamine, cocaine or other controlled substances.
 - H. All 23 previous wiretap applications and affidavits for taps on telephone facilities allegedly used by Juan Alcazar and his associates, as listed in "Attachment A" to the wiretap affidavit in this case.
- 3. All trap & trace and pen register information in computerized (and readable) format for all telephones intercepted as a result of this investigation. Additionally, we are requesting the applications, affidavits and orders for such interception. Further, we are requesting the unsealing of the miscellaneous court files which contain these documents.
 - 4. All search warrant affidavits, warrants and returns issued in these investigations, and in related state investigations. Likewise, we are requesting the unsealing of these files.
 - 5. Copies of any relevant written or recorded statements made by the defendants, and the substance of any oral statement made by the defendants which the government intends to offer in evidence at the trial within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the attorneys for the Government.
 - 6. The defendants request the Government to furnish to the defendants such copies of defendants'

criminal records, and corresponding police incident reports, if any, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the government.

7. The defendants request the government to permit the defendants to inspect and copy books, papers, documents, photographs, and tangible objects which are within the possession, custody or control of the government, and which are material to the preparation of their defense or, which are intended for use by the government.
8. The defendants request the government to permit the defendants to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense, or which are intended for use by the government as evidence at trial.

The defendants further request that the government provide them with the following general categories of information:

1. The date, time and place of every occasion on which any surveillance, mail cover, search and/or seizure, whether electronic, photographic, videotape, mechanical, visual, aural, or any other type, was made of any defendant, their residences, any person or entity associated with them, together with all documents, photographs, recordings or other material resulting from, or reflecting, or relating to, such occasion, including but not limited to affidavits and warrants utilized in connection therewith.
2. Any statement as to whether or not, during the course of the investigation of this matter, the defendants, photograph, likeness or image was exhibited to anyone. This request includes a list of the date(s), time(s) and place(s) of each such occurrence, and the name(s) of the person(s), including counsel, who were present.
3. Any and all evidence of criminal conduct, state or federal, on the part of any person whom the prosecution intends to call as a witness at trial.
4. Any and all statements formal or informal, oral or written, by the federal or state government, its agents and representatives, to any person (including counsel for such person) whom the prosecution intends to call as witness at trial, pertaining in any way to the possibility, likelihood, course or outcome of any government action, state or federal, civil or criminal, including immigration matters, against the witness, or anyone associated in business with the witness, or any corporation, partnership, joint venture or other association employing the witness or in which the witness has an interest.

5. Any statements or documents, including but not limited to grand jury testimony, and federal, state and local tax returns made, or executed by, any potential government witness at the trial in this action which the government knows, or through reasonable diligence, should have reason to know is false.
6. Any and all statements reflecting, or referring to, any discussion or conversation which any agent or representative of the state or federal government suggesting that any individual might possibly be afforded more favorable treatment in any regard in the event such individual offered evidence against any defendant. This list includes a list of the date(s), time(s) and place(s) of each such occurrence and the name(s) of the person(s), including counsel, who were present.
7. A list of all judicial proceedings in any criminal cases involving any person who is, or may be, a potential government-witness at the trial in this action.
8. Any and all actions, promises or efforts, formal or informal, on the part of the government, its agents and representative to aid, assess or obtain benefits of any kind for any person whom the government considers a potential witness at trial, or a member of the immediate family of such witness. This request includes, but is not limited to: (a) letters informing the recipient of the witness' cooperation; (b) recommendations concerning federal aid or benefits; (c) promises to take affirmative action to help the status of the witness in a profession, business or employment or promises not to jeopardize such status; (d) aid or efforts in securing or maintaining the business or employment of a witness; (e) aid or efforts concerning a new identity for the witness and his or her family, together with all other actions incidental thereto; (f) direct payments of money or subsidies to the witness; or (g) any other activities, efforts or promises similar in kind or related to the items listed in (a) through (f) above.
9. A list of all documents used, obtained or written in connection with the investigation preceding the indictment in this case that the government destroyed, for whatever reason, including but not limited to, rough notes of interviews, reports, memoranda, subpoenaed documents and other documents.
10. Any and all evidence that any person who is a government witness or prospective government witness in this case is or was suffering from any physical or mental disability or emotional disturbance, drug addiction or alcohol addiction at anytime during the period of the indictment to the present.
11. In addition to the information and material requested above, any documents, books, papers, photographs, scientific tests or experiments, tangible objects, written or recorded statements of anyone, reports, grand jury transcripts and oral statements of anyone, reports, memoranda, names and addresses of persons, or other evidence or information which either tends to exculpate the defendant or tends to be favorable or useful to the defense as to either guilt or punishment, or tends to effect the credibility of a potential government witness or the weight of his or her testimony or which will lead to evidence favorable to or exculpatory of the defendant. This request includes

disclosure to the defendant of all exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny.

12. The names and addresses of all persons whom the prosecution, its agents and representative believe to have relevant knowledge and/or information with reference to the charges contained in the indictment but whom the prosecution does not propose to call as witnesses at trial, along with all statements of such persons made to government agents or the grand jury which pertain to the defendant or the allegations in the indictment against the defendant.
13. A written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of its case-in-chief, together with any criminal record or evidence of prior convictions of any such witnesses.
14. A written list of the names, addresses and qualifications of all experts the government intends to call as witnesses at trial, together with all reports made by such experts or, if reports have not been made, a brief description of the opinion and subject matter to which each is to testify.
15. A statements as to whether or not the government intends to offer evidence pursuant to Rule 404(b) of the Federal Rules of Evidence against any defendant. If yes, provide a specific factual statement describing the evidence.
16. A statement as to whether the government intends to utilize accomplice or co-conspirator statements or testimony at trial.
17. All exhibits which the government intends to introduce at trial in the case-in-chief.

The defendant further requests all information to which he is entitled pursuant to 18 U.S.C. §3500 or Rule 26.2 of the Federal Rules of Criminal Procedure.

This request for discovery may be supplemented when the defendants know more about the case and are in the position to specify other areas of discovery.

If you wish, in order to facilitate the above requests and the efficient flow and progress of this case, I, and my co-counsel are available to meet with you to discuss these requests.

This request is obviously being made on behalf of counsel for all defendants. We look forward to discussing this with you. Since obviously, numerous areas exist which will require us to litigate, it is hoped that we can coordinate the technical aspects of this case. Since we are not requesting any information that the government wouldn't normally give us, we anticipate an easy resolution to these requests.

Thank you for your attention to this matter.

Very truly yours,

Wiretaps – Attacking Them Step By Step
Sample Pen Register

'5105349731',05/02/96
,15:21:42,0:00:22,1,-0,-0,-0,-0,-0,-0,-0,-0,-0,-0,'O','5108739999',-0,-0,-0,-0,-0,-0,'LNU,
FNU','LNU, FNU',-0,-0,-0,-0,-0,-0,'N',-0,-0,-0,-0,384,'N',-0,-0-
'5105349731',05/02/96
,16:33:30,0:00:21,2,-0,-0,-0,-0,-0,-0,-0,-0,-0,-0,'O',-0,-0,-0,-0,-0,-0,'DEROBLES,
PEDRO','LNU, LUPITA (CHILD)',-0,-0,-0,-0,-0,-0,'N',-0,-0,-0,-0,384,'N',-0,-0-
'5105349731',05/02/96
,17:16:31,0:00:29,4,-0,-0,-0,-0,-0,-0,-0,-0,-0,-0,'I',-0,-0,-0,-0,-0,-0,'LNU, DREW','LNU,
FNU',-0,-0,-0,-0,-0,-0,'N',-0,-0,-0,-0,384,'N',-0,-0-
'5105349731',05/02/96
,17:42:51,0:00:32,5,-0,-0,-0,-0,-0,-0,-0,-0,-0,-0,'I',-0,-0,-0,-0,-0,-0,'LNU, FNU','LNU,
FNU',-0,-0,-0,-0,-0,-0,'N',-0,-0,-0,-0,384,-0,-0,-0-
'5105349731',05/02/96
,19:58:48,0:01:29,6,-0,-0,-0,-0,-0,-0,-0,-0,-0,-0,'I',-0,-0,-0,-0,-0,-0,'TOURESH,
ROBERT','LNU, FNU',-0,-0,-0,-0,-0,-0,'Y','(SEE INTERCEPT 001) C REACHED DEROBLES"
MACHINE, LEAVES A MESSAGE THAT HE IS RETURNING CALL, PAGER HAS BEEN
OUT OF ORDER. C SAYS HE"S STILL "WAITIN" OUTSIDE", DOESN"T KNOW WHY
HE"S LAGGING, THAT NOW HE (DUDE) SAYS FRIDAY RATHER THAN THE
WEEKEND. C SAYS IF DEROBLES NEEDS HIS MONEY, C CAN BRING IT BY OR IF
PEDRO CAN HOLD ON, C WILL GIVE HIM (DUDE) UNTIL WEEKEND. HE (DUDE) SAID
SOMEONE "CAME THROUGH" RIGHT BEFORE HE CONTACTED C AND PICKED UP "THE
STUFF" SO THAT"S WHY HE SAID A COUPLE OF MORE DAYS AND U/I "GET SOME
MORE STUFF OUTTA HERE". C WILL KEEP IN CONTACT WITH YOU. DIDN"T KNOW
PEDRO"S HOME PHONE BEFORE AND NOW (U/I) "ACTIN" LIKE A LITTLE BITCH SO...
873-9999. C SAYS TO LEAVE A MESSAGE SAYING WHAT PEDRO WANTS C TO DO, TO
LET C KNOW IF CESAR (PH) BROUGHT UP THAT STUFF TOO BECAUSE C HAS EXTRA
CASH AND C MIGHT BUY SOME OF THAT STEREO STUFF HE"S BRINGIN" UP OR "WE
CAN TRADE IT WHEN I GET THE STUFF - EITHER/OR... LET ME
KNOW.',-0,-0,-0,384,'N',-0,-0-
'5105349731',05/02/96
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PEDRO','CONTRERAS, TERESA','CONTRERAS, CESAR',-0,-0,-0,-0,'Y','R2 SAYS HE HAS A
BAD HANGOVER AND ASKS C WHERE HE IS AT C SAYS HE'S AT HOME SINCE 10:00
WILL GO BACK TO WORK AT 4:00 TILL 12:00 AND WILL BE OFF TOMORROW. C
EXPLAINS WHY HIS WORK SCHEDULE CHANGES. R2 TALKS ABOUT JOGING. C LAST
MONDAY DID 214 A DAY AND WANTS TO GET UNDER 210. BY THIS WEEK. R2 SAYS HE
HAS TO GO GET TAGS FOR THE TAHOE. SOME GIRL WANTS TO BUY IT. C TELLS R2 IF
WANTS TAGS HE CAN BRING HIM SOME FROM WORK. R2 TELLS C THAT THE GUY IS
GOING TO PAY HIM TOMORROW. C AND R TALK ABOUT GILBERTO AND THAT ALL
THE GUYS WANT INTEREST. C TELLS R WHY SHOULD ONE TAKE MONEY OUT OF THE

Wiretaps – Attacking Them Step By Step

Date: 08/18/95

Periodic Report

[illegible]

On 03/21/95 at 20:22:52 a 0:00:40 minute call was placed to this line by U UM to U UM

The following was stated:

C1 - ASKS WHAT'S HAPPENING

R1 - NOTHING, JUST RESTING

C1 - WAS THERE ANYTHING

R1 - NO NOTHING BUT THERE WILL BE SOME TOMARROW

C1 - WHAT TIME

R1 - AFTER 10 I THINK

C1 - I WANT TO BE SURE SO I CAN TELL THE GUY NOW

R1 - AFTER 10 I BELIEVE

This was an incoming call

The total # of minimizations is 0

The log number for the above interception is: A03/21/95-1

[illegible]

On 03/22/95 at 9:12:55 a 0:00:33 minute call was placed to this line by U UM to U UM

The following was stated:

R WHERE

CRC

R DONT

R THEY DON'T ANSWER I'LL KEEP DIALING OK

R ASKS WHERE HE'S AT AND C SAYS HE'S IN REDWOOD CITY. R TELLS C THAT THOSE GUYS HAVEN'T REPORTED IN OR CHECKED IN. R SAYS HE'S BEEN CALLING SINCE YESTERDAY AND HE ONLY SPOKE W/ CALIAS AND HE TOLD HIM THAT POSSIBLY THIS MORNING BECAUSE THE OTHER GUY WAS STILL OVER THERE, BUT THAT THEY'RE NOT ANSWERING NOW. R SAYS HE'LL KEEP DIALING THEM.

This was an incoming call

The total # of minimizations is 0

The log number for the above interception is: A03/22/95-7

Page # 1

[illegible]

On 03/22/95 at 9:18:07 a 0:00:36 minute call was placed to this line by U UM to RAMIRO LASEY-GARCIA

The following was stated:

C - YOU HAVE ANY

C - YOU'LL CALL ME RAMIRO DOWN, RAMIRO. C ASKS R IF HE CAN AT LEAST GET "ONE OF THEM." R TELLS C HE DOESN'T HAVE ANYTHING. C SAYS HE THOUGHT THEY CAME IN YESTERDAY, BUT R SAYS HE WAITED FOR HIS FRIEND BUT HE DIDN'T SHOW UP. HE THINKS MAYBE HE'LL SHOW UP TODAY, BUT HE HASN'T CALLED. C TELLS R TO BE SURE TO CALL HIM AND R SAYS HE'LL CALL HIM AS SOON AS HE HAS SOMETHING.

On 03/22/95 at 11:03:42 a 0:01:09 minute call was placed from this line by U UM to U UM

C ASKS IF THE GUY CAME BY AND R SAYS NO. C ASKS FOR THE "BALLENA". THEY THEN DISCUSS THE RAIN. THEY ALSO TALK ABOUT OPENING THE SHOP. R SAYS A GUY DROVE BY W/ A WOMAN BUT HE DOESN'T KNOWN IF THAT'S THE GUY. C SAYS IF THE GUY SEES THE SHOP CLOSED HE WON'T GO IN. THE "BALLENA" MEANS "WHALE" IN SPANISH. MOST LIKELY A NICKNAME FOR A PERSON.

On 03/22/95 at 11:04:52 a 0:01:00 minute call was placed to this line by UUM UUM to UUM

C AND R TALK ABOUT WHETHER ANYTHING IS HAPPENING AND R SAYS NO. C ASKS IF THERE IS ANYTHING AND R SAYS NOTHING. R SAYS HE'S WAITING FOR THE WORKERS. R THINKS BECAUSE OF THE RAIN THEY WON'T SHOW UP. R THINKS MAYBE LATER TODAY AND HE'LL CALL HIM WHEN IT COMES. C TELLS R TO BE SURE AND CALL HIM BECAUSE HE HASN'T GOTTEN ANYTHING SINCE THE LAST ONE. C SAYS HE'LL BE GOING TO WORK BUT HIS WIFE WILL BE HOME FOR R TO CALL. R SAYS HE HAS "MANTECAS" NUMBER.

On 03/22/95 at 11:24:07 a 0:00:55 minute call was placed to this line by U UM to U UM

The following was stated:

C - WHAT'S UP

R - JUST WAITING NOTHING DON'T KNOW WHAT'S UP... TOLD THEM IT WAS ALREADY THERE. MAYBE THIS AFTERNOON... WE'RE STILL WAITING

C - OK C ASKS WHAT'S GOING ON AND R SAYS NOTHING, THAT HE'S JUST BEEN WAITING FOR THE GUYS. HE SAYS THAT THEY CALLED YESTERDAY AND THEY WERE STILL DOWN THERE. HE THINKS THE WEATHER HAS DELAYED THEM. THEY WERE GOING TO COME YESTERDAY, BUT THEY COULD MAKE IT. HE SAYS IT'S RAINING HARD DOWN WHERE THEY ARE TOO. THE OTHER DAY THEY WERE ONLY ABLE TO "WORK" A LITTLE BUT THEN IT STARTED RAINING. R SAYS THEY'RE JUST WAITING BUT AS SOON AS HE GETS OR HEARS ANYTHING HE'LL CALL C.

This was an incoming call

The total # of minimizations is 0

The log number for the above interception is: A03/22/95-13

[illegible]

On 03/22/95 at 12:51:50 a 0:00:19 minute call was placed to this line by to JAY UM U UM

The following was stated:

C ASKS R WHAT'S UP. R SAYS NOTHING RIGHT NOW. R TELLS C TO CALL BACK AROUND SIX.

This was an incoming call

The total # of minimizations is 0

The log number for the above interception is: A03/22/95-14

[illegible]

On 03/22/95 at 16:55:17 a 0:01:02 minute call was placed from this line by U UM to U UM

The following was stated:

C ASKS R WHAT'S GOING ON - R SAYS MAYBE TOMARROW IN THE AFTERNOON. C ASKS R IF THE MAN CALLED, AND IF IT WAS A SURE THING FOR TOMARROW. R SAYS YES, THAT BY THE TIME THEY GO AND COME BACK IT WILL DEFINITELY BE TOMARROW AFTERNOON. R MENTIONS THEY'RE GOING TO BE COMING UP AND "WORKING" SOMEWHERE ELSE TOO AND THAT'S GOING TO DELAY THEM A LITTLE MORE. C ASKS ABOUT ANOTHER GUY WHO WAS SUPPOSED TO BE DOWN THERE BUT R SAYS HE COULD NOT GET ANYTHING ARRANGED.

This call was to 510 914-4433

The total # of minimizations is 0

The log number for the above interception is: A03/22/95-24

)))))))))

Page # 3

II. TRIAL: LAW, TACTICS & ADVOCACY

2001 NEW APPROACHES

ACTING FOR LAWYERS
(Welcome to the Theater of the Absurd)

Dale T. Cobb, Jr.

Lawyer
Post Office Box 71121
Charleston, SC 29415

ACTING FOR LAWYERS

Welcome to the Theater of the Absurd

*All the world's a stage, and all the men and women merely
players. They have their exits and their entrances and one man
in his time plays many parts.*

As You Like It, Act II, ii, 139.

How many years after graduating from law school did it take you to act and feel like a human being again? Too many I fear. Our ivory covered institutions very often take from us the very qualities required to be good communicators: the ability to listen, and the ability to feel. Having been stripped of those attributes, we wallow in litigation anonymity, unable to effectively persuade.

The purpose of this exercise is to rekindle the magic of trial work as a performing act. Learn to be yourself, and in doing so, learn to be others. For it is in this metamorphosis we find the ability to transmit the imagery and essence of the spoken work to the most important audience in the world; the jury.

Our tools; the only ones we possess for this task are the voices and the body. We therefore explore, develop, and utilize their potential to the fullest. To do so, alas, sometimes requires a sublimation of our egos. We are not all blessed with the voice of a Burton; the polished presence of an Olivier; the spell bounding sincerity of a Darrow; or the rapier like wit of a Will Rogers. However, working within confines of our physical being, we can all create our own magic.

To do so, we must realize that impression are critical to the fabric of the task at hand; the art of persuasion. Jurors all have preconceived notions of what a lawyer should look and sound like. They come to a court room expecting to be guided, entertained, directed and ultimately persuaded. So relax, enjoy, listen and learn.

The old adage "You never get a second chance to make a first impression" is as, if not more, important in the trial of a criminal case than in any other facet of life. Being able to meet twelve complete strangers in the formal setting of a courtroom and to be able to get, and hold their attention is the key to winning in the criminal theater. Persuasion starts when jurors begin to formulate their opinions of you as a person and as a lawyer. In order to do that we first need to understand the dynamics of what things impact on jurors; what captures their imaginations; what evokes a response; what lingers in their memories, and creates a memory.

The opening statement therefore becomes your chance to be the raconteur; to tell the tale. If done properly you will be able to effectively do the following:

- A. Deliver information
- B. Establish facts
- C. Convey Feelings
- D. Evoke a Response
- E. Create a Memory

It is, in essence, the art of story telling.

ACT I

Trial as Drama

The art of story telling dwindles with every passing generation, and with it goes the power to move; to change; to persuade. To tell a story well is to weave a tapestry of the spoken word with the use of our bodies as instruments. To bring a story to life requires raw talent enhanced by rehearsal, genius, improvisation, and most importantly by the wisdom to know the difference.

The true artist can bring to life the theme or plot of the story in a single line or gesture. A now deceased trial lawyer who tried scores of railroad crossing accident case in his career would begin his closing thusly:

"Ladies and gentlemen; this man represents steel and steam. I represent flesh and blood."

The lawyer who does not grasp the premise that a jury is an audience waiting to be entertained, caressed, wooed, and thereby persuaded, does a disservice to his or her client and to the profession as a whole.

ACT II

When to Open

(NEVER WAIVE OPENING)

My psychiatrist friends are all in accord that the doctrines of "primacy" and "recency" dictate that we should seize the first, last and every opportunity to address the audience (jury).

If there is a constant in this area, it must be; open at whatever opportunity you may have to maximize impact. If you have a luxury of making the last argument to the jury, do it. Your opening statement will set the tone for the trial as well as acting as a road map for the jury.

ACT III

How to Open

Every lawyer must have a "game plan." An overall strategy emanating from careful pre-trial planning and towards which all other parts of the trial logically lead the trier of fact.

To be consummately prepared for this part of the trial takes hours of painstaking creating, eliminating, adding, changing, and ultimately digesting all facets of the trial into a moving, touching and understandable story worthy of belief. (KISS - Keep it simple stupid).

Preparation

Establish a theme from the evidence presented and incorporate common experiences of the jurors into the theme. Use book titles, song titles, literature references, even T.V. or radio commercials to grab the jury and give them a reference point. Refer to it often. Make it a refrain. Create a trilogy to emphasize it. Give your case some identity.

"Ladies and gentlemen; this is a case of a woman who loved not too little, but too much," or "My friends, this case is the story of a boy in a cage. Not a bamboo or steel cage, but a cage built in his mind day by day, week by week, year by year. And this boy's jailer was his father."

Psychologically you are creating the imagery of a client who is doomed to commit the acts charged, but who is not morally or legally responsible for the consequences.

Body

Having gotten the audience's attention, move quickly to emphasize the evidence (or lack of evidence) that bolsters your theme. Your objective here is to be concise, cogent, and congruent. Give the jury something they can relate to and believe in. Remember, in many cases you may need just one

solider on the jury to take charge and be your advocate in the guilty room.

Be brief. I frequently tell jurors in multi defendant cases the following:

"Ladies and gentlemen; I have some good news and bad news for you. The bad news is that you have to listen to me too. The good news is that I am only going to take twenty minutes of your time."

You will see a marked increase in the attention span of jurors who have been subjected to a lengthy opening by the prosecutor from the Sominex Podium. (Remember - The mind can absorb only so much as the butt can endure).

Caveat: Deliver on your promise. If you tell them you are only going to take twenty minutes; then stand up, speak up, and shut up.

Law

If you must speak of the law, speak English. All too often we fall into the trap of parroting horn book law which holds no meaning for jurors. Countless jury interviews confirm the fact that jurors have very little recall or understanding of legal precepts. Make the law come alive. Use anecdotes, analogies, common experiences, anything which reduces the law to understandable terms. Jurors will subliminally react to your coming to their aid in telling them what the law really means. The use of a theory of the case instruction in plain language does wonders to bolster your closing when thereafter the trial judge reads the instructions verbatim.

Conclusion

Finally, tell the jury what they have been longing to hear; that your client is innocent. This is where you must pull out all the stops. "Primacy" and "Recency" dictate that you loop back to your voir dire to emphasize the theory of the case.

"Remember what we discussed in voir dire. Remember how we all agreed that branding someone as a criminal on the word of a drug dealing, convicted felon would be a travesty of justice. I would suggest to you that there is one way to tell when Mr. Martinez (Agent 007) is lying. Watch his lips. When they're moving, he's lying.

or

"Remember how the U.S. Attorney in his opening statement talked about letting the light of truth into this case. Well folks, the sun has set on the governments case and they have left you in the dark again."

Looping back gives emphasis, simplicity, and credibility to what you are saying.

Lastly, finish strong. Leave the jury with the knowledge that their decision will impact not only in your client, but on them as well for the rest of their lives.

"Ladies and Gentlemen; we all know that people make mistakes. That's why erasers are on pencils. If I make a mistake, we have a judge to correct me. If judges in our system make mistakes, we have appellate courts to correct them. But if you make a mistake, there is no eraser. You can't come back to court tomorrow, or next month, or next year and say, 'I made a mistake.' Please don't make the mistake of finding an innocent man guilty."

Having dispensed with the mechanics of the opening statement, let us now look to the heart and soul of the argument. How to breath life into the spoken word.

ACT IV

What Tools Do I Use

"She speaks, yet she say's nothing."

Romeo & Juliet, II, ii, 12

Speech by itself conveys information. Speech with movement creates interest. Speech with movement and passion creates imagery far beyond the spoken word.

The tools available to us all to create such imagery lies dormant in every lawyer. What we must strive to do is awaken those passions and summon them to our use. It is time to tune the instrument.

A. Voice

Listen to yourself on tape. Have friends listen to you. Do you have a monotonous cadence? Do you speak with a nasal quality? Figure out what, if anything, is wrong with your voice before you try to fix, or alter it. Take diction lessons, speech lessons, singing lessons. Anything that will get you in tune with what your voice sounds like to your audience.

1. Pitch

We All can and should be conscious of the fact that we can alter pitch to emphasize a particular point. Unfortunately we have been trained to speak in conversational tones which generally translate into a monotone. Monotones will result in lawyers being victimized by the ever present "juro de siesta" (jurors sleeping all the way to the guilty room).

Try exercises involving a piano and modulating your voice to the chromatic scale. Repeat the same sentence using higher or lower octaves and see what your instrument is comfortable with.

2. Rhythm

Machine gun rapidity may let you fill the record with thousands of words. Unfortunately, the jury will probably only remember every tenth word. Likewise, a tortoise like presentation may win the race in Aesop's Fables, but pausing between every word will surely guarantee the "juro de siesta" syndrome (see above).

Try changing the rhythm when you get to an impassioned part of your argument. Create the frenetic imagery of things being out of control by speeding up the rhythm. Try slowing things down and interjecting a pregnant pause when you wish to let a particular point sink in.

3. Volume

Actors talk about filling the theater. We must fill the court room; or at least the jury box. By what I do not mean that we must scream at our audience. Nor are we able to whisper effectively in some settings. To adjust our volume for maximum effect we need to know the size of the courtroom, the acoustic qualities of the room, the size of the jury and the jury box, how close we are permitted to be to the jury, and last but not least, the composition of the jury.

Try putting friends at either end of the jury box and adjust your volume to see if you are too loud or too soft in your delivery to be effective. Positioning yourself before the jury greatly effects volume, but we will talk more of that later.

4. Projection

Speaking from the diaphragm allows you to reach your audience. Projection is inextricably intertwined with volume, but they are not synonymous. Projection allows you to reach your audience without having to shout. It is sometimes referred to as speaking as if you are larger than life. Stage actors can project throughout an entire theater, unamplified, and make each member of the audience think they are being spoken to in a conversational tone.

5. Articulate

The ability to speak precisely, concisely, and to project a distinct pronunciation of your words is crucial to the art of communication. Jimmy Buffet sings about not being able to pronounce his R's and G's when he's speaking Southernese.

Too often we tend to run words together or slur them if we tend to speak too quickly. We also tend to drop the endings off certain words when speaking in colloquial terms. The effect of which

frustrates the jurors ability to comprehend what word you are trying to us.

Try listening to news commentators, Shakespearian actors, or operatic singers to see how they enunciate, and practice with a tape recorder.

6. Color

Words should spring from our mouths like colors from an artists palette. We are, in essence, artists of a kind. The only difference is that we paint on the canvas of a juries' mind. Jurors remember colorful words as much as, if not more than, the color of the tie or suit or blouse we wear. The choice of a single word may very well shape the outcome of the entire case. As such, we should be aware of the range of colors available to us, and to prepare the palette accordingly.

words

sexual intercourse
car collision
the body
hurt
left

colors

savage rape
window shattering crash
bloody remains
devastated
abandoned

7. Vocabulary

Inselecting words for our canvas we must strive to not only look for color and simplicity, we must also be careful to avoid the "eses". Remember we are creating a sensory environment which permits the jury to see, hear, taste, smell and feel the sensations created by the words we use. Why spoil the imagery with legalese. We revert back to our carrels in law school and to the familiarity of terms like "Did you have occasion to," or "I submit for your careful consideration." Speak English. We are not trying to impress a debate coach, or even the judge with our extensive legal vocabulary. Let the cops and prosecutors use that vernacular, while we dance circle around them with our new found ability to evoke responses and create memories.

B. Physical Instrument

As we may be constrained by the type of voice we have; so are we constrained by our size and stature in the courtroom. But just as we have learned that there is must we can later about our voices; so too is there a great deal that we can do with the physical instrument to enhance our presentations.

1. Positioning the Instrument

Understanding that we have a full range of the courtroom to use, why not place our physical instrument in the most advantageous position in every given situation? The most effective position is a full front 3/4 side view of our body so that the jury is left with the impression that we are addressing all of

them. Conversely, the least effective position is that of placing our backs to the jury when trying to make a point.

While seemingly simple in principle, the above information needs to be well thought out and applied constantly during all facets of a trial. For instance:

a. When examining a witness you wish the jury to hear -- place yourself at the back of the jury box during the questioning. This has the effect of taking you out of the limelight; focusing attention on the primary target, the witness; and making the witness speak up loudly enough for all jurors to hear while maintaining eye contact with the entire jury panel.

Conversely if you wish the jurors not to have the intimate relationship with the witness, then position yourself away from the jury box so that the witness will effect a weak body position having his or her back to the jury.

b. When examining a witness that you wish to intimidate; invade their space. Take the opportunity to hand them a document and hover over them while you continue to examine. You may even wish to stand behind them while you examine to add to the pressure. The effect can be devastating.

c. When examining a witness who is unworthy of belief, position yourself in front of the jury box, ask the questions with sarcasm, surprise, disbelief, etc. As you get the answers, let your body and facial expressions register to the jury so that they are more impressed by your reaction than by the answer.

d. When using demonstrative aids such as easels, blackboards, charts, etc. make sure that all jurors are able to clearly see the focus of your presentation. A 3/4 stance to one side or the other and using a pointer allows the jurors the unobstructed view of the aid emphasized by your commentary

e. When arguing to the jury, make use of the whole courtroom. Perhaps begin at a safe distance from the jury box, but gradually work your way closer to them, and then perhaps range back and forth with your head, eyes and hands. A simple step to one side or the other from center stage may be all you need to reach all the jurors. Remember, this is not a tennis match, so don't run from one end of the box to the other thinking you need to address every juror personally.

f. In argument, use the full range of the courtroom. When you wish to emphasize what a witness said, walk to the witness stand and recreate the examination as if the witness was on the stand. If emphasizing what opposing counsel may have said or not said, position yourself in front of his or her table and challenge them to answer the allegation.

g. Be creative. Use props to enhance your argument. Lay on the floor, sit in a chair, do anything that emphasizes the spoken word.

2. Gesturing

Gestures command attention; they emphasize the spoken words; they create an atmosphere; they entertain; and they enlighten. Used to excess, they distract the jurors attention and distract your presentation. Economy of movement must therefore be rehearsed and employed.

Dont's

- walk back and forth incessantly
- look away or down when talking to jurors
- fold arms or waive arms
- play with facial hair or hair
- play with change in pockets
- toy with pens, pencils, pads, etc.
- keep hands in pockets
- use notes or the podium

Do's

- use one hand or the other to gesture
- use palms open for friendliness
- pause for emphasis
- drink water (1/2 cup only) to break up argument
- make eye contact with every juror
- use facial expressions to show concern, pity, anger, disappointment, sincerity, and strength.

3. Epilogue

Every actor experiences the butterflies that go hand in hand with opening night. To overcome that stage fright remember the five P's: Prior Preparation Prevents Poor Performance. That equates to knowing your case inside and out. Preparation coupled with rehearsal will overcome all the anxieties that accompany a stage performance.

Remember to tune up the instrument beforehand. Take a drink of water, a few deep breathing exercises, dry your hands and concentrate on the first grabbing words you intend to utter. All else will follow smoothly.

IT'S SHOWTIME!

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6. ABA "Standards Relating to the Defense Function", §4-7

**SAMPLE MOTION IN LIMINE TO DETERMINE ADMISSIBILITY OF
EXPERT TESTIMONY REGARDING EYEWITNESS
IDENTIFICATION**

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[CAPTION]

**MOTION IN LIMINE TO DETERMINE ADMISSIBILITY OF
EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATION**

NOW COMES Defendant, _____, and moves this Honorable Court to determine, before trial in this cause, that the testimony of Defendant's proposed expert witness is admissible as expert testimony on the subject of eyewitness identification.

Defendant _____ is charged with one count of Bank Robbery, in violation of 18 U.S.C. § 2113(a). A trial date has been scheduled for _____.

Defendant asks the Court to determine that the testimony of Defendant's proposed expert witness, Solomon M. Fulero, J.D., Ph.D., is admissible as expert testimony on the subject of eyewitness identification pursuant to Federal Rule of Evidence 702. In support of this motion, Defendant relies on his Memorandum in Support.

Respectfully submitted,

Attorney for Defendant

Dated:

[CAPTION]

**MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE TO DETERMINE ADMISSIBILITY OF
EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATION**

ISSUE PRESENTED

**WHETHER THE TESTIMONY OF SOLOMON M. FULERO,
J.D., PH.D., IS ADMISSIBLE PURSUANT TO FEDERAL
RULE OF EVIDENCE 702 AS EXPERT TESTIMONY
REGARDING EYEWITNESS IDENTIFICATION?**

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P. Wall, <u>Eye-Witness Identification in Criminal Cases</u> 19 (1965)	6
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Attachments

Attachment A: Vita of Dr. Fulero

Attachment C: Handberg, Expert Testimony on Eyewitness Identification: New Pair of Glasses for the Jury, 32 Amer. Cr. L.R. 1013, 1022-1027 (1995)

Attachment D: Penrod, Fulero & Cutler: Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The state of the Law and the Science, Behavioral Sciences and the Law, Vol. 13, 229-259 (1995)

Attachment E: Cutler & Penrod: Assessing the Accuracy of Eye-witness Identifications, Handbook of Psychology in Legal Contexts (1995, John Wiley & Sons, Ltd.), Chapter 3.3

INTRODUCTION

_____, the Defendant in the above-captioned case, is charged with one count of Bank Robbery, in violation of 18 U.S.C. § 2113(a). The evidence linking _____ to the bank robbery consists mainly of the eyewitness identification of _____ by an employee at the bank.

The reliability of the eyewitness identification is thus at the heart of this case, and challenging the reliability of that identification will be _____'s primary defense. Therefore, _____ intends to call an expert on eyewitness identification, Dr. Solomon M. Fulero, J.D., Ph.D., a licensed practicing psychologist and a practicing attorney.

Defendant submits that such testimony is admissible under the test established by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, ___ U.S. ___, 113 S.Ct. 2786 (1993) as expert testimony based upon relevant scientific knowledge. Additionally, Defendant submits that there is no reason to exclude such testimony under Federal Rule of Evidence 403. Therefore, Defendant requests that the Court permit Dr. Fulero to testify at trial.

ARGUMENT

Defendant anticipates that the identification testimony of government witness _____ will be a critical part of the case against Defendant. Defendant asks the Court to determine that the testimony of his proposed expert, Solomon M. Fulero, J.D., Ph.D., is admissible as expert testimony regarding the reliability of eyewitness identification. Dr. Fulero is an expert in the study of factors which should be considered by a jury in assessing eyewitness identification testimony. This specialized knowledge satisfies the standards of Federal Rule of Evidence 702 and the standards set forth by the U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, ___ U.S. ___, 113 S.Ct. 2786 (1993). After reviewing Dr. Fulero's credentials and the authorities cited in this brief, Defendant asks the Court to conclude that the testimony of expert witness Solomon M. Fulero, J.D., Ph.D., is admissible as expert testimony regarding the reliability of eyewitness identification under Federal Rule of Evidence 702.

In Daubert v. Merrell Dow Pharmaceuticals, *supra*, the Supreme Court explicitly rejected the Frye¹ standard for admitting expert testimony. The Court noted that Frye required expert testimony based on scientific theory be "generally accepted" as reliable in the relevant scientific community, and stated that "[t]hat austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials." Daubert, 113 S.Ct. at 2794.

Since issuing that decision, the Supreme Court has made it clear that it is Daubert, and not Frye, that district courts must apply in determining whether to admit expert testimony on eyewitness

¹ Frye v. United States, 54 App.D.C. 46, 293 F. 1013 (1923).

identification. In Rincon v. United States, ___ U.S. ___, 114 S.Ct. 41 (1993), the Supreme Court vacated a Ninth Circuit decision that had applied a pre-Daubert standard which upheld the exclusion of expert testimony on eyewitness identification,² and remanded the case to the Ninth Circuit for further consideration in light of Daubert.³

In order to determine whether such testimony is admissible, this Court must apply the Daubert standard to the testimony that is being proffered in this case.

A. Applying the Daubert Standard, This Court Should Admit the Expert Testimony

Under Daubert, expert testimony on eyewitness identification should be admitted in this case. The proposed testimony meets the standards of relevance and scientific validity called for by Daubert and Rule 702, and thus the court should allow the evidence to be presented to the jury.

In Daubert, the Supreme Court elucidated the standard that is to be applied in determining whether scientific testimony may be admitted at trial. The touchstone for the inquiry is Federal Rule of Evidence 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under Rule 702, the district judge “must determine at the outset, pursuant to Rule 104(a),⁴ whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” Daubert, 113 S.Ct. at 2796. Whether testimony will “assist the

² United States v. Rincon, 984 F.2d 1003, 1005-1007 (9th Cir. 1993).

³ The Ninth Circuit subsequently remanded the case to the district court for the limited purpose of reexamining the admissibility of expert testimony on eyewitness identification in light of Daubert. See United States v. Rincon, 11 F.3d 922 (9th Cir. 1993).

⁴ Rule 104(a) states:

“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.”

Preliminary matters are to be established by a preponderance of proof. See Bourjaily v. United States, 483 U.S. 171, 175-176 (1987).

trier of fact” as required by Rule 702 “goes primarily to relevance. ‘Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.’” *Id.* At 2795, quoting 3 Weinstein & Berger ¶ 702[02] p. 702-18.

The Sixth Circuit in United States v. Bonds, 12 F.3d 540 (6th Cir. 1993), applied the Daubert standard to the admission of expert testimony regarding DNA evidence. The Bonds court noted that “Daubert sets out a ‘flexible’ and more lenient test that favors the admission of any scientifically valid expert testimony.” *Id.* at 565. The court concluded that the DNA testimony offered by the FBI “easily” met the “more liberal test set out by the Supreme Court in Daubert.” *Id.* at 568.

Applying the Daubert test to the instant case, it is clear that testimony attacking the reliability of eyewitness identifications is relevant. The evidence against Mr. Smithers will consist primarily of the eyewitness identification by a bank employee. Expert testimony challenging the reliability of such an identification will be central to Mr. Smithers’ defense. It is, beyond question, relevant.

The second matter the court must address is whether the theory being propounded by the expert is trustworthy and scientifically valid. The Supreme Court in Daubert identified four factors for district courts to consider when determining scientific validity, although it stressed that this is not a definitive checklist and the inquiry is to be a flexible one. Daubert, 113 S.Ct. at 2796-97. The district court should determine first, whether the scientific theory can be (and has been) tested; second, whether the theory has been subjected to peer review and publication; third, what the known or potential rate of error is; and fourth, whether the theory is generally accepted. *Id.*

It is unclear how the third step in the Daubert analysis, reviewing the known rate of error, would apply to this form of scientific testimony. *See Daubert*, 113 S.Ct. at 2797 (rate of error discussed in context of error rate of spectrographic voice identification technique). However, the question of the known rate of error is addressed by the article included as Attachment __: Handberg, Expert Testimony on Eyewitness Identification: New Pair of Glasses for the Jury, 32 Amer. Cr. L.R. 1013, 1022-1027 (1995). This article analyzes in detail the effect that certain variables are likely to have on the ability of eyewitnesses to correctly identify persons they have previously seen, pointing out the rate of error in making identifications. *See* Attachment __. It is the knowledge of this rate of error that forms part of the scientific basis of Dr. Fulero’s testimony.

Therefore, expert testimony on eyewitness identification meets the requirements for admissible scientific testimony established by Daubert.

B. The Expert Testimony Should Not Be Excluded Under Federal Rule of Evidence 403.

The Court in Daubert advised that when assessing a proffer of expert scientific testimony under Rule 702, the district court should also be mindful of other applicable rules, including Rule 403.

Defendant submits that Rule 403 in no way bars the admission of expert testimony on eyewitness identification in this case.

Rule 403 provides that relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

There is substantial support of the proposition that expert testimony on this subject is important and probative. There are significant concerns about the trustworthiness of eyewitness testimony. See, e.g., Watkins v. Sowders, 449 U.S. 341, 350 (1981) (Brennan, J. Dissenting) (“eyewitness identification is notoriously unreliable”); United States v. Wade, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”). Yet juries give significant weight to eyewitness testimony. See, e.g., E. Loftus, Eyewitness Testimony, 2d ed. at 5-6 (1992) (jurors accord more weight to eyewitness testimony than other testimony); P. Wall, Eye-Witness Identification in Criminal Cases 19 (1965) (“[J]uries are unduly receptive to identification evidence and are not sufficiently aware of its dangers”). And it is increasingly clear that jurors are not equipped with knowledge of the reasons why a witness might truthfully, but mistakenly, believe that the defendant is the person they saw. See United States v. Downing, 753 F.2d 1223, 1230-30 (3d Cir. 1985) (factors regarding reliability are “beyond what an average juror might know as a matter of common knowledge and indeed some of them directly contradict ‘common sense’”); United States v. Smith, 736 F.2d 1103, 1106 (6th Cir.), cert. denied, 469 U.S. 868 (1984) (expert testimony can refute common assumptions about reliability of eyewitness identifications and provide knowledge outside jury’s “ken” about possibility of cross-racial misidentification).

Expert testimony on eyewitness identification therefore meets Rule 403’s requirement that the probative value is not substantially outweighed by any prejudicial impact, and so it should not be excluded on those grounds.

C. Defendant’s Proposed Witness Solomon M. Fulero, J.D., Ph.D. is an Expert in the Specialized Knowledge Relating to the Reliability of Eyewitness Identification.

Dr. Fulero is a licensed practicing psychologist and also a practicing attorney. He is Clinical Director of the state-licensed Center for Forensic Psychiatry in Hamilton, Ohio. The Center provides psychological evaluation services for a four-County area around Dayton. Dr. Fulero is also Clinical Assistant Professor of Psychology at Wright State University and also Professor and Department Chair of Psychology at Sinclair College in Dayton.

Dr. Fulero has a Bachelor of Arts in Psychology/Sociology, a Master of Arts in Psychology, a Doctorate of Philosophy in Psychology, and a Juris Doctor degree . He was a Russell Sage Foundation Law and Social Science Residence Fellow for two years. He is a member of numerous state and national professional organizations. Dr. Fulero’s own research of forensic psychology issues, including the

psychology of memory, has been published more than two dozen times. He has taught numerous classes and made numerous presentations on eyewitness identification. Dr. Fulero's Vita is affixed to this Memorandum as Attachment A. Dr. Fulero has testified as an expert witness on eyewitness identification in more than 60 criminal trials, including trials in the States of Michigan and Ohio, and in the Sixth Circuit Court of Appeals.

Under Federal Rule of Evidence 702, a person may be qualified as an expert by knowledge, skill, experience, training or education. This court should conclude that Dr. Fulero qualifies as an expert in the psychology of eyewitness identification.

D. The Substance of Dr. Fulero's Testimony is Recognized Scientific or Other Specialized Knowledge.

Expert testimony based on scientific theories must satisfy the Daubert test for general acceptability. Dr. Fulero's expert testimony is based on scientific theories generally accepted by impartial experts in the behavior science field. See People v. Anderson, 389 Mich 155, 173-177, 205 N.W.2d 461 (1973). In a pre-Daubert case, a panel of the Sixth Circuit concluded that Dr. Fulero's testimony on the psychology of memory and the reliability of eyewitness identification was relevant and admissible under Federal Rule of Evidence 702. See United States v. Smith, 736 F.2d 1103, (6th Cir.), cert. denied, 469 U.S. 868 (1984). While the Smith court concluded that it was harmless error for the district court to have excluded Dr. Fulero's testimony, that finding was based upon the fact that other overwhelming evidence against Smith, including his palmprint, was found at the scene of the crime.

This Court may make judicial notice of the scientific acceptability of the psychology of memory and its impact on eyewitness identification, and should do so.

E. Dr. Fulero's Testimony Will Assist the Trier of Fact in its Assessment of the Eyewitness Identification Evidence.

Expert testimony must assist the jury in reaching a better understanding of the evidence or facts at issue. In this case, the identification of the bank robber is a fact at issue. All witnesses testify from memory. Human memory does not work like a video cassette recorder, i.e., "replay" is not necessarily accurate. Over the past 15-20 years, psychologists have determined that memory is affected by many factors, and that eyewitness identifications are erroneous far more often than expected. Research also shows that jurors' "commonsense" beliefs about memory and recall are contrary to what research studies show. Handberg, Expert Testimony on Eyewitness Identification: New Pair of Glasses for the Jury, 32 Amer. Cr. L.R. 1013, 1022-1027 (1995). (Attachment C) Researchers have identified several variables which negatively influence memory accuracy identification reliability. These variables include changes in appearance or disguises, cross-racial identification, extreme stress and fear of violence, delay in making the identification, influence of viewing photo arrays and, suggestive police conduct. Researchers have also concluded that there is no relationship between a witness's confidence in his identification and its accuracy. See Penrod, Fulero & Cutler: Expert Psychological Testimony on Eyewitness Reliability

Before and After Daubert: The State of the Law and the Science, *Behavioral Sciences and the Law*, Vol. 13, 229-259 (1995) (Attachment D); Cutler & Penrod: Assessing the Accuracy of Eye-witness Identifications, *Handbook of Psychology in Legal Contexts* (1995, John Wiley & Sons, Ltd.), Chapter 3.3 (Attachment E).

[The following section deals with the application of the principles of Eyewitness Identification Expert testimony to the facts of U.S. v. Smithers, 212 F.3d 306 (6th Cir. 2000) and should be modified to include relevant facts of eyewitness identification in a particular case. Other possible areas for discussion include: weapons focus, cross-racial identification, stress, “trained observers”, etc.]

Applying the Daubert standard to the instant case, it is clear that Dr. Fulero's testimony is very relevant to the critical issue in this case: eyewitness identification. Dr. Fulero's testimony would educate the jury about the general factors that may affect eyewitness accuracy, and thereby improve the jury's ability to assess the accuracy of the eyewitness identification that has occurred in this case. Dr. Fulero would not be called as a witness merely to testify as to the general unreliability of eyewitness identification. Rather, he would educate the jurors as to the factors they should consider in order to evaluate the credibility and accuracy of the eyewitness identification testimony they have heard.

Dr. Fulero's testimony would identify the areas that scientific research has shown affect the accuracy of the identification testimony that was presented by witnesses Teresa Marino, Debra White and Timothy Wilson. Dr. Fulero would testify regarding the perception of the bank robber by Ms. Marino, Ms. White and Mr. Wilson, and how the length of their exposure to the robber, stress of the event, and any details of his appearance, are directly related to the accuracy of their identification testimony. Dr. Fulero would testify that scientific studies have shown that eyewitnesses tend to focus on unusual characteristics. Had Mr. Smithers been the robber, the witnesses would have observed and been able to recall the large scar on Mr. Smithers' neck. That deformity would have been *more* memorable to the witnesses if there had actually been such a deformity on the neck of the bank robber. This particular concept is called "detail salience."

Dr. Fulero's testimony would next address the period of time that passed between the bank robbery and the eventual recollection of that incident at Mr. Smithers' trial. For instance, the robbery occurred in November 1996, yet this trial is occurring in January 1998, approximately 14 months later. Dr. Fulero would note that scientific studies have found the accuracy of the identification by witnesses is directly and negatively affected by a lengthy passage of time, such as occurred in this case.

Moreover, information that the witnesses acquired after the incident can drastically affect their memory of the bank robber. Dr. Fulero would thus testify that the photo spread procedures, and the witness' numerous meetings with the police, FBI, and each other, may have directly influenced the witness' ability to accurately recall the particular characteristics of the bank robber with any degree of accuracy.

One very important area of Dr. Fulero's testimony would involve the photo spread procedures utilized in the present case. Each witness for the government testified that they were exposed to a photo spread sometime after the robbery occurred. The way in which the photo spread was shown to each of them by Detective Redmond, along with the way in which the photo spread was composed by Detective Redmond, are very relevant issues which would affect the witness' identification. Dr. Fulero would testify that, since Detective Redmond and FBI Agent Waugh knew the identity of the suspect, scientific studies have demonstrated that they could unconsciously communicate that to the witnesses when showing them the photo spread. Dr. Fulero would testify that scientific studies have shown that when the person who composes the photo spread is the same person who administers it, the likelihood of misidentification is increased. Since Detective Redmond both composed and administered the photo spread to the witnesses, the jury would be assisted by being provided with the scientific basis for evaluating witness accuracy under those circumstances.

Moreover, Dr. Fulero's testimony would demonstrate how post-event information, such as Ms. White telling Ms. Marino who she had identified from the photo spread, can result in a "conformity effect," thereby undermining the reliability of the identification. Thus, Dr. Fulero would note the fact that numerous inter-witness communications taints any possibility of an independent identification by each witness.

Finally, Dr. Fulero would address the in-court identification by witnesses Marino, White, and Wilson, and explain to the jury the factors they should know in evaluating the reliability of that identification. For instance, the jury should be aware that a witness' confidence in his/her identification increases over time and with the number of times they are asked to make an identification or tell their story. Contrary to popular opinion, the confidence of a witness' identification *has no relationship to accuracy*.

In the case at bar, identification is the sole issue. One witness, Ms. White, initially identified the Defendant under circumstances that scientific research has shown to be less than reliable. Similarly, two other witnesses -- Ms. Marino and Mr. Wilson -- contrary to their prior statements, have now claimed the ability to identify the Defendant under circumstances that have been scientifically demonstrated to promote inaccuracy. The jury is entitled to the scientific or technical principles that it needs to evaluate the evidence. In this situation, the use of expert testimony to provide the scientific framework with which to evaluate the accuracy of the eyewitness identification would "assist the trier of fact to understand or determine a fact in issue," FRE 702, and thus, should be admitted into evidence.

F. A Jury Instruction Cannot Provide Jurors with All the Information They Need.

The Court concluded that a jury instruction on the evaluation of identification testimony would be just as useful to this jury as Dr. Fulero's testimony. Such a conclusion is erroneous. There are distinct flaws in using a jury instruction, such as the Sixth Circuit Pattern Jury Instruction regarding identification testimony, in place of expert testimony regarding identification.

First, the instruction points to an insufficient number of eyewitness factors (whether the witness had a good opportunity to see the person, length of exposure, visibility, distance, prior knowledge) without explaining how those factors influence memory or identifying the magnitude of their effects. Second, the factors to which the instructions allude are based on legal precedents (for example, Neil v. Biggers) rather than scientific research. Consequently, the accuracy of the assumptions embodied in the instruction is questionable. Finally, a jury instruction is likely to be of assistance to jurors only to the extent that the factors mentioned in the instruction are raised during trial and made the subject of direct and cross-examination.

Many scientifically recognized factors appear in this case, but are not referenced in the jury instruction. Indeed, absent the requested expert testimony of Dr. Fulero, the jury will have *no* information on factors such as detail salience, conformity effect, unconscious transference, and the lack of relationship between confidence and accuracy. As a result, the Defendant could not argue, nor the jury consider, these factors in evaluating the eyewitness testimony -- *which is the key issue in this trial*.

Scientific studies have shown that jury instructions do not appear to serve as an effective safeguard against mistaken identifications and wrongful convictions. Expert testimony is more effective as such a safeguard. Penrod, Fulero & Cutler: Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The state of the Law and the Science, Behavioral Sciences and the Law, Vol. 13, 229-259 (1995)

CONCLUSION

Expert testimony must assist the jury in reaching a better understanding of the evidence or facts at issue. Over the past 15-20 years, scientific studies have determined that memory is affected by many factors, and that eyewitness identifications are erroneous far more often than expected. Research also shows that jurors' beliefs about memory and recall are contrary to what research studies show. The jury needs to know that several variables have been identified by researchers which negatively influence memory accuracy identification reliability.

For all of these reasons, the Court should determine that Dr. Fulero's specialized knowledge and testimony will assist the trier of fact to understand the evidence or determine the facts in issue.

RELIEF REQUESTED

Defendant asks the Court to take judicial notice of the scientific reliability of the psychology of memory and its influence on the reliability of eyewitness identification, and to determine that Dr. Fulero is an expert witness whose testimony will assist the jury pursuant to Federal Rule of Evidence 702.

COMPUTER AND INTERNET CRIMES
Including Pornography on the Internet

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“The Internet moves at the speed of light, while the law moves at the Speed of Congress.”

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I. INTRODUCTION

On February 16, 2000, the Justice Department asked Congress to consider legislation that would bolster its efforts to track down and prosecute computer hackers and others who threaten the internet information infrastructure. Federal law enforcement officials also asked for more federal money to fund efforts to curb hacker attacks.

In testimony delivered before the Senate Appropriations Subcommittee, Attorney General Janet Reno suggested that several laws need revision to address computer crimes. She cited the recent attacks that shut down major commercial sites on the World Wide Web Feb. 8 and 9, 2000.

Reno specifically cited the Computer Fraud and Abuse Act, 18 U.S.C. 1030, which currently provides for criminal penalties for accessing a computer without authorization. The act requires that the unauthorized access be committed “knowingly and with intent to defraud” but, under subsection (a)(4), does not apply if the object of the fraud and the thing obtained is merely the use of the computer itself and “the value of such use is not more than \$5,000 in any 1-year period.”

Reno called this provision a “loophole” that needs to be closed. According to Reno, it allows hackers who have wreaked massive havoc across large networks to escape punishment as long as no single computer received \$5,000 worth of damage.

Reno further said that the current sections of the U.S. Code that govern pen registers and trap and trace devices, 18 U.S.C. 3121, et. seq., should be updated to take into consideration the increasingly wide scale of computer messaging. Those sections, among other things, spell out the procedures law enforcement officers must take to gain permission to identify the origin of telephone calls and computer messages. Under Section 3123(a), for example, a court issuing an order for the use of such devices can only authorize its use within its jurisdiction.

“[I]n some instances we must obtain court orders in multiple jurisdictions to trace a single communication,” Reno testified. “It might be extremely helpful, for instance, to provide nationwide effect for trap and trace orders.”

FBI Director Louis Freeh, who also testified at the hearing, said he was directing his staff to investigate the application of Racketeer Influenced and Corrupt Organizations (RICO) provision, 18 U.S.C. 1961 et seq., to computer hacking crimes.

Saying their current resources are spread thinly, Reno and Freeh called for a five-year strategy that would include increased appropriations to address computer crime—starting with a 28 percent boost to \$128 million in fiscal year 2001 – as well as improved coordination among law enforcement agencies, hiring of additional staff, and refining training programs for investigators.

Reno asked for \$37 million for FY 2001 in funding alone for the Justice Department’s staffing, training, technology to address computer crime. The funding would include:

- # More than \$5 million for 59 new assistant U.S. attorneys and nine additional attorneys in the department’s Criminal Division to prosecute computer crime and violations of child pornography laws,
- # \$8.75 million to provide computer and crime investigation training to state and local law enforcement, and
- # \$11.4 million for 100 new FBI Computer Analysis and Response Team (CART) members to provide support to investigations of computer-related crimes.

II. UNAUTHORIZED COMPUTER ACCESS (Intruders/Hackers) 18 U.S.C. § 1030

The explosive growth of the Internet has resulted in information becoming an increasingly valuable commodity. Several labels have been applied to the individuals who break into other’s

computer systems. Terms such as hacker, cracker, and intruder are commonly used; however, each term can have a different meaning. For example, “hacker” is often times used to denote thrill seekers who break into other computer systems. When these individuals are caught they typically explain that they were motivated by their desire to improve computer security. Regardless of their motivation, hackers typically broadcast their conquest via several BBSs. These communications often include the log-on and password for the newly compromised system. “Crackers,” on the other hand, are commonly defined as being more interested in breaking into a computer system to perform acts of vandalism. The term “intruder” in this paper includes hackers and crackers.

The main anti-intruder law is 18 U.S.C. § 1030. This statute was first enacted as the “Computer Fraud and Abuse Act of 1996.” As presently written, 18 U.S.C. § 1030 creates six felony offenses and five misdemeanors.

Example violations of section 1030 would include:

- Hacking into a protected computer to steal information
- Destroying data or damaging hardware on protected computers by transmitting commands (e.g. virus or worm)
- “Denial of Service” attacks against protected computer
- Extortion based on threat to crash protected computer
- Attempts are also covered, under 1030(b)

Section 1030(a)(4) establishes the offense of computer fraud. It requires that the government prove that, in furthering an intended fraud, the accused knowingly accessed without proper authorization a protected computer and obtained something of value. If the only thing obtained is the use of the computer the value of such use must have exceeded \$5,000 in any one-year period. The \$5,000 figure was designed to limit the application of this felony to the more serious

offenders and was generally tailored to protect “supercomputers.” This section targets both outsiders and insiders, and provides for a maximum sentence of not more than five years imprisonment.

The “value” of the information obtained is often critical in deciding which section of 18 U.S.C. § 1030 is applicable. Some courts have held that any reasonable method can be used to establish value. This can include research and development costs, or the value of the information. See United States v. Stegora, 849 F.2d 291 (8th Cir. 1988). But see United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997) (Finding that searches of taxpayer information on IRS computer did not satisfy 1986 version of 18 U.S.C. § 1030(a)(4) requirement for “anything of value.” The value of information is relative to the violator’s needs and objectives.)

18 U.S.C. § 1030(a)(5) has three subsections, (A)-(C). 1030(a)(5)(A) prohibits knowingly causing the transmission of a program, information, code, or command, with the intention to cause damage to a “protected computer.” A violation of this section is a felony and carries a maximum sentence of imprisonment for not more than five years for the first offense, and imprisonment for not more than 10 years for a subsequent conviction. The elements of this offense are that:

- 1) the accused knowingly caused the transmission of a program, information, code, or command;
- 2) that by doing so the accused caused damage to a protected computer; and
- 3) that the accused was not authorized to cause said damage.

“Protected computer” is broadly defined in § 1030(e)(2) of the statute. Essentially, there are three groups of protected computers: 1) any computer that is “exclusively for the use of a financial institution or the United States Government;” 2) any computer that is used part-time by a financial institution or the United States

Government, if the offense affects that use; or 3) any computer “which is used in interstate or foreign commerce of communication.” This last group would include **any** computer hooked to the Internet.

This subsection was enacted in response to the Morris Internet Worm (United States v. Morris, 928 F.2d 504 (2nd Cir. 1991), cert. denied, 502 U.S. 817 (1991), in which a college student set loose a program (worm) on the Internet that crippled over 6,000 educational, medical, and military computer systems). The subsection has equal applicability to both insiders and outsiders. The meaning of the word “damage” is defined at 18 U.S.C. § 1030(e)(8) and is critical to charging any of the three sections. See United States v. Magnuson, 120 F.3d 263 (4th Cir. 1997) and United States v. Sablan, 92 F.3d 865, (9th Cir. 1996). Damage is defined as “any impairment to the integrity or availability of data, a program, a system, or information that:

- 1) causes losses aggregating at least \$5,000 in value during any 1-year period to one or more individuals
- 2) modifies or impairs, or potentially modifies or impairs the medical examination, diagnosis, treatment, or care of one or more individuals;
- 3) causes physical injury to any person; or
- 4) threatens public health or safety.”

18 U.S.C. § 1030(a)(5)(B) makes it a felony for an outsider to intentionally access and then *recklessly* cause damage to a protected computer. The two elements to this crime are:

- 1) that the accused intentionally accessed without authorization a protected computer; and
- 2) that as a result of that conduct, the accused *recklessly* caused damage to the protected computer.

Section 1030(a)(5)(C) makes it a misdemeanor for an outsider to intentionally access and then *unintentionally* cause damage to a protected computer. This offense is essentially a lesser-included offense of section 1030(a)(5)(B), above.

In 1996, the Court in North Texas Preventive Imaging v. Harvey Eisenberg, et. al., 1996 U.S. Dist. LEXIS 19990, (C.D. CA. 1996) (not published), was faced with deciding whether any section of 18 U.S.C. § 1030 prohibited a person from sending a disk containing disabling codes to an authorized person who then unwittingly loads the damaging codes onto a computer. The Court held that such conduct was covered by 18 U.S.C. § 1030(a)(5).

18 U.S.C. § 1030(a)(6) prohibits trafficking in computer passwords while the “Access Device Fraud Act” at 18 U.S.C. § 1029 prohibits both trafficking and possession of unauthorized computer passwords. Section 1030(a)(6) establishes trafficking in computer passwords as a misdemeanor and requires that the government prove:

- 1) that the accused knowingly obtained and transferred or disposed of passwords to another;
- 2) that the accused did so with the intent to defraud; and
- 3) that this conduct affected interstate or foreign commerce or that the computer is used by the United States Government.

Although “password” is not defined in 18 U.S.C. § 1030 or the main statute dealing with passwords, 18 U.S.C. § 1029, the Senate Committee defined password to include “a set of instructions or directions for gaining access to a computer.” The Committee indicated that the password was to be broadly construed to cover more than a single word. (See S. Rep. No. 432, 99th cong., 2d Sess.9 (1986).)

18 U.S.C. § 1030(a)(7) prohibits computer extortion, which carries up to five years imprisonment and fine for the first offense. The elements of this offense are:

- 1) to transmit in interstate or foreign commerce a communication that contains a threat to cause damage to a protected computer; and
- 2) that the threat is made with the intent to extort money or other thing of value from any person or entity.

This section was enacted in response to actual cases where intruders would break into others' computer systems and encrypt their data so that the computer system was rendered inoperable and then demand money for the key to unencrypt the information.

III. ILLEGAL CAPTURE, TRAFFICKING, AND POSSESSION OF COMPUTER ACCESS DEVICES AND PASSWORDS, 18 U.S.C. § 1029

18 U.S.C. § 1029 prohibits possession of unauthorized computer passwords. While the majority of this statute is directed at credit card and cellular phone fraud, the term "access devices" has been interpreted to include computer passwords. In United States v. Fernandez, 1993 U.S. Dist. LEXIS 3590 (1993) (not published), the court held that "the plain meaning of the statute certainly covers stolen and fraudulently obtained passwords which may be used to access computers to wrongfully obtain things of value, such as telephone and credit services." 1993 U.S. Dist. LEXIS 3590, at *6.

The statute makes it a felony for an individual who, knowingly and with intent to defraud, possesses, traffics, or uses an unauthorized or counterfeit access device; or produces, traffics in, has control or custody of, or possesses device making equipment. There are

numerous sections to this statute and the requirements of proof vary among them.

Section 1029(a)(3) prohibits a person from knowingly, and with the intent to defraud, possessing fifteen or more devices, which are counterfeit or unauthorized access devices. Intruders frequently collect and trade password information on systems they have compromised. Possession of such passwords provides verification that the intruder has gained access to various computer systems and is often used for bragging rights. Intruders frequently install "sniffers" so that they can collect additional passwords. A sniffer, which is a software program that intruders secrete on a compromised computer system, records the log-on name and passwords of valid users. Intruders retrieve and use this information to masquerade as the valid user. If a sniffer is placed on a large computer network, it can collect literally hundreds of passwords. Use of such an illegally placed sniffer could constitute a felony violation of the Wiretap Act.

Another intruder trick is to download or copy the password file from a targeted computer system. This file is designed to hold all of the authorized users' passwords in one central repository. For security reasons the passwords are automatically encrypted and maintained in the file in this encrypted state. Unfortunately, there are a number of software programs such as "Crack" that will decrypt these password files. These cracking programs are readily and freely available over the Internet.

IV. IDENTITY THEFT, 18 U.S.C. § 1028

Title 18, U.S.C. § 1028 was recently amended by The Identity Theft and Assumption Deterrence Act of 1998. This statute essentially creates a new crime – Identity Theft – which recognized that computers can be used to create documents that allow a user to assume the identity of another or even create fraudulent identities. This practice has already resulted in

considerable monetary loss to businesses and financial institutions and can have profound and long-lasting effects on the victim's credit rating.

The U.S. Sentencing Commission on May 1, 2000, sent to Congress several amendments to the federal sentencing guidelines that will significantly increase penalties for a number of computer crimes.

The Sentencing Commission voted to increase penalties for criminals who steal another person's means of identification and then use that stolen document to commit additional crimes, such as obtaining fraudulent loans or credit cards. In so doing, the Commission recognized that the individual whose identity is stolen is also a victim of the fraud, just as is the bank or credit card company. In the same amendment, the Commission also increased penalties for the cloning of wireless telephones in response to the Wireless Telephone Protection Act of 1998.

On May 20, 2000, a 23-year old convicted felon told a Senate panel how he created phony documents using a computer at a public library and public government records online.

"The availability of false identification on the Internet is a ... growing problem, to which we plan to devote additional resources and attention," Secret Service Director Brian Stafford testified before the Senate Governmental Affairs Committee's investigative subcommittee.

There are three levels of fake ID procurement, subcommittee investigators found in a five-month undercover inquiry.

First, some Web sites sell bogus, real-looking documents in the customer's name.

Others sell high-quality computer files, called templates, that allow customers to make their own phony documents.

The false documents offered on some sites are of "shockingly high quality," K. Lee Blalack II, the panel's chief counsel and staff director, testified at the hearing.

The fake IDs often contain holograms, bar codes, magnetic stripes, and other security

features added to genuine documents to prevent counterfeiting.

V. THE PRIVACY PROTECTION ACT OF 1980, 42 U.S.C. § 2000AA

The Privacy Protection Act of 1980 (PPA) was enacted by the United States Congress in response to the decision in Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

Although the PPA was originally designated to protect traditional publishers such as the media and authors of articles and books, it has already made its impact felt in the computer crime investigations. See e.g., Steve Jackson Games, Inc. v. United States Secret Service, 816 F. Supp. 432 (W.D. Tex. 1993). There are four exceptions to the general prohibition against using warrants to obtain documentary materials. These exceptions are set forth in 42 U.S.C. § 2000aa(b) and include:

(1) Probable cause to believe that the "person possessing such materials has committed or is committing the criminal offense to which the materials relate;"

(2) Reason to believe that immediate seizure of the work product materials is necessary to prevent the death or serious bodily injury of a human being;

(3) Reason to believe that giving notice pursuant to a subpoena duces tecum would result in destruction, alteration, or concealment of such materials; or

(4) Such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum and (A) all appellate remedies have been exhausted; or (B) there is reason to believe that the delay in an investigation or trial would threaten the interests of justice.

In summary, the PPA requires law enforcement officers – absent exigent circumstances – to rely on subpoenas (as opposed to search warrants) to acquire materials which are reasonably believed to be intended for

publication unless there is probable cause to believe that the person possessing the material has committed or is committing a crime. Under the PPA, a civil cause of action for monetary damages may be brought against the law enforcement agency and potentially, against the individual officers in their personal capacity, should they conduct a search or seizure of materials in violation of this Act.

VI. PORNOGRAPHY AND THE INTERNET

Prior to the Internet, pornography was usually produced and distributed in the form of photographs and magazines. The photographs and film were commercially processed. Distribution was accomplished by the mail or the use of clandestine distribution networks. With the development of video technology, commercial film production was no longer necessary. Hand-held camcorders allowed individuals to produce pornography videos at any location.

This decade has seen the emergence of a new medium for pornography: the Internet. The result has been a tremendous expansion of the pornography industry. Child pornography was significantly curtailed in the United States in the 1980s. It has resurged in the 1990s due to unregulated news groups, chat rooms, and commercial on-line services.

There are numerous reasons for the profusion of pornography on the Internet and computer bulletin boards. If one has access to a computer and a modem, one has access to pornography. Photographic images from pictures or books can be input into a computer using scanners, devices that convert images into digital form that may be saved as files on a hard disk. Computer technology has revolutionized the distribution of pornography. Material can now be exchanged on small floppy disks or by way of the Internet rather than through the mail or personal contact. Furthermore, users and distributors are provided with substantial anonymity on the Internet.

It has been reported that the United States is the largest consumer market in the world for child pornography.

A. LAW ENFORCEMENT OPERATIONS

While investigating the disappearance of a juvenile in 1993, FBI agents identified two suspects who had sexually exploited numerous juvenile males over a 25 year period. Investigation into the activities of the suspects determined that adults were routinely utilizing computers to transmit images of minors showing frontal nudity or sexually explicit conduct. Further FBI investigation revealed that the utilization of computer telecommunications was rapidly becoming one of the most prevalent techniques by which some sex offenders shared pornographic images. Based on information developed during this investigation, the Innocent Images operation was initiated, in 1995, to address the illicit activities conducted by users of commercial and private online services as well as the Internet.

Today, according to the Philadelphia Inquirer, the FBI's operation, Innocent Images, has 37 agents and 45 analysts at its Baltimore, Maryland headquarters. It has satellite offices in Houston, Texas, and Los Angeles, California. The annual budget is stated to be over \$10 million. It has been reported that since the operation began in 1995, it has led to 300 convictions, 200 indictments, and 500 searches.

Prior to Innocent Images, the first investigation by a U.S. agency that targeted the use of computers to traffic in child pornography was conducted by the U.S. Customs Service (USCS) in 1992. In Operation LONGARM, agents identified a BBS based in Denmark that transmitted child pornography to the United States and sixteen other nations. The investigation resulted in twenty-five convictions.

B. COMPUTER BULLETIN BOARDS, GRAPHICS TECHNOLOGY AND PORNOGRAPHY

1. Computer Bulletin Boards and Electronic Mail

A BBS is a simple operation: essentially, it is a computer which allows other computers to connect with it. The BBS receives messages from other computers and allows users to read the messages. The number of users connecting to a BBS can range from a few to thousands. This simple operation allows for quick and expansive communication.

Although the BBS networks provide expansive communication, a BBS is only one part of the vast communication network available through online services. The parent of the BBS networks is the Internet. The Internet links thousands of BBS networks. The BBS, in turn, is the subsection of the online service which allows communication through a public forum.

In addition to bulletin boards, an online service provides other services which enable users to communicate. For instance, an online service might offer electronic mail. E-mail messages provide greater privacy than the posting of messages on BBS networks because a user can send e-mail directly to a party.

E-mail is the most private form of electronic communication because users can secure their e-mail with passwords. However, an outsider may still discover the password and thus, view the e-mail. In order to increase the privacy of e-mail messages, BBS networks and the Internet recently developed a system of public-key encryption.

Public-key encryption is the encoding of messages. One system of encryption is called Privacy Enhanced Mail (PEM). With PEM, a user has a public key and a private key. A user can send messages to another user by placing the recipient's public key number on the message. In order to view the message, the user must decrypt or decode the message with the

private key number. The private key is the only way to access the message. Accordingly, this technology provides greater privacy for e-mail messages.

2. Synthetic Pornography

Prior to September 30, 1996, in any federal child pornography case, the government had to prove beyond a reasonable doubt that the images involved actual minors. 18 U.S.C. §§ 2252, 2256(1) (1996) (defining "minor" as any person under the age of 18 years). The Child Pornography Prevention Act of 1995, however, proscribes certain activities with respect to "child pornography." 18 U.S.C. § 2252A (effective Sept. 30, 1996). Newly-enacted 18 U.S.C. § 2256(8) defines "child pornography" to include images which "appear to be of a minor child engaged in sexually explicit conduct." It was Congress' express intent to include within the definition of "child pornography" images which never involved actual minors. The images could involve adults depicted as minors or images created wholly from a computer program. *See generally* S. Rep. 358, 104th Cong., 2d Sess. (1996) (available on Westlaw as 1996 WL 506545 (Leg. Hist.)).

"Virtual Child Pornography"

In "virtual child pornography," no sexual conduct by children is occurring, as the images reflect either a completely imaginary child, or a real child, but one who has not engaged in any sexual conduct. Thus, the images are "virtual" as opposed to "real" pornography. The images only appear to represent real children.

Virtual child pornography can be created by putting an innocent picture of a real child through a scanner, and converting it into an image which can then be manipulated into pornography. A pornographer can create virtual child pornography by using various computer graphics programs to create the picture of an imaginary child. For example, a pedophile would obtain an

innocent picture of a real child, such as those found in department store catalogs. He would then use a scanner to turn this picture into a computer file. At that point, he can bring the image up on his computer screen using a graphics viewer, and he can edit the picture however he chooses using graphics software. He could insert the child's face into pornographic pictures of adults that he has obtained from legal magazines and scanned into his system. With a little editing, he can make it appear as though the child is engaging in any sort of sexual activity.

A section 2251(a) exploitation of a male was not made because defendant never engaged in any actual or simulated sexually explicit conduct, but rather only "[a] picture of his face was taken and later – without his knowledge or consent – superimposed on a picture exhibiting the genitals of one not shown to be a minor. United States v. Carroll, 190 F.3d 298 (5th Cir. 1999). Defendant's action in superimposing a photograph of the face of an identifiable minor on an image of a nude body is not conduct proscribed by 18 U.S.C. § 2251(a). United States v. Reinhart, 227 F.3d 651 (5th Cir. 2000) (en banc).

"Pseudo Child Pornography"

The term "pseudo-child pornography" refers to pictures, in which young-looking actors who have reached the age of majority play the parts of young children. The performers only appear to be below the legal age. As stated above, the term "virtual child pornography" refers to pornographic images which have been produced with the use of a computer graphics program, and in which no real child was sexually abused or exploited in the making of the image. The computer equipment and expertise required to produce high-tech pornography is readily available to any individual. All a pornographer needs is a personal computer with a few inexpensive and easy-to-use accessories, such as a scanner, image editing and morphing software costing as little as \$50 to \$100, all available at

virtually any computer store or through mail order computer catalogs.

A scanner is a computer device which converts hard copies of pictures into binary computer files, which can then be stored on the computer hard drive just as any other file.

C. THE RELEVANT STATUTES

1. The Most Recent Formulation: 18 U.S.C. §§ 2252 & 2252A

On October 30, 1998, President Clinton signed Public Law 105-314 into existence. This Act known as the "Protection of Children From Sexual Predators Act of 1998" made several significant changes to both of these statutes and in some cases double the maximum terms of confinement. The most important change was the amendment of both 18 U.S.C. § 2252 and 18 U.S.C. § 2252A to reflect a "zero tolerance" for those possessing child pornography. Under these amendments, the government now must only show that the subject possessed one or more images containing child pornography. (Until this change, the government was required to prove that the subject possessed three or more images.) The amendment also creates an affirmative defense for the possession of child pornography, which were added as subsection (c) to 18 U.S.C. § 2252 and as subsection (d) of 18 U.S.C. § 2252A, respectively. While there are some differences in the wording of these two subsections, generally they provide that it shall be an affirmative defense to a charge of violating these acts if the subject – (1) possessed less than three images of child pornography; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof – (A) took reasonable steps to destroy such image; or (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

2. The Previous Version: 18 U.S.C. 2252A

The Child Pornography Prevention Act of 1996, which became effective on September 30, 1996, was enacted in large part to remedy a loophole in the earlier version regarding the illegality of computer-generated or morphed child porn, even where no actual children have been used to produce the images.

Among other things, the statute punishes the knowing transmission, receipt, or distribution of child pornography in interstate or foreign commerce. § 2252A(a)(1)-(2). It also more broadly punishes the knowing possession of any material containing three or more images of child pornography, provided the requisite interstate or foreign nexus is established. § 2252A(a)(4)(B).

Written into the statute is an affirmative defense for material produced using actual adults, rather than minors, and which was not marketed as child pornography. § 2252A(c).

The most important part of the statute is its amended definition of offensive depictions. In 18 U.S.C. § 2256, Congress added a definition of “child pornography” that sweeps into the statute’s net material that “appears to be” or “has been created, adapted, or modified to appear” as a minor engaging in sexually explicit conduct. As revised, therefore, the statute makes it illegal to morph computer images into child pornography.

The statute retains the old definition of sexually explicit conduct: “actual or simulated (A) sexual intercourse...; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person.” § 2256(2).

Note that for purposes of the statute, a minor is someone under 18 years of age. § 2256(1).

3. The Earlier Version: 18 U.S.C. § 2252

This earlier version of the statute remains in effect, although its continued vitality is questionable.

The prohibited offenses are analogous to § 2252A, although its scope is narrower due to its more restricted definition of objectionable depictions. For example, under the old statute, it was possible to argue that the transmission, receipt, or possession of morphed depictions of child pornography was not illegal and that the government had to prove that the depictions were of actual minors. See United States v. Lamb, 945 F.Supp. 441, 454 (N.D.N.Y. 1996).

The old statute also narrowly limited prosecutions for possession of child porn. Under its formulation, a person could be convicted for possession of child porn only if he possessed three or more matters containing visual depictions of child pornography (*e.g.*, three or more pornographic books or magazines). § 2252(a)(4)(B). Under the 1996 statute, a person can be convicted for possessing just one matter if it contains three or more images of child pornography (*e.g.*, just one book with multiple pictures). § 2252A(a)(4)(B).

4. Other Related Statutes

The production of child pornography is punishable under 18 U.S.C. § 2251, while the buying or selling of children for purposes of producing child porn is prohibited under 18 U.S.C. § 2251A.

Sexual abuse crimes involving children may be punishable under 18 U.S.C. § 2241-2248 and 18 U.S.C. § 2421-2423.

See United States v. Somner, 127 F.3d.405 (5th Cir. 1997), regarding the interstate transportation of a minor with the intent to engage in illegal sexual activities with the minor; 18 U.S.C. § 2423(a).

Sending death threats over the Internet is a possible violation of 18 U.S.C. 875(c).

Texas Penal Code § 43.26; Possession or Promotion of Child Pornography. Texas Penal Code § 43.25(f); Affirmative Defenses

5. Definitions, Elements and Jury Instructions

Visual Depictions

Computer GIF files (*i.e.* graphic interchange format files used to store information like photographs) constitute visual depictions under the pre-1996 version of the statute. United States v. Hockings, 129 F.3d 1069, 1071-72 (9th Cir. 1997). Note that the new statute explicitly provides that a “visual depiction” includes “data stored on computer disk or by electronic means,” § 2256(5), and that now, a person can be convicted for possession of merely three or more images (*i.e.*, no more need to prove possession of three or more matters containing images).

Under § 2252, “a cartoon character, a computer-animated image, a person eighteen or over who appears to be a minor, or an image of... an adult ‘doctored’ by computer or other means to appear younger are not covered.” United States v. Lamb, 945 F. Supp. 441 (N.D.N.Y. 1996).

Mens Rea and Knowledge

In United States v. Crow, 164 F.3d 229 (5th Cir. 1999), the defendant contended that the Court’s instructions on the scienter and *mens rea* elements of § 2251(a) and (d) were inadequate and resulted in plain error. The defendant asserted that the government was required to show that he actually “knew” that _____ was a minor, rather than instructing the jury that it was permitted to convict if they found the defendant simply “believed” that _____ was a minor.

In disagreeing with the defendant’s position, the Fifth Circuit relied on United States v. United States District Court for the Central District of California, 858 F.2d 534, 538 (9th Cir. 1998), wherein the Ninth Circuit held that under § 2251(a), “a defendant’s awareness of the

subject’s minority is not an element of the offense.”

Crow also contended that the district court plainly erred in failing to properly and adequately instruct the jury on the scienter element in count five in violation of his Fifth and Six Amendment rights. Count five alleged a violation of 18 U.S.C. § 2252(a)(2), which makes it a crime to knowingly receive any visual depiction of a minor engaged in sexually explicit conduct via interstate commerce. Crow asserted that the court failed to instruct the jury that he must have known that the individual depicted was a minor as shown in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). The Court did not find plain error in the court’s instructions to the jury.

In order to convict a defendant under § 2252, the government must prove that the defendant knew of the sexually explicit nature of the images and of the minority of the performers. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

A defendant may be convicted of unlawful possession of child pornography under § 2252(a)(4)(B) “only upon a showing that he knew the matter in question contained an unlawful visual depiction.” United States v. Lacy, 119 F.3d 742, 747 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1571 (1998).

Matters and Materials

Defendant Charles Dauray was arrested in possession of pictures (or photocopies of pictures) cut from one or more magazines. He was convicted following a jury trial of violating 18 U.S.C. § 2252(a)(4)(B), which punishes the possession of (*inter alia*) “matter,” three or more in number, “which contain any visual depiction” of minors engaging in sexually explicit conduct. On appeal from the judgment of conviction, Dauray argued that the wording of § 2252(a)(4)(B) – which has since been amended – is ambiguous as applied to possession of three or more pictures, and that the rule of lenity should therefore apply to resolve this ambiguity in his favor. The court

reversed the conviction, and directed that the indictment be dismissed. United States v. Charles R. Dauray, 215 F.3d 257 (2d Cir. 2000).

Contrary to the government's contention that a computer GIF file containing a visual depiction is a "matter" under the statute, the court held that the relevant "matter" is "the physical medium that contains the visual depiction" (i.e., the computer disks and hard drive). Lacy, 119 F.3d at 748, cf., United States v. Hall, 142 F.3d 988-99 (7th Cir. 1998).

"Materials" mean not only tangible matters that go into a visual depiction (that become an ingredient of the depiction) but also tangible matters that are used to give being, form or shape to, but do not necessarily become a part of ingredient of the visual depiction, such as computers or floppy disks; with respect to the jurisdictional nexus, the question is were the visual depictions contained on the diskettes produced using materials that traveled in interstate commerce? Although the diskettes themselves traveled in interstate commerce, there was a lack of proof that the diskettes were actually used to produce the graphic files; it was unclear from the testimony at trial whether a computer graphics file is produced or created prior to being recorded on a storage media but instead comes into being at or after being recorded, and as a result, the proof failed. (Conviction reversed, acquittal entered.) United States v. Wilson, 1999 WL 435908 (10th Cir. (Colo.)). 6/29/99.

Interstate Commerce

The required jurisdictional element is established "if the 'pictures or the materials used to produce them' traveled in interstate commerce." In this case, under the "materials" prong, the government must prove that the computer hard drive and disks themselves had traveled in interstate commerce, rather than that the computer's components so traveled. Lacy, 119 F.3d at 749.

The interstate commerce element of § 2252(a)(2) is satisfied if the child pornography was ever shipped or transported in interstate commerce. In addition, the electronic transmission of information across state lines or *across the street* over the Internet or an on-line computer service occurs in interstate commerce (i.e., transmission in "cyberspace" is transportation in interstate commerce). United States v. Smith, 47 M.J. 588 (Navy-Marine Ct. Crim. App. 1997); see also United States v. Carroll, 105 F.3d 740 (1st Cir.), cert. denied, 117 S.Ct. 2424 (1997). Possession of child pornography photographs taken solely within one state, but with the use of film manufactured in another state, involves a sufficient interstate nexus. United States v. Winningham, 953 F. Supp. 1068 (D. Minn. 1996).

Evidence that defendant's computer was connected to Internet and contained child pornography on its hard drive, and that defendant had viewed pornographic images on Internet was insufficient to sustain conviction for possession of three or more matters containing visual depictions of minors engaged in sexually explicit conduct which were produced using materials shipped or transported in interstate commerce, even if one image from hard drive had website address embedded on it and witness testified that defendant had viewed another image on Internet, absent evidence connecting third image to Internet. 18 U.S.C. § 2252A(a)(5)(B). United States v. Henriques, 234 F.3d 263 (5th Cir. 2000).

In United States v. Mohrbacher, 182 F.3d 1041 (9th Cir. 1999), the government charged defendant with receiving and possessing child pornography, as well as transportation because Mr. Mohrbacher downloaded child pornography from a foreign-based electronic board. He admitted to receiving the images in violation of § 2252(a)(2) but denies transporting or shipping them in violation of § 2252(a)(1). The court agreed and said the government overcharged. U.S. v. Colavito, 19 F.3d 69 (2d Cir. 1994). Receipt and possession case. Section

2252(a)(4)(B) “lists several means by which pornography may travel between states, including the transmission of visual images across telephone lines by way of computer modems.” The defendant must know that he is receiving material through interstate commerce and the materials contain sexually explicit depictions of minors.

United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998), also discusses on the interstate commerce issue. Simpson is especially interesting, given the depth of the Court’s discussion of the inner workings of a computer and how files stored on a computer can be traced to Internet downloading sessions.

The limits of Congress’ authority under the interstate commerce clause of the Constitution was the focus in United States v. Bausch, 140 F.3d 739 (8th Cir. 1998). Bausch had taken several pictures of two girls, aged fifteen and sixteen, while they were nude. These photos showed the girl’s exposed genitalia and depicted the girls engaging in sexually suggestive conduct to include simulated oral sex. After conviction, Bausch appealed arguing that Congress had no authority to regulate intrastate conduct. He recounted that he had taken the pictures in the same state that he was apprehended in and since he had not distributed them to anyone out of state, the government had failed to prove that his conduct affected interstate commerce. Although the Court agreed with Bausch’s recitation of the facts, it found that Congress had the power to regulate activities that substantially affects interstate commerce. *Id.* at pages 740-41. The Court found that since Bausch had used a Japanese camera to take the pictures and this camera had been transported in interstate or foreign commerce, his conviction was proper.

Production

A “production” occurs when a computer is used to download data. Lacy, 119 F.3d at 750.

Lasciviousness

Courts analyze the following factors to determine whether a visual depiction as a whole constitutes a “lascivious exhibition” under § 2256: “(1) whether the focal point of the visual depiction is the child’s genitals or public area; (2) whether the setting of the image is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and] (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.” United States v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff’d sub nom.*, United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).

Visual depictions that focus on the genital and pubic area of minors may constitute “lascivious exhibitions” even when these body parts are covered by clothing and are not discernible. United States v. Knox, 32 F.3d 733 (3d Cir. 1994).

Mere nakedness is not a “lascivious exhibition.” United States v. Amirault, 173 F.3d 28 (1st Cir. 1999) (using the Dost analysis to reverse the district court). Since this issue implicates First Amendment analysis, its resolution is subject to plenary review.

Transmissions

In United States v. Matthews, 11 F.Supp.2d 656, (D. Md. 1998), the defendant raised a multiplicity problem with his indictment. The defendant claimed that he should have been charged in two, rather than four, counts for his transmission of four e-mail attachments of pornographic images. He claimed that the images were part of only two on-line “conversations,” each of which constituted a single use of the telephone wire, regardless of the number of transmissions made during each conversation. The court disagreed, holding that a defendant

may be charged in separate counts for each e-mail transmission.

Miscellaneous

1. Crime of Violence

Possession of child pornography in violation of § 2252(a)(4) is a non-violent offense for purposes of a downward departure at sentencing. United States v. McBroom, 124 F.3d 533, 542 (3d Cir. 1997). But see VI, Pretrial Detention, below, regarding 18 U.S.C. § 3142(f).

2. Extraterritorial Application

A military court recently held that 18 U.S.C. § 2252(a)(2) applies extraterritorially, so that a lieutenant in the navy could be prosecuted for receiving child pornography while stationed in Japan. United States v. Kolly, 48 M.J. 795, 1998 WL 433688 (Navy-marine Ct.Crim.App., July 24, 1998).

3. Evidence Stipulation

A defendant could not exclude child pornographic images in a child pornography prosecution by offering to stipulate that the images were pornography within the statute. The evidence was factual not legal and rule in Old Chief did not apply. United States v. Campos, 221 F.3d 1143 (10th Cir. 2000).

Jury Instructions

See United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995), cert. denied, 517 U.S. 1157, 116 S.Ct. 1547, 134 L.Ed.2d 650 (1996), where the Fifth Circuit approved the submission of instructions regarding a violation of section 2252(a).

Also see, United States v. Crow, 164 F.3d 229 (5th Cir. 1999), regarding §§ 2251 and 2252.

District court did not abuse its discretion in refusing defendant's requested instruction that illicit sex must have been one of his dominant purposes for foreign travel in order to convict for traveling in foreign commerce for the purpose of engaging in a sexual act with a juvenile. 18 U.S.C. § 2423(b). United States v. Garcia-Lopez, 234 F.3d 217 (5th Cir. 2000).

D. CONSTITUTIONAL ISSUES AND CASE LAW

1. Constitutional Challenges

The constitutional definition of "obscenity," was solidified in Roth v. United States, 354 U.S. 476 (1957). The Roth definition asks if the material deals with sex in a manner appealing to prurient interests. This standard was further explained in Miller v. California, 413 U.S. 15 (1973), a case which explored the constitutionality of a state statute prohibiting the mailing of unsolicited sexually explicit material. The court expressed the test of obscenity as:

whether

(a) the average person, applying community standards would find that the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller addressed the issue of adult pornography, not child pornography. Although the Miller Court held that the distribution of obscene materials can be regulated, in a prior case, Stanley v. Georgia, 394 U.S.C. 557, the Court held that the private possession of

obscenity cannot be proscribed. This ruling was based on a person's right to privacy in his or her own home, and the issue of the First Amendment was not paramount. The Court, in Stanley, held that, notwithstanding the government's right to regulate the distribution of obscene materials, it does not have the right to control the moral content of a person's thoughts. The Court reasoned that the government may not prohibit the mere possession of obscene material on the grounds that it may lead to antisocial conduct.

In 1982, the U.S. Supreme Court in New York v. Ferber, 458 U.S. 747 (1982), created a new category of unprotected speech: child pornography. In Ferber, the Court held that the evils involved in producing child pornography, namely the sexual abuse of children, caused the material to fall outside the protection of the First Amendment. The government, therefore, met its strict scrutiny burden of proof. New York's interest in preventing child sexual abuse at the hands of child pornographers was compelling enough to allow the banning of child pornography.

The Ferber decision empowered states to enact laws to combat the child pornography industry. The enforcement of these laws is not hindered by the constitutional attacks based on the First Amendment issues involved in laws regulating obscenity, because child pornography may be made illegal per se, without any proof that the material is obscene. Child pornography has been defined as photographs of actual children engaged in some sort of sexual activity, either with adults or with other children. Child pornography, of course, includes still photographs, but it may also take the form of videos, or still photographs that have been scanned into a computer image. However, child pornography does not include hand-made drawings, sculptures, or graphic written accounts of sex with children. In order to understand a legal analysis of the constitutional issues of virtual child pornography, it is important to note that, until very recently, child pornography, by

definition, required pedophiles to sexually exploit children in order to create the materials.

In the Internet age, the application of the Miller "community standard" presents an interesting challenge. The Sixth Circuit recently rejected a "cyberspace community standard" in favor of a local Memphis, Tennessee community standard in testing the obscenity of material downloaded onto a computer in Tennessee, but posted on an electronic bulletin board located in California. United States v. Thomas, 74 F.3d 701 (6th Cir.), cert. denied, 117 S.Ct. 74 (1996).

The possession and viewing of child pornography are not entitled to First Amendment protection because the government has a compelling interest in protecting the physical and psychological well-being of exploited minors. Osborne v. Ohio, 495 U.S. 103 (1990).

To date, the Supreme Court has not decided a case that explicitly addresses the issue of "virtual child pornography." Ferber was the first, and is the leading, case on child pornography, and it should therefore guide the Supreme Court when it eventually addresses the issue of "virtual child pornography."

Alert: On January 22, 2001, the Supreme Court agreed to decide whether the First Amendment protects virtual child pornography that doesn't involve images of actual children. Ashcroft v. Free Speech Coalition, U.S. Supreme Court Docket No. 00-795.

2. Communications Decency Act of 1996 (the "CDA")

The Supreme Court has ruled that two provisions of the CDA - aimed at protecting children from "indecent transmissions" and "patently offensive displays" on the Internet -- were unconstitutionally vague and over broad in violation of the First Amendment. Reno v. American Civil Liberties Union, 117 S.Ct. 2329 (1997). Negligence action brought against America Online (AOL) on the ground that it unreasonably delayed in removing, failing to

screen for, and failing to post retractions of defamatory messages, held barred by the CDA. Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), cert. denied, 118 S.Ct. 2341 (1998).

3. Child Pornography Prevention Act (the “CPPA”)

A federal district judge in California has upheld the constitutionality of the CPPA against a First and Fifth Amendment challenge. The plaintiffs argued that the CPPA’s prohibition of images that *appear* to be of children actually criminalizes the production and sale of legitimate works. The Court disagreed. It held that the CPPA is content-neutral and advances compelling governmental interests because it was enacted to address the effects child pornography has on society and innocent children, rather than to regulate the ideas expressed in the pictures. It also noted that the affirmative defense in § 2252A(c) would be available to producers or distributors of such legitimate works. Free Speech Coalition v. Reno, No. C 97-0281 VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997).

Thereafter, in The Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) (petition for rehearing denied July 24, 2000). The court said: “We find that the phrases ‘appears to be’ a minor, and ‘convey the impression’ that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment.” The court said the balance of the Child Pornography Prevention Act, or CPPA, was constitutional when those phrases are removed.

A federal district court in the First Circuit considered another First Amendment challenge to the CPPA in the context of a criminal prosecution. Although the court rejected the defendant’s argument that the CPPA prohibited constitutionally protected speech, the court did agree that the CPPA is unconstitutionally vague and over broad in violation of the First Amendment. The Court held that the CPPA’s

broadened definition of “child pornography,” which includes materials that “appear to be” of children, is vague because it fails to adequately warn viewers of what conduct is prohibited. The definition is also over broad because it sweeps within its scope a substantial amount of constitutionally protected pornography featuring younger-looking adults. United States v. Hilton, Criminal No. 97-78-P-C (D. Me. Mar. 30, 1998). However, on January 27, 1999, the First Circuit Court of Appeals held that 18 U.S.C. § 2252 is neither vague nor invalid under the First Amendment. The conduct reached by the statute is outside the protection of the free speech guarantee, and the prohibition of images that “appear [] to be” of minors is sufficiently clear to satisfy due process concerns, the court said. (United States v. Hilton, CA1, No. 98-1513, 1/27/99, reversing 999 F. Supp. 131, 63 CrL 85). A Motion for Rehearing was denied in March 1999. On May 28, 1999 a Petition for Certiorari was filed with the U.S. Supreme Court. The petition was denied on October 4, 1999.

On March 6, 2000, the District Court for the Northern Division of Utah held the CPPA constitutional. A Defendant charged with various child pornography offenses moved to dismiss multiple counts, asserting that Child Pornography Protection Act (CPPA) was unconstitutional for vagueness, overbreadth, and burden-shifting. The District Court, Stewart, J., held that: (1) the scrutiny of Act was required; (2) as a matter of first impression, Act’s prohibition of computer-generated pornography appearing to involve minors was not overbroad or vague under the First Amendment; and (3) Act’s affirmative defense permitting proof of subject’s adulthood was not improper burden-shifting. United States v. Thomas J. Pearl, 89 F.Supp.2d 1237 (D.Utah 2000).

Also see United States v. Fiscus, 105 F.Supp.2d 1219 (D. Utah 2000). Child Pornography Prevention Act (18 U.S.C. § 2252A), definition of the crime as a visual depiction that “appears to be” or “conveys

impression” of a minor engaging in sexually explicit conduct is not unconstitutionally vague or overbroad.

Prosecution of a pedophile pursuant to § 2252 is not unconstitutional under the Eighth Amendment. United States v. Black, 116 F.3d 198 (7th Cir.), cert. denied, 118 S.Ct. 341 (1997).

Alert: On January 22, 2001, the Supreme Court agreed to decide whether the First Amendment protects virtual child pornography that doesn’t involve images of actual children. Ashcroft v. Free Speech Coalition, U.S. Supreme Court Docket No. 00-795.

E. PRETRIAL DETENTION

Title 18 U.S.C. § 3141 et seq., sets forth the controlling statutes on the issue of pretrial release or detention. These sections provide certain circumstances under which the government may seek to have a person detained without bond pending trial. 18 U.S.C. § 3142(f).

The government may move for a detention hearing where the case involves:

1. a crime of violence;
2. an offense for which the maximum sentence is life imprisonment or death;
3. a drug offense carrying a maximum term of imprisonment of ten years or more;
4. any felony committed after the person has been convicted of two or more of the above offenses (state or federal);
5. a serious risk of flight;
6. a serious risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to do so to a prospective witness or juror.

A crime of violence is defined in 18 U.S.C. § 3156(a)(4) as follows:

- (A) an offense that has as an element of the offense the use, attempted use, or

threatened use of physical force against the person or property of another;

- (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
- (C) any felony under Chapter 109A or Chapter 110.

Title 18 U.S.C. §§ 2551 through 2252A are felonies under Chapter 110.

However, can a person be released under 18 U.S.C. § 3145(c) pursuant to the “exceptional reasons” clause? Title 18 U.S.C. § 3145(c) provides that “a person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in § 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.”

The language of the sentence included in § 3145(c) is direct. It states that “the judicial officer” may order release if certain conditions are met and there are exceptional reasons why detention would be inappropriate.

Section 3143(a)(2) supplies the threshold requirements that a person convicted of a “violent crime” must meet. To satisfy those requirements, the trial judge must find that the person poses no risk of flight and no danger to the community during release. 18 U.S.C. § 3143(a)(2). Only then does the trial court consider the presence of exceptional circumstances making detention inappropriate. See United States v. Carr, 947 F.2d 1239, 1240 (5th Cir. 1991) (per curiam) (exceptional reasons provision to be applied on original application despite inclusion of provision “in a section generally covering appeals.”); United States v. Douglas, 824 F.Supp. 98, 99 (N.D. Tex.1993).

Neither the statute nor case law defines the circumstances which may qualify as exceptional

reasons permitting release. There is sparse case law regarding the factors that the district court must consider in deciding the issue of whether there are exceptional reasons why such person's detention would not be appropriate. The Court of Appeals for the Ninth Circuit stated in United States v. Koon, 6 F.3d 561 (9th Cir. 1993), that "whether 'exceptional reasons' exist must be determined case-by-case." The Second Circuit offers a working definition of "exceptional reasons:" "a unique combination of circumstances giving rise to situations that are out of the ordinary." United States v. DiSomma, 951 F.2d 494, 497 (2d Cir. 1991). Another court notes that "purely personal considerations" such as disruption of the family do not constitute exceptional reasons within the meaning of 18 U.S.C. § 3145(c) because "[a] defendant's incarceration regularly creates difficulties for him and his family." United States v. Mahabir, 858 F.Supp. 504, 508 (D.Md.1994). See also, e.g., United States v. Douglas, 824 F.Supp. 98 (N.D.Tex.1993) (finding fact that defendant had pled guilty to cocaine trafficking charge and agreed to cooperate with the government by testifying against codefendants, leaving himself open to retaliation, not sufficient to qualify as "exceptional reasons"); United States v. Bloomer, 791 F.Supp. 100 (D.Vermont) (finding defendant's close relationship with his stepchild, his financial support of the family, his support to an unrelated family, and his health problems stemming from his affliction with cerebral palsy not sufficient to qualify as "exceptional reasons"); United States v. Taliaferro, 779 F.Supp. 836 (E.D.Va.1992), aff'd, 993 F.2d 1541 (4th Cir.), cert. denied, 114 S.Ct. 261 (1993).

F. PRETRIAL HEARINGS, DISCOVERY, AND GOVERNMENT DISCOVERY VIOLATIONS

As stated previously herein, newly enacted 18 U.S.C. § 2256(8) defines "child pornography" to include images which "appear to be of a minor engaged in sexually explicit

conduct." Because the legislation proscribes material not involving children, it is open to a First Amendment challenge.

Issues about the constitutionality of 18 U.S.C. § 2252A aside, there still are other First Amendment issues arising in a case brought under § 2252, which involve the use of an actual minor in producing the image. For example, the defense should request a pretrial hearing at which the government must prove the image involved does depict a minor, and not merely a synthetic image resembling a minor. Support for such a hearing can be found in Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 67 (1989). But see Lamb, 945 F. Supp 441, 454-55 (N.D.N.Y. 1996) (declining to hold such a hearing). In Fort Wayne Books, the Supreme Court held that in an obscenity/RICO prosecution of an adult bookstore, the state had to show at an adversarial pre-trial hearing that the materials seized pursuant to a warrant were obscene. The ex parte probable cause determination which resulted in the issuance of the seizure warrant was insufficient to sustain the pretrial seizure of the bookstore's inventory. The Court reasoned that it was necessary to prevent presumptively protected materials from being removed from circulation without the protection of an adversarial hearing. Fort Wayne Books, 489 U.S. at 62-67; see also Adult Video Ass'n v. Barr, 960 F.2d 781, 788 (9th Cir. 1992) (citing Fort Wayne Books, 489 U.S. at 66), vacated sub nom., Reno v. Adult Video Ass'n, 509 U.S. 917 (1993), modified in part, 41 F.3d 503 (9th Cir. 1994), cert. denied, 115 S.Ct. 1966 (1995).

Of course, this argument in favor of a pretrial hearing had considerable force in Fort Wayne Books and Adult Video Ass'n when it applied to the wholesale seizure of a business's inventory as a result of an allegation that the inventory contained some child pornography. Nevertheless, the defense should consider arguing that a citizen's right to view sexually explicit materials in private is no less deserving of First Amendment protection than a business's right to sell materials for a profit. If a pretrial

adversarial hearing is necessary to protect the profits of a business, it should be just as necessary to protect the rights of an individual.

A discovery issue in a computer child pornography case may be whether the defense is allowed access to the alleged contraband. Many U.S. Attorney offices routinely oppose providing defense counsel with copies of any alleged contraband images based upon United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995). The stated rationale for this position is the government's refusal to participate in further "exploitation" of the child through further dissemination of the image. In actuality, the government means that it is acceptable for the prosecutor as well as the case agent to have the images, but not for defense counsel. The government only allows defense counsel and defense experts to view the images at the prosecutor's or case agent's office, or the prosecutor offers to have the case agent bring the images via computer disk to the defense expert while maintaining a vigil over the image's whereabouts.

An obvious line of response to such a situation is to file a motion with the trial judge under Rule 16 of the Federal Rules of Criminal Procedure. Such images are discoverable under one of the three bases of that rule: (1) as tangible items either seized from or belonging to your client; (2) as material necessary to the preparation of the defense; or (3) as material the government intends to use at trial. Additionally, the defense attorney should be prepared to argue that the constitutional right to counsel, a fair trial, and due process require the production of the images to the defense without a case agent "babysitter" being present.

Despite the seeming obviousness for the need to produce the images to the defense, the trial judge may need to be convinced. Therefore, you must be prepared to educate the judge on how computerized images are created and stored. An affidavit from an expert or live testimony may be necessary.

In addition, defense counsel will want a copy of all hard drives and floppies seized from the client regardless of whether the government alleges they contain pornography. This will become important to investigate defenses such as whether someone else had access to the computer other than their client or whether the contraband image was e-mailed to the client without his knowledge.

In United States v. Katz, 178 F.3d 368 (5th Cir. 1999), the Government brought an interlocutory appeal of a pretrial ruling excluding evidence in a criminal prosecution that charged Arnold Katz with a violation of 18 U.S.C. § 2252(a)(2), receipt of child pornography. The government challenged the district court's ruling excluding the color versions of the GIF images. The district court found that the government's failure to disclose the "photographs" to the defendant in the identical form it intended to produce them at trial was either an attempt to "sandbag" the defense or highly unprofessional conduct and therefore limited the government to the use of black and white images. The court affirmed the exclusion of the images.

G. SEARCH AND SEIZURE

Most possession of child pornography cases involve Fourth Amendment search and seizure issues. To some extent, these are not too different from any other criminal case that involves the search of a defendant's home or business. However, the computerized nature of a child pornography case gives an added dimension to the Fourth Amendment issue. Potential issues include wiretap warrants and whether the government followed the correct legal procedures for obtaining a defendant's subscription information from an Internet service provider.

[See United States v. Alvarez, 127 F.3d 372 (5th Cir. 1997), wherein the court found that in a § 2252(a)(4)(B) case that, a law enforcement officer's statement in an affidavit for a search warrant that a videotape possessed by

the defendant depicted “sexual conduct” demonstrated reckless disregard for the truth.]

In United States v. Carey, 172 F.3d 1268 (10th Cir. 1999), the court reversed a conviction for possession of child pornography after police, who obtained a warrant to search defendant’s computer files for drug related items, downloaded and viewed 44 image files. The police claimed inadvertent discovery after seeing the first pornographic image, but failed to get a warrant to look at the other files. The appeals court said that the police needed a second warrant to view the remaining image files.

United States v. Villard, 678 F. Supp. 483 (D.N.J. 1988), aff’d on other grounds, 885 F.2d 117 (3d Cir. 1989). Executing arrest warrant in Calif. for fed charges out of NJ (transp. child porn). Saw binder of pages of photographic slides on closet shelf. Held page of slides up to light, saw suspected child porn. Got sw to search apt.; held: evidence suppressed.

United States v. Hall, 142 F.3d 988 (7th Cir. 1998). During CPU repair/upgrade, tech saw unusually named files and viewed 4 - 6 files (1,000 files total). Tech calls state trooper, describes 2 - 3 images; trooper has tech copy several of the files onto a disk. Held: evid. discovered by private search; government conceded copying of files to disk was a warrantless search, but copied disk was never reviewed by law enforcement nor used as basis for probable cause in the search warrant.

United States v. Jasorka, 153 F.3d 58 (2nd Cir. 1998). Issuing magistrate did not look at the photos, but relied on the Customs agent’s opinion that the photos contained a lascivious display of the genitals. Held: agent’s reliance on magistrate’s determination of warrant application for violation of § 2252, based on lascivious exhibition of the genitals, was reasonable (relying on the authority of Leon, 468 U.S. 897 (1984)).

United States v. Barth, 26 F.Supp.2d 929 (W.D. Texas, 1998). Computer technician was not government actor for the 4th Amendment purposes when he found child pornography on computer he was fixing despite the fact he was

C.I. in addition to his computer job; however, one government knows of or acquiesces in the intrusive conduct, and the private party intends to assist law enforcement, then it is a warrantless search.

In United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000), it was held that: (1) even if police officer’s search of computer hard-drive was illegal, evidence discovered in customs agent’s subsequent search pursuant to warrant was admissible under independent source and inevitable discovery doctrines; (2) even if police officer’s seizure of computer in repair shop was illegal, evidence was admissible based on customs agent’s subsequent re-seizure of computer pursuant to warrant.

Many computer child pornography cases involve a defendant who allegedly downloaded images from the Internet or received them via e-mail. The medium utilized in child pornography cases triggers special search and seizure procedures. E-mail, for instance, is an “electronic communication” for purposes of the federal wiretap act, 18 U.S.C. §§ 2510-2522 (the “Wiretap Act”). Before government agents may intercept the content of an e-mail, they must follow the same procedures necessary to wiretap a telephone. This includes getting an intercept warrant. 18 U.S.C. § 2518. If the provisions of the law are not complied with, the evidence derived from the unlawful intercept is subject to suppression under § 2515. The statute further provides that the wiretap warrant, its supporting affidavit, and evidence obtained from the warrant must be produced prior to any trial or hearing where the material is to be used. § 2518(9). If a case involves the interception of the contents of an e-mail, then it is crucial that the defense attorney carefully review the applicable statute and case law in this area.

A different statute applies when the e-mail was not intercepted during its transmission, but was stored on some online service computer, like America Online. See Stored Wire and Electronic Communications and Transactional Records Access Act, Title II of the Electronic

Communications Privacy Act of 1996, Pub. L. No. 99-508, 100 Stat. 1848, 1860 (1986) (codified at 18 U.S.C. §§ 2701-2709). This statute governs the seizure of the material as well as law enforcement access rights to subscriber information like a client's Internet "handle," telephone number, or length of subscription to the Internet service.

If the content of the e-mail has been stored in the service provider's system for 180 days or less, then the content of the e-mail is obtainable only through a search warrant. 18 U.S.C. § 2703(a). E-mails more than 180 days old or other types of subscriber information may be obtained any number of ways, including warrant or subpoena. § 2703(b) & (c). Noticeably lacking from this provision is statutory authority for the suppression of evidence obtained in violation of the statute. *Cf.* 18 U.S.C. 2516 (authorizing suppression of wiretap evidence). Accordingly, an aggrieved defendant must simply argue that the Fourth Amendment requires suppression of any information obtained in violation of the Act. See United States v. Kimbrough, 69 F. 723 (5th Cir. 1995), regarding a search warrant involving a Title 18 U.S.C. § 2252 offense. Attached as Appendix 3 is a checklist and guide to handling seized electronic evidence.

H. MEDICAL EXPERTS (TANNER STAGING)

If the case involves images depicting individuals who look like they might be teenagers, the government will probably attempt to prove that the person depicted is a minor by a method called "Tanner Staging." Under the method developed by Dr. J.M. Tanner, a pediatrician or pediatric endocrinologist will look at the image, specifically at secondary sexual characteristics like breast development and pubic hair growth. See generally, J.M. Tanner, *Growth at Adolescence* (2d ed. 1962). From that information, the doctor will then render an opinion on the probable age range of the

depicted individual. A defense expert is crucial in understanding Tanner Staging and confronting the government's expert. For example, does the image present enough information about the pertinent secondary sexual characteristic for a medically valid opinion?

Another issue concerning Tanner Staging is whether it is admissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). For an excellent summary of the Daubert decision, see James G. Connell, III, *Challenging Scientific Evidence under Daubert: Scope, Procedure, and Discovery*, CJA Defense Journal, Winter 1996 at 1. There are really two Daubert issues in computer child pornography cases: first, whether Tanner Staging itself is admissible; and second, whether Tanner Staging based on computerized images (as distinct from conventional photographs or an examination of a live person) is admissible. These issues will require precise coordination between the defense's medical and computer experts. The attorney will need to explore with the experts what is necessary to Tanner Stage a computerized image and whether the process used to computerize the image originally (scanning a photograph or using a digital camera on a live subject; compressing that image into a GIF or JPEG format; transmitting that image across the Internet; downloading that image to a floppy or hard drive; recreating the image onto a VGA or Super VGA display) makes it unlikely that any Tanner Staging will be accurate and reliable enough to be admitted as evidence.

See United States v. Katz, 178 F.3d 368 (5th Cir. 1999), where the defendant filed a pretrial Daubert motion pursuant to Federal Rules of Evidence 104(a) and 702. The Court found that the Tanner Scale was a scientifically valid methodology. The defendant also contended that the Tanner Scale analysis could not be adequately performed on the images. The Court preliminarily ruled that the images and expert testimony were admissible.

United States v. Anderton, 136 F.3d 747 (11th Cir. 1998). Medical doctor's opinion as to

age of depicted children was sufficient to allow jury to receive the case. Also see: United States v. Broyles, 37 F.3d 1314 (8th Cir. 1994). Language used by defendant in correspondence (“teenies”; between the ages of 11 and 15, just developing; range could be as low as 6 to 8 but no higher than 15); Postal Inspector’s professional and personal familiarity with child development; pediatrics professor’s testimony. United States v. Long, 108 F.3d 1377 (6th Cir. 1997) (unpublished disposition). Even though defendant did not actually view the video tapes before his arrest, Court found there was sufficient evidence that he knew about the ages of the participants and about the type of conduct depicted, due to the descriptions of the videos, the jacket illustrations, and the warning on the order forms.

I. ENTRAPMENT

Mark Poehlman, an Air Force Officer, a cross-dresser, and foot-fetishist, sought the company of like-minded adults on the Internet. What he found, instead, were federal agents looking to catch child molesters. The government’s actions did amount to entrapment. United States v. Mark Douglas Poehlman, 217 F.3d 692 (9th Cir. 2000).

Jacobson v. United States, 503 U.S. 540 (1992). Government did not establish that defendant has a predisposition, independent of government action, to receive child porn though the mail where evidence showed that defendant was ready and willing to commit the crime only after government had engaged in 2 ½ years of undercover activity consisting of communications from fictitious organizations and persons attempting to convince defendant that he had the right, or should have the right, to engage in behavior prohibited by law.

United States v. Gamache, 156 F.3d 1 (1st Cir. 1998). Case reversed because judge failed to instruct the jury on entrapment.

United States v. Osborne, 935 F.2d 32 (4th Cir. 1991). Receipt case. Defendant failed to

produce any evidence of lack of predisposition, which warranted dismissal of the entrapment defense prior to trial. Defendant had responded to advertisement placed by postal inspector in video publication with letter indicating his interest in purchasing “young girl (teenagers) videos,” received catalog offering 5 adult and 5 child pornographic videos for sale, and then ordered 2 child porn videos.

United States v. Harvey, 991 F.2d 981 (2nd Cir. 1993). Receipt case. Defendant’s requests for catalog of material featuring “younger performers,” “young performers,” and “your youngest performers” were indirect requests for child porn sufficient for jury to find predisposition *brd*. Defendant’s prompt acceptance of government-sponsored invitation to buy child porn, as reflected in the order form, was sufficient for government to show defendant was predisposed to commit the crime.

United States v. Gifford, 17 F.3d 462 (1st Cir. 1994). Receipt case. Evidence comfortably supported conclusion that postal inspectors did not induce defendant to commit the crime, and thus did not entrap the defendant, by mailing open-ended solicitations to purchase pornographic materials depicting children. Solicitations made no appeal to the sympathy of any obviously reluctant person, and in fact, defendant was required to pay in advance to obtain any material that he deigned to order.

United States v. Gendron, 18 F.3d 955 (1st Cir. 1994). Receipt case. No entrapment where government mailed solicitations from sham companies, where solicitations did not progress from innocent lure to frank offer, did not (with one exception) appeal to any motive other than desire to see child pornography, did not claim to come from lobbying organization seeking removal of restraints and funding its efforts through pornographic catalogue sales, and did not ask defendant to commit crime as a matter of principle.

United States v. Byrd, 31 F.3d 1329 (5th cir. 1994). Receipt case. Sufficient evidence of defendant’s predisposition to commit offense,

though defendant had been targeted by undercover Postal Service “sting” operation, given evidence of defendant’s eager and prompt response to each government mailing, his preexisting possession of foreign sex education text containing pictures of children and sexually explicit questionnaire prepared for 9 year old boys, testimony that he fondled his young foster sons and had possession of photos of foster sons.

Agent Posing as a Child:

1. United States v. Butler, 92 F.3d 960 (9th Cir. 1996). A sentencing case pursuant to a travel case conviction where agent posed as the child while communicating with the defendant.
2. United States v. Brockdorff, 992 F.Supp 22 (D.C. 1997). Travel case where agent posed as child. Discussion by court validating this investigative technique.
3. United States v. Smith, 749 F.2d 1568 (11th Cir. 1985). Case deals with fraud statute but may be applicable by analogy. Defendant need not cause a “real” victim to travel interstate commerce to violate § 2314; causing the travel of a government agent who poses as a victim is sufficient.

J. SENTENCING GUIDELINES

The U.S. Sentencing Commission Guideline for a violation of 18 U.S.C. § 2252(a)(4) is found in U.S.S.G. § 2G2.4. It provides for a base offense level of 15. Specifically, it provides as follows, to wit:

§2G2.4 Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

- (a) Base Offense Level : 15
- (b) Specific Offense Characteristics

- (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.
- (2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.
- (3) If the defendant’s possession of the material resulted from the defendant’s use of a computer, increase by 2 levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Explicit Visual or Printed Material; Custodian Permitting Minor To Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
- (2) If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor, Possessing Material

Involving the Sexual Exploitation
of a Minor with Intent to Traffic).

Note: A violation of 18 U.S.C. §§ 2251(c)(1)(A), 2252(a)(1-3), and 2260 provides for a base offense level of 17 in U.S.S.G. § 2G2.2. A violation of § 2251(a), (b), (c)(1)(B), provides for a base offense level of 27 in U.S.S.G. § 2G2.1. See United States v. Crow, 164 F.3d 229, wherein the defendant was convicted of the attempted sexual exploitation of a minor based on his correspondence over the Internet with an undercover agent posing as a 13-year-old girl. He argued that § 2G2.1 and its specific offense characteristics were inapplicable since the offense did not actually involve a minor. The Fifth Circuit agreed with the government that this argument related to a factual impossibility defense, which does not provide a defense to the application of the sentencing adjustments.

1. Computer Enhancement

Under the revised sentencing guidelines, a defendant will receive a two offense level enhancement for (1) using a computer “to solicit participation by or with a minor in sexually explicit material,” U.S.S.G. § 2G2.1 (b)(3), (2) using a computer to transmit “the material or a notice or advertisement of the material,” U.S.S.G. § 2G2.2 (b)(5), or (3) “if the defendant’s possession of the material resulted from the defendant’s use of a computer.” U.S.S.G. § 2G2.4 (b)(3). Defendant contended 2G2.4(b)(3) applied only where the possessor sent images via a computer, not when the possessor merely received; HELD: affirmed; enhancement applies whenever images are transported over the Internet. U.S. v. Johnson, 1999 WL 335318 (10th Cir. (N.M.)), 5/27/99.

2. Prepubescent Minor or Minor Children Under Age 12: U.S.S.G. § 2G2.2(b)(1)

The two-level enhancement applicable to receipt of sexually explicit material involving prepubescent minors and minors under age 12 cannot be applied to a defendant who did not intend to receive material involving prepubescent children or children under age 12. United States v. Saylor, 959 F.2d 198 (11th Cir. 1992). Evidence sufficient to support a two-level increase under 2G2.2(b)(1); United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995). See United States v. Cole, 61 F.3d 24 (11th Cir.), cert. denied, 116 S.Ct. 1052 (1996) (Insufficient evidence of child pornography depicting minors under twelve).

3. Distribution Enhancement: U.S.S.G. § 2G2.2(b)(2)

Application of sentencing guidelines offense level increase when sentencing defendant for distributing child pornography, on ground that the offense involved the “distribution” of child pornography, was proper, even if defendant was not paid for any of the pornographic images that he sent to others over the Internet, since “distribution,” as used in sentencing guideline, was not limited to transactions entered into for pecuniary gain, but included defendant’s “trading” of pornographic images. U.S.S.G. § 2G2.2(b)(2), 18 U.S.C.A. United States v. Lyckman, 235 F.3d 234 (5th Cir. 2000).

Defendant’s distribution of child pornography with the purpose of enticing a minor to have sex with him warrants the five-level distribution enhancement. United States v. Canada, 110 F.3d 260 (5th Cir.), cert. denied, 118 S.Ct. 195 (1997). Compare United States v. Black, 116 F.3d 198 (7th Cir.) (enhancement under 2G2.2 (b)(2) not available unless the distribution is for pecuniary gain), cert. denied, 118 S.Ct. 341 (1997); United States v. Delmarle, 99 F.3d 80 (2d Cir. 1196) (departure under 5K2.0 warranted for computer transmission of images used to solicit sexual activity with a minor), cert. denied, 117 S.Ct. 1097 (1997).

In calculating the fair market value of child pornography, the government may take a defendant's own figures for recent sales and current catalogue offerings and apply them to the defendant's existing inventory, including retail value of the tapes to be reproduced from master tapes. United States v. Kemmish, 120 F.3d 937 (9th Cir. 1997), cert. denied, 118 S.Ct. 1087 (1998). See also United States v. Stanton, 973 F.2d 608 (8th Cir. 1992).

4. Sadistic or Masochistic Portrayal Enhancement: U.S.S.G. § 2G2.2(b)(3)

When a pornographic image depicts sexual/physical penetration of young child by an adult male, the conduct portrayed is sufficiently painful, coercive, abusive, and degrading to qualify as "sadistic or violent" within meaning of sentencing guideline providing for four level offense level increase for offense involving material portraying sadistic or masochistic conduct or other depictions of violence. U.S.S.G. § 2G2.2(b)(3), 18 U.S.C.A. United States v. Lyckman, 235 F.3d at 235.

5th Circuit held that possession of sadistic pictures was not relevant conduct to sending pornography. Defendant sent child pornography via the Internet to "Katrina," an undercover agent. Police recovered from his residence several electronic images of sadistic sexual conduct, two of them depicting minors. The Fifth Circuit reversed a § 2G2.2(b)(3) increase for sadistic material, holding that defendant's receipt and possession of the sadistic pictures was not relevant conduct to his transmission of child pornography. The electronic mailing occurred at a discrete moment, and defendant's receipt of the other, sadistic images did not occur "during the commission of the offense of conviction." United States v. Fowler, 216 F.3d 459 (5th Cir. 2000).

Defendant's trafficking in material portraying sadistic conduct -- anal and vaginal penetration of minors through the use of sexual devices -- warranted a four-level enhancement under U.S.S.G. § 2G2.2(b)(3). United States v.

Canada, 110 F.3d 260 (5th Cir.), cert. denied, 118 S.Ct. 195 (1997).

A photograph depicting a nude minor boy having an unidentified object inserted into his anus constituted a sadistic portrayal warranting a four-level enhancement. United States v. Delmarle, 99 F.3d 80 (2d Cir.1996), cert. denied, 117 S.Ct. 1097 (1997).

Defendant's possession of pornographic magazines depicting minors engaged in sadomasochism constituted "relevant conduct" that could be considered under § 2G2.2(b)(3). United States v. Ellison, 113 F.3d 77 (7th Cir.), cert. denied, 118 S.Ct. 235 (1997).

United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995). Two images that depicted female minor in bondage out of hundreds was sufficient to support four-level enhancement for possessing material portraying sadistic or masochistic conduct.

Logs of Internet conversations can support this enhancement, United States v. Tucker, 136 F.3d 763 (11th Cir. 1998) (scienter is an element of this enhancement).

5. Pattern of Sexual Exploitation: U.S.S.G. § 2G2.2(b)(4)

Five-level enhancement for a pattern of sexual exploitation of minors does not apply to traffickers who are not directly involved in the actual abuse or exploitation of minors. United States v. Kemmish, 120 F.3d 937 (9th Cir. 1997), cert. denied, 118 S.Ct. 1087 (1998); see also United States v. Neilssen, 136 F.3d 965 (4th Cir. 1998) (however, enhancement may apply to unrelated sexually abusive conduct of minors). Computer transmission of child pornography is not sexual exploitation of minor. United States v. Chapman, 60 F.3d 894 (1st Cir. 1995). United States v. Ketcham, 80 F.3d 789 (3rd Cir. 1996), enhancement for exploitation of a minor was reversed in a child pornography case for insufficient evidence. United States v. Anderton, 136 F.3d 747 (11th Cir. 1998)

(exploitation does not have to be part of the offense of conviction).

6. Minor Role Adjustment: U.S.S.G. § 3B1.2

No minor role adjustment warranted based on defendant's claim "that he was simply one of a large network of people engaged in the exchange of child pornography through computers and therefore played a minuscule role in a grandiose pornography operation: via a Danish bulletin board service ("BBS"). United States v. Everett, 129 F.3d 1222, 1224 (11th Cir. 1997)."

7. Grouping: U.S.S.G. § 3D1.2

The "victims" under § 3D1.2 (b) of the distribution of child pornography are the children depicted in the illegal material, rather than society as a whole, and thus substantive counts involving pictures of different minors should not be grouped for purposes of sentencing. United States v. Boos, 127 F.3d 1207 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 734 (1998).

The defendant was not entitled to have counts grouped for sentencing, as multiple children depicted in multiple pornographic images could be treated as different victims for sentencing purposes. United States v. Norris, 159 F.3d 926 (5th Cir. 1998); and United States v. Ketchum, 80 F.3d 789 (3rd Cir. 1996).

8. Ten or More: U.S.S.G. § 2G2.4(b)(2)

Computer files constitute "items" for purposes of § 2G2.4(b)(2)'s two-level adjustment for possession of "ten or more books, magazines, periodicals, films, video tapes, or other *items*, containing a visual depiction involving the sexual exploitation of a minor." The defendant had argued that he was not subject to the adjustment because the only "items" he possessed were three individual computer disks.

United States v. Hall, 142 F.3d 988 (7th Cir. 1998).

At sentencing, the court imposed a two-level enhancement under § 2G2.4(b)(2) because the defendant possessed more than 10 "items" (i.e., graphics files) containing visual depictions of minors engaged in sexually explicit conduct. Because the graphics file is the container used for compiling and storing visual depictions in a computer, it qualifies as an "item" under the plain language of § 2G2.4(b)(2). United States v. Fellows, 157 F.3d 1197 (9th Cir. 1998). United States v. Demeritt, 196 F.3d 138 (2nd Cir. 1999).

The PSI recommended a two level enhancement under U.S.S.G. § 2G2.4(b)(2), because Harper possessed more than ten items depicting child pornography. Harper argued that because he had only one disk – the equivalent of a book or magazine – he possessed only one item. The Court concluded that a computer's drives are like libraries, and each file within a drive is akin to a book or magazine. Thus, the files and not the hard drive or disk are "items" for the purposes of the enhancement, and the Court deemed the enhancement proper. United States v. Harper, 218 F.3d 701 (7th Cir. 2000).

9. Diminished Capacity Departure: U.S.S.G. § 5K2.13

Following the mandate of the Third Circuit in United States v. McBroom, 124 F.3d 533, 548 (3d Cir. 1997), that in considering a diminished capacity defense, the court must consider not only a defendant's cognitive capacity, but also his volitional capacity, the district court departed downward based on the defendant's obsessive/compulsive disorder that caused him to view Internet porn even though he knew he would soon be caught by the FBI. United States v. McBroom, 124 F.3d 533 (D.N. J. 1998); *cf.* United States v. Miller, 146 F.3d 1281 (11th Cir. 1998) (defendant's impulse control disorder did not contribute to his transport of child pornography through the computer).

10. Post-Offense Rehabilitation

Two-points downward departure warranted based on defendant's extraordinary post-offense rehabilitation efforts -- daily attendance at AA, continued sobriety, weekly attendance at therapy sessions, compliance with medication, full-time employment, and commitment to family responsibilities. United States v. McBroom, 124 F.3d 533 (D.N.J. 1998); *see also* United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997); United States v. Shasky, 939 F. Supp. 695 (D. Neb. 1996).

11. Susceptibility to Abuse

A downward departure for susceptibility to abuse in prison is only warranted in extraordinary cases, not in a case where the defendant is of average size and good health. United States v. Drew, 131 F.3d 1269 (8th Cir. 1997); United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997). *Compare* United States v. Wilke, 995 F.Supp. 828 (N.D. Ill. 1998) (defendant unusually susceptible due to his sexual orientation and his passive, meek demeanor); United States v. Shasky, 939 F. Supp. 695 (D. Neb. 1996).

K. CONDITIONS OF SUPERVISED RELEASE

When a defendant is convicted for transmission of child pornography, the court may order as a condition of supervised release that the community (*i.e.* law enforcement officials, school officials, and neighbors) be notified of the conviction. United States v. Coenen, 135 F.3d 938 (5th Cir. 1998).

Forbidding access to the Internet, BBS, or "exchange format involving computers" is an appropriate condition of supervised release. United States v. Crandon, 173 F.3d 122 (3rd Cir. 1999).

L. SEX OFFENDER REGISTRATION

On November 26, 1998, a number of new Federal provisions concerning sex offenders became effective. The new laws are complicated.

The new amendments to 18 U.S.C. §§ 3563(a), 3583(d), and 4209(d) require that, as mandatory condition of probation, supervised release, and parole, an offender convicted of any of the federal sex offenses described in 18 U.S.C. § 4202(c)(4) register in any state in which he lives, is employed, carries on a vocation, or is a student.

1. Federal Law

The following offenders must register under the provisions of 18 U.S.C. §§ 3563(a) and 3583(d) as amended.

1. Any offender who committed an offense listed in 18 U.S.C. § 4042(c)(4) on or after November 26, 1998, pursuant to the new mandatory condition that must be imposed under the provisions of §§ 3563(a) and 3583(d).

2. Any offender who committed an offense listed in § 4042(c)(4) prior to November 26, 1998, if the federal conviction for that offense requires registration under state law, pursuant to the §§ 3563(a)(1) and 3583(d) mandatory conditions of release that an offender comply with all federal, state, and local laws.

3. Any other offender who committed an offense that under state law requires registration, pursuant to the §§ 3563(a)(1) and 3583(d) mandatory conditions of release that an offender comply with all federal, state, and local laws. These offenses may include federal offenses not included in § 4042 but covered under the state registration statute, and they may include offenses committed before the enactment of the state registration law if the state law is retroactive.

4. Any offender for whom the court has imposed a special condition of release that requires registration under the provisions of 18 U.S.C. §§ 3563(b)(22) and 3583(d).

2. State Law

Texas Penal Code § 62.01 does require individuals with federal and military convictions to register.

In 1994, federal legislation directed each state to draft and implement its own sex offender registration law. Some state statutes specifically include federal convictions, others do not. The Texas statute originally referred only to convictions under state law and the UCMJ. No reference or mention was made to federal convictions. The code was amended in 1999.

VII. EDUCATING YOURSELF AND THE JUDGE

Defense counsel must educate the judge on all of these issues. Although computers are now widely used in office settings, the Internet and the field of computer images are not widely understood by those who use them. Many of us use a desktop or laptop computer to perform word processing and the like, but not many understand the process involved. Neither should we expect the trial judge to do so. The attorney should write every motion and use every hearing to educate the judge as to the complexity of the case and what needs to be done. This will take more time than most criminal cases, but is necessary to convince the judge that your case is more than one involving “dirty pictures.”

I also recommend that attorneys consult the Department of Justice Federal Guidelines on Searching & Seizing Computers (1994) (DoJ Guidelines) as well as their 1997 Supplement to Federal Guidelines For Searching and Seizing Computers (DoJ Supplement). These two documents are essential reading in any computer crime case. The full text of both the DoJ Guidelines and the DoJ Supplement can be found on DoJ's website, www.usdoj.gov/criminal/cybercrime.

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4. Jennifer Stewart, “If This is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet,” 20 Hous. J. Int'l L. 205, 207 (1997).
5. *Philadelphia Inquirer* newspaper; article dated Friday, June 19, 1998.
6. *Washington Post* newspaper; article dated July 22, 1998.
7. *New York Times* newspaper; article dated July 22, 1998.

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8. Samantha Friel, "Porn by Any Other Name? A Constitutional Alternative to Regulating 'Victimless' Computer-Generated Child Pornography," 32 Val.U.L.Rev. 207, 1997.
 9. Testimony of D. Douglas Rehman before the Congress of the United States, House of Representatives, Committee on the Judiciary Subcommittee on Crime, on October 7, 1997.
 10. Materials obtained from the Naval Justice School, Newport, Rhode Island, October 2000 Computer Crimes Course
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CROSS-EXAMINING THE LAW ENFORCEMENT WITNESS

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I. CROSS OF COPS -- PUTTING THE POLICE ON TRIAL¹

The cross-examination of a police officer or federal agent is no different than that of any other specialized witness or expert. Amazingly, so many of us do not take the time and effort to prepare adequately for the specialized testimony given by the COP.

Each federal law enforcement training facility, the FBI Academy, DEA Academy at Quantico, Virginia, the Federal Law Enforcement Institute at Glenyco, Georgia, and Roswell, New Mexico, has extensive blocks of training which cover testifying and being cross-examined by criminal defense lawyers. Treasury Agents train at Glenyco, Georgia and Roswell, New Mexico. All Federal Agents receive periodic moot court training to prepare for cross-examination.

A. No Cop Wants to Be Embarrassed on the Stand

This is the paramount theme instilled in every COP.

- “Be skeptical of the trickster.”
- “They’ll do anything to get their client’s off.”
- “Don’t volunteer anything.”
- “If the defense lawyer opens the door, jam him.”

B. The Mechanics

- The key to an effective cross-examination of a COP is to close all avenues of escape prior to questioning.
- Your cross-examination must establish a safe haven for the COP from the beginning.
- Your questioning must place him/her in a comfortable state of mind, their safe haven.
 - “I’m a good COP.”
 - “This isn’t so tough.”
 - “This is a piece of cake.”

C. A Stiletto Rather Than a Sledge Hammer Will Accomplish Your Goals

- Accusatory words or attitude will almost always result in the COP attempting to retreat or become combative.
- COPS when confronted enjoy nothing more than sparring with the cross-examiner.
- They believe they know the facts better than the cross-examiner. Unfortunately, for some of us, this is sometimes true.

One of the real joys of cross-examination is to prepare in such a manner that the COP locks himself/herself in with his/her own self-protective shell. This is especially true of COPS who think they know where the cross-examiner is going and are not above stretching their testimony to protect themselves from embarrassment.

II. CLOSING THE AVENUES OF ESCAPE

A. Set the Tone at the Beginning

- To assert witness control over a COP, you must do so from the very start or, the COP will try to take over.
- Set this tone at the very beginning.
- Once you have set up the COP so that their escape is problematic, proceed with short, penetrative jabs to start the slow bleeding. (MacCarthy method).

B. Establish The Appropriate Procedure.

- You must know the appropriate procedure utilized by the particular department.
- Obtain the training and/or policy manual of the COP agency.
- Completely debrief a former detective, agent or crime scene technician who will give you the general background.
- Know the nomenclature and procedures to establish the proper procedures in conducting the particular activity.

C. Method That Should Have Been Followed

- Your cross-examination should be short, concise and probative of the method that “Should have been followed in order to conduct the search/interrogation.”.
- Refer to the department policy.
- Tell them the policy.

D. Knows How to Do it Properly.

- With short controlling questions, have the COP ratify that he/she knows how to follow the proper procedure.
- Always follows department policy.
- Purpose of the policy.
- Familiar with policy.
- Testified numerous times.
- Hundreds of searches.
- Well trained, academy, OJT.
- Training officer.

E. What Did He Do?

- Tell him, don’t ask him

F. Witness Did Not Do it Properly

- Tell him, don’t ask him

III. COP EXCUSES

A. Safety - All Cops Know this Is Their Best Out; A Protective Sweep Conducted to Neutralize Everyone Present.

- Planning

- Rarely are federal searches spontaneous.
- There are normally several pre-search strategy meetings.
- Location has been previously cased OR surveyed.
- COPS are aware of intervening problems.

1. The Number of Cops Involved in the Search

- SWAT
- Crime Scene Technicians.

2. The Weapons Used

- Shotgun, M-16's, automatic pistols, battering ram, etc.

3. Ammunition - Armor Piercing

- Shotgun
 - Slug
 - 9-shot
 - Bird shot
- Number of rounds
- Firepower

4. Police Equipment

- Clothing
 - Black ski masks
 - Colored jump suits
 - Raid jackets
 - Helmets, etc.
 - Batons/PR-24
 - ASP

B. Not Important at The Time.

C. Not Enough Time - Urgency.

D. I Just Gave You a Summary.

E. Not My Responsibility.

F. Other Officer Was Going to Do It.

IF YOU WERE SUCCESSFUL IN SHUTTING DOWN THE AVENUES OF ESCAPE, YOU WILL SUCCESSFULLY ACCOMPLISH YOUR CROSS.

IV. PRIME TOPICS FOR COP CROSS

A. Polygraph

All law enforcement agencies have policies that allow the polygraph examination of their own employees, witnesses, and informants. (See, Polygraph Policy Model For Law Enforcement, FBI Law Enforcement Bulletin, June 3, 1987).

The following is reprinted from the FBI Law Enforcement Bulletin. It is a small excerpt from a twenty page article entitled Polygraph Policy Model for Law Enforcement.²

One area deserving special comment is the use of polygraph to verify information furnished by citizens and informants, especially those whose reliability has yet to be established or is suspect. Consideration should be given to establishing a policy that requires polygraph be considered prior to significant commitments of manpower or financial resources solely on the basis of unsubstantiated information furnished by citizens or informants. This can be especially useful in matters involving allegations against prominent individuals and public officials whose reputations could be unduly tarnished by the mere existence of an investigation. Frequently, the use of polygraph for such “verification” or “confirmation” purposes will disclose there is no basis for the allegations or that they were grossly exaggerated or distorted. In either case, valuable investigative time will have been saved and possible embarrassment to a citizen or the department will have been prevented.³

- Typically, the government will not corroborate information of a snitch/flip.
- This allows for fertile cross from any collateral witness COP who will testify.
- Don’t put any questions to the case agent or the COP who has sat at counsel table throughout the trial, rather select an ancillary agent, i.e. such as a surveillance agent.
- After adequately and sufficiently laying the groundwork, take the COP through a sequence of cross-“questions” about his/her agencies’ policies concerning polygraph examinations of a cooperating witness and/or informant.
- You are now prepared to argue to the informant’s lack of veracity and or the government’s knowledge of the lack of veracity.

B. Sentence/Punishment

- All COPS threaten/advise their suspect interviewees of the potential period of incarceration and other jailhouse consequences.
- All COPS are taught to have a discussion with a suspect at time of interrogation as a method of persuasion.
- The COP will safely admit that he/she told your client and/or a cooperating witness that they were subjected to forty years in prison, etc.
- Make the appropriate argument at closing.

C. Audiotapes

- Don't Trust the Discovery Provided.
 - COPS give instructions to their informants on how to use the equipment.
 - How to turn it off at appropriate times.
 - They premise this on the safety factor but in reality it is used solely at the discretion of the person wearing the wire.
 - Many times the law enforcement officer will give a preamble to the recording.
 - Absence of a preamble more than likely means that the informant did the recording on his own.
 - Hire an expert.
 - Quality of tape.

D. Transcripts

- Foreign language transcripts, musts be carefully scrutinized by your own interpreter.
- A translator is not an interpreter.
- Rule 604, Fed. R. Evid.

- An interpreter must satisfy Rule 702, 703, and 705 of the Federal Rules of Evidence.
- Fight summaries, Rule 1006, Fed. R. Evid.

E. Interviews

- The FBI does not audio-record interviews.
- The FBI would rather rely on the agent's memory or notes which they place into an FD-302.
- The FD-302s are written in the third person for the consumption of a third party.
- DEA, ATF and other federal agencies do audio-record interviews.

F. Informants

- Rule 608(b) allows the cross-examination of misconduct dealing with dishonesty and deceit.
- Your cross must demonstrate that agents are specifically trained in the developing and the handling of informants.
- COPS are taught that informants are not trustworthy.
- They must control an informant.
- They should not meet alone with an informant.
- All payments to an informant must be in cash.
- Informants are provided with a false identity.
- A code name.
- They must keep their relationship confidential.
- They mislead and lie to everyone so that they can perpetuate their activities.

G. Cross of Control Agent

EXAMINATION OF CONTROL AGENT - INFORMANT

- Q: Agent Smith, you received training on the use of informants?
- Q: Using informants is an intricate part of your job?
- Q: You received training on how to handle informants?
- Q: Problems with informants?
- Q: Their motivation?
- Q: That many informants can't be trusted?
- Q: You must control the informant?
- Q: You open separate files on each informant?
- Q: You assign him a "Code Name"?
- Q: You make-up that "Code Name"?
- Q: You give him a secret identification number?
- Q: You give a thorough orientation to the informant?
- Q: You tell him that this relationship must be kept confidential?
- Q: Secret?
- Q: That he can't tell anyone?
- Q: That you will only refer to him by his "Code Name"?
- Q: That any memos you write will only identify him by his "Code Number"?
- Q: You do a complete criminal records check on the informant?
- Q: You know when he was arrested?
- Q: For what?
- Q: How many times?
- Q: You tell him if he tells anyone he is an informant you will deny it?
- Q: That you can pay him money?
- Q: That you will pay him in cash?
- Q: That you will never give him a check?
- Q: That you will pay him in cash to protect his identity?
- Q: That he can receive a lot of money depending on how valuable the information he provides?
- Q: That some informants have received thousands of dollars?
- Q: Some have received hundreds of thousands of dollars?
- Q: That you can give him money for expenses?
- Q: To rent cars?
- Q: Hotel rooms?
- Q: Spending money?
- Q: To buy drinks?
- Q: To play the role of a bad guy?

Q: That any money you give him he may have to sign a receipt?

Q: But if there is a receipt he won't have to sign the receipt in his real name?

Q: He can sign it with his fake name?

Q: That any monies he receives he must pay taxes to the IRS?

Q: That is your agency's policy correct?

Q: That is what you told him?

Q: You must fill out forms every time you give him money?

Q: A DEA-103?

Q: You told him he must pay taxes, correct?

Q: But the agency doesn't give him a 1099 IRS form for that money do they?

Q: You don't give him a 1099 in his real name?

Q: Not one in his fake name?

Q: But informants are required to pay federal income taxes on all monies received from the government, correct?

Q: Policy requires you to have another agent or COP witness you giving the informant the money?

Q: DEA Form 356, Informant Payment Record is kept in his file?

Q: As a matter of fact, DEA policy in section 6612 requires you to tell the informant to claim the income to IRS as "Other Income"? (Hold up the policy).

Q: You must fill out form DEA-202 every time you give him money?

Q: Your SAC (Special Agent in Charge) is authorized to approve payments of up to \$25,000 per informant per quarter?

Q: That is \$200,000 a year?

Q: You can pay the informant on a Commission Basis?

Q: You tell him that he is not an agent of the government?

Q: You tell him that an agent can not entrap someone into committing a crime?

Q: You as an agent would not entrap someone would you?

Q: But an informant is not an agent, is he?

Q: You discuss the defense of entrapment don't you? (See ATF Electronic Surveillance Request - Appendix pages 34-36).

Q: You also tell the informant that he can make up to \$250,000 if you forfeit any property?

Q: Or money.

Q: Anything of value?

Q: Each item forfeited could be a separate \$250,000? (28 U.S.C. § 524(c)(1)).

- ***Let's talk about wiring up the informant to record some of these conversations.***

Q: You have to get permission to use a body bug?
 Q: A microphone?
 Q: You must fill out several forms or authorizations?
 Q: You also tape the conversations?
 Q: On a tape recorder?
 Q: The government has some sophisticated recording equipment?
 Q: Small ones?
 Q: Some you can put into a brief case? Purse? Shoe?
 Q: You use a transmitter?
 Q: You show him how to turn it on?
 Q: How to turn it off?
 Q: You do this covertly?
 Q: In secret?
 Q: You don't want anyone to know?
 Q: The informant can turn it off at anytime?
 Q: The informant can cover the mic at anytime?

o ***Let's talk about what illegal activity you can authorize an informant to commit?***

Q: You can authorize an informant to commit a crime?
 Q: They can't do anything on their own?
 Q: You're with the informant all day?
 Q: All night?
 Q: No, you're only with the informant for part of the day?
 Q: You don't know what he does when he's not with you?
 Q: You sign contracts with some informants?

ENDNOTES

1. COP will be used throughout this outline as a generic term for any state, local or federal law enforcement officers or agents.
2. Reprinted from Polygraph policy Model for Law Enforcement, by Ronald M. Furgerson, Special Agent Assistant Section Chief, Document Section, Laboratory Division, FBI Headquarters, FBI Law Enforcement Bulletin, June 1987, at 7, 11, 20.
3. Id.

**CROUCHING TIGER, HIDDEN DRAGON:
KUNG FU FOR TRIAL**

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crouching tiger,
hidden dragon:
KUNG FU for trial

Know The Battleground

Know Your Enemy

Know Yourself

1. KNOW THE BATTLEGROUND

“Know the ground, know the natural conditions, and the victory can be total.” Sun Tzu, *The Art of War*.

“Those who are first on the battlefield and await opponents are at ease; those who are last on the battlefield and head into battle get worn out.” Sun Tzu, *The Art of War*.

- a. Consider the contours of the battleground:
 - i. What is the physical layout of the courthouse and your courtroom?
 - ii. What are the juror demographics of the particular city or town in which the case will be tried?
 - iii. What judges and prosecutors are assigned to try the case? For more on knowing your judges and prosecutors, see Sections II(A) and (B), *infra*.
- b. Use or reshape the battleground to your client’s advantage.
 - i. Select the right local counsel to help with jury selection and with managing the judge and prosecutor.
 - ii. Make early allies of the clerks and court reporter by sheer friendliness.
 - iii. Consider what audio and/or visual aids in the cavernous or cozy courtroom might make your case the easier side to understand.
 - iv. Consider what judge shopping mechanisms are available in your jurisdiction.
 - v. At your earliest hearing, establish your table as the one that will be nearest the

jury during trial, and condition the prosecutor to use the farther table.

- c. File pretrial motions to gain control over the battleground.
 - i. Motion to recuse a particular judge for bias. These motions should take into account the governing jurisdiction's recusal statutes and judicial code of ethics. For examples of standards and considerations, see ***Liteky v. United States***, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); ***United States v. Anderson***, 160 F.3d 231 (5th Cir. 1998); ***Nichols v. Alley***, 71 F.3d 347 (10th Cir. 1995); ***United States v. Antar***, 53 F.3d 568 (3rd Cir. 1995); ***People v. T & C Design, Inc.***, 680 N.Y.S.2d 832 (N.Y. Nassau County. J. Ct. 1998); ***State v. Cella***, 976 S.W.2d 543 (Mo. Ct. App. 1998); ***Crawford v. State***, 686 So.2d 199 (Ala. Ct. Crim. App. 1996); ***Maharaj v. State***, 684 So.2d 726 (Fla. 1996).

See Attachment A (sample Motion for Recusal), page 429.

- ii. Motion for a change of venue. Changes of venue are complicated matters that often require the assistance of an expert and a detailed survey and analysis of the community. As a starting point on this subject, see Cathy E. Bennett and Robert B. Hirschhorn, *Bennett's Guide To Jury Selection And Trial Dynamics In Civil And Criminal Litigation* §§ 6.7, 7.12 (Eda Gordon, ed., West Pub. Co. 1993).
- iii. Motions to ensure that jurors do not unduly find your client threatening and dangerous.
 - (1) Motion to prevent the use of metal detectors outside the courtroom door and/or the obvious use of extra security personnel in the courtroom. Although courts have held that such security measures are not "inherently prejudicial," the case law suggests that they *might* be prejudicial in a particular case. See ***Holbrook v. Flynn***, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) ("it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy"; rejecting presumption that use of identifiable security guards in the courtroom is inherently prejudicial, and mandating case-by-case approach; rejecting complaint about presence of security guards behind defense table under facts of case); ***State v. Lemons***, 844 P.2d 378 (Utah Ct. App. 1992) (following *Flynn* to reject complaint about use of metal detector outside courtroom; defendant's right to physical indicia of innocence must be weighed against the essential state

policy of providing security in the courtroom).

See Attachment B (sample Motion To Prevent Use Of Metal Detectors And/Or Extra Security Personnel During Trial), page 430.

- (2) Motion to prevent empaneling of anonymous jury. See ***Commonwealth v. Angiulo***, 615 N.E.2d 155, 171 (Mass. 1993) (trial court erred in empaneling anonymous jury); ***State v. Samonte***, 928 P.2d 1, 12-13 (Haw. 1996) (“an anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence”; “juror anonymity denies a defendant information that might be helpful in the exercise of his or her right to utilize peremptory challenges during *voir dire*”; however, trial court did not err in impanelment of anonymous jury where defendant’s earlier trial resulted in a mistrial as a result of jury tampering); ***United States v. Ross***, 33 F.3d 1507, 1520 (11th Cir. 1994) (court should not empanel anonymous jury without (a) concluding that there is a strong reason to believe that the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant; impanelment of anonymous jury approved in large-scale mafia case where acts of violence had been directed at relatives of government witnesses; one witness’ sister was beaten and placed in the trunk of a car with her children; other relatives were subjected to shootings and kidnapping).

See Attachment C (sample Objection To Empanelment of Anonymous Jury), page 432.

- (3) Motion for your client to wear his own clothes during trial. See ***Estelle v. Williams***, 425 U.S. 501, 503-505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (where a defendant is forced to wear prison clothes when appearing before the jury, “the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment,” and since no “essential state policy” is served by compelling a defendant to so dress, this practice is unconstitutional); ***People v. Roman***, 324 N.E.2d 885, 886 (N.Y. Ct. App. 1975) (*per curiam*) (“A defendant is presumed innocent and he is entitled to appear in court with the dignity and the self-respect of a free and innocent man. To forbid him to wear his own clothing and to require him to appear in convict’s attire—a continuing visual communication to the jury—is to deny him this

right”).

See Attachment D (sample Motion To Allow The Accused To Wear His Own Clothes During Jury Trial), page 434.

- (4) Motion for your client to be allowed to remove any visible shackles or electronic monitoring device during trial. *See Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (defendant may be prejudiced if he appears before the jury bound and gagged; “not only is it possible that the sight of shackles and gags might have a significant effect on the jury’s feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold”; *nonetheless*, in certain extreme situations, “binding and gagging might possibly be the fairest and most reasonable way to handle” a particularly obstreperous and disruptive defendant); *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir.1983), *cert. den.* 466 U.S. 941, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984) (“restraints may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow”); *Clark v. State*, 195 So.2d 786, 788 (Ala. 1967) (“all of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely deter them from deciding the prisoner’s fate impartially”; drawing distinction between handcuffing a prisoner in taking him to and from the court and keeping him in handcuffs while he is being tried).

See Attachment E (sample Motion To Remove Physical Restraints From The Accused During Jury Trial), page 435.

- (5) Motion to remove courthouse plaque commemorating slain policemen.

See Attachment F (sample Motion To Remove Or Conceal Commemorative Courthouse Plaque During Jury Trial), page 436.

- d. Enlist the positive energy of your client and your client’s family, friends, and character witnesses through a pre-trial Family Meeting.

See Attachment G (sample letter arranging Family Meeting), page 437.

- i. Remind your client and all potential supporters not to react verbally or physically

when they perceive the witnesses to lie, not to flash gang signs, not to curse at the prosecutor, and not to wear the stolen shoes that are the subject of the prosecution to court.

- ii. Encourage your client's family and friends to maintain a constant presence in the courtroom, and to appear conscientiously and conservatively dressed.
- iii. Remind your client and all potential supporters that when they are within five miles of the courthouse during trial, they are under the microscope and anyone who sees them could be a prospective juror.
 - (1) Everyone should assume that once they are within that radius, they are within the view of someone who may be selected as a juror.
 - (2) If your client's father-in-law cuts someone off in traffic or rushes to hog a parking place in the courthouse parking garage, Murphy's Law will guarantee that the irate driver will somehow get on the jury.
- iv. Warn your client's family and friends that they will be hearing negative evidence about their loved one, and that the jury will attach to that particular piece of evidence or testimony greater importance if your client's mother or husband or girlfriend runs weeping from the courtroom when it comes in.
- v. Explain behavior or other tactics you expect to employ in the courtroom, so the family will not wonder why you are acting so cordially towards the prosecutor or making certain admissions during opening statement.
- e. Physically transform the courtroom by asking the judge if you can conduct *voir dire* from a chair pulled up next to the jury box.
- f. Use language during *voir dire* to transform the courtroom into something or someplace else.
 - i. Ask the jurors to visualize that your conversation is taking place, for instance, over a cup of coffee at the kitchen table.
 - ii. Ask the jurors to visualize times in their own lives that will place them in your client's shoes. Ask individual jurors to describe those times.

2. **KNOW THE ENEMY**

"He who knows the enemy and himself will never in a hundred battles be at risk." Sun Tzu, *The Art of War*.

- a. Identify and research your potential enemies.
 - i. The prosecutor.
 - (1) Ask other defense lawyers about their experience with the prosecutor.
 - (2) Use the on-line forums of any legal organizations to which you belong to inquire about the prosecutor. *See, e.g.,* <http://www.criminaljustice.org/> (NACDL website).
 - (3) Visit the prosecutor's office and learn what you can about him or her from evidence of compulsive organization (or disorganization), or things on display, like photographs, books, and pet tarantulas.
 - (4) Use Westlaw or Lexis or the Internet to search for articles written by the prosecutor, or opinions mentioning the prosecutor by name.
 - (5) Learn the federal prosecutor's official battle rules by reviewing the United States Attorney's manual. This manual and other United States Attorney materials may be downloaded from <http://www.usdoj.gov/usao/eousa/foia/foiamanuals.html>.
 - ii. The judge.
 - (1) Ask colleagues about their experience with the judge.
 - (2) Use Westlaw or Lexis or the Internet to search for articles written by the judge, or opinions authored by the judge, originating from the judge's court, or listing the judge's name as attorney of record before he or she ascended to the bench.
 - (3) Read, collect, and keep on file biographies and articles about local judges.
 - (a) ***The American Bench: Judges of the Nation*** (Marie T. Finn, *et al.*, eds., 8th ed., Forster-Long, Inc. 1995/96) (published biennially; check local law library).
 - (b) ***Judicial Staff Directory*** (CQ Press 1999) (directory of Federal and State Courts, including biographies of judges and staff, published twice annually). For more information, see <http://books.cq.com/cq-press/index.html>.

- (c) ***BNA's Directory of State and Federal Courts, Judges, and Clerks*** (BNA Books 2000) (directory of state and federal judges and clerks, with jurisdictional maps, court internet sites, email addresses, and so forth).
 - (d) Articles and biographies published in local newspapers, local bar journals, and so forth.
- (4) See what your judge boasted about in *Martindale Hubble* before becoming a judge. See <http://lawyers.martindale.com/marhub>.
- iii. The press.
 - (1) Use Westlaw or Lexis or the Internet to search for articles written in the local paper about crimes similar to the one with which your client has been charged. Note which reporter wrote the articles and what sorts of details the reporter likes.
 - (2) Introduce yourself at the earliest opportunity when a reporter shows up in the courtroom.
- iv. The witnesses.
 - (1) Use Westlaw or Lexis or the Internet to search for opinions mentioning the government's law enforcement witnesses.
 - (2) Gather information about the government's law enforcement witnesses by searching the Internet for websites sponsored by the local police department, the county sheriff's office, and/or the state bureau of investigation. See, e.g., <http://www.acadiacom.net/nopd/> (New Orleans Police Department site with biographies of officers); <http://www.geocities.com/Heartland/3509/roster.htm> (Udall, Kansas Police Department site featuring Bible quotes, graphics of firing guns, and individual pages for each officer, including "Felony," the department's trusted drug-sniff dog). Search for a particular officer by name to determine whether he or she has a personal website. See, e.g., <http://www.james.gonzales.com/> (personal website of Gary, Indiana police officer, featuring links to the computer games "Drug Lord," and "Blood Bath").
 - (3)

3. KNOW YOURSELF

“If you are equal, then fight if you are able. If you are fewer, then keep away if you are able. If you are not as good, then flee if you are able.” Sun Tzu, *The Art of War*.

- a. Convert your role from defensive to offensive; strike quickly and decisively! Just because you represent the defendant does not mean your role must be a defensive one.
 - i. Strike quickly and strongly immediately upon your client’s arrest or investigation, even if no charges have been filed.
 - ii.
 - (1) File a pre-indictment motion to unseal the search warrant and supporting affidavits. Although many jurisdictions boast statutes either allowing or mandating that these documents be placed under seal until charges are issued, some courts have held that the Fourth Amendment right to be free of unreasonable searches and seizures includes at least a *qualified* pre-indictment right to examine affidavits supporting an executed warrant, so long as no compelling governmental interest outweighs that right. See ***In re Search Warrants Issued August 29, 1994***, 889 F.Supp. 296 (S.D. Ohio 1995) (distinguishing between media’s claimed First Amendment right of access to warrant materials and targeted suspect’s Fourth Amendment right to access; holding that government failed to demonstrate legitimate interest in keeping documents under seal pre-indictment); ***Sloan v. Sprouse***, 968 P.2d 1254 (Okla. Ct. Crim. App. 1998) (granting mandamus relief and ordering hearing for unindicted arrestee to determine whether compelling state interest required keeping warrant materials under seal); ***In re Search Warrant for 2934 Anderson Morris Road***, 48 F.Supp.2d (N.D. Ohio 1999) (assuming pre-indictment Fourth Amendment right of access to warrant materials, but finding that government made adequate showing of necessity to protect ongoing investigation to outweigh searched persons’ rights). But see ***In the Matter of Eyecare Physicians of America***, 100 F.3d 514, 517 (7th Cir. 1996) (“no provision within the Fourth Amendment grants a fundamental right of access to sealed search warrant affidavits before an indictment”).
 - (2) If the judge refuses to release the affidavit, file a motion for the return of property. See, e.g., Fed. R. Crim. P. 41(e). If you are not allowed to file such a motion because there is no criminal case yet in which to file it, initiate a civil *in rem* action naming the property and requesting access to the warrant and supporting affidavits. See, e.g., ***In re Two Bose Speakers***, 17 Kan. App. 2d 179, 181, rev. den. 251 Kan. 938 (1992)

(property seized during a police investigation is held *in custodia legis*; “[w]here no criminal action has been filed, the district court retains *in rem* jurisdiction over property held *in custodia legis*”).

- (3) File a civil suit under 42 U.S.C. § 1983, based on the police’s misconduct in arresting your client.
 - (4) Contest the forfeiture of your client’s property.
- iii. Help the press identify with your client’s position in a criminal case.
- (1) Cautiously consider holding a press conference to tell the truth: your innocent client is being framed by the police. See ***Gentile v. State Bar of Nevada***, 501 U.S. 1030, 111 S.Ct 2720, 115 L.Ed. 2d 888 (1991) (“An attorney’s duties do not begin inside the courtroom door A defense attorney may pursue lawful strategies to obtain dismissal . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.”)
 - (2) Generate favorable defense publicity in the courtroom.
- iv. Move for a judgment of acquittal at the close of the prosecution’s opening statement. Many jurisdictions have held that such motions may, in rare cases, be appropriate. See, e.g., ***United States v. Graham***, 146 F.3d 6, 10 (1st Cir. 1998) (decision to grant motion for acquittal after prosecutor’s opening statement is discretionary and should be made only where the statement contains a clearly admitted fact that must defeat its case) ***United States v. Welch***, 97 F.3d 142, 148 (6th Cir. 1996) (motion for judgment of acquittal should be granted after the government’s opening statement only when the statement clearly shows that the charge against defendant cannot be sustained under any view of the evidence consistent with the statement); ***United States v. Hudson***, 717 F.2d 1211, 1213-14 (8th Cir. 1983) (same); ***United States v. Donsky***, 825 F.2d 746, 751-52 (3rd Cir. 1987) (dismissal or directed verdict may be ordered at the conclusion of the prosecution’s opening statement only when the prosecution has made a clear and deliberate concession which must necessarily prevent a conviction, and only after the prosecution has been given an opportunity to correct any errors or omissions in its opening); ***United States v. Ingraldi***, 793 F.2d 408 (1st Cir. 1986) (motion for judgment of acquittal may be brought after government’s opening statement in certain limited circumstances); ***United States v. Capocci***, 433 F.2d 155 (1st Cir. 1970) (prior to the adoption of the Federal Rules of Criminal Procedure, common law allowed a judgment of acquittal at close of government’s opening statement); see

also **United States v. Ubl**, 472 F. Supp. 1236 (N.D. Ohio 1979) (motion for judgment of acquittal granted in middle of government's case).; **State v. Smith**, 988 S.W.2d 71, 75-76 (Mo. Ct. App. 1999) (trial court has power to enter judgment of acquittal after state has made opening statement "when it clearly and affirmatively appears from the statement that the charge against the accused cannot be sustained under any view of the evidence consistent with it"); **State v. Scott**, 455 N.E.2d 1363 (Ohio Ct. App. 1983); **State v. Simpson**, 641 P.2d 320 (Haw. 1982); **State v. Whorton**, 589 P.2d 610 (Kan. 1979) (judgment of acquittal may be rendered where the State's opening statement shows it has no case); **Matter of Ferguson**, 261 N.W.2d 8 (Mich. Ct. App. 1977); **State v. Gallagher**, 549 P.2d 499 (Wash. Ct. App. 1976). But see **State v. Desperett**, 535 A.2d 963, 965 (Md. Ct. Spec. App. 1988) ("Lest there be any lingering doubt, we hold that the granting of a judgment of acquittal on opening statement is improper").

See Attachment H (sample Motion For Judgment Of Acquittal Based On Prosecutor's Opening Statement), page 438.

- v. At trial, clearly explain the defense theme in *voir dire* and in a fully developed opening statement.
- b. The person who has the will to fight the longest wins.
 - i. Never leave the battleground.
 - (1) Keep yourself, your client, and your client's family in the courthouse.
 - (2) Be prepared to respond if the jury indicates that it has reached an impasse in its deliberations. Consider whether your client would benefit more from a mistrial or an Allen charge influenced verdict, taking into account all available information, including the state of the record (have you preserved any or all reversible errors?), the unique advantages or disadvantages of this trial (could you get a better jury or better witness examinations in a retrial?), the split of the jury (has it indicated the majority's leanings?), the judge's proposed Allen instruction (is it a model instruction already approved in your jurisdiction, or is it modified to the point of coerciveness?), and the law of your governing jurisdiction. For discussions of the various issues that might arise in this situation, see, e.g., **Scoggins v. State**, 726 So.2d 762 (Fla. 1999) (court erred in seeking potentially hung jury's numerical division on merits of verdict; error harmless under totality of circumstances); **Smalls v. Batista**, 191 F.3d 272 (2nd Cir. 1999) (Allen charge was unconstitutionally coercive;

granting habeas relief and reversing state robbery conviction); **United States v. Paniagua-Ramos**, 135 F.3d 193 (1st Cir. 1998) (setting forth elements of Allen charge required by First Circuit to ameliorate its potentially prejudicial effect; finding trial court's failure to include all elements of charge amounted to plain error warranting reversal of cocaine conviction); **Freeman v. State**, 659 So.2d 158 (Ala. Ct. Crim. App. 1994) (court's repeated admonitions that minority of potentially hung jury conform its views to majority required reversal of rape conviction); **Jiminez v. Myers**, 40 F.3d 976 (9th Cir. 1994) (*de facto* Allen charge was unduly coercive; granting habeas relief and reversing state attempted murder conviction); **People v. O'Rama**, 579 N.E.2d 189 (N.Y. 1991) (reversible error for trial court to withhold from defense counsel contents of juror's note that indicated numerical division of potentially hung jury).

ii. Use spies.

- (1) "Spies are useful everywhere." Sun Tzu, *The Art of War*
- (2) Put yourself and your client in the jury room by explaining the Jurors' Bill of Rights during *voir dire* (credit for this concept is due the Colorado State Public Defender Office).

See Attachment I (Juror's Bill of Rights), page 439.

c. Watch, wait, and listen.

"Therefore the sage keeps to the deed that consists in taking no action and practices the teaching that uses no words Do that which consists in taking no action, and order will prevail." Lao Tzu, *Tao Te Ching*.

Nothing in the world is as soft and yielding as water.
 Yet for dissolving the hard and inflexible,
 Nothing can surpass it.
 The soft overcomes the hard;
 The gentle overcomes the rigid.
 Everyone knows this is true,
 But few can put it into practice.

-- Lao Tzu, *Tao Te Ching*

- i. Before examining the physical evidence, ask LEO Loose-Lips Larry to meet you in the evidence room or at the scene of the alleged crime. Do what you were never trained in law school to do and *be quiet* while Larry gossips about details of the case you could never obtain through ordinary discovery mechanisms.
- ii. Exercise silence during plea negotiations. The prosecutor is uncomfortable with silence, and will speak without having intended to, telling you things about the case you did not know before, or perhaps offering a better bargain than you were prepared to volunteer.
- iii. Use silence during trial
 - (1) As Sunwolf suggests, take a moment of silence at the beginning of your voir dire to make eye contact with each and every juror. Connect more powerfully with the jurors by utilizing this silence instead of barraging them with explanations or questions like the prosecutor did.
 - (2) Rather than cross-examining a witness about a minor point, simply dismiss the prosecutor's efforts by declaring you have "no questions of this witness."
- d. Yield to your opponent's force and use your opponent's words or actions to your benefit.

"Focus is your greatest asset . . . you will feel the rhythm of your opponent and maintain control of his actions. You will understand his approach and effortlessly defeat him by naturally concentrating your attack in an appropriate place at an appropriate time." Miyamoto Musashi, *A Book of Five Rings*.
- i. Create or seize the moment when the prosecutor or judge makes a comment or mistake that you can turn to your favor.
- e. Lose the battle in order to win the war.

"Men are born soft and supple; dead they are stiff and hard Thus whoever is stiff and inflexible is a disciple of death. Whoever is soft and yielding is a disciple of life. The hard and stiff will be broken. The soft and supple will prevail." Lao Tzu, *Tao Te Ching*.

"Warfare is the art (tao) of deceit. Even though you are competent, appear to be incompetent. Though effective, appear to be ineffective." Sun Tzu, *The Art of War*.
- i. Lose the preliminary hearing.

- (1) Let the prosecutor think you don't know how to cross-examine witnesses, by asking open ended questions and thereby learning what they might testify to at trial (and giving them plenty of rope with which you will hang them later).
 - (2) Allow the prosecutor to think you do not have a coherent theory of defense, so that you can take advantage of the element of surprise at trial.
- ii. Lose the motion to suppress.
- (1) If the suppression issue is whether your client consented to a search or an interrogation, establish that your client was not on drugs at the time of the consent. The prosecutor will be eager to characterize your client as fully coherent when consent was given, thus winning the consent battle at the suppression hearing, but losing an opportunity at trial to smear your client with testimony about his or her drug use.
 - (2) If the suppression issue is whether your client has standing to object to a search, establish that your client had no ownership claim in the suitcase in which the evidence was found. The prosecutor will happily allow you to elicit the law enforcement officer's denial that there was any information to suggest that your client had an interest in the suitcase, thus winning the standing battle at the suppression hearing, but losing the war at trial when you use that same officer to testify as an expert that there is "no evidence" to suggest that the suitcase with the evidence in it is your client's.

4. Conclusion

- a. "Attack when they are unprepared,
make your move when they do not expect it."

Sun Tzu, *The Art of War* (Thomas Cleary trans.)

- b. "The Master allows things to happen.
She shapes events as they come.
She steps out of the way
and lets the Tao speak for itself."

Lao Tzu, *Tao Te Ching* (Stephen Mitchell trans.)

- c. “Thus, a thing is added to by being diminished
And diminished by being added to.

Know when to stop
And you will meet with no danger.”

Lao Tzu, *Tao Te Ching* (D.C Lau trans.)

A Few Words About The Sample Motions

The following sample motions are offered to inspire further research and argument on the various issues covered. Each of the sample motions addresses an issue that should be presented in a very fact-intensive manner in each particular case (in large part so that existing negative case law can be distinguished!). The sample motions refer to the client as “the accused.” It is suggested that clients be personalized in all motions and referred to by name, i.e., “Mr. Jones”; Ms. Smith; or Tommy (if a juvenile, or if the client’s youthful character is part of the theory of defense). As always, the legal authority relied on should be updated, and efforts should be made to determine the appropriate jurisdiction’s statutes, rules, and common law addressing the relevant issues.

Publisher’s note: Throughout the following pages, to save trees, we have single-spaced the text of the sample motions; ordinarily, motions are double-spaced except where a lengthy quotation is included as a block quotation. Also for reasons of economy, we have inserted “[CASE CAPTION]” where the case caption would ordinarily be found. A sample case caption follows:

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00-10000-01-ABC
	)	
THE ACCUSED,	)	
Defendant.	)	
_____	)	

ATTACHMENT A

[CASE CAPTION]

MOTION FOR RECUSAL

COMES NOW the accused, by and through her attorney of record, and respectfully requests that this Honorable Judge recuse himself from the accused's case. In support of this motion, counsel for the accused shows as follows:

(Set forth facts warranting recusal under 28 U.S.C. §144 or §455. If proceeding under 28 U.S.C. § 144, also submit affidavit stating facts and reasons).

(Set forth citation to appropriate provisions of relevant jurisdiction's recusal statutes and code of judicial ethics). In addition to these authorities, the United States Supreme Court has held that judges have a duty under the due process clause of the United States Constitution to recuse themselves if necessary to prevent actual or even probable bias:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." ***Tumey v. State of Ohio***, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." ***Offutt v. United States***, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (fact that same judge presiding over "judge-grand jury" before which witnesses had testified presided at witnesses' contempt hearing violated due process).

WHEREFORE, counsel respectfully requests an order of recusal and assignment to a different judge consistent with the above and foregoing motion.

Respectfully submitted,

Counsel for the Accused

ATTACHMENT B

[CASE CAPTION]

MOTION TO PREVENT USE OF METAL DETECTORS AND/OR EXTRA SECURITY PERSONNEL DURING TRIAL

COMES NOW the accused, by and through his attorney of record, and moves for an order preventing the use of metal detectors and/or the visible presence of extra security personnel during the accused's jury trial. In support of this motion, counsel for the accused shows as follows:

The court has suggested that it intends (1) to require all parties, witnesses, and observers at the accused's trial to pass through a metal detector before entering the courtroom, and (2) to assign extra security personnel to guard over the accused's trial. The accused objects to these security measures for the following reasons:

The use of obvious extra security measures suggests to the jurors that they need to be protected, and that the accused is a dangerous man or, at the very least, a flight risk. This suggestion would impermissibly infringe on the presumption of innocence and would invite a guilty verdict based on the court's indication to the jurors that the court agrees the accused is to be feared. But there is no evidence in this case that the jury actually needs protection. The accused, his family, and his friends have all appeared before this court during pretrial motions without incident. There has never been any suggestion that the accused or his supporters have threatened to disrupt the trial or to place any juror or other person in danger. The accused has been transported to the courtroom on numerous occasions and has never attempted to flee or assault his custodians. Consequently, the use of obvious extra security measures is unnecessary, and would violate the accused's rights to due process, an impartial jury, and the presumption of innocence, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

The United State Supreme Court has recognized the constitutional risks that extra security measures pose, noting "it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." See **Holbrook v. Flynn**, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). In **Holbrook**, the Supreme Court held that under the particular facts of the case before it, a trial court did not deny six co-defendants a fair trial by allowing four security officers to sit quietly in the first row of the courtroom's spectator section. *Id.* The Court mandated a case-by-case approach to the use of extra security measures, cautioning: "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Id.*, 475 U.S. at 570-71, *citing* ABA Standards for Criminal Justice 15-3.1(c) (2d ed. 1980). The Court further suggested that there is a greater danger of prejudice if the jury is aware that the security measures taken are extraordinary. *Id.*, *citing Dorman v. United States*, 140 U.S. App. D.C. 313, 327, 435 F.2d 385, 397 (1970).

WHEREFORE, because there has been no showing that extra security measures are necessary in this case, and because of the risk that the accused's constitutional rights would be abridged by the use of such measures, the accused prays that this court will decline to impose such measures at the accused's trial. Counsel respectfully requests a hearing and oral argument on this objection.

Respectfully submitted,

Counsel for the Accused

ATTACHMENT C

[CASE CAPTION]

OBJECTION TO EMPANELMENT OF ANONYMOUS JURY

COMES NOW the accused, by and through his attorney of record, and objects to any proceeding by which the court would empanel the jurors in this case without revealing their names to the accused. In support of this motion, counsel for the accused shows as follows:

The state has asked the court to refer to the potential jurors by number instead of name during *voir dire*, and thus reassure the jurors that court-imposed anonymity before the accused will protect them from repercussions for carrying out their duties as jurors. The accused objects to this procedure for the following reasons:

Reassuring the jurors that their anonymity before the accused will protect them from repercussions suggests to the jurors that they need to be protected, their fears of repercussions are justified, and that the accused is a dangerous man. This suggestion would impermissibly infringe on the presumption of innocence and would invite a guilty verdict based on the court's indication to the jurors that the court agrees the accused (and *only* the accused, since the court proposes that counsel for the accused and the state will be provided with the juror's names) is to be feared. But there is no evidence in this case that the jury actually needs protection. Additionally, the anonymity of potential jurors would deny the accused information necessary for him to assist his attorney in exercising peremptory challenges and challenges for cause during *voir dire*. Consequently, this procedure would violate the accused's rights to due process, an impartial jury, and the presumption of innocence, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

The Massachusetts Supreme Judicial Court has recognized the constitutional implications of anonymous jury empanelment:

The Fourteenth Amendment to the United States Constitution embodies the notion, reaching back to Roman law, that a "shield of innocence surrounds a defendant on trial." This so-called "presumption of innocence" is "a basic component of a fair trial under our system of criminal justice." In *Estelle*, the Supreme Court of the United States held that a State may not -- consistent with the presumption of innocence -- create trial conditions that affect the jurors' perception of the defendant unless there is a substantial government interest in doing so. . . .

The empanelment of an anonymous jury triggers due process scrutiny because this practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence The due process clause precludes the empanelment of an anonymous jury at a criminal trial unless anonymity is necessary to protect

the jurors from harm or improper influence.

Commonwealth v. Angiulo, 615 N.E.2d 155, 171 (Mass. 1993) (internal citations omitted; emphasis supplied) (trial court erred in empaneling anonymous jury; reversing conviction for accessory before the fact to first degree murder).

The Supreme Court of Hawaii has likewise recognized the risks of empaneling an anonymous jury:

First, a criminal defendant has a constitutional right to a presumption of innocence. An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence.

Second, a criminal defendant has a constitutional right to an impartial jury. We are . . . mindful of the fact that juror anonymity denies a defendant information that might be helpful in the exercise of his or her right to utilize peremptory challenges during *voir dire*.

State v. Samonte, 928 P.2d 1, 12-13 (Haw. 1996) (internal citations omitted) (trial court did not err in empanelment of anonymous jury where defendant's earlier trial resulted in a mistrial as a result of jury tampering). The **Samonte** court expressed a preference, once a need for anonymity is shown, that the trial court "give anonymous jurors a plausible and nonprejudicial reason for not disclosing their identities that decreases the probability that the jurors would infer that the defendant is guilty or dangerous (e.g., . . . that the purpose for juror anonymity is to protect the jurors from contacts by the news media . . .)." *Id.*, 928 P.2d at 16.

These state court opinions are consistent with opinions on this issue by the federal circuit courts, which have required that a court should not empanel an anonymous jury without "(a) concluding that there is a strong reason to believe that the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." **United States v. Ross**, 33 F.3d 1507, 1520 (11th Cir. 1994) (emphasis supplied) (empanelment of anonymous jury approved in large-scale mafia case where acts of violence had been directed at relatives of government witnesses; one witness' sister was beaten and placed in the trunk of a car with her children; other relatives were subjected to shootings and kidnapping).

WHEREFORE, because there has been no showing that the jury in this case needs protection, and because of the risk that the accused's constitutional rights would be abridged by the empanelment of an anonymous jury, the accused prays that this court will decline to empanel an anonymous jury in the above captioned case. Counsel respectfully requests a hearing and oral argument on this objection.

Respectfully submitted,

Counsel for The Accused

ATTACHMENT D

[CASE CAPTION]

**MOTION TO ALLOW THE ACCUSED TO WEAR
HIS OWN CLOTHES DURING JURY TRIAL**

COMES NOW the accused by and through his attorney of record, and moves for an order allowing the accused (who is currently in custody at the county jail) to wear his own clothes instead of a jail jumpsuit during trial, and directing jail officials to accommodate the accused and his counsel in effectuating this order. In support of this motion, counsel for the accused shows as follows:

The United State Supreme Court has cautioned that “courts must be alert to factors that may undermine the fairness of the fact-finding process . . . [and] must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” ***Estelle v. Williams***, 425 U.S. 501, 503-505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). When an accused is forced to wear prison clothes when appearing before the jury, “the constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment”. *Id.* Since no “essential state policy” is served by compelling an accused to dress in this manner, the Supreme Court concluded in ***Estelle*** that “the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes.” *Id.*, 425 U.S. at 512 (but affirming conviction where the accused failed to object or make request to wear his own clothes); *see also* ***People v. Roman***, 324 N.E.2d 885, 886 (N.Y. Ct. App. 1975) (*per curiam*) (“A defendant is presumed innocent and he is entitled to appear in court with the dignity and the self-respect of a free and innocent man. To forbid him to wear his own clothing and to require him to appear in convict’s attire--a continuing visual communication to the jury--is to deny him this right”).

WHEREFORE, counsel requests an order consistent with the above and foregoing motion.

Respectfully submitted,

Counsel for The Accused

ATTACHMENT E

MOTION TO REMOVE PHYSICAL RESTRAINTS FROM THE ACCUSED DURING JURY TRIAL

COMES NOW the accused, by and through his attorney of record, and moves for an order directing law enforcement to remove all (shackles) (handcuffs) (leg restraints) (electronic monitoring devices) from the accused at all times that the accused might be in view of the potential jurors or jurors in his trial. In support of this motion, counsel for the accused shows as follows:

The accused is currently (in custody) (under supervision), and has appeared in court for his pretrial hearings wearing (shackles) (handcuffs) (leg restraints) (electronic monitoring devices). The accused has proven himself to be cooperative with law enforcement in coming to and from the courtroom, and has never attempted to flee or assault his custodians. The accused has made no threats against any person since his arrest in this case. Under these conditions, the state has no legitimate interest in restraining the accused during trial. His visible restraint will improperly prejudice the jury against him and interfere with his ability to communicate with counsel, thus undermining the accused's rights to the presumption of innocence, an impartial jury, counsel, and to participate in his own defense, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The United State Supreme Court has cautioned that "courts must be alert to factors that may undermine the fairness of the fact-finding process . . . [and] must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503-505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the Supreme Court strongly condemned the use of visible restraints in all but certain extreme situations: "not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."

The use of restrains interferes not only with an accused's presumption of innocence and right to an impartial jury; it may also "confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow." *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir.1983), *cert. den.* 466 U.S. 941, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984) (shackles justified under particular facts of case where the accused made previous escape attempt by jumping through a third-floor plexiglass courthouse window while awaiting appearance before court).

WHEREFORE, because the state has made no showing that restraints are necessary in this case counsel requests an order directing law enforcement to remove all (shackles) (handcuffs) (leg restraints) (electronic monitoring devices) from the accused at all times that the accused might be in view of the potential jurors or jurors in his trial.

Respectfully submitted,

ATTACHMENT F

[CASE CAPTION]

MOTION TO REMOVE OR CONCEAL COMMEMORATIVE COURTHOUSE PLAQUE DURING JURY TRIAL

COMES NOW the accused by and through her attorney of record, and moves for an order that the commemorative courthouse plaque dedicated to the victim-police officer in this case be removed or concealed from the view of any potential jurors or jurors in the accused's trial. In support of this motion, counsel for the accused shows as follows:

The accused has been charged with the first degree murder of Officer. Her defense at trial will be that the killing was in self-defense. Officer was a popular public figure whose death has been commemorated with a courthouse plaque measuring three feet by four feet, featuring a large color photograph of Officer with his wife and his three young daughters, and announcing that Officer was "murdered" (not merely "killed") in the line of duty on July 4, 1999. The jurors' exposure to this sympathetic portrayal of Officer, and to the plaque's legal conclusion as to the cause of Officer's death, will unduly prejudice the accused's rights to the presumption of innocence and an impartial jury, in violation of the Sixth, and Fourteenth Amendments to the United States Constitution.

The United State Supreme Court has cautioned that "courts must be alert to factors that may undermine the fairness of the fact-finding process . . . [and] must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503-505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In *Tyler v. Nelson*, 163 F.3d 1222 (10th Cir. 1999), the Tenth Circuit declined to grant habeas relief to an accused whose jurors may have been exposed to a commemorative plaque dedicated to the victim-police officer in that case. However, in *Tyler*, the plaque "was small and therefore was not necessarily noticeable," and it stated only that the officer was "killed" (not "murdered") in the line of duty. *Id.*, 163 F.3d at 1228. In contrast, the plaque in this case is much larger and includes the legal conclusion that Officer was "murdered." Under these circumstances, the jurors' exposure to this plaque will "undermine the fairness of the fact-finding process," and removal or concealment of the plaque is necessary.

WHEREFORE, counsel requests an order consistent with the above and foregoing motion.

Respectfully submitted,

Counsel for the Accused

ATTACHMENT G

January 1, 2000

Family or Friend of the Accused
100 West Pine Street
Wichita, Kansas 67203

Re: The Accused

Dear Friend:

_____ and I would like to take this opportunity to thank you for all of your caring support during the past few months of _____'s trial preparation. As you know, _____'s trial is scheduled to begin at 9:00 a.m. on Monday, January 24, 2000.

I understand that you have generously offered to attend _____'s trial (and/or serve as a character witness if necessary). I am requesting that everyone who expects to be present for any part of the trial meet with _____ and me at my office in Wichita, 221 South Broadway, Suite 512, **at 2:00 p.m. Saturday, January 8, 2000.**

The purpose of this meeting is so that I can let you know what rules the judge will expect everybody in the courtroom to follow, and to let you know how I think we can best help _____ through our presence at trial.

This is a very important meeting. In fact, so important that we hope you will appreciate the fact that anyone unable to attend this meeting should not attend the trial. Of course, if special arrangements need to be made to meet with you at a different time, please just let us know and we will make every effort to accommodate you. Our goal is to assure that everyone in attendance at _____'s trial knows how best to assist us in obtaining _____'s acquittal. Again, _____ and I thank you for your continuing support.

Sincerely,

Counsel for The Accused

ATTACHMENT H

[CASE CAPTION]

MOTION FOR JUDGMENT OF ACQUITTAL BASED ON PROSECUTOR'S OPENING STATEMENT

COMES NOW the accused by and through her attorney of record, and moves, based on the prosecutor's admissions during opening statement, for an order of acquittal in the above captioned case. In support of this motion, counsel for the accused shows as follows:

The accused has been charged with (crime). In order to prove that the accused committed (crime), the state must show (elements). The prosecutor admitted during opening statement that the facts will show only (some elements), and, more importantly, the prosecutor admitted that the facts will show (fact defeating remaining element). Even if the prosecutor proves every fact claimed in opening statement, the state's case must fail as a matter of law. Thus an acquittal should be granted at this stage, in order to avoid any further waste of the court's or the accused's resources.

Many jurisdictions allow for a judgment of acquittal at the close of the prosecutor's opening statement. *See, e.g., United States v. Graham*, 146 F.3d 6, 10 (1st Cir. 1998) (acquittal after prosecutor's opening statement may be granted where the statement contains a clearly admitted fact that must defeat prosecutor's case); *State v. Smith*, 988 S.W.2d 71, 75-76 (Mo. Ct. App. 1999) (trial court has power to enter judgment of acquittal after state has made opening statement "when it clearly and affirmatively appears from the statement that the charge against the accused cannot be sustained under any view of the evidence consistent with it"); *State v. Scott*, 455 N.E.2d 1363 (Ohio Ct. App. 1983); *State v. Simpson*, 641 P.2d 320 (Haw. 1982); *State v. Whorton*, 589 P.2d 610 (Kan. 1979) (judgment of acquittal may be rendered where the state's opening statement shows it has no case; dismissing state's appeal from acquittal based on opening statement); *Matter of Ferguson*, 261 N.W.2d 8 (Mich. Ct. App. 1977) (dismissing state's appeal from acquittal based on opening statement, noting that prosecutor admitted he could prove nothing more than facts alleged in opening); *State v. Gallagher*, 549 P.2d 499 (Wash. Ct. App. 1976) ("when some fact is clearly stated or admission is expressly made, leaving only an isolated and determinative issue of law, the court may resolve that issue"; affirming in part acquittal based on opening statement).

In this case, the prosecutor has made express admissions of fact that will legally foreclose the state from obtaining a conviction based on the crime(s) charged. (Legal discussion regarding proof necessary to fulfill elements of crime(s), and application of state's claimed evidence to required elements).

WHEREFORE, counsel requests an order of acquittal consistent with the above motion.

Respectfully submitted,

ATTACHMENT I

~ Juror's Bill of Rights ~

- I. Each juror has the individual right to be treated with respect by other jurors.
- II. Each juror has the individual right to decide the credibility of the witnesses based on the actions and demeanor of each witness.
- III. Each juror has the individual right to send a note to the judge about any misconduct by other jurors or about any other questions or concerns the juror might have.
- IV. Each juror has the individual right to give any piece of evidence whatever weight the juror chooses.
- V. Each juror has the individual right to reject all of the evidence.
- VI. Each juror has the individual right to refuse to consider information not heard in court.
- VII. Each juror has the individual right to agree or disagree with other jurors.
- VIII. Each juror has the individual right to ask questions in the jury room.
- IX. Each juror has the individual right not to be pressured or intimidated by other jurors in the jury room.
- X. Each juror has the individual right to require a higher level of convincing than other jurors require, and to say "that's not enough for me."
- XI. Each juror has the individual right not to have to justify his or her verdict to anyone after trial.
- XII. Each juror has the individual right not to talk to anyone about his or her verdict after trial.

DISCOVERING & UNCOVERING FOR THE JURY THE LYING INFORMANT

H. Dean Steward

Attorney at Law

34700 Pacific Coast Highway, Suite 205

Capistrano Beach, CA 92624

(949) 496-0164; (949) 496-6753 (fax)

I. INFORMANT DISCOVERY MATERIAL

Defense counsel is entitled to the following types of material regarding informants. All rights are based on Brady v. Maryland, 373 U.S. 83 (1963), (defendant's right to a fair trial requires the prosecution to disclose all evidence that is both favorable and material "either to guilt or to punishment.")

Criminal History

Defense is entitled to the criminal record of an informant. United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991); United States v. Auten, 632 F.2d 478 (5th Cir. 1980). However, government need only make reasonable efforts to secure records. United States v. Jones, 34 F.3d 596 (8th Cir. 1994), (government checked in Missouri state, deemed sufficient).

Promised Immunities or Other Benefits

Any promises of consideration of any type (including cash payments) should be revealed. Giglio v. United States, 405 U.S. 150 (1972); United States v. Foster, 874 F.2d 491 (8th Cir. 1988); United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980). This includes any plea bargain or other benefit for cooperation. United States v. San Filippo, 564 F.2d 176 (5th Cir. 1977).

Identification of Informant's Prior Testimony

If the government has transcripts or knows of prior testimony, the transcripts or information must be turned over to the defense. 18 U.S.C. § 3500; United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992); Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975).

Evidence of Psychiatric Treatment

In the unique case where the informant has been treated for any type of mental illness, the government must disclose such evidence. United States v. Barrett, 766 F.2d 609 (1st Cir. 1989); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), at least as to any mental problems during the time period relevant to the issues in this case.

Opportunity to Meet with Informant

The government must make "reasonable efforts" to produce the informant for a defense interview. United States v. Saa, 859 F.2d 1067 (2nd Cir. 1988); United States v. Williams, 496 F.2d 378 (1st Cir. 1974). This extends to production of the informant at trial, even if the defense seeks to call the witness. United States v. Tornabene, 687 F.2d 312 (9th Cir. 1982).

Additionally, the government must furnish the defendant with all known information about the informant's location. United States v. DeJesus-Boria, 518 F.2d 368 (1st Cir. 1975).

Identity of the Informant

The court must balance the "public interest" in protecting the identity of the informant against the need for disclosure in order to prepare an adequate defense. _Will the informant's identity be "relevant and helpful" to the defense? Roviaro v. United States, 353 U.S. 53 (1957). The defense must make at least "some plausible showing" of how the identity and perhaps testimony would be helpful to the defense. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). If the informant was a percipient witness to the transaction the identity must be revealed. Will v. United States, 389 U.S. 80 (1957); United States v. Ordonez, 737 F.2d 793 (9th Cir. 1984).

If the government refuses to disclose the identity of the informants, the court has the power to dismiss the case. Roviaro, supra, at p. 61; United States v. Ayala, 643 F.2d 244 (5th Cir. 1981).

Details of Prior Investigations

The court must balance between the security interests of the government and the defendant's need for information. United States v. Cutler, 806 F.2d 933 (9th Cir. 1986). District Attorney records and files from previous cases may be discoverable, and, at least in California state court, are subject to subpoena power. Shepard v. Superior Court, 17 Cal.3d 107 (1976).

Other Brady Material

Prior Presentence Reports of Informant: United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988); also - in California state court, probation reports are open public records for a limited period of time, and can later be obtained by motion. Calif. Penal Code § 1203.05(b).

Agent Thought Informant Unreliable: Any such evidence must be turned over to the defense. United States v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992).

No Ostrich Defense: "Allowing the government to absolve itself (on a Brady violation) on the basis of its counsel's asserted ignorance of the facts -- ignorance prompted by the government lawyers closing their eyes to facts which should have prompted them to investigate -- would be akin to allowing criminal defendants to avoid guilty knowledge by means of Ostrich defense." United States v. Burnside, 824 F. Supp. 1215 (N. D. Ill 1993).

Sample Discovery Letter

MEMORANDUM

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA

TO: Dan XXXXX
Assistant U.S. Attorney

DATE: February 22, 2001

FROM: Joan XXXXXXXXX
Deputy Federal Public Defender

RE: United States v. Terrell XXXXXXXX - SA CR 00-XX-DOC

I am assigned to represent Mr. XXXXX who appeared on the post-indictment arraignment calendar on Monday, April 6, 1998. I formally request all discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure, as well as all materials which are discoverable pursuant to other statutes and case law, in particular, Brady, Giglio, and Jencks (18 U.S.C. § 3500). I am also specifically requesting, on a continuing basis, the following documents:

1. The handwritten notes of any agent's interviews with Mr. XXXXX, which I ask be preserved;
2. The names, serial numbers, employment and present assignment of all law enforcement personnel involved in the investigation and arrest(s) in this case and reports submitted by them;
3. The Grand Jury transcripts of all testifying government witnesses;
4. Any scientific analysis conducted in the case including but not limited to fingerprint, fiber, or other forensic tests, as well as the underlying data in any government test;
5. Any photographs, photographic arrays, or video surveillance utilized to identify Mr. XXXXX, and if they are in color, color photocopies;
6. The name, address and whereabouts of any cooperating witness or informant who provided information in regards to the investigation of this case or whom may have information relevant and helpful to the defense. Roviaro v. United States, 353 U.S. 53, 50-61 (1957);

7. The prior arrest and conviction record of potential government witnesses, comprising their complete criminal history: all information within the possession, custody, or control of the government, both known or which may become known through due diligence, including but not limited to C.I.I and F.B.I. rap sheets;
8. The conclusions and findings of any expert witness you intend to call, whether or not he or she has prepared a written report. United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983).
9. All written or recorded statements of Mr. XXXXX, to whomever and whenever made, and the substance of any oral statement, if not embodied in writing. If the statements are recorded, please provide a transcript and audible copy of each recording. See United States v. Bailleaux, 685 F.2d 1105, 1113-14 (9th Cir. 1982).
10. All agent's rough notes of all statements referred to in item #9 above. See United States v. Harris, 543 F.2d 1247, 1250-53 (9th Cir. 1976).
11. The arrest and conviction record of Mr. XXXXX, if any, and each prospective government witness, including the docket number and jurisdiction of all prior and pending cases. See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988).
12. The description of any prior conviction of Mr. XXXXX, any prior similar act" or any other evidence covered by Fed. R. Evid. 609 or 404(b) that you may seek to introduce at trial and the theory of its admission.
13. Any evidence that someone other than Mr. XXXXX committed the crime charged. Bowen v. Maynard, 799 F.2d 593 (10th Cir.), cert. denied, 107 S.Ct. 458 (1986), Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978); please produce accordingly any and all "offense reports and any other written statements dealing with this case." Id.; Sellers v. Estelle, 651 F.2d 1074, 1077 (5th Cir. 1981).
14. Any evidence that any prospective government witness has ever made any false statement to the authorities, whether or not under oath or under penalty of perjury, or that any witness does not have a good reputation in the community for honesty. See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988); Rule 608(a), Federal Rules of Evidence.
15. Any evidence that any prospective government witness, has ever made a false, contradictory, or inconsistent statement with regard to this case, or any statement showing bias or a motive to fabricate. Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987); United States v. Strifler, 851 F.2d 1197, 1202 (9th Cir. 1988).

16. Any evidence that the testimony of any prospective government witness, is inconsistent with or contradicted by that of any other person or prospective witness. Kyles v. Whiteley, ___ U.S. ___, 115 S.Ct. 1555 (1995); United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995).
17. Any express or implicit promise, understanding, offer of immunity or of past, present, or future compensation, or any other kind of agreement or understanding between any prospective government witness (federal, state and local). This request includes any explicit or implicit understanding relating to criminal or civil income tax liability. United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986). Please note, also, that "[the prosecutor is responsible for the nondisclosure of assurances made to his principal witnesses even if unknown to the prosecutor. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure." United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978) (citation omitted).
18. Any discussion about or advice concerning any contemplated prosecution of any prospective government witness, or any possible plea bargain, even if no bargain was made, or the advice not followed. Brown v. Dugger, 831 F.2d 1547, 1555 (11th Cir. 1987) (Clark, J. concurring) (evidence that witness sought plea bargain is to be disclosed, even if no deal struck); Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985).
19. The name and last known address of each prospective government witness. "Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecutor nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), cited with approval in United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984); United States v. Tucker, 716 F.2d 583 (9th Cir. 1983) (failure of defense counsel to interview government witnesses is ineffective assistance of counsel).
20. The name and last known address of every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a government witness. United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984).
21. The name of any witnesses who made an arguably favorable statement concerning Mr. XXXXX or who could not identify him or who was unsure of his identity or participation in the crime charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978).
22. All prior written, recorded or oral statements of each prospective government witness

relating to this case to whomever made, and agents' rough draft notes of interviews with prospective government witnesses.

23. Copies of any documents or other exhibits intended to be introduced at trial by the government.
24. Any evidence, including any statements by any person, tending to exculpate Mr. XXXXX, in whole or in part. United States v. Srulowitz, 785 F.2d 382, 387-88 (2d. Cir. 1988).
25. Any identification statements/cards completed by any witnesses.
26. For in camera review by the district court, any and all personnel files of all law enforcement witnesses whom the government intends to call at trial. United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991); United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).
27. Any information which the government intends to use as part of any sentencing procedures, including adjustments and departures.

In addition, in order that I may prepare appropriate motions, in necessary, please provide the following:

- (a) Notice under rule 12(d)(2) of the Federal Rules of Criminal Procedure of your intention to use in your case-in-chief at trial any evidence which the defendant may be entitled to discover under Rule 16.
- (b) Whether any searches of person or places occurred during any phase of this case. If so, please provide the date and location of the search and list of the items seized. If a warrant was obtained, please provide a copy of it, as well as any affidavits submitted in support of the application for the warrant and also any search inventory or warrant returns. Also provide arrest warrants and accompanying affidavit, if any.

Please make specific inquiry of each government agent connected to the case for the above materials. United States v. Bailleaux, 685 F.2d 1105, 1113 (9th Cir. 1982). Brady material is in the possession of the government even when it is held by another agency which has been involved in the investigation. United States v. Wood, 57 F.3d 733 (9th Cir. 1995); United States v. Santiago, 46 F.2d 885, 893 (9th Cir. 1995). If you decline to disclose any of the above, or if you have doubts as to the propriety of disclosure, the proper course is to submit the materials to the court for its review. United States v. Lehman, 756 F.2d 725, 729 (9th Cir. 1985). Thank you for your cooperation in this regard. Again, please provide the materials requested above as soon as possible.

SAMPLE DISCOVERY MOTION

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	NO. CR XX-XXXX-XX
Plaintiff,	)	
	)	NOTICE OF MOTION; MOTION
v.	)	FOR DISCOVERY OF INFORMANT
	)	INFORMATION; MEMORANDUM
DANIEL XXXXXXXXX, <u>et al.</u> ,	)	OF POINTS AND AUTHORITIES;
Defendants.	)	DECLARATION OF H. DEAN STEWARD
	)	
-	)	Hearing Date: To be set
	)	Hearing Time:
	)	Est. Time Req:

TO PLAINTIFF UNITED STATES OF AMERICA AND ITS ATTORNEYS OF RECORD,
ASSISTANT UNITED STATES ATTORNEYS Aaaaaa and Bbbbbb:

PLEASE TAKE NOTICE that on _____, 2001, at ____ a.m./ p.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable Edward Rafeedie, United States District Judge, Defendant DANIEL XXXXXXXXX, by and through his attorneys of record, will and hereby does move for an order directing the government to produce and/or make available for inspection certain items of discovery.

Specifically, Mr. XXXXXXXXX seeks the following items of discovery:

I. CONFIDENTIAL INFORMANT NUMBER 1

A. The identity, last known address and telephone number of the individual referred to in discovery as CI number 1. Alternatively, Mr. XXXXXXXXX specifically requests that the Court order the government to make CI number 1 available for an interview by defense counsel.

B. All impeachment materials regarding CI number 1, including but not limited to the following:

1. The CI's criminal record, including but not limited to reports of law enforcement agencies relating to his prior arrests and/or his participation in criminal activity.
2. The CI's prior statements (including handwritten notes) concerning his

knowledge of persons engaged in illegal activities charged herein.

3. Records of payments, expense reimbursements, and any and all other benefits received by CI number 1 by any federal, state or local government agency for his assistance in the investigation and prosecution of the instant case and any and all other criminal matters, including but not limited to a written summary of payments, expense reimbursements and other benefits received by the CI, if no such records exist or if existing records do not completely reflect all payments, expense reimbursements, and benefits.
4. Contracts, agreements, and letters/memoranda of understanding between the CI and any agency of the United States government or any other state or local law enforcement agency.
5. The name, case number and jurisdiction of all other judicial proceedings in which CI has been utilized as an informant and/or testified.
6. Records (including hand written notes) which in any way indicate that the CI has provided untruthful or misleading information or testimony in connection with this case or any other case to any state or federal law enforcement agency, state or federal grand jury, or state or federal court.

II. OTHER INFORMANTS

The defense requests the same information regarding any other informants utilized by the government in this case.

This motion is brought pursuant to Fed. R. Crim. P. 12(b)(4) and is based on the attached memorandum of points and authorities, declaration of H. Dean Steward, and exhibit; the files and records in this case; and any further evidence and argument that may be presented at or before the hearing on this motion.

Respectfully Submitted,

[CASE CAPTION]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant DANIEL XXXXXXXX has been charged herein with five counts of murder-for-hire under 18 U.S.C. § 1958 and one count of conspiracy, also alleging murder-for-hire under 18 U.S.C. § 1958. The government has given the defendant notice that they intend to seek the death penalty, if there is a conviction.

The case evolved from the investigation of co-defendant Edward XXXXXXXX's alleged drug ring in South-Central Los Angeles. XXXXXXXX, YYYYYYY and Roy Lovett are charged with murder-for-hire, and twelve other defendants are charged with drug trafficking unrelated to the murder-for-hire scheme. In connection with the investigation, FBI agents monitored phone calls with court authorization for seventy-seven days.

On November 26, 1996, Rickey ZZZZZ was shot to death in an alley in North Las Vegas, Nevada. The government alleges that ZZZZZ was shot by YYYYYYY, with orders from YYYYYYY in Los Angeles, in retaliation for ZZZZZ's theft of \$300,000 from YYYYYYY. The government alleges that XXXXXXXX was paid a sum of money to commit the murder.

This motion seeks discovery of informant information. Several informants were apparently used in the investigation of this matter.

II. STATEMENT OF FACTS

The government investigated the Edward YYYYYYY drug organization for six months to a year. During that period of time, they used various methods to gain information, including surveillance, electronic tracking, wiretaps and informants.

Confidential informant number 1 is an individual who had great success in penetrating the YYYYYYY organization. This man negotiated with Edward YYYYYYY himself over many months, and eventually made three hand-to-hand buy of heroin from YYYYYYY. At least as to those transactions, CI number 1 is a percipient witness to the crimes charged in counts _____.

More importantly, CI number 1 and his efforts were a major foundation in the application by the government for court-ordered wiretaps. As such, informant information disclosure is important for all defendants charged, not just those in the drug portion of the case.

To date, the government has disclosed the following about CI number 1:

The defense has asked both orally and in writing for further information. [See attached Declaration of Counsel]. To this point, the government has declined to provide any further information. The government did, however, provide the defense with a video tape of one of the hand-to-hand sales involving YYYYYY and the informant. They have declined, however, to even provide the defense with the true name of CI number 1.

It is also apparent from the discovery that one or more other informants were used by the government. Their role, success and actions are not known by the defense at this time.

III. **ARGUMENT**

A. **THE COURT SHOULD ORDER THE GOVERNMENT TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT**

Under Rovario v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), a trial court should balance the public interest in protecting the identity of the informant against the need for disclosure in order to prepare an adequate defense. Id. at 62. The defendant need only "show that he has more than a 'mere suspicion' that the informant has information which will prove 'relevant and helpful' or will be essential to a fair trial." United States v. Amador-Galvan, 9 F.3d 1414, 1417 (9th Cir. 1993). When the informant is a percipient witness to or participated in the criminal transaction, the balance weighs in favor of disclosure. See Rovario, 353 U.S. at 61-62; United States v. Ordonez, 737 F.2d 793, 808 (9th Cir. 1984). The Ninth Circuit has held that the government's failure to take reasonable efforts to produce an informant is reversible error where the informant's testimony was material to an entrapment defense. United States v. Montgomery, 998 F.2d 1468, 1478 (9th Cir. 1993).

The Ninth Circuit recently set out the Rovario factors to be considered by the trial court. In United States v. Ramirez-Rangel, 103 F.3d 1501 (9th Cir. 2001), the court found that the relevant factors are:

- crime charged
- possible defenses
- significance of informant's testimony
- other relevant factors

Taking each of the factors in turn, the need for full disclosure is apparent.

a) **Crime Charged-** in that narcotics violations, conspiracy, murder-for-hire with a possible death penalty are at stake, the charges are the most serious possible in the federal system. The fact of a potential death sentence alone should favor liberal discovery generally, and full disclosure of informant information.

b) **Possible Defenses** - critical to all defendants is whether or not the wiretaps were lawfully acquired , and whether the wiretap procedure was according to statute. Examining the wiretap issues is an important defense to all 15 defendants.¹

In the application for the wiretaps, the government had to establish the necessity of the wiretaps, in that other investigative methods were fruitless.

At this early stage, it appears that the representations regarding necessity by the government to the court were at least questionable. CI number 1 had in fact effectuated three hand-to-hand sales with Edward YYYYYY.

Further informant information will probably bolster the argument that there was no necessity for wiretaps: the government had an effective, experienced, highly paid informant *who was getting results*.

B. THE COURT SHOULD ORDER THE GOVERNMENT TO DISCLOSE ALL EVIDENCE RELEVANT TO THE CONFIDENTIAL INFORMANT'S CREDIBILITY

In Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court held that evidence bearing on a government witness' credibility is material to guilt and, therefore, must be disclosed. Id. at 155 (reversing conviction where government withheld information that witness had been promised immunity). The Ninth Circuit has recognized that "[b]y definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." United States v. Bernal-Obeso, 989 F.2d 331, 335-36 (9th Cir. 1993). Accordingly, when the government's case relies on a confidential informant, the government has "the duty as required by Giglio to turn over to the defense all material information casting a shadow on a government witness' credibility." Id.; see also United States v. Steinberg, 99 F.3d 1486, 1492 (9th Cir. 1996) (reversing conviction where prosecutor failed to disclose that CI had engaged in illegal transactions and owed defendant money); United States v. Shaffer, 789 F.2d 682, 688-89 (9th Cir. 1986) (affirming new trial order where prosecutor failed to disclose impeachment evidence against its main witness). The specific items of discovery would impeach the CI's expected testimony. Accordingly, each of the items should be disclosed.

¹ It appears that without the wiretap evidence, the government has an exceptionally weak, speculative case as to DANIEL XXXXXXXX.

IV. CONCLUSION

For all the foregoing reasons, Mr. XXXXXXXXX respectfully requests the Court to order the government to forthwith disclose or make available for inspection each of the specific items of discovery requested by this motion.

Respectfully Submitted,

SAMPLE DECLARATION UNDER OATH

DECLARATION OF H. DEAN STEWARD

I, H. Dean Steward, hereby state and declare the following:

1. I am appointed co-counsel for defendant DANIEL XXXXXXXXX.

2. I have requested informant information in the XXXXXXXXX matter from Assistant United States Attorney Stephen G. Wolfe. I have made my requests both orally and in writing. As of May ___, 2001, Mr. Wolfe has declined to reveal this information. He did indicate that he may reveal it at a time closer to the trial date. He told me that five months prior to trial is “too early”.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: May ___, 2001

H. DEAN STEWARD

Cross-Examination of Informants

INFORMANTS AND SNITCHES ARE PAID WITNESSES.

How are they paid?

1. Cash
2. Immunity
3. Plea Bargains
4. Forbearance of Prosecution
5. Bond Reductions
6. Forbearance of Probation Revocations
7. Agreements with Other Jurisdictions
8. Sentencing Recommendations
9. Bail Pending Sentencing
10. Freedom

YOU MUST SENSITIZE THE JURY TO THE VALUE OF THE PAYMENT.

Sensitization

- How much is a year of an individual's life worth?
- What are the jury perceptions about jail?

Jail

- What are the conditions that a person lives under in jail?

Time

- 20 years
- How old will his children be if he had to serve 20 years; his parents; his wife?
- By talking about jail and time you can establish that the witness is familiar with the criminal justice system.

U.S.S.G. § 5K1.1 and RULE 35 " BIAS (No Motion/No Reduction)

- A motion for reduction of sentence can be filed only by the prosecutor. This is extremely important.
- The witnesses' testimony is the key to the jail cell.
- Truth is not therefore an issue.
- The witness is rewarded only if this testimony leads to the investigation or prosecution of another.

LET'S CALL IT WHAT IT IS . . .

- The government calls it cooperation; you must call it a plea bargain.
- Remember, plea bargaining witnesses receive benefits!
- This makes the snitch different from any other witness. In order to gain his testimony, the government must confer a benefit.
- The truth does not require or should not require a bargain.
- This is not a witness who came forward and volunteered to tell the truth and that must be emphasized.

EXAMINE THE PLEA BARGAIN CAREFULLY

- It generally contains an insurance policy in that if the witness fails to tell the truth some awful thing is going to happen to him..
- This also can be exploited - what other witness needs to be reminded to tell the truth separate and apart from the oath.
- The government does not even trust him!!!
- Normally, witnesses don't have to be threatened to tell the truth.

PRIOR CRIMINAL RECORD.

- Parole
- Bail
- Allocution at previous sentencing.
- All these things contain some promise that witness has inevitably failed to keep, so a promise to tell the truth in the present case should be viewed with caution.

SENTENCING HEARINGS.

- What facts were contested at the witnesses' sentencing?
- Obstruction of justice.
- Did the court make any findings that adversely reflect on the witness' credibility?

PRESENTENCE REPORTS.

- Witnesses' version of the offense.
Generally tends to minimize involvement
- Jencks Act.

DETENTION HEARINGS.

- Government's generally angry
- Said terrible things about the witnesses
- Ask if witness heard them

IMPEACHMENT

- Debriefings
- Post Arrest Statements
- Timing of Plea

ORGANIZING IMPEACHMENT

- To impeach or not to impeach?
- When to impeach?
- Early or late in cross-examination
- How to impeach?
- Theatrics of impeachment
- To show the witness the transcript or not

DRUG TRAFFICKING CONSPIRACIES: THE BEST DEFENSE IS AN AGGRESSIVE OFFENSE¹

Christine A. Freeman

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Christine_Freeman@fd.org

It used to be that a “caught-inside” burglary was the prime example of a criminal defense attorney’s unwinnable case. Makes me feel kind of nostalgic: Oh, for the days of quiet little one-day trials, where probation would still be an option at the end of the trial and where sometimes the prosecutors would make mistakes that actually counted. But nowadays I know, even without Learned Hand’s characterization of conspiracy as “that darling of the modern prosecutor’s nursery,” *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.), that “the government currently enjoys substantive and procedural advantages in [drug] conspiracy trials that are unparalleled anywhere else in the criminal law.” Kevin Jon Heller, *Whatever Happened to Proof Beyond a Reasonable Doubt: Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 STAN. L. REV. 111, 111-12 (1996). In this particular type of criminal case, more than in any other, prosecutors are permitted to forum-shop through the “any jurisdiction” rule; are permitted liberal joinder of defendants despite the obvious prejudice of the “spillover” effect of clearly separate evidence; may rely solely on circumstantial evidence and argumentative inferences or on the direct testimony of unreliable convicted felons with “contingent” plea agreements; may introduce innuendo as substantive evidence through the coconspirator hearsay exception; may obtain draconian sentences for defendants based on the “relevant conduct” of other people; and may successfully defend appellate attack on marginal cases despite the obvious injustice of the convictions and sentences imposed in them.

Under these circumstances, it is not surprising that for many of our clients, the primary “trial strategy” when faced with drug conspiracy charges is to seek the “substantial assistance” of a plea agreement and downward departure under U.S.S.G. § 5K1.1. Pity the clients who have nothing to offer. They, of course, must often go to trial. What’s the appropriate strategy then?

In an uphill battle, the best (if not the only) defense is a strong offense. In the course of discovering and refining the theory of your case for trial, you should employ a three-step offensive defense: (1) identify and lock in the government’s case by compelling complete discovery and filing motions that force the prosecution to commit itself to the court as to what its case will be; (2) keep evidence out by filing motions that, if successful, will prohibit the introduction of each part of the prosecution’s case; and (3) discredit what remains by investigating and preparing affirmative evidence attacking the accuracy of evidence and credibility of witnesses. Implicit in each of these three steps is your secondary goal—to make the government *work*, and work *hard*, every step of the way.

Part One of this article and the first section of Part Two (appearing in the next issue) will focus on pretrial motions practice. Although the motions discussed should be considered for filing in any federal criminal case, they take on even greater importance in drug conspiracy cases, particularly where the evidence of your client's involvement is weak. The balance of Part Two will include coverage of *Pinkerton* liability issues and defense theories such as mere presence, innocent association, and buyer-seller relationship.

LOCKING IN THE GOVERNMENT'S CASE

Identify the Government's Witnesses, Evidence, and Strategy. Obviously, you should start any trial preparation with a thorough review of the discovery materials you've received from the government. The government's performance of its discovery obligations under Fed. R. Crim. P. 16¹ and under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny² should enable you to identify the following: (1) the case agent and what direct involvement he or she has had in the investigation and preparation of the case for trial (important if you have impeachment evidence against the agent); (2) the other law enforcement agencies and agents involved in various activities during the investigation (important if a particular law enforcement agency or agent is notorious for bad behavior during, for example, searches or interrogations); (3) the chronology of significant events in the offense and investigation, including the dates, times, locations, and participants involved in those events (e.g., drug buys, traffic stops and follow-up searches, search warrant executions, state criminal arrests); (4) the physical evidence that the prosecution will seek to introduce (particular drugs, drug tests, hotel records, "ledgers" or other incriminating papers, phone records, plane tickets, videotapes,³ etc.) and the witnesses used to establish the foundation for and relevance of this evidence; (5) the identity, criminal records, payments and plea agreements, and probable testimony of cooperating codefendants and informers; and (6) the statements and bad acts of your own client which the prosecution intends to use against him or her. This review, in combination with your own investigation of the case, should allow you to predict the substance of the government's case against your client.

Move to Compel Disclosure of Any Missing Information. If you cannot generally cover the six areas listed above after looking over the discovery you've received, then you need more discovery. Often, your own experienced review of the materials will tell you what else is, or should be, out there—search warrant applications and returns, *Miranda* waiver forms, additional statements by your client, information from local law enforcement files, agents' rough notes, etc.

In formulating your motion to compel, be expansive in your definition of "information in the prosecution's possession." For example, the presentence reports (PSRs) of testifying witnesses are sometimes in the government's possession and, under certain circumstances, may qualify as *Brady* material that must be disclosed. The PSR of a government witness may contain valuable impeachment information, including the witness's account of his or her offense of conviction and a more complete description of his or her criminal record than that indicated in the government's previous disclosure.⁴ Other pieces of information in a cooperating witness's file that you should request include the cooperation agreement, documentation of inducements and payments, polygraph examination results, and information

on prior use of the witness. For more on this, see Hugo Rodriguez & Timothy Cone, *Informants Against Your Client: Impeaching Cooperating Witnesses*, DEFENDER'S ADVOCATE, Summer 1999, at 3.

To succeed in motions to compel discovery (and to seek sanctions for incomplete discovery), you must put the government on notice as soon as possible of what information is missing and of your demand for it. Most courts require some good faith attempt to resolve a discovery dispute informally before they will get involved. See, e.g., *United States v. Baumwald*, Crim. No. 89-00002-P, 1989 WL 58696 (D. Me. May 26, 1989) (order setting out procedure for defining and resolving discovery disputes); see also *United States v. Cravero*, 545 F.2d 406, 420 (5th Cir. 1976) (“[T]here is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production.”). However, a simple letter setting out the demand—and the government’s subsequent failure to respond to the letter—should establish the unsuccessful good faith effort to resolve the matter.

Seek Sanctions for Non-Disclosure of Required Information. Although Fed. R. Crim. P. 16(d)(2) permits imposition of sanctions for discovery violations, most courts require a flagrant violation and prejudice to a defendant before sanctions will be imposed. Courts will consider and weigh a number of factors before determining what remedy is appropriate for a discovery violation. These factors include: (1) the reasons for the government’s delay in disclosure; (2) the extent of prejudice to your client caused by the delay; (3) the feasibility of curing the prejudice by various methods; (4) the importance of the evidence to the government’s case; (5) the availability of effective alternative sanctions other than suppression or dismissal to remedy even a flagrant violation; and (6) whether the prosecutor acted in bad faith in committing the violation. See *United States v. Hasting*, 126 F.3d 310, 317 (4th Cir. 1997); *United States v. DeCoteau*, 186 F.3d 1008, 1010 (8th Cir. 1999); *United States v. Fernandez*, 780 F.2d 1573, 1576 (11th Cir. 1986); *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312-14 (11th Cir. 1985).

Where the government, acting in bad faith, has actually destroyed or lost evidence that is potentially helpful to a defendant, a due process violation has occurred. *Arizona v. Youngblood*, 488 U.S. 51, 56 (1988). A defendant may obtain appropriate sanctions if he or she can show that: (1) the government acted in bad faith in failing to preserve the evidence; (2) the exculpatory value of the evidence was apparent before its destruction; and (3) the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means. *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996).

If you have an argument that sanctions are appropriate, make it. Make the government work! And, under the right circumstances, the court might just order suppression of the missing evidence, or even dismissal of the indictment. See *United States v. Elliott*, 83 F. Supp. 2d 637 (E.D. Va. 1999); *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979); *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993); *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994). If the judge won’t

order suppression or dismissal, consider asking for a “missing evidence” instruction. *See, e.g.*, EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* §§ 72.15-.16.

Obtain Written or On-the-Record Commitments from the Government. Even if you have no doubt as to the substance of the case against your client, work to obtain commitments from the government, either in writing or on the record, as to what its evidence will be. Doing this will, obviously, help you prepare for the trial. More importantly, it will present obstacles to any later attempts by the government to surprise you with changes in its theory of the case, its trial strategy, or the anticipated testimony of its witnesses. This technique will also limit the government’s ability to support the introduction of evidence of your client’s bad acts, coconspirator statements, and changes to the description or definition of the conspiracy.

Forcing the government to commit can be done in part through filing pretrial motions concerning issues that will lead the court to request responses on the record. Preferably, such motions should force the prosecution to provide written responses detailing the evidence, witnesses, and theory of prosecution. A partial listing of motions to consider filing, each of which is discussed further below, includes: (1) a motion for a bill of particulars; (2) a motion for severance of counts or defendants under Fed. R. Crim. P. 8 and R. 14; (3) a motion in limine attacking admission of bad acts evidence under Fed. R. Evid. 404(b); (4) a motion in limine attacking admission of alleged coconspirator statements under Fed. R. Evid. 801(d)(2)(E); and (5) a motion to compel disclosure of the identity of any informers. Other pretrial issues which may warrant evidentiary hearings include motions for a *Daubert* hearing on the admissibility of the prosecution’s proposed experts or scientific tests, motions to dismiss for pre-indictment delay, or any of the motions permitted under Fed. R. Crim. P. 12(b)(1).

Bill of particulars. Fed. R. Crim. P. 7(f) authorizes trial courts to direct the government to file a bill of particulars, a matter in which the courts have broad discretion. *Will v. United States*, 389 U.S. 90, 98-99 (1967). Of course, the courts of appeals repeatedly state that a bill of particulars should be granted only in cases in which the defendant needs the information to adequately prepare a defense, to minimize surprise at trial, or to avoid double jeopardy. *See* 1 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE CRIM.* 3D § 129 nn.15-16, 18 (1999). However, many appellate courts have also held that in conspiracy cases, bills of particulars may be granted to disclose the names of the unindicted coconspirators in cases in which the government plans to use them as witnesses. *Id.* § 129 n.34. Where a large number of acts have been attributed to coconspirators in the indictment, the court may order a bill of particulars identifying, for each relevant paragraph of the indictment, which coconspirator performed the specified acts. *See United States v. Hsia*, 24 F.3d 14, 31 (D.D.C. 1998).

Severance. Frequently, our clients are charged in multi-defendant indictments with both drug conspiracy and substantive drug offense charges. Fed. R. Crim. P. 8(a) permits joinder of offenses against a defendant when they (1) are of the same or similar character; (2) are based on the same act or transaction; or (3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Rule 8(b) permits multiple defendants to be charged by a single indictment “if they are alleged to have participated in the same act or transaction or in the same series of acts or

transactions constituting an offense or offenses.” Rule 14 permits severance of defendants or counts “[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together” Although appellate courts routinely hold that consideration of a motion to sever under Rule 14 is well within a trial court’s discretion, this holding is almost always coupled with the observation that denial of such motion will be reversed only where the movant has shown that he or she suffered substantial prejudice due to the joint trial. *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984); see 1 WRIGHT, *supra* page 22, § 227.

In determining whether to grant severance of charges,

courts are directed to examine “whether the charges are laid under the same statute, whether they involve similar victims, locations, or modes of operation, and the time frame in which the charged conduct occurred so that the rule of joinder does not become a license to join any and all charges made against a single defendant, no matter what their interconnection One point seems both clear and prudent: A vague thematic connection among offenses may not support joinder.

United States v. Buchanan, 930 F. Supp. 657, 662 (D. Mass. 1996). Another significant factor is whether the evidence required to prove one offense would be admissible at a trial on the other charges. See, e.g., *United States v. Holloway*, 1 F.3d 307, 310-11 (5th Cir. 1993); *United States v. Lewis*, 787 F.2d 1318, 1321-23 (9th Cir. 1986), *as amended*, 798 F.2d 1250; *United States v. Edwards*, 700 F. Supp. 837, 838 (W.D. Pa. 1988); *United States v. Massaquoi*, No. Crim. A 99-644-2, 1999 WL 1241089, slip op. at 1 (E.D. Pa. Dec. 13, 1999); see generally 1 WRIGHT, *supra* page 22, § 222.

To argue for severance of your client’s case from that of another defendant, you will have to show either that the cases were incorrectly joined in the first place or that “there is a serious risk that a joint trial would compromise a specific trialright of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Potential grounds for severance arise where (1) a codefendant’s statement that the prosecution intends to introduce contains information that implicates your client, in violation of *Bruton v. United States*, 391 U.S. 123 (1968), see *United States v. McKay*, 70 F. Supp. 2d 208, 213 (E.D.N.Y. 1999); (2) a codefendant is willing to testify and exculpate your client, *United States v. Cobb*, 185 F.3d 1193, 1195 (11th Cir. 1999); (3) your client and a codefendant have antagonistic defenses, *United States v. Mayfield*, 189 F.3d 895, 899-900 (9th Cir. 1999); or (4) joinder causes certain management problems for the court, see *United States v. Casamento*, 887 F.2d 1141, 1151-52 (2d Cir. 1989). See generally 1 WRIGHT, *supra* page 22, §§ 223-226.

Motion in limine regarding Fed. R. Evid. 404(b). Rule 404(b) requires the government, upon request by defense counsel, to give “reasonable notice in advance of trial” of “the general nature” of “other crimes, wrongs, or acts” of non-offense misconduct by the defendant which the government intends to introduce in its case-in-chief. Although Rule 404(b) prohibits the introduction of such evidence “to prove the character of a person in order to show action in conformity therewith,” the evidence may be “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” The notice of intent to introduce such

evidence should include a description of the proposed evidence sufficiently detailed to fairly apprise a defendant of the general nature of the conduct, and sufficiently clear to allow pretrial resolution of its admissibility. *United States v. Barnes*, 49 F.3d 1144, 1148-49 (6th Cir. 1995); *United States v. Lampley*, 68 F.3d 1296, 1300 n.4 (11th Cir. 1995).

Although there are variations among the circuits of the formula used to evaluate Rule 404(b) evidence, generally courts consider whether: (1) the evidence is relevant to a matter in issue other than the defendant's character; (2) the act has been established by sufficient proof to permit a finding that the defendant committed it; and (3) the probative value of the evidence is substantially outweighed by its undue prejudice under Fed. R. Evid. 403. *United States v. Zapata*, 139 F.3d 1355, 1357 (11th Cir. 1998); cf. *United States v. Trenkler*, 61 F.3d 45, 52 (1st Cir. 1995); *United States v. Liefer*, 778 F.2d 1236, 1242 (7th Cir. 1985); *United States v. Baker*, 82 F.3d 273, 276 (8th Cir. 1996); *United States v. Wilson*, 107 F.3d 774, 782 (10th Cir. 1997). The probative value of the evidence is often weighed against the government's "need" for the evidence. Thus, where the government does not have overwhelming proof on the issue to which the Rule 404(b) material relates, or even has a weak case on that issue, the impetus for its admission is greater. See *Zapata*, 139 F.3d at 1358. "In other words, if the government can do without such evidence, fairness dictates that it should; but if the evidence is essential to obtain a conviction, it may come in. This may seem like a 'heads I win; tails you lose' proposition, but it is presently the law." *United States v. Pollock*, 926 F.2d 1044, 1049 (11th Cir. 1991).

In drug conspiracy cases, the prosecution may contend that a prior similar act of drug-related conduct is admissible to show a defendant's knowledge of or intent to commit the charged drug offense. "A defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue." *Zapata*, 139 F.3d at 1358. "Courts focus on the degree of similarity between the charged offense and the prior acts A greater degree of similarity increases the relevance of the prior acts." *United States v. Maisonneuve*, 954 F. Supp. 114, 116 (D. Vt. 1997) (holding prior conviction for criminal possession of controlled substance to be "sufficiently dissimilar to the charged offense as not to be relevant"); cf. *United States v. Jones*, No. 98-40040, 1999 WL 318147 (D. Kan. Feb. 11, 1999) (permitting admission of 1992 conviction for possession of cocaine and of 1994 traffic stop that led to an arrest for heroin possession).

Where the defense at trial will not address knowledge or intent, you can make a strong argument that Rule 404(b) evidence should not come in. See *United States v. Paniagua-Ramos*, 182 F.R.D. 376, 378 (D.P.R. 1998) (defendant's alibi defense "does not dispute his knowledge or intent" but rather "disputes his physical whereabouts at the time of the crime" and thus proposed Rule 404(b) prior acts were inadmissible).

However, Rule 404(b) does not prohibit the use of "other acts" that are "inextricably intertwined" with the offense charged. *United States v. Richardson*, 764 F.2d 1514, 1521-22 (1st Cir. 1985). Thus, in a drug conspiracy case, be prepared for the government to argue that the challenged conduct is

in furtherance of the conspiracy itself, i.e., it is “part of the very [criminal] act charged.” *United States v. Concepcion*, 983 F.2d 369, 392 (2d Cir. 1992); *see also United States v. Treff*, 924 F.2d 975 (10th Cir. 1991) (evidence of defendant’s shooting of wife 2½ hours before firebombing of defendant’s former boss’s home admissible where shell casing from gun used in shooting found at firebombing site).⁵

Whatever the outcome, a hearing on the admissibility of the proposed Rule 404(b) evidence should provide insight into the government’s trial strategy and its theory of the case, and may succeed in locking in that theory. This is because, as the Third Circuit has observed,

it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact “that is of consequence to the determination of the action.” Fed. R. Evid. 401. And it is likewise advisable for the trial court to place on the record a clear explanation of the basis for its ruling on the admission of the evidence. Not only do these procedures help to ensure that sensitive Rule 404(b) rulings are made with care (and thus to diminish the likelihood that these rulings will result in reversals), but these procedures greatly assist the process of appellate review. Consequently, although the language of Rule 404(b) does not require such procedures, our cases have emphasized their usefulness.

United States v. Murray, 103 F.3d 310, 316 (3rd Cir. 1997); *see also United States v. Hardwell*, 80 F.3d 1471, 1488 (10th Cir. 1996) (prosecution “must precisely articulate the purpose for which the evidence is offered, and the trial court must specifically identify the purpose for which it is admitted”).

Even if the trial court defers ruling on the admissibility of the proposed Rule 404(b) evidence until the trial is underway, the request for the ruling may impose some limits on the government. The government may be prohibited from mentioning the evidence during voir dire or opening argument, and from seeking to introduce such evidence without first approaching the bench. *United States v. Lee*, 972 F. Supp. 1330, 1340 (D. Kan. 1997); *see also United States v. Rosse*, 418 F.2d 38, 41-42 & n.4 (2d Cir. 1969) (government may not introduce “bad acts” evidence relevant to matter not yet put in issue by defense).

Motion in limine regarding coconspirator statements under Fed. R. Evid. 801(d)(2)(E). Under Rule 801(d)(2)(E), “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy” is not considered hearsay; consequently, it is admissible as substantive evidence against a defendant. The Supreme Court has held that where the requirements of this rule are satisfied, the proponent of the statement does not have to show unavailability of the witness and that this admission does not violate the Sixth Amendment right to confrontation of witnesses. *United States v. Inadi*, 475 U.S. 387, 391 (1986). The Supreme Court has also held that there is no need for an independent inquiry into the reliability of the statement. *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987).

To permit admission of such a statement, the trial court must determine whether (1) a conspiracy existed; (2) your client and the declarant both took part in the conspiracy; and (3) the statement was made in the course of and in furtherance of the conspiracy. *United States v. Goins*, 11 F.3d 441, 442 (4th Cir. 1993); *United States v. Monus*, 128 F.3d 376, 392 (6th Cir. 1997); *United States v. Perez*,

658 F.2d 654, 658 (9th Cir. 1981); *United States v. Owens*, 70 F.3d 1118, 1123 (10th Cir. 1995). The party offering the statements, be it the government or the defense, has the burden of proof to establish these factors by a preponderance of the evidence. *Bourjaily*, 483 U.S. at 176. The hearsay statements may themselves be considered as part of the proof to establish these factors, *id.* at 181, but are not by themselves sufficient, *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993). A “liberal standard” is used to determine if the statement was made in furtherance of the conspiracy. *United States v. Beale*, 921 F.2d 1412, 1422 (11th Cir. 1991).⁶ Further, only a slight connection of your client to the conspiracy is required for admission of the statement. *United States v. Paris*, 827 F.2d 395, 400 (9th Cir. 1987). Even a statement made before your client joined the conspiracy may be introduced against him or her, if there is evidence of his or her subsequent knowledge and willingness to participate in the conspiracy. *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1224 (5th Cir. 1994). However, a statement made prior to the existence of the conspiracy is clearly not admissible under Rule 801(d)(2)(E). *United States v. Garcia*, 13 F.3d 1464, 1473 (11th Cir. 1994).

Exactly when the trial court must make such determinations appears to be a discretionary matter. In *Bourjaily*, *supra*, the Supreme Court declined to express an opinion on “the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial.” 483 U.S. at 176 n.1. In *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979) (en banc), the former Fifth Circuit held that the trial court has a duty to make findings on these factors upon appropriate motion. Many circuits adopted the procedure described in that opinion, and require, or address the requirement of, a “*James* hearing.” For example, the Tenth Circuit has held that the “preferred order of proof” is for the district court to hold the *James* hearing prior to admission of the statement. *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1242 (10th Cir. 1996). Consequently, you should request a hearing prior to trial. However, most circuits have also held that the trial court may defer its ruling and may provisionally admit the statements with the cautionary caveat that the evidence must “connect up” during the trial. *Owens*, 70 F.3d at 1123; *United States v. Allison*, 908 F.2d 1531, 1534 n.2 (11th Cir. 1990); see *Gonzalez-Balderas*, 11 F.3d at 1224. But, the court should do so only where it “finds [the *James* pretrial hearing] order of proof impractical.” *Gonzalez-Balderas*, 11 F.3d at 1224. Finally, the district court should rule on the admissibility of a coconspirator’s statement on the record, but out of the presence of the jury. *United States v. Hester*, 140 F.3d 753, 758 (8th Cir. 1998).⁷

Disclosure of informer’s identity. Although it is generally established that the government has a qualified privilege to withhold the identity of informers and other information related to investigative techniques, such information must be disclosed when it is relevant and helpful to the preparation of a defense. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). The defense motion for disclosure must provide sufficient detail to establish that the informer may be able to give testimony necessary to a fair determination of the guilt or innocence of your client. You will have the burden of establishing the necessity for disclosure. *United States v. Moreno*, 588 F.2d 490 (5th Cir. 1979). However, the government’s mere assertion of the “informer privilege” will not end the issue. Rather, at the very least, the government must provide information to the court, to be considered in camera, of the alleged need to continue to keep the information confidential. *United States v. Weir*, 575 F.2d 668, 672-73 (8th Cir.

1978), *appeal after remand*, 597 F.2d 648 (8th Cir. 1979). The court must then balance your client's specific needs for the information in order to prepare a defense against the public policy considerations of the "informer privilege." *Roviaro*, 353 U.S. at 62.

If the informer can be characterized as a "material witness" to the events of the offense itself, to the identity of the perpetrator of the offense, or to the potential defense of entrapment, then disclosure is required. See *United States v. Gomez-Rojas*, 507 F.2d 1213, 1219 (5th Cir. 1975); *United States v. Eddings*, 478 F.2d 67, 69-70 (6th Cir. 1973). Similarly, disclosure is required where the informant is either a participant or the only non-participant eyewitness to the offense other than the government agents. *United States v. Roberts*, 388 F.2d 646, 650 (2d Cir. 1968); *United States v. Barnett*, 418 F.2d 309, 311 (6th Cir. 1969); *United States v. Barnes*, 486 F.2d 776, 779 (8th Cir. 1973); see *United States v. Brodie*, 871 F.2d 125, 128 (D.C. Cir. 1989).

In addition to filing some or all of the formal motions described above, try to pin down even the information you have received off the record from the prosecutor. If, in informal discussions, the prosecutor has given a general description of the government's theory of prosecution on one or more counts or of expected testimony, confirm the details of those conversations in writing. Close your letter with a specific request that the prosecutor notify you if any of these predictions change or if any of your characterizations are inaccurate. Then, be prepared to assert the assurances contained in the letter in objecting to any changed or new theory or testimony presented by the government in court.

This article has focused thus far on how to obtain the information you need to defend your client, and on how to force the government into revealing its theory of the case. Once you have gathered this information, you can work both to keep out the government's evidence, through motions to suppress and motions in limine, and to develop your own theory of defense. These topics will be the focus of Part Two, appearing in the next issue of *The Defender's Advocate*.

FOR FURTHER READING

The number of research resources available for drug cases is quite extensive. For a partial listing, call the Defender Services Division Training Branch at (800) 788-9908 and request a copy of "Drug Cases—Resources;" a resource list is also available for conspiracy cases generally.

For more on pretrial motions practice, including a motions checklist and sample letters and motions regarding discovery, request both *Federal Criminal Pretrial Motions*, in 2000 WINNING STRATEGIES FOR DEFENDING FEDERAL CRIMINAL CASES 52 and the resource list for motions practice.

NOTES

1. This article originally appeared in the Summer 2000 issue of *The Defender's Advocate*, the periodic newsletter published by the Defender Services Division Training Branch. If you would like to subscribe to it, please mail to the Training Branch a letter, on your office letterhead, stating that you are a member of the CJA panel in your district and requesting that you be placed on the mailing list. Please provide your e-mail address.

2. Briefly, Fed. R. Crim. P. 16 obligates the prosecution to disclose, upon the request of the defendant, the following: statements of the defendant; the prior record of the defendant; documents and tangible objects in the government's possession which are material to preparation of the defense, are intended for use as government exhibits, or were taken from the defendant; reports of examinations and tests in the government's possession which are material to preparation of the defense or intended for use by the government; and the identity of expert witnesses, their qualifications, and their opinions and the bases for them. Note, however, that making the discovery requests permitted under Rule 16(a)(1)(C) or (D) will trigger a reciprocal discovery obligation under Rule 16(b)(1) to disclose the same types of materials that you have requested.

3. See, e.g., *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (prosecution must disclose deals or other inducements offered to government witnesses); *United States v. Bagley*, 474 U.S. 667, 678 (1985) (prosecution's duty under *Brady* includes obligation to disclose contingent inducements to informants which would be helpful in cross-examination); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (individual prosecutor has responsibility to learn of any favorable evidence known to others acting on government's behalf in case).

4. If your case involves videotapes or audiotapes which the government has turned over, don't wait to view or listen to them—often they provide the best defense. My office had a case in which we relied heavily on a videotape of an alleged drug transaction to obtain an acquittal on a substantive drug distribution. After repeated views of the videotape, it became clear that the testifying codefendant/snitch had gone to his car trunk and taken something out of it before meeting with our client (the alleged drug source), he had balled up his hand as if he already had something in it while he walked toward our client, and his conversation with his customer (the original informer) before and after the alleged drug distribution supported our argument that he wanted to hide any source of drugs from the customer and emphasize his own importance as a link to a greater source.

5. Several approaches have been considered by courts for determining whether or not such information should be provided to counsel seeking to impeach such witnesses. These approaches and other concerns about the "court document" character of PSRs, the inapplicability of *Jencks* to reports not in the government's physical possession, and the appropriate time frame for *Brady* disclosures are set out in *United States v. Beckford*, 962 F. Supp. 780 (E.D. Va. 1997).

6. If, despite your best efforts, the court rules against your client and finds the proposed Rule 404(b) evidence to be admissible, the court must give a limiting instruction concerning its use. "Extrinsic evidence of past bad acts is admissible to establish intent, provided the judge offers a limiting instruction to the jury to the effect that the evidence may not be used to establish that the defendant acted in conformity with the past behavior." *United States v. Costa*, 947 F.2d 919, 925 (11th Cir. 1991). Be sure to request the instruction if the court does not give it *sua sponte*.

7. A statement is "in furtherance of" the conspiracy if it promotes the objectives of the conspiracy, *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982) (though it need not be necessary to the conspiracy, *Beale*, 921 F.2d at 1422); or identifies the participants and their roles in the conspiracy, *United States v. Hitow*, 889 F.2d 1573, 1581 (6th Cir. 1989); or constitutes a boast relevant to the conspiracy, *United States v. Green*, 180 F.3d 216, 223 (5th Cir. 1999) (but "mere puffing," narratives, discussions of past events, and idle chatter are not statements in furtherance of the conspiracy, *United States v. Lieberman*, 637 F.2d 95, 102-03 (2nd Cir. 1980); *United States v. Roberts*, 14 F.3d 502, 514-15 (10th Cir. 1993); *United States v. Means*, 695 F.2d 81, 8181 (5th Cir. 1983)); or indicates future intent relevant to the conspiracy, *Roberts*, 14 F.3d at 515 (10th Cir. 1993). A statement by a drug dealer to a drug customer that identifies the drug source is also in furtherance of the drug conspiracy. *United States v. Paris*, 827 F.2d 395, 400 (9th Cir. 1987).

8. If the court does permit the government to introduce coconspirator statements under Rule 801(d)(2)(E), be prepared to impeach the statements. Using Rule 806, you can attack both the statements themselves and the credibility of the declarant just as if the declarant had testified in person. Even when you are sure a coconspirator will not testify at trial, your pretrial investigation should still cover the coconspirator's prior convictions, inconsistent statements, bias and motive, and opinion and reputation. For more on this, see Barbara Bergman & Nancy Hollander, *Tips for Trial: Dealing with Those Pesky Little Rules of Evidence*, in 1 NATIONAL SEMINAR FOR FEDERAL DEFENDERS 265, 270 (Federal Judicial Center 2000) (available from the Federal Defender Training Group).

CHAPTER ONE – THE ELEMENTS OF PERSUASION

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Introduction

This book is a sequel to *Examining Witnesses*, which I wrote in 1993. I began that book by noting that an architect first imagines a complete house, then uses experience, skill and artistry to devise the components that will become the completed project. I divided trial preparation and presentation into parts -- direct examination, cross-examination, demonstrative evidence, and presentation of expert witnesses.

Now, I want to take the analysis a step farther. Most of this book deals with trials, but its themes are relevant to appellate practice as well. This book goes farther in one sense because it deals with argument as well as witness presentation. In another sense, it moves behind the elements of trial presentation to the elements of persuasion itself. This is not a new undertaking. For 2,500 years, lawyers, orators, philosophers, and teachers have analyzed these elements. Their studies are entitled “rhetoric,” or “semiotics”. I have freely borrowed, and will often credit, their insights.

A Note on the Organization of this Book

Chapters One and Two are about the advocate as story-teller, and they refer to the classical rhetorical tradition in which Williams was educated and of which he was a master. Chapter Three, Part One talks about opening statement, and Part Two is a fine example: Williams’ opening in *United States v. John Connally*. I have “split the screen” for Part Two, to comment on the techniques he is using as the opening proceeds. In this way, I try to make this fine example teach us how to accomplish the same goals that Williams did.

Chapter Four talks about tactics during trial. Chapter Five, Part One, considers closing argument. Using the same technique as in Chapter Three, Part Two is the annotated closing argument in *United States v. Connally*.

Chapter Six, Part One talks about argument to judges. Many lawyers think that the principles of argument to the court are entirely different than those for jury argument. It is certainly rare for an advocate to have the mastery of both forums as did Edward Bennett Williams. But I am convinced that his techniques are in fact based on the same principles. In that spirit, Part Two is an annotated version of two Supreme Court oral arguments he made on the same day in 1969.

The Dialectic of Advocacy

A trial is an exercise in dialectic, in the clash of opposites. I encountered these words “dialectic of advocacy” my first day in law school, from Geoffrey C. Hazard, and from the casebook that he and David W. Louisell wrote. Advocates present two, and sometimes more, opposing versions of events. A trier -- judge or jury -- decides. In this book, I speak mostly of jury trials until Chapter Six, when I add some thoughts on persuading judges. The jury’s decision -- its speaking of the truth, its ver-dict -- is sometimes “general” and sometimes “special”. Most special verdicts simply answer some general questions, such as “do you find by a fair preponderance of the evidence that John Smith proximately caused the death of Lisa Jackson?” The essential opacity of verdicts is a hindrance when we want to think about persuasion. Jury verdicts are evanescent, to be interpreted fleetingly by the participants, but leaving no firm and permanent record that tells us how the jurors parsed the evidence and decided what was true.

By contrast, think of the judicial opinion. Appellate judges write at length about their reasoning -- in most cases. Even trial judges are compelled to issue findings and conclusions, though these may be party-drafted and not give us much insight into the actual process of deciding. Studies of the judicial opinion abound, along with theories about how opinions should be parsed. Scholars write books, symposia consider the meaning and interpretation of “text,” and schools of jurisprudence form over whether the categories of judicial thought contain anything at all. The point, however, is that there are texts that permit such study.

When we ask how to persuade jurors, we are forced to rely upon secondary sources. We can read psychological studies of juror behavior. We can hire trial consultants to match the demographics of our prospective jurors, and then “test” themes for trial. We can draw upon our experience from living and working in a community, to know the attitudes and values that jurors are likely to bring to court -- or if we are strangers come simply to try a case, we can ask others to share their insights.

In writing this book, I assume you have some or all of these tools available to you. I assume that you will use juror questionnaires, effective voir dire, and all the other tools the judge will allow. Making that assumption puts my writing at a certain level of generality. I am talking about trials -- and in Chapter Six, appeals -- in general.

Talking about cases in general is useful, because there are enduring ideas about persuasion. These ideas took shape beginning in ancient Greece, and have been refined in use ever since. I will not trace the history of classical rhetoric, nor pay more than the customary passing homage to Aristotle. The ideas I share are valuable for their living power and not for their lineage.

By noting that trial is an exercise in dialectic, we are using another word for “adversary system,” or “clash of ideas.” Of course, the inequality of resources between opponents, or decider bias, or any number of other things, may make the adversary contest unequal. But our job is to understand that contest so that we may participate in it most effectively.

After all, the process assumes equality of resources. Sometimes, a fair judge in a criminal case will actually see that the resource balance is as equal as the system can make it. But the rhetoric of trials is filled with references to equality – giving each side a fair hearing, listening to all the witnesses, not making up your mind until you’ve heard it all. “You have been sworn as jurors to try the case between John Smith and Priscilla Jones,” or “do you solemnly swear or affirm that you will truly try the cause now on trial between the United States of America and Terry Lynn Nichols, and true deliverance make.” Everybody knows that Terry Lynn Nichols doesn’t have anything like the resources that the United States has, and even intoning the ritual oath seems to put him in a bad position. Judges confirm that the ritual and pomp of the courtroom may indeed give jurors the idea that the accused must have done something wrong, rather than conditioning them to be fair and impartial.

If your side is light on resources, then you must seize the advantages that the ideology of adversary procedure gives you. You act “as if” you really have a chance at victory. You try your case so that the jurors may seize hold of their duty and really go behind the façade built by unequal resources. To say this is not to deny the inequality, but to suggest a means to rise above it.

If you make a habit of defending underdogs, the system is always ready to lend you an ideology, the better to deny your client justice without the slightest regret. This is a paraphrase of one of Roland Barthes’ most trenchant observations, in his essay on criminal justice “Dominici, or the triumph of Literature.” Barthes writes, characterizing the Kantian “as if”:

la Justice . . . est toujours disposée à vous prêter un cerveau de rechange pour vous condamner sans remords, et . . . , cornélienne, elle vous peint tel que vous devriez être et non tel que vous êtes.

That is, the system that calls itself Justice is always willing to lend you a spare brain, in order to condemn you without remorse, and in the manner of Corneille, to paint you as you must be and not as you are. We treat the accused, no matter how poor and deprived of understanding, as though he were the conscious and willing author of his acts.

In its fundamental sense, dialectics underpins Darwin’s theory of natural selection, materialist theories of history, and indeed many visions of human progress. We speak colloquially but accurately about new ideas opposing old ones, and the social change that comes from such a confrontation. In the dialectical clash, the new synthesis contains elements of both opposing forces which have collided.

It is important to understand dialectics in this more general sense, because many advocates make the silly mistake of assuming that being an adversary means opposing every contention the opponent makes. I say “silly” because in almost every case, the two competing versions of events overlap significantly. You don’t want to attack at every point. Rather, you want to find the points of identity and difference. You will probably find a somewhat different point of reference from your adversary, from which the same events take on a different meaning.

In social life, we can illustrate this by talking about the American Revolution. Never mind the skeptics that say it wasn't a revolution at all. The colonists overthrew the monarchy and established a constitutional system that became the envy of the world. As the Revolutionary War song had it, "the world turn'd upside down." Yet the "new" system traced deep roots in the one it had replaced. Almost every provision of the new Constitution and its Bill of Rights echoed claims for justice that had been in circulation for at least a century. The system of justice itself carried forward most elements of the English one. We called it a revolution, but what we got was a synthesis of the new and the old.

So it is with trials. The jury's verdict gives a victory to one side or the other -- or maybe a little to both. But the story that the jury credits must take into account elements of the stories told by both sides. Asking the jurors to reject the opponent's case utterly, with not a single thought to any merit it may have, is to assume an unnecessary and probably impossible burden.

The Primacy of Story

Legal literature these days is filled with paeans to "the story," or "the narrative." Everyone has one. The jurors will find one. The advocate had better tell one. The judge will buy into one or make one up to provide a context for decision. The jurors are waiting for one, and once they have locked on to a tentative version of events, they will receive and process all later information with an eye to making it consistent with the story's framework. Does all of this talk about story represent a new insight? No. For thousands of years, writers on rhetoric have insisted on the primacy of topic, of invention.

In this history, dramatists have an easier time than lawyers. When Sophocles wanted to tell a story about just deserts and good intentions, he could move his characters around and put his chosen words into their mouths. A lawyer has to work with evidence of the past facts, limited by an ethical obligation and by the practical sanction that if the jurors (aided by your adversary) catch you telling a fib, they will punish you and your client for it.

In the most fundamental decisions of our daily lives, we put the story first -- it has primacy -- and from it draw conclusions about results and reasons. A few examples will make the point. In the Judeo-Christian tradition, the Bible begins with the story of creation. It continues with the Jews' sojourn in Egypt, and Moses' leadership. We are well into Exodus before God makes a covenant with his people, and Moses receives and transmits the law. The collective experience of a people -- that is, their story -- precedes resolution and revelation. The power of that story is shown again and again, and aspects of it are examined and re-examined to validate claims about morals, ethics and law.

In the New Testament, Jesus puts himself into the biblical story as the promised Messiah. His work on earth is the culmination of the same story, differently told. Jesus illustrates his teaching with stories that also form part of a basic cultural identity shared by many prospective jurors. Christian principles are, in short, also based on a series of stories. On

a somewhat parallel track, speaking of the western cultural tradition, Greek philosophy begins with an interpretation of nature – physis – and continues by overlaying norm – nomos.

In other cultures, this primacy of story is also apparent. Young Prince Siddartha travels, mingles, and endures for years before he is ready to announce his teachings. The Prophet Mohammed puts himself into the monotheistic New Testament tradition, as the last in a line of prophets.

I am careful not to generalize these insights into a supposed universal collective consciousness. We are talking about jurors in the United States at this moment in historical time, with all of their diversity, yet united in ways that the advocate must discover to persuade twelve of them. Other jurors, in other times and places, are socially conditioned in different ways. In each community where you try cases, the mix of jurors in the venire will be different, and from each venire will come a group with its own particular characteristics.

The classical studies of persuasion are vindicated by modern learning about human perception. I have expressed a central premise of that learning as “Deciders Perceive Whole Stories.” Jurors and judges decide cases based on a gestalt, or total picture, from which the decision occurs to them as a just resolution.¹

For the advocate, the task of persuasion involves several distinct skills. These were in classical rhetoric:² invention -- the choice of topic or story -- arrangement, style, memory (which includes using mnemonic devices and demonstrative evidence),³ and delivery. As Professor Balkin has said, “people attempting to solve a problem need a preexisting framework to get started. They need a way of characterizing a problem and a way of approaching the problem once it is identified.”⁴

We can also see the power of story by looking at trials in American history. True, some big cases in the television age blur this insight. Millions of Americans watched *People v. O.J. Simpson*, and Court TV has given gavel to verdict coverage of other trials. Some of these cases may qualify as cultural signposts, but they are tainted with elements both bathetic and boring -- soapoperific might be a good word.

No, I am speaking of trials that affected their generation, and in some measure shaped our vision of events and issues. In the Anglo-American tradition, trials have told enduring stories. Let me recall some of these, to introduce the next theme, which will of course be “how

¹ Michael E. Tigar, *Examining Witnesses* ch. 1 (1992)[hereinafter *Examining Witnesses*].

² See John Hollander, *Legal Rhetoric*, in *Law's Stories* 176 (Peter Brooks & Paul Gewirtz, eds. 1996)[hereinafter *Law's Stories*].

³ As discussed in *Examining Witnesses*, making your presentation memorable includes the use of prologues, loops and transitions in direct examination. *Examining Witnesses* ch 2.

⁴ J. M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *Law's Stories*, 211, at 214-15.

can each advocate discover in each case the point of reference from which a persuasive story is told?”

Stories in Famous Trials

In 1735, a colonial newspaper editor named John Peter Zenger published articles criticizing the colonial governor, William Cosby. Cosby got Zenger prosecuted for seditious libel, for it was a crime to criticize government. Zenger could have paid a fine, or perhaps issued an apology, and gone about his business. Zenger’s education and background suggest that he did not even write the offending material. The probable authors were his New York lawyers, John Chambers and William Smith. When an arbitrary judge disqualified the local lawyers from the case, Andrew Hamilton of Philadelphia undertook the defense.

Hamilton used a tactic later used by the English advocate Thomas Erskine, in the libel trials of the 1770s.⁵ He admitted that Zenger had published the articles, and called upon the jury to take unto itself the issue whether they were libelous or not. At that time, English (and colonial) judges believed that the libelous (and therefore seditious) character of the publication was a matter of law, and that the only jury issue was whether the defendant was responsible for the publication.

Hamilton’s theme was that – for the liberty of the subject – the only safe way to decide libel cases was by the jury’s general verdict. He thus spoke over the heads of the judge and prosecutor, urging the jurors in their own self-interest to decide the case, and in that interest to recognize that criticism of government was valuable.

The question before you, Gentlemen of the Jury, is not of small or private concern. It is not the cause of the poor printer, nor of New York alone. No! It may in its consequence affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty.

The jury acquitted, and of its verdict Gouverneur Morris said “it was the morning star of that liberty which subsequently revolutionized America.” Even though we may not remember the participants’ names, we recall the colonial struggles over a free press at some level – they form part of our modern sensibility about freedom of expression.

Another historic trial was that of John Brown.⁶ He made his reputation as a guerrilla leader of anti-slavery forces. On October 16, 1859, he led a small “army of emancipation” against the federal arsenal at Harper’s Ferry, Virginia, seeking to obtain arms for a slave revolt.

⁵ For a discussion of the semiotics of sedition trials in historical context, see Michael E. Tigar, *Crime-Talk, Rights-Talk and Doubletalk*, 65 *Tex. L. Rev.* 101 (1986). See also Michael E. Tigar, *The Trial of John Peter Zenger* (1986)(a dramatization).

⁶ On the John Brown trial and its semiotic/historical significance, see Robert Ferguson, *Story and Transcription in the Trial of John Brown*, 6 *Yale J. L. & the Humanities* 37 (1994), discussed in Robert Weisberg, *Proclaiming Trials as Narratives*, in *Law’s Stories* 61, at 79-82.

His force took hostages, but was finally dislodged and captured by a Marine detachment under General Robert E. Lee.

Brown was tried in a Virginia court for treason, murder and inciting slaves to rebel. He was convicted, and Virginia hanged him on December 2, 1859.

Brown knew that he would not be acquitted. He determined to use his trial to dramatize the irreconcilable division between the forces of slavery and those of freedom. He used the rules of evidence to exclude much consideration of his own personal, business and political past. He obtained leave of court to present his motivations and objectives. By the time of his trial, Brown was already known to abolitionist leaders, and had been praised by some of them, including Frederick Douglass.

Brown showed that he understood to whom he was speaking, and how to manipulate the symbols and devices of the courtroom. He was speaking over the heads not only of the judge and prosecutor, but of the jurors as well, to the broad audience of anti-slavery opinion. He denounced his captors and anyone who would endorse their cause as tools of a sinister force that held people in slavery. One could not, he argued, expect justice from anyone in that courtroom. Brown saw that the legislative and judicial developments of the 1850s had put the slavery issue beyond any hope of compromise. The slave states would secede, or the free states would impose an end to slavery. That was an historic inevitability, seen and preached by many.

Brown portrayed himself as symbolizing and prefiguring that historic inevitability. He did so eloquently. His self-portrayal elevated him to a shared place with Zenger and others. He became the symbol he sought to be.

Professor Robert Ferguson, who wrote a brilliant study of Brown's life and trial, has also described more generally what lawyers and parties are doing when they seek to persuade jurors to accept a story of events. He writes that "the struggle of attorneys to find the best accounts for their clients turns courtroom transcripts into excellent barometers of what is said and thought in a culture at any given moment of time."⁷ He notes that "jurors must first recognize the developing contours of a story to accept it."⁸ This theme – the historically and culturally defined relationship between speaker and listener – will be treated in Chapter Two. For now, we acknowledge that as advocates we must both study and embody the basic understanding of the world shared by most jurors. Sometimes we do that to ask jurors to validate that understanding; at other times we will ask them to look beyond it. But whether we accept or challenge, we are speaking in a context of shared meaning.⁹

⁷ Robert Ferguson, *Untold Stories in the Law*, in *Law's Stories* 84, at 87. This essay by Professor Ferguson tells the story of slaves on trial in Virginia in 1800 for rebelling. The story chillingly captures the slave leaders' grasp of the social, political and cultural significance of their trial.

⁸ *Id.* at 87.

⁹ *Id.* at 88.

Clarence Darrow and Dudley Field Malone, in the historic Scopes trial, knew they had little chance of a jury acquittal. They tried their case to the audience beyond the courtroom. William Jennings Bryan tried his case to that audience, and to the jurors as well.

Professor Ferguson notes that sometimes the story an advocate or party wants to tell is so challenging to accepted views that it is suppressed. In 1800, a group of slaves were tried for insurrection, convicted and hanged. The surviving record of their trial shows that their leaders were literate students of revolutionary rhetoric. They confronted the tribunal by acknowledging that its decision was inevitable. Yet their leader made clear where he stood by saying “I have nothing more to offer than what General Washington would have to offer, had he been taken by the British and put to trial by them.”

In the Oklahoma City bombing case of Terry Nichols, the defendant had been condemned by the media within hours after he was arrested. No juror in Colorado, where the case was moved, was unaware of the main outlines of the proposed government proof. The trial and death sentence of co-defendant Timothy McVeigh had generated more publicity in Colorado than in any other media market, including Oklahoma City.

The jury’s acquittal on the main counts of the indictment¹⁰ was the result of formulating a theme – a story, if you understand that means something based on evidence and not imagination – that put the evidence in a certain perspective. “Terry Nichols was building a life, not a bomb.” From there, we had to cross-examine every witness, blunt every bit of forensic evidence, and build a plausible alternative to the government’s theory.

You may tell me that your cases will never risk sundering a fragile American Union, as did that of John Brown, nor point toward a revolution as did that of Zenger. Hardly the point, I say. And these cases illustrate what I am saying. John Brown’s case could be seen as simply the trial of a desperate, bankrupt man who committed an ordinary crime and deserved to be punished for it. Indeed, one wonders why the prosecutors and judges did not make more of an effort to portray it so. Brown’s genius was to transform his criminal trial into a morality play about the most basic issues confronting the American people.

Every case you try should be about issues that move jurors. The plaintiff in your torts case seeks a fair deal from a corporation that ignores public health and safety. Your sexual harassment client wants corporate America to bring decent conditions to the workplace. If you are defending, the jury is the institution that can protect all of us from the expense of needless lawsuits and inflated claims. If you cannot summon up a moral to your story, better to settle the case or not to bring it at all. I am reminded of Mark Twain’s dedication to Huckleberry Finn:

¹⁰ The jury convicted of conspiracy and of involuntary manslaughter of federal agents. It acquitted of use of a weapon of mass destruction, arson of a federal building, first degree murder of federal agents and second degree murder of federal agents.

Notice

Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot.

Elements of Classical Rhetoric

We understand the primacy of story in human communication, perception and persuasion. We also know that jurors are moved to accept one story over another by emotional elements in the narrative. Rather than rely upon trial consultants to help us shape the story we will tell, we can profitably return to a classical understanding of persuasion. Great advocates, including Edward Bennett Williams, were schooled in classical rhetoric, and applied the lessons well.

We all employ “rhetoric” in the classical sense of persuasive discourse. This is what we do every day. We are in this regard like the man in Moliere’s play who exclaimed: “My goodness! For more than forty years I have been speaking prose without knowing it.”¹¹ When we speak we are, like it or not, condemned to signify. Our words, gestures and exhibits in court mean something to the jurors, just as they do in ordinary speech. But to become better persuaders, we must deconstruct or dissect our presentations. To do this usefully, we need a taxonomy -- words to describe what we are doing. We can then give those words content and meaning as we analyze the process of persuasion. By such analysis, we can do better as participants in the process. The utility of classical rhetoric is that the words lie ready to hand.

In the Western tradition, the study begins with Aristotle,¹² but its roots can be traced even earlier. Then Roman disciples such as Cicero and Quintilian enlarged upon the subject. Aristotle’s treatise on rhetoric contains an extensive discussion of emotions -- all to the end of understanding the role they play in persuasion.¹³

Classical rhetoric is divided into five parts, some of which we have already encountered. They are:

- Invention – *inventio* in Latin, *topos* in Greek – referring to the topic, point of view, and structure of argument. We might call this the choice of the basic story and its elements.
- Arrangement, or the order in which the argument will be presented. In Chapter Three, Part Two, we reproduce Edward Bennett Williams opening statement in *United States v. Connally*. Williams worked on the opening over several weeks, beginning with a planned order and then filling in details. Arrangement is important because you want your hearers

¹¹ In the French original, it is “Par ma foi! Il y a plus de quarante ans que je dis de la prose sans que j’en susse rien.” Molière, *Le bourgeois gentilhomme*, acte 1, scène 4

¹² Or perhaps earlier, if one credits the accounts of one Corax, who is said to have taught rhetoric in Siracusa. See source notes in *Examining Witnesses*, at 303, and works there cited.

¹³ See John Hollander, *Legal Rhetoric*, in *Law’s Stories* 176, at 181.

ready for the main message at the time you deliver it. In a symphony, the first movement generally is in sonata form; this convention helps the hearer to identify and trace the composer's themes as they are introduced and as they reappear.

- **Style.** From Roman times until early in this century, rhetorical “styles” were an object of detailed study. Writers thought that various styles -- varying in formality and mode of expression -- fit different settings and circumstances. It remains true that a jury trial calls forth a different style of discourse than an oral argument to a court, or a dinner-table conversation. However, a proper style begins with the advocate's own personality, rather than being something engrafted by study or imitation. In contemporary America, a more informal and direct style is appropriate than was the case even fifty years ago. Thus, the study of style for its own sake is self-defeating, for one may be tempted to adopt mannerisms that put barriers between the advocate and the jurors. Style may involve gesture and placement as well as figures of speech.
- **Memory.** The classical writers regarded memory as subsidiary to invention and arrangement.¹⁴ A part of memory has to do with the speaker, who must have learned the discourse well enough to pronounce it effectively. To assist, one might use mnemonic devices, from the Greek word for memory. Some speakers think to avoid the issue by writing out their openings and closings, or even all of their questions on direct and cross-examination. This is always a bad idea. Memory can also refer to being memorable, or remembered, or retained. In *Examining Witnesses*, I referred to ways in which a lawyer might put down markers that could later be recalled in argument, by using demonstrative evidence, vivid words, or particular forms of expression. This is the more important sense of memory -- fashioning the argument in ways that its main elements can be recalled. In jury trials, the jurors vote only after deliberating. Usually, this takes some time, and your champions in the jury room must have something to hold onto, to recall and to present to their opponents.
- **Delivery, the presentation.** One unites the other four elements at a specific time and place.

In Greece and Rome, at least among literate free citizens, the study of these principles was regarded as essential to participation in public discourse. Those who represented people or points of view in public forums studied these principles intensely. Their reported speeches, such as those of Cicero, still repay our careful study. There are many possible reasons why such study has lost pride of place in modern legal education. Perhaps the retreat of rhetorical study into formality and mannerism hastened its exodus. Perhaps the “case method,” which turned attention to appellate opinions rather than the process of persuasion, played a role.

The disappearance of education in rhetoric from law schools has robbed a generation of lawyers of tools forged long ago and honed in dutiful service. Properly understood, the study of rhetoric illuminates the intrinsic connection between discourse and reasoned decision. More

¹⁴ See also J. M. Balkin, *supra*, in *Law's Stories*, at 273 (notes). In this restatement of principles, I credit the essay by John Hollander cited above in *Law's Stories* at 181.

precisely, we can study the ways in which reasoned decision is helped or hindered by certain forms of argument.

We have all heard “rhetoric” used in a pejorative sense, often modified by “mere.” To say that a speaker uses “rhetorical flourishes” may not be a compliment. Neither this book, nor the proper study of rhetoric itself, provides recipes for exaggerated speechifying, much less for intentional distortion. It is true that the study of persuasion may be used to conceal deceit as well as to illuminate truth. In that sense, rhetoric may be value-neutral. Whether it is “good” or “bad” will depend on the purposes for which it is used. Identifying and defining “purpose” is one function of legal ethics. In the dialectic of adversary advocacy, the study of rhetorical principles helps truth to emerge through rigorous testing.

Invention: Principles of the Story

I have often urged lawyers to map out a closing argument in the very first stages of working on a case. I have received some irate letters from lawyers who wonder how one can do that without having all the facts in hand. Isn’t it irresponsible to be working on a closing argument so early? The answer is no.

Unless you are appointed by the court in a criminal case, you will make a decision to accept a client’s matter, or to file litigation. Inevitably, you do not know all the facts when you make this initial decision. You know only enough to commit resources, and to have a probable view of the theory on which relief is available. That is the point to imagine you are summing up. You will identify the holes in factual or legal research that need to be filled. Then every time there is action in the case, take a quick look and see that the overall theory you have developed still works. In working the case, you say its story over and over.

Let us look at an example of finding, developing and then telling the story.

The Air Force major sat in my office with tears in her eyes. She was about to be charged with sodomy and conduct unbecoming an officer and a lady . Conviction would ruin the career she had spent 22 years building, and might forfeit the pension she had earned and even send her to prison. The felony of sodomy, under the Uniform Code of Military Justice, includes any oral-genital contact between people of the same or opposite sex, whether married or not.

The Air Force proposed to charge that the major had carried on a two-year affair with a civilian woman, Pamela Dillard, who lived in her home. When the affair cooled, so the allegations went, the major demanded that the woman move out. When the woman refused, and instead threatened legal action, the major allegedly brandished a pistol and threatened her life.

Two lawyers – one military and one civilian – had urged the major to plea bargain. They couldn’t think of a story that might raise a reasonable doubt before the military officers who are the “jury” in a general court-martial. Of course, we made the pretrial arguments about

equal protection, privacy, and a Department of Defense policy that made private consensual sexual conduct none of the Air Force's proper concern. We made those arguments to protect the record in case an appeal was necessary. But at trial, those issues would not be our story, our moral drama.

The first lawyers on the case rightly saw that the testimony of the alleged lover/victim was, if believed, conclusive. The lover/victim, Pamela, had made consistent statements to civilian law enforcement officers about the alleged assault, and after several sessions with Air Force investigators had told the story of alleged sexual liaison in great detail.

We first had to ask to whom we would tell this story. In a general court-martial of an officer, the "jury" consists of up to nine officers who outrank the accused. So we would see colonels and lieutenant colonels. Each of these career officers would have a college degree and some post-graduate work. Each would have served in the Air Force for at least twenty years. They would all have some interest in military history and customs. They would look across the courtroom and see the major, with her medals, and see reflected a distinguished service record. Or, the military base being a fairly tight community, and the case having been covered by the media, they would already have some idea of the issues.

You will notice in all these historic cases that "to whom" must have been on the advocate's mind early on. To be sure, John Brown knew that the "in court" judgment would go against him. He was talking to somebody other than the roomful of deciders. In most cases, however, you will want the more immediate pleasure of victory. Andrew Hamilton wanted both the immediate and the long-term win – and he addressed the jury in terms that helped gain both.

In the usual case, you will anticipate facing a jury whose demographic composition is in a general way predictable. If that prediction displeases you, choose another forum to begin with, or seek to undo your adversary's choice.

In the major's case, we doubted that a gay rights approach would avail us. We were confident that the jurors would agree that privacy in sexual matters deserves respect, by the military itself and by individuals keeping their sexual preferences to themselves.

The standard of proof was "beyond a reasonable doubt." We might have made the classic defense error of analyzing the weaknesses of the prosecution's case, deciding how best to reveal and emphasize them, and stopping there. That would have been a mistake, as it is always a mistake for a defendant to rely solely upon weaknesses in the plaintiff's case. The jurors will, one must assume, apply the burden of proof. However, they will want a context – a how and a why.

The heart of prosecution's case would be testimony by Pamela, the alleged victim and sexual partner, describing in the same detail as at the preliminary hearing her sexual liaison with the major in Virginia, followed by Pamela's moving to San Antonio to share the major's house and bed. The prosecution would produce letters and cards allegedly from the major to

Pamela. Some of the letters were affectionate. Others were suggestive (“I can’t wait to see you face to face. Or face to”) One card was rather graphic, and spoke of tongues. A handwriting analyst was scheduled to testify.

In addition, the Air Force investigators who took Pamela’s statement would produce a prior consistent statement if necessary, and a San Antonio police officer would testify that Pamela had called and complained that the major had brandished a gun at her. A former (and perhaps now) lover of Pamela’s would say that she saw the major and Pamela being affectionate and that the major said at a public gathering that she was going to “marry” Pamela.

If we could undermine Pamela’s credibility, we could win. We would also have to deal with the corroborating evidence. It would not be enough merely to show that Pamela had some animus, bias, motive to falsify. It never is. All witnesses are biased, if only in favor of their own prior version. That prior version becomes “their truth.” We must show why the witness is not to be trusted on a point -- we must develop a reason.¹⁵

As we pondered, we received a gift. The prosecution produced Pamela’s journal for the year in question. The journal corroborated the brandishing charge -- for it contained an account consistent with Pamela’s present story -- but it proved the prosecution’s undoing. Here in Pamela’s hand was nearly a year’s worth of reflections -- the year leading up to her leaving the major’s house and a few weeks beyond. In the diary, Pamela confessed her hatred and resentment of the major. She described her dream as being able to live off someone else’s earnings. She explained that she wanted to live in the major’s house rent-free until she could get around to applying for medical school, and that by having a Texas residence she would avoid out-of-state tuition. She described filing a false insurance claim, and forging a signature on a medical school recommendation letter. She wrote of threatening to ruin the major’s career by “exposing” her as a lesbian. The diary was written in a hand that resembled in many ways the handwritten portions of the more salacious of the correspondence Pamela claimed the major had authored and sent.

I said that we needed to undermine Pamela’s credibility. Not quite. We needed to do that while maintaining the major’s dignity as a military officer. We were not going to put the major on the witness stand. In criminal cases, that is an acceptable option -- tactically and legally.¹⁶ The major sat throughout the trial in uniform with her medals on her chest. She faced the court members -- the military jury. Her response to the testimony being offered was visible. She did not shake her head, laugh, or otherwise display emotion. She was attentive, respectful, and at times dourly and subtly dubious.

In opening statements, I told our story. The major, having served for more than twenty years, was being accused by Pamela Dillard. Pamela Dillard’s story does not make sense, is contradicted by her own diary, and motivated by a demonstrable desire to inflict hurt. Perhaps knowing that Ms. Dillard’s story is not convincing, the prosecutors will bring other witnesses,

¹⁵ Examining Witnesses ch. 9.

¹⁶ Examining Witnesses ch. 5.

whom they claim add to Ms. Dillard's version. Not so. Everything these witnesses say depended on Ms. Dillard's credibility. Ms. Dillard's friend repeated what Ms. Dillard told her, using the excited utterance hearsay exception. A police officer summoned by Ms. Dillard days later could not repeat Ms. Dillard's story, but admitted that Ms. Dillard did not ask him to search the house for a gun, nor did he do such a search. He did check and see that in fact the major did not have a gun registered in her name. Photographs of Ms. Dillard and the major do not show them in any compromising positions, and the only one slightly suggestive showed the major – fully dressed – with her arm around a man.

The handwriting expert from the Texas Department of Public Safety would not, I said, be able to add anything. I left that part vague, because the expert's report was riddled with errors and we did not want to reveal the defense theory about the letters and cards.

Ms. Dillard's direct was predictable – describing sexual encounters with the major, and purporting to tell the story of their living together. Cross-examination took longer than the direct. I took Ms. Dillard one by one over the relevant parts of her diary.

One of Ms. Dillard's friends took the stand to describe a party in Virginia at which the major supposedly told the guests that she was going to marry Ms. Dillard. There were some pictures of the party, which showed fully-clothed people of both sexes smiling. The friend had not told this story to investigators the first few times she spoke with them.

The handwriting "expert" did not do well for the prosecutors. He had mixed up the handwriting samples, showing some as being both the major's handwriting and also not identifiable. He had made elementary errors in evaluating the handwriting sample given by the major. He had to acknowledge that the most provocative writings – on greeting cards that Ms. Dillard claimed the major had sent, were done with a different pen and in a different style – hand-printing rather than handwriting – than the letters from the major to Ms. Dillard.

Eventually – in closing argument – I wanted to argue that Ms. Dillard and not the major had written the inscriptions on the cards, but I did not ask the expert about this. After all, handwriting comparison can be done by the lay fact-finder as well as by expert witnesses. A prosecution expert was not likely to agree with our assessment of the writing.

To find a theme, we cast our minds back to an oration of Cicero, *Pro Murena*. Cicero defended General Murena on charges of corruption. The themes were military v. civilian accusers, and the dignity of military service. Of course, any civilian accuser may destroy a military career with a true tale of wrongdoing. But Ms. Dillard had threatened the major's military career with extortionate demands for money and lodging long before she told a story of a lesbian affair. The parallel with Murena's case, where civilians jealous of the general's power had made their accusations, was therefore clear.

In any jury case, one wants to have a theme with which the jurors will identify. One casts the case as championing a set of agreed values against an adversary who threatens those values. Sometimes the values are simply those of fairness, burden or proof, and neutral

application of accepted principles. In the major's case, the ill-motivated civilian accuser was one strong element. Another element was the threat to military careers from allegations so easy to make and so difficult to dispel. If statistical evidence is any guide, most of the officers on the panel would at some time have had sexual relations other than with a spouse. Similarly, it is likely that most of the officers – in or outside their marriages – had engaged in some form of oral sex. The Uniform Code of Military Justice provision criminalized as “sodomy” all oral-genital contact, consensual or not. A sexual partner would therefore have a powerful weapon – the threat to report that he or she had been kissed below the belt.

Relying on our theme, I cross-examined Ms. Dillard on her admitted hatred, her admitted threats, and her admitted wrongdoing. I examined the officers who had questioned her on her delay in making the central accusation, and from the police officers Dillard had called I brought out that Ms. Dillard had not sought to have the major's house searched. From Ms. Dillard herself, I showed that after allegedly being threatened, she came back and lived in the house for a few more days.

Then in closing argument, we could weave these elements around our central theme. After all, one could not cite Cicero in the opening statement, lest one be thought too argumentative. One could not refer to principles of law about credibility, for the fact-finder had not yet been instructed.

The major's case illustrates all the decisions you must make in choosing the story. A basic decision must be based on the theory of minimal contradiction.¹⁷ This theory has different names: KISS (keep it simple, stupid), don't assume a burden of persuasion that you do not have, everybody on the other side is not a damn liar, and so on.

Remember that the jurors come into court with a set of intuitions, sensibilities and points of view. We might call these prejudices, and if any juror possesses them to an unacceptable degree we challenge for cause or peremptorily. We are fortunate to have voir dire and challenges, for these tools give us far more control over who decides the case than a speaker before a public assembly in ancient Greece or Rome -- or even a candidate for office or member of a deliberative assembly.

For the jurors who are selected and sworn, we dignify their presuppositions by calling them common sense, or we work to identify them and show how they cannot properly be applied in our case. Thus, the first canon of minimal contradiction is that our story should be one that jurors are ready to accept. Ideally, you will not challenge their basic assumptions – or not all of them. In the major's case, we had to accept that the jurors assumed sodomy to be a crime, and that some of them thought it an abomination against God. The military judge would instruct on the first of these principles, and voir dire revealed the second. We might have put the issue directly, and asked for a nullifying verdict. This is an honorable tradition in criminal cases, but it takes a jury convinced that a certain stance is so morally right that one ought

¹⁷ Examining Witnesses ch. 8.

properly to defy the judge's interpretation of strict law. We decided not to pursue this strategy -- it would have been foredoomed.

But the legal rules of conduct were not the only principles in play. There was also the idea of reasonable doubt -- of the prosecution's burden. The principal witness was a civilian, accusing an officer with a distinguished career. So rather than confront the prosecution's and jurors' principles head on, we counterpoised them to another set of equally compelling ones. Jurors are mindful of their oath. And they understand that they do represent a particular community -- in this case, a military one.

A second form of contradiction is with the story being put forth by our adversary. Both sides are working with almost the same body of data -- allowing for whatever secrets remain in these days of open civil discovery. Why and how must our story differ from the adversary's? When you read Edward Bennett Williams' opening statement in Chapter Three, note how most of it relates evidence that will not be contradicted. He has chosen to emphasize different items of evidence than has the government, and has put them in a different context, but he has narrowed the scope of dispute to what is really important, and that is the credibility of just one witness.

As we work towards a theme, we must first examine all of the adversary's evidence, and all the witnesses on their side, for material favorable to us. "Even their witnesses tell us," "even their documents say" -- these are refrains we begin to develop. Perhaps my desire to mine the other side's ore has its basis in criminal defense practice, where the "reasonable doubt" standard and conventional wisdom often make the defense presentation of "its own" witnesses truncated or absent. But I am convinced that it has more general application. You are looking for the minimum perceptual shift that brings the entire story in line with your viewpoint.

For those who study martial arts, even the less violent ones, there is a helpful image. Suppose an assailant aims a blow at you. To maximize your own power, use his energy to increase your own. Take the arm that is delivering the blow, and pull it through and beyond its intended target. Continue the motion until you have upended the assailant and he is flat on his back.

In harmony with this teaching, do not label as liars all the opposing witnesses. It may be that some of them have forgotten, or are misunderstood, or did not have as good a chance to observe as your witnesses. All the documents on the other side may be authentic, relevant, original and either non-hearsay or covered by a hearsay exception. Yet the essential meaning of those documents may support your side, as can be seen by looking at other documents, or having a perceptive witness provide needed context.

To illustrate, let us take an ordinary breach of contract case.¹⁸ The plaintiff, Brendan Newton, sent a story idea to World Film Enterprises, and had one meeting with a WFE Vice-President, Wilson Turner. The story was in the form of a “treatment,” a standard format in the industry for pitching a film idea. Turner made notes of the meeting, which included the words “half a point of BO” – presumably box office, “screen credit” and “memorialize a deal.” WFE is about to release a film that resembles Newton’s idea. WFE says that it never acted on Newton’s proposal because it already had a similar idea in the works, and that it never made a deal with Newton for screen credit, one-half of one percent of the gross proceeds, or anything else.

Newton claims that WFE stole his idea, and that Turner agreed to pay him the one-half percent and give him a screen credit if his idea was used.

Newton’s story is straightforward – a contract was formed and he wants its benefit. A deal is a deal. No formality, no writing is required to make a contract.

The defense to this cannot simply be that it didn’t happen the way Newton says. That is an important thing to say, but it makes the case into a collision of memory and veracity between Newton and the executives of WFE. No, WFE wants to say not only that Newton did not have a deal, but also that neither he nor anybody with an ounce of knowledge about the film industry would think that he did.

The defense will look for documents – letters, memoranda – by Newton that cast doubt on his version. More importantly, the defense has a story to tell – a story about stories. Many people would like to think that if they had a good idea, and told it to somebody, that an obligation is created. The hearer, in this version, must account to the teller for a profit made from the idea. The WFE folks had better show that everybody in their industry – and that would have to include Newton – knows that ideas are protectable property only if steps are taken to protect them. Not only must they tell a story about their industry, they must do so without arrogance and in a way that makes it fair to stick Newton with the consequences of that story.

In the telling of such a story, one can accept most of the strictly factual assertions the plaintiff is making. One is looking at those facts from a different point of view. And point of view is the initial and very important decision that every storyteller makes.

When you have worked on the story, and when you finally have the evidence and legal rules in hand, you have a trial plan. Do not lightly depart from your trial plan. “That’s my story and I’m stickin’ to it,” as the saying goes. Too often, I have seen trial lawyers buffeted by the opponent’s evidence, who respond by starting to make hurried changes to their trial plan. They compound the hurt by looking fearful.

¹⁸ I wrote up this idea as a short story, under the pseudonym Edward Michaels: *The Lawyer Who Broke the Retaining Wall*, 18 *Litigation* 27 (Fall 1991)

Demonization

John Brown demonized slavery. Prosecutors seeking a death penalty must demonize the defendant – make him or her something other than, less than, human, so that jurors will feel comfortable ordering somebody to take the defendant from a cell one day and pump poison into the veins until death.

We are all prone to demonize. We might call it by the more polite term stereotyping. Ben Stein's book *The View From Sunset Boulevard* deals with the stereotypes perpetuated by television – the sleazy lawyer, the underhanded banker, and so on. We have our own lists – gays, African-Americans, greedy plaintiffs, insurance defense lawyers, corrupt corporations, corrupt labor officials, and so on.

Jurors have their lists. One purpose of voir dire is to find out what's on everybody's list.

Your opponent wants to say "this is just another instance of" and then fill in the blank. Be candid: you would like to do the same thing. Research shows, for example, that a local corporation with a good reputation, whose advertisements and delivery vehicles are all over town, starts off with an advantage in the jurors' eyes. In a society saturated by media, image counts as the relevant reality.

You have two options, depending on your case. You can go with the current or you can swim someplace else. If you are trying the case of an injured worker in a working class community, favorable images are already in the minds of many jurors. You are going to talk about what this case means in "our" community.

But if your case presents an unattractive client, somebody the jurors will "love to hate," then you must shift the argument. Jurors care about the facts and the law. They care about their oaths to be fair. From voir dire onwards, you must make a virtue of your client's unpopularity. There is a long tradition of such contrarian advocacy. It begins, in our culture, with four key Bible verses:

- Exodus 22:21: Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.
- Exodus 23:9: Also thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.
- Leviticus 19:34: But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt.
- Deuteronomy 10:19: Love ye therefore the stranger: for ye were strangers in the land of Egypt.

Your story, your claim for justice, for such a client, is based upon a set of transcendent and shared values. If you represent the “other,” you must make the “other” into “us.”

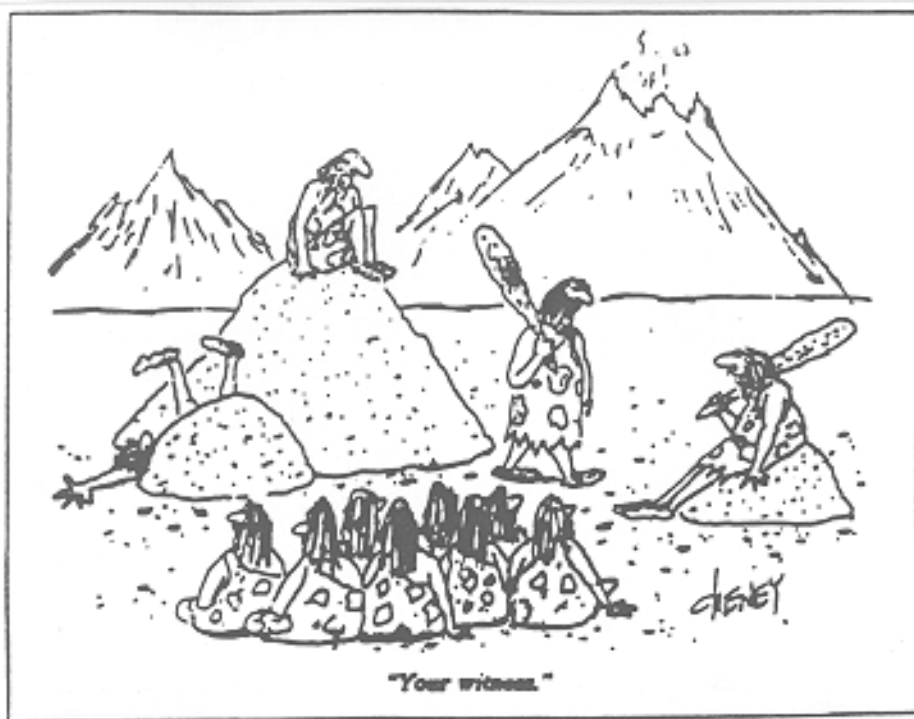
The advocate who seeks to demonize the opposition runs a great risk. As the trial goes on – and longer trials make it harder for the tactic to succeed – the jurors become caught up in the process of rational inquiry. They begin to see all the players in the courtroom drama in human terms. And with time, the words of Alexander Pope become apt:

Vice is a monster of so frightful mien,
As to be hated needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace.¹⁹

¹⁹ An Essay on Man, Epistle II, l.217

"LOOK GOOD CROSS"

Terence F. MacCarthy
Executive Director
Federal Defenders of Chicago
© May 1997



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I. Cross is Critical

"The age-old tool for ferreting out truth in the trial process is the right to cross-examination. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." Perry v. Leake, 109 S.Ct. 594, 601 n.7, 488 U.S. 272 (1989).

"[Cross examination is] the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence §1367 (J. Chadbourn rev. 1974).

"Cross examination is the principle means by which the believability of a witness and the truth of his or her testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974).

II. Scope of Cross-Examination

Rule 611. Mode and Order of Interrogation and Presentation

(b) Scope of cross examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

"...[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986).

"Cross examination should be limited to the subject matter of the direct examination and matters affecting credibility of the witnesses [limiting the original draft which allowed cross-examination]"..."on any matter relevant to any issue in the case." [H.R.Rep. No. 63-650, 93rd Cong. First Sess. 12-1973]. See United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978). Make mention of an apartment (i.e. left it at 8:00 a.m.) then cross as to the apartment's contents. United States v. Vasquez, 858 F.2d 1387, 1392 (9th Cir. 1988).

Federal Rule of Evidence 611(b) governs the scope of cross-examination. While the rule specifically limits cross-examination to the subject matter of direct examination and to matters affecting witness credibility, it also provides: "[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." United States v. Harbour, 809 F.2d 384 (7th Cir. 1987); United States v. Alvarez, 833 F.2d 724 (7th Cir. 1987); United States v. Carter, 910 F.2d 1524 (7th Cir. 1990); United States v. Moore, 936 F.2d 1508 (7th Cir. 1991).

III. The First Cross Examination: Susanna and the Elders

IV. Ethical Considerations

"In appearing in his professional capacity before a tribunal, a lawyer shall not...[a]sk any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." ABA Disciplinary Rule 7-106(C)(2).

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. . ." ABA Model Rule 4.4.

"The prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." ABA Prosecution Function Standard 3-5.7(b).

"It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking." ABA Prosecution Function Standard 3-5.7(d).

"A lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination but should, if possible, be taken into consideration by counsel in conducting the cross-examination. Defense Function Standard 4-7.6(b).

It is unprofessional conduct for a lawyer to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking. Defense Function Standard 4-7.6(d).

United States v. Wade, 388 U.S. 218, 257-58, 87 S. Ct. 1962, 1948 (1967) (White, J., dissenting in part and concurring in part.)

"[the defendant] Phillips, complains that the government was not cross-examining Bradach to establish the truth and was therefore acting improperly. The point of impeachment, however, is not to vouch for the validity of the impeachment material, rather, it is to suggest that the witness may be mistaken or inconsistent in his testimony and therefore is not a credible witness." United States v. Phillips, 914 F.2d 835, 839 (7th Cir. 1990)

V. The Bad, The Ugly and The Good

A. The Bad: Cross examination is the most difficult trial skill.

1. The Witness -- There to hurt, not help.
2. Anticipation Level, or The Perry Mason Syndrome.
3. State of the Art of Cross Examination
 - a. The Bible: The Art of Cross-Examination by Francis L. Wellman, Collier Books

- b. The New Testament: The Ten Commandments of Cross Examination by Professor Irving Younger
- c. Taught as an art

B. The Ugly: Most cross examinations today involve three stages.

- 1. Traditional Introductory Incantations
- 2. Begging
- 3. Demolish, Destroy & Devastate

C. The Good: Cross is a science, not an art, and therefore it can be taught and learned as a system.

VI. The Purpose of Lecture on Cross

- A. Share with and teach the "Look Good" system and style of cross examination.
- B. Change overview, perception of cross from dialogue to monologue concept.
- C. Use cross to tell story to the jury: to paint pictures, create images and persuade.

VII. The "Look Good" Cross System of Cross Examination

A. Objectives

- 1. "Look Good"

Presumed Innocent by Scott Turow: cross examination of Dr. Kumagi (Painless) (Attachment "A") with permission of author.

- 2. **Helpful Information**

- 3. **Confrontation**

[T]he principal purpose of cross-examination [is] to challenge whether the declarant was sincerely telling

what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.

Ohio v. Roberts, 448 U.S. 56, 71, 100 S. Ct. 2531, 2541 (1980).

Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness, testimony at just the right time, in just the right way.

Perry v. Leake, 109 S. Ct. 594, 601, 488 U.S. 272 (1989).

- a. Some Confrontation Possibilities:
 - i. Poor vision
 - ii. Poor memory
 - iii. Bias or motive
 - iv. Prior crimes or bad acts
 - v. Mental instability
 - vi. Narcotics addiction

B. Style/Manner

1. Lectern

If your presentation will be delivered from a lectern, you should experiment. If appropriate, move to the side or front of the lectern to get nearer the audience. Many professional speakers do this. It is engaging, and audiences feel closer to the speaker without barriers.

Mandel, Technical Presentation Skills – A Practical Guide for Better Speaking, at 55.

2. Notes

3. Blackboard

"[C]ross-examination in a technical area frequently requires the availability of material or at least effective demonstrative aids." Thermo King Corporation v. White's Trucking Service, Inc., 292 F.2d 668, 676 (5th Cir. 1961).

"No permission or foundation is needed for a lawyer to write on a blackboard

as the examination proceeds, so long as what is written is drawn from either a proper question or a proper answer." Siemer, Tangible Evidence: How to Use Exhibits at Trial (2d ed. 1989).

C. **Primacy/Recency**

1. "It would be fair to say. . ." or "We can agree. . .".
2. Use your head
3. One question too many commandment

VIII. Report Card

- A. **Gold Star** = Yes
- B. **Silver Star** = "No" (intended)
- C. **Bronze Star** = "I don't know - don't remember"
- D. **Special Award**
1. An "Albert" (see Control)
 2. A "Howard" (see Listen)
 3. Non-Plausible Response
- E. **ANYTHING ELSE = A BLACK MARK!**
(See how to handle the intractable witness.)

IX. System/Formula

- A. **See** "Cross Examination: Why Johnny Can't Lead and Some Other Observations," Dean Deryl D. Dantzler, National Criminal Defense College.
- B. **See:** William M. O'Barr, Linguistic Evidence, Language, Power and Strategy in the Courtroom, (1982), (reporting the work of the Law and Language Project at Duke University, which studied various aspects of communication and linguistic courtroom behaviors and their effects on jurors).

SHORT + STATEMENT **A** CONTROL

A. Short

1. **Eliminate prefixes**

2. **Eliminate suffixes**

- a. Reasons
 - i. Too long
 - ii. Question rather than statement
 - iii. Does not look good

3. **Transitions**

"Good transitions are useful to the audience because they make clear the thought patterns of the speaker and the relation of evidence to the conclusion it supports. In the form of internal summaries, good transitions aid memory, recall, and understanding of the speaker's material." Minnick, Public Speaking, p.84.

The traditional state of the art transition: "Calling your attention to March 5, 1992, at or about 2:30 in the afternoon, what, if anything, unusual occurred?"

Try a "look good" transition: "I want to ask you a few questions about what you saw when you left Murphy's Bar at 3 in the afternoon. You understand?"

Exceptions (when you can use longer statements)

- a. Looping: Incorporate the good and important into the next statement.
- b. Themes, trilogies, enneads, repetition
- c. Misdirection

"If [a lawyer] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . . Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a

witness who he thinks is lying." United States v. Wade, 388 U.S. 218, 257-58, 87 S. Ct. 1962, 1948 (1967)(White, J., dissenting in part and concurring in part); United States v. Phillips, 914 F.2d 835, 839 (7th Cir. 1990)

See IV. Ethical Considerations

B. Statements

1. Grammar - Legal Considerations:

- a. Open-ended questions:
who, what, where, why, when, how
- b. Questions
- c. Leading questions
 - Can you ever use any of the above three?
 - Exceptions - Seldom to be used!
 - 1) Long/short; far/close
 - 2) The overly rehearsed or ridiculous witness.
 - 3) You have no choice
- d. Statements

2. Possible Objections as to Form

- a. The Legal Response.
 - Ohio v. Roberts, 448 U.S. 56, 70-71, 100 S. Ct. 2531, 2541-42 (1980) ("counsel's questioning clearly partook of cross-examination as a matter of form.)¹

¹ " 'you never gave them. . .'; 'this wasn't then in the pack'; 'you have never [not] seen [discussed; talked]. . .you never gave. . .'"

- H.L. v. Matheson, 450 U.S. 398, 401-02, 101 S. Ct. 1164, 1167, (1981). The witness gave ". . . monosyllabic answers to . . . leading questions." ²

b. Responding to the Objection:

- "As your Honor well knows. . ."
- TFM Rule 99 - use your head
- "Right"

3. Details

4. Organization

5. Terms

- a. No legalese. United States v. Marshall, 488 F.2d 1169, 1171 n. 1 (9th Cir. 1973)
- b. Power language: Not hedges, fillers, deferential expressions or intensifiers. Duke Univ. Law and Language Project
- c. Your terms
"The difference between the almost right word and the right word is really a large matter - 'tis the difference between the lightning bug and the

-
- ² Q At the time that the Complaints in this matter was signed, you were pregnant?
- A Yes
- Q You had consulted with a counselor about that pregnancy?
- A Yeah.
- Q You had determined after talking to the counselor that you felt you should get an abortion?
- A Yes.
- Q You felt that you did not want to notify your parent--
- A Right.

* * *

lightning." Mark Twain in The Art of Authorship, pp. 87-88, by George Bainton (1890).

6. Tell your story, and paint your pictures by using:

- a. Statements of the witness
- b. Verisimilitude = Truth
- c. Plausibility = Reasonable - Credible

C. Control

1. Fragmented/Narrative

- a. Pavlov's Dog
- b. Pre-Closing
- c. An "Albert"

2. Pace

3. Listen ("Howard's")

4. Impeach (see attached outline)

5. Intractable Witness

- a. What is done (conventional wisdom) but should not be done.
 - i. "All my questions can be answered yes or no"
 - ii. "Just answer yes or no"
 - iii. Interrupt the witness
 - iv. "Your honor, would you instruct the witness to answer yes or no"
 - v. "I move to strike as nonresponsive"

"Although it is true that the opponent may not object to a non-responsive answer on that ground alone, he may move to strike such an answer if it is objectionable for any other reason." Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356, 359 (6th Cir. 1961).

vi. "May I have a cautionary instruction?"

"The naive assumption that prejudicial effects can be overcome by instructions to the jury..., all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 723 (1949) (J. Jackson, concurring).

b. What you may do:

- i. "I'm sorry; I confused you. Let me try again." -- Juanita Brooks
- ii. "Can you try to answer my question?", with questions asked and answered on blackboard -- Jerry Spence
- iii. "You came to tell the truth. If the simple truth is yes, can't you just tell us yes?" -- Garvin Isaacs
- iv. "What did I ask you?" -- Eugene Pincham

c. What you should do: "Tweak the Puppy":

Repeat, word for word, the same statement

- 1) slowly
- 2) rising inflection
- 3) use of name

Exceptions

- i. you were wrong (Details)
- ii. perfect one word cross

- iii. add name the third time
- iv. Turn your back
- v. WIN ALL SKIRMISHES
- vi. Turn your back
- vii. Exactly the same

7. Safe Havens

USING THIS SYSTEM YOU SHOULD BE ABLE
SIMPLY TO TELL YOUR STORY TO THE JURY.

X. Impeachment by [Prior] Inconsistent Statement

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. The provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

A. Impeachment

- 1. Discredit the witness, show mistaken or lying
- 2. May come in as substantive evidence

"Prior inconsistent statements may be admitted as substantive evidence...Whether to admit them as substantive evidence or to limit their use to impeachment is within the broad discretion of the trial court." United States v. Dennis, 625 F.2d 782, 795-95 (8th Cir. 1980).

Rule 801. Definitions.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by a witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

B. [Prior]?

C. Inconsistent

1. Contradiction

"[T]he determination of whether statements are in fact inconsistent is committed to the sound discretion of the trial court." United States v. Jones, 808 F.2d 561 (7th Cir. 1986), cert. denied sub nom., Humphrey v. United States, 481 U.S. 1006, 107 S. Ct. 1630 (Mem) (1987).

"Statements need not be diametrically opposed to be inconsistent." United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988).

"The trial judge has considerable discretion in determining whether testimony is 'inconsistent' with prior statements; inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position." United States v. Dennis, 625 F.2d 782, 795 (8th Cir. 1980).

2. Omission

"Inconsistencies can be found in witness' change of position implied through silence..." United States v. Causey, 834 F.2d 1277, 1283 (6th Cir. 1987), cert. denied, 108 S.Ct. 2019, 486 U.S. 1034, 100 S. Ct. 2124, 2129 (1988).

"Under certain circumstances prior silence concerning critical facts might be

deemed inconsistent with later testimony which includes their purported recollection." United States v. Leonardi, 623 F.2d 746, 756 (2d Cir. 1980).

"Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." Jenkins v. Anderson, 447 U.S. 231, 239, 100 S. Ct. 2124, 2129 (1980).

3. **Lack of knowledge or memory: "I do not know - do not remember." You have a choice**

a. **Refresh Recollection**

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either --

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, and adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness....

In United States v. Nobles, 422 U.S. 225, 95 S. Ct. 2160 (1975), the Court indicated that any pretrial statement of a witness which is used to refresh recollection may have to be produced to the opposing party for the purpose of cross-examination.

b. **Impeach**

"Inconsistencies can be found in witness' change of position implied through...claimed inability to recall." Causey, 834 F.2d at 1283.

"The district court should have considerable discretion to determine whether evasive answers are inconsistent with statements previously given." United States v. Thompson, 708 F.2d 1294, 1302 (8th Cir. 1983).

D. Statements

1. **Writing (possibly substantive)**
2. **Oral**
3. **Trial considerations**

E. Organizing our Impeachment

1. **What do you do to impeach?**
2. **What do you want to accomplish?**
3. **How to do - let's go fishing!**

Official Impeachment Fishing Rules

1. Let the Small Fish Go

- a. **Exception:**
 - i. No big fish,
 - ii. Very hungry, and
 - iii. A lot of little ones

2. Set Hook

"The traditional practice of requiring a foundation to be laid during cross-examination of the witness to be impeached had three objectives: (1) to avoid unfair surprise by giving the opposite party an opportunity to draw a denial or an explanation from the witness on redirect examination; (2) to give the witness himself an opportunity to deny or to explain the apparent discrepancy; and (3) to save time." United States v. Bibbs, 564 F.2d 1165, 1169 (5th Cir. 1977).

a. Exceptions:

- i. Fish swallowed

- ii. Inconsistent with purpose

3. Do not Rush: Take it Easy, Play with it, Bring in slowly

- a. Exalt, Extol, Enshrine the statement
- b. Indicia, Trappings of Truthfulness, Reliability, Accuracy³
- c. Close escape routes

4. Net -- Into Boat

The Queens Case, 2 Br. & B. 284, 129 Eng.
Rep. 976 (1820)

- a. Show witness the statement (FRE 613)
- b. How to show the statement
 - i. Judge
 - ii. Opponent
 - iii. Witness (Loop: Accurate, complete, truthful statement)

5. Kill the Fish

- a. Who reads the statement?
 - i. You
 - (1) Emphasis
 - (2) Witness no opportunity to read or explain
 - ii. Witness
 - (1) Same mouth

³ Truthful, Accurate, Details, Important details, Fresh in memory, Others to rely upon, Wanted, Expected, Understood questions, Importance of questions, Possibly: oath, read over, corrected, signed.

(2) Looks better (fairer)

iii. Both

b. If deny

i. Collateral/non-collateral

"A matter is collateral when it cannot reasonably be considered crucial or material to the issues on trial." United States v. Budzanoski, 462 F.2d 443, 455 (3d Cir. 1972).

ii. Extrinsic evidence

iii. Comes in as evidence (not necessarily substantive)

iv. Publish (the inconsistent statement exhibit should be admitted into evidence as being the best evidence of the contradiction, even though the witness admits making the inconsistent statement.) Gordon v. United States, 344 U.S. 414, 420-21 73 S. Ct. 369, 374 (1953).

6. Put Fish in Bag: Do Not Play with it!

ATTACHMENT "A"

THANKS AND ACKNOWLEDGEMENT TO SCOTT TUROW

Scott Turow, besides being an outstanding author, was and is an experienced trial lawyer. He was kind in allowing me to reproduce this material from his best selling book, "Presumed Innocent."

Presumed Innocent

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"Doc-tor Kumagai," Stern begins, "you have testified here as an expert, is that right?"

"Yes, sir."

"You have told us about your papers and your degrees, have you not?"

"I answer questions about that, yes."

"You said you have testified on many prior occasions."

"Hundreds," says Painless. Each answer has a kind of screw-you brittleness. He means to be a smart guy and tough, the better of any cross-examiner.

"Doctor, has your competence ever been called into question, to your knowledge?"

Painless adjusts himself on the stand. The assault has begun.

"No, sir," he says.

"Doctor, is it not true that many deputy prosecuting attorneys over the years have complained about your competence as a forensic pathologist?"

"Not to me."

"No, not to you. But to the chief of police, resulting in at least one memorandum being placed in your personnel file?"

"I don't know about that."

Sandy shows the document first to Nico, then to Kumagai on the stand.

"No, I never seen that," he says at once.

"Do you not have to be notified under police regulations of any addition to your personnel file?"

"Could be, but you ask what I remember. I don't remember that."

"Thank you, Doctor." Sandy removes the document from Kumagai's hands. As Stern is strolling back to our table, he asks, "Do you have any nicknames?"

Kumagai stills. Perhaps he is wishing that he had acknowledged the letter.

"Friend call me Ted."

"Aside from that?"

"Don't use nicknames."

"No, sir, not that you use. But by which you are known?"

"I don't understand question."

"Has anybody ever referred to you as Painless?"

"To me?"

"To anyone, to your knowledge?"

Again Painless takes a moment to shift around in his seat.

"Could be," he says finally.

"You do not enjoy that nickname, do you?"

"Don't think about it."

"You acquired that nickname some years ago from the former chief deputy prosecuting attorney Mr. Sennett, in an unflattering context, did you not?"

"If you say."

"Mr. Sennett told you to your face, did he not, that you had bungled an autopsy and that the only person who found working with you painless was the corpse, because it was dead?"

The laughter thunders in the courtroom. Even Larren is chuckling up on the bench. I shift in my seat. Whatever Stern has better be good, because for the first time he has abandoned his innate decorousness. His cross so far verges on the cruel.

"I don't remember that," says Painless coldly when the room has come back to order again. Over the years he has grown adroit in his knowledge of the rules of evidence. Every cop and P.A. in Kindle County knows that story. Stan Sennett would be happy to tell it from the stand. But the judge is not likely to allow such a diversion, called collateral impeachment. Painless has drawn his shoulders around him. He looks out at Stern, waiting for more. He has apparently taken some pleasure in what he regards as his own small triumph.

"Now, Mr. Della Guardia and Mr. Molto are two persons from the P.A.'s office with whom you have worked with less—let us say disagreement, is that right?"

"Sure. They my good friends." On this point, Painless has apparently been well schooled. He will acknowledge his contacts with Tommy and Delay, in order to minimize their importance.

"Did you discuss this investigation with either one of them while it was in progress?"

"I talk to Mr. Molto sometime."

"How often did you speak to him?"

"We stay in touch. We talk now and then."

"Did you talk to him more than five times in the first few weeks of April?"

"Sure," he says, "if you say." Painless is taking no chances.

He knows that subpoenas are out. He can't be sure whose MUDs we have obtained.

"And you talked in detail about this investigation?"

"Mr. Molto's a friend. He ask what I'm doin, I tell him. We talk about public information. Nothin from the gran jury." Painless resumes his satisfied smile. These answers, of course, have been the subject of prior discussion with the prosecutors.

"Did you tell Mr. Molto the results of the forensic chemist's analysis prior to conveying them to Mr. Sabich? I am talking specifically about the specimen which showed the spermicidal jelly."

"I understand," says Painless curtly. He looks directly over at Tommy. Molto has his hand over part of his face, and with Kumagai's glance, he straightens up and takes it away.

"I think so," says Kumagai.

He has not quite finished his response when Larren interrupts.

"Just a second," says the judge. "Just one second. The record will reflect that Prosecuting Attorney Molto has just made a gesture which I recognize to be a signal to the witness in connection with his last answer. There will be further proceedings with regard to Mr. Molto at a later time. Proceed. Mr. Stern."

Tommy is crimson as he struggles to his feet.

"Your Honor, I am terribly sorry. I don't know what you are talking about."

Neither do I, and I was watching Molto. But Larren is inflamed.

"This jury is not blind, Mr. Molto. And neither am I. Proceed," he says to Stern, but his anger is too great to store away and he immediately wheels his chair around in Molto's direction and gestures with the gavel. "I warned you. I told you before. I am very upset with your conduct during this trial, Mr. Molto. There will be proceedings."

"Judge," says Tommy despairingly.

"Resume your seat, sir. Mr. Stern, proceed."

Stern comes over to the table. I explain what I saw. He, too, observed nothing. But Stern does not let the incident pass. In a mincing tone he asks, "It is fair to say, Dr. Kumagai, that you and Mr. Molto have always had good communication, is it not?"

The question evokes a few snickers, especially from the reporters' section. Kumagai blinks with disdain and fails to answer.

"Dr. Kumagai," asks Stern, "it is your ambition, is it not, sir, to become coroner of Kindle County?"

"I like to be coroner," says Painless with disarmingly little hesitation. "Dr. Russell doin a good job now. Couple years he retire, maybe I put in for the job."

"And the P.A.'s recommendation would help you obtain that position, would it not?"

"Who knows?" Painless smiles. "Can't hurt."

Grudgingly, I must admire Delay. Kumagai is his witness and he has obviously counseled him to play it straight about whatever was going on during the election campaign. Nico quite clearly wants to have some prosecutorial candor to troop before the jury to make up for some of Molto's gaffes. And his judgment strikes me as correct. If it were not for the incident with the judge a moment ago, it would all sit pretty well.

"By April, had you and Mr. Molto ever discussed the possibility of you becoming coroner, Dr. Kumagai?"

"I say. Mr. Molto and me friends. I talk about what I wanna do, he talk about what he wanna do. Talk all the time. April. May. June."

"And in April you also spoke about this investigation a number of times before you received the forensic chemist's report?"

"I'd say so."

"Now, that report, sir, concerned the semen specimen which you had taken from Ms. Polhemus during the autopsy, is that right?"

"Right."

"And it is that specimen which has been identified as being of Mr. Sabich's blood type and as containing chemicals consistent with the use by Ms. Polhemus of a birth-control device—a diaphragm. Am I correct?"

"You are correct."

"And the presence in that specimen of this birth-control chemical, the spermicide, is critical to your opinion, is it not?"

"All facts important, Mr. Stern."

"But that fact is particularly important, because you, sir, want

us to believe that this tragic incident merely had the appearance of a rape, do you not?"

"Don't want you to believe nothin. I give you my opinion."

"But it is your opinion—to get down to brass tacks, as they say—that Mr. Sabich tried to make this look like a rape, correct?"

"If you say so."

"Well, is that not what you are trying to suggest? You and Mr. Molto, and Mr. Della Guardia? Let us be plain with these people." Sandy points to the jury. "Your opinion is that this was a staged rape. And that the way it was done suggests some knowledge of investigative techniques and of Ms. Polhemus's regular duties in the P.A.'s office, correct?"

"That's what I say on direct."

"And all of that points at Mr. Sabich, does it not?"

"If you say so," Painless says eventually, with a smile. You can see his reluctance to believe that Stern is inept enough to implicate his own client. But Sandy keeps forcing the issue, saying more than Kumagai would risk on his own, and Painless takes his characteristic pleasure in someone else's misfortune.

"And all of those deductions depend in the end on the presence of spermicidal jelly in the specimen you sent to the forensic chemist, do they not?"

"More or less."

"Much more than less, is it not?"

"I would say."

"So this specimen, and the presence of the spermicide, is critical to your expert opinion?" says Stern, arriving at the point where he was a moment ago. This time Painless concedes. He shrugs his shoulders and says a'l right.

"Now, does your expert opinion, Dr. Kumagai, take any account of the fact that no spermicidal jelly was found in Ms. Polhemus's apartment? Are you familiar with that testimony that was given here by Detective Greer?"

"My opinion on scientific evidence. I don't read the transcript."

"But are you familiar with that testimony?"

"I heard about it."

"And are you not concerned, as an expert, that your opinion

depends on the presence of a substance not found in the victim's belongings?"

"Am I concerned?"

"That is my question."

"Not concerned. I got an opinion on scientific evidence."

Stern gives Painless the long look.

"Spermicide came from somewhere, Mr. Stern. I don't know where lady hides this stuff. It's in the specimen. Test says what it says."

"Just so," says Sandy Stern.

"You stipulated," says Kumagai.

"That the spermicide was in the specimen you sent. Yes, sir, we did agree to that." Sandy walks around the courtroom. I still cannot guess what it is that Kumagai missed. Until Painless mentioned the stipulation I was ready to bet that the spermicide was misidentified.

"Now, sir," says Stern, "your initial impressions at the time of the autopsy took no account of the presence of a spermicide, did they?"

"Can't remember now."

"Well, think back, please. Was it not your original theory that the person who had last had intercourse with Ms. Polhemus was sterile?"

"Don't recall."

"Really? You told Detective Lipranzer that Ms. Polhemus's attacker seemed to have a condition in which he produced dead spermatozoa, did you not? Detective Lipranzer has already testified once before the jury, I am sure it would be no problem for him to return. Please reflect, Dr. Kumagai, is that not what you said?"

"Maybe. Very preliminary."

"All right, it was your very preliminary opinion. But it was your opinion then?"

"I guess."

"Now, do you recall the physical findings that led you to that opinion?"

"No, sir."

"As a matter of fact, Doctor, I am sure it is difficult for you

to recall, unaided, any autopsy within days of when it took place, is that right?"

"Sometime."

"How many autopsies do you do in a week, Dr. Kumagai?"

"One, two. Sometime ten. Depends."

"Do you remember how many you performed in the thirty days surrounding Carolyn Polhemus's death?"

"No, sir."

"Would you be surprised to know that it was eighteen?"

"Sound right."

"And with that number, it is obvious, is it not, that the specifics of any one examination may slip your mind?"

"True."

"But when you spoke to Lipranzer the details were fresher. Were they not?"

"Probably."

"And you told him then that you believed the attacker was sterile?"

"I say, I somewhat remember that."

"Well, let us review for a moment those findings you presently recall that might have led to that preliminary opinion."

Sandy runs through it quickly. The rigor mortis, blood coagulation, and digestive enzymes established the time of death. The primary deposit of male fluids in the rear of the vagina, away from the vulva, indicated that Carolyn had spent little time on her feet after sex, meaning that intercourse had occurred near the time of her attack. And there was an absence in the fallopian tubes of any live spermatozoa, which one would expect to find ten to twelve hours after intercourse, assuming no contraception had been used.

"And to explain these phenomena, particularly the dead spermatozoa, you theorized that the attacker was sterile. It did not occur to you at first, Doctor, that a spermicide had been used, did it?"

"Apparently not."

"As you look back, you must think you were a fool to have missed something so obvious as the use of a contraceptive spermicide?"

"Make mistakes," allows Painless with a flip of his hand.

"You do?" asks Stern. He eyes the state's expert. "How often?"

Kumagai does not answer that. He recognizes his miscue.

"Mr. Stern, I find no birth-control device. No diaphragm. Apparently, I assume no birth control used."

"But certainly, Dr. Kumagai, an expert of your stature could not have been so easily misled?"

Kumagai smiles. He knows he is being taunted.

"Any single fact important," he says. "Kind of thing that murderer knows."

"But you yourself were not trying to mislead Detective Lipranzer when you gave him your initial impression, were you?"

"Oh no." Painless shakes his head vigorously. He has been prepared for that suggestion.

"You must have been convinced, Doctor, at that time, that birth control had not been used—so convinced that you considered the use of a spermicide to be out of the question?"

"Look, Mr. Stern. I got an opinion. Chemist has results. Opinion changes. Lipranzer know opinion's preliminary."

"Let us consider some alternatives. For example, Dr. Kumagai, you would be convinced that birth control would not be used by a woman who knew she could not bear children, correct?"

"Sure," he says. "But Ms. Polhemus got a child."

"So the evidence has shown," remarks Stern. "But let us not consider the particulars of Ms. Polhemus. Just bear my example in mind. If a woman knew she could not conceive, it would be unreasonable for her to use a spermicide, would it not?"

"Sure. Unreasonable." Painless agrees, but his answers are growing slower. His eyes seem thick. He has no idea where Stern is headed.

"Absurd?"

"I'd say."

"Can you, as a forensic expert, conceive of any reason that such a woman might use a diaphragm or a spermicide?"

"We not talkin about a lady in menopause?"

"We are speaking of a woman who knows without question that she cannot conceive."

"No reason. No medical reason. I think of nothin."

Sandy looks up at Larren. "Your Honor, may the court reporter mark the last five questions and answers so that she can read them back later, if need be?"

Kumagai conducts a slow survey of the courtroom. He looks at the judge, the reporter, finally the prosecutors' table. He is actually frowning now. The trap, whatever it is, has been set. Everyone knows it. The reporter attaches a clip to the narrow sheaf of stenographic notes.

"Is it not your expert opinion, Dr. Kumagai," asks my lawyer, Alejandro Stern, "that Carolyn Polhemus was a woman who knew she could not conceive?"

Kumagai looks out at Stern. He bends over the microphone before the witness chair.

"No," Painless says.

"Please do not rush yourself, Doctor. You did eighteen autopsies in those weeks. Would you not rather consider your original notes?"

"I know the lady use birth control. You stipulate," he says again.

"And I, sir, say once more that we stipulated to the chemist's identification of the specimen that you sent."

Stern returns to our table. Kemp is already holding aloft the document Sandy wants. Stern drops a copy with the prosecution and delivers the original to Kumagai.

"Do you recognize the notes of your autopsy of Ms. Polhemus, Dr. Kumagai?"

Painless flips a few pages.

"My signature," he says.

"Would you please read aloud the short passage marked by the paper clip?" Sandy turns to Nico. "Page 2, Counsel."

Kumagai has to change glasses.

"The fallopian tubes are ligated and separated. The fimbriated ends appear normal." Kumagai looks down at the sheet he has read from. He pages again to the end. He is frowning, deeply now. Finally he shakes his head.

"Not right," he says.

"Your own autopsy notes? You dictate them as you are con-

ducting the procedure, do you not? Surely,⁴ Doctor, you are not suggesting you made a contemporaneous error?"

"Not right," he says again.

Stern comes back to the defense table for another piece of paper. I have gotten it by now. I look up to him as he takes the next document from Kemp. I whisper:

"Are you telling me that Carolyn Polhemus had her tubes tied?"

It is Kemp who nods.

The next few seconds are blank. Weirdly, unaccountably, I feel alone, locked in my own teetering sensations. An essential connection has been interrupted. For a moment it is like *déjà vu*. I cannot make out reasons. What takes place in the courtroom seems remote. I am aware, in a dislocated way, that Painless Kumagai is being devastated. He denies two or three more times that it is possible that Ms. Polhemus had had her fallopian tubes surgically separated to prevent conception. Stern asks if other facts might affect his opinion and pushes into Kumagai's hands the records of the West End gynecologist who performed the tubal ligation six and a half years ago, after Carolyn aborted a pregnancy. It was this doctor, no doubt, whom Kemp went to meet yesterday afternoon.

"I ask you again, sir, would these records alter your expert opinion?"

Kumagai does not answer.

"Sir, is it now your expert opinion that Carolyn Polhemus knew she could not conceive?"

"Apparently." Kumagai looks up from the papers. In my confusion, I find that I actually feel sorry for him. He is slow now, hollow. It is to Molto and Nico he speaks, not Stern or the jury. "I forgot," he tells them.

"Sir, is it not absurd to believe that Carolyn Polhemus used a spermicide on the night of April first?"

Kumagai does not answer.

"Is it not unreasonable to believe that?"

Kumagai does not respond.

"There is no reason known to you that would explain why she might do that, is there, sir?"

Kumagai looks up. There is no way to tell if he is thinking or simply being ravaged by shame. He has taken hold of the beveled rail of the witness stand. He still does not answer.

"Shall I have the court reporter read back your answers to the questions I asked a few moments ago?"

Kumagai shakes his head.

"Is it not clear, Dr. Kumagai, that Carolyn Polhemus did not use a spermicide on April first? Would that not be your expert opinion? Does it not seem to you, sir, as an expert and a scientist, the most obvious reason that no trace of a spermicide could be found in her apartment?"

Kumagai seems to sigh. "I cannot answer your questions, sir," he says with some dignity.

"Well, answer this question, Dr. Kumagai: Is it not clear, given these facts, that the specimen you sent to the chemist was not taken from the body of Carolyn Polhemus?"

Kumagai now sits back. He pushes his glasses back up on his nose.

"I have a regular procedure."

"Are you telling this jury, sir, that you have a clear recollection of taking that specimen, marking it, sending it on?"

"No."

"I repeat: Is it not likely that the specimen containing the spermicide, the specimen identified as containing fluids of Mr. Sabich's blood type, was not taken from the body of Carolyn Polhemus?"

Painless shakes his head again. But this is not denial. He does not know what occurred.

"Sir, is it not likely?"

"It is possible," he finally says.

From the jury box, clear across the courtroom, I can hear one of the men say, "For Chrissake."

"And that specimen, Dr. Kumagai, was sent, was it not, while you were having these regular conversations with Mr. Molto, am I right?"

With this, Kumagai finally rediscovers his spark. He draws himself up in the chair.

"Do you accuse me, Mr. Stern?"

4 4

It is some time before Stern speaks.

"We have had enough unsupported accusations for one case," he says. Then, before resuming his chair, Stern nods in the direction of the witness, as if to dismiss him. "Doc-tor Kumagai," he adds.

After court, Jamie Kemp and I sit in Stern's conference room describing Kumagai's cross-examination for a small audience composed of Sandy's secretary, the private investigator Berman, and two law students who work in the office as clerks. Kemp has brought out a bottle of champagne, and one of the young people has turned on a radio. A fine actor, Kemp does a burlesque in which he plays the parts of both Stern and Kumagai. He repeats Stern's most damaging questions in an insistent tone, and then falls in a chair, where he beats his feet and makes the sounds of a person being choked. We are roaring when Stern comes through the door. He has on a tuxedo, or, more properly, part of it: only the striped trousers and the boiled shirt; a red bow tie, not yet knotted, is through his collar. Inspecting the scene he is livid; a fierce anger grips all his features. You can tell that he is struggling to keep himself in check.

"This is inappropriate," he says. He is speaking to Kemp. "Entirely inappropriate. We are on trial. This is not the time to congratulate ourselves. We may not bring a trace of smugness to that courtroom. Juries sense such things intuitively. And they resent it. Now, if you would please clean this up, I wish to speak with my client. Rusty," he says, "when you have a moment."

He wheels and I follow Stern to his office with its soft, almost feminine interior. I suspect that Clara had a hand in the decoration. Everything is done in the same creamy tone. Full-length drapes cover the windows, and furnishings upholstered in Haitian cotton crowd the office, so that it feels as if you are being pushed into a seat. Stern has a heavy crystal ashtray at each corner of his desk.

"It's my fault more than Jamie's," I say when I enter.

"Thank you, but you are not charged with making judgments at this time. He is. That was entirely inappropriate."

**RETREADING DAUBERT:
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“The government is correct in their assertion that pre-*Daubert*/ *Kumho* Ninth Circuit precedent supports the admissibility of this [handwriting expert] testimony, *however, the world has changed.*”

United States v. Santillan, No. CR-96-40169 DLJ, 1999 WL 1201765, *3 (N.D. Cal. Dec. 3, 1999) (Ord.) (emphasis added).

Introduction

The following outline summarizes post-*Kumho Tire* federal authority and is current as of March 13, 2001. It is divided into two major areas; the history and origins of federal expert jurisprudence, and application of this authority to specific fields of expertise. A Wordperfect version of this document will be on the CD distributed with the seminars, or contact AFD Steve Kalar at Steven_Kalar@fd.org for a copy.

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¹ This outline collects and summarizes every published (non-military) federal decision that discusses or applies the Supreme Court’s decision in *Kumho Tire* (as of March 13, 2001). Expert witness testimony, however, is still a relatively new and rapidly-evolving field of evidence. Counsel are cautioned to update this research before mounting an evidentiary challenge to a government expert or attempting to introduce a defense expert at trial.

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I. The Basics: Federal Rules of Evidence and Supreme Court Authority: A

theme sounded in our expert presentation is that this area of law is very results-driven. These introductory cases help to illustrate that point. In *Frye*, the D.C. Circuit rejected a defense expert who would testify regarding the precursor to a modern polygraph. In *Daubert*, *Joiner*, and *Kumho Tire* the Court rejected the testimony of experts called on behalf of plaintiffs in personal injury or wrongful death suits. Given this trend, one would assume that the majority of federal criminal cases after the *Daubert* trilogy would reject expert testimony.

That assumption would be wrong. The vast majority of federal criminal cases that discuss expert testimony uphold the admission of government experts over defense objection. The *Daubert* Trilogy has thus created a dichotomy in the federal system; rigorous, aggressive review of plaintiff experts in civil personal injury or civil rights case, and open, deferential review of government experts admitted in criminal cases.

This perception is more than just the paranoia of the criminal defense bar. Professor D. Michael Risinger has written an outstanding article on the double-standard applied to federal expert testimony in the civil and criminal contexts. See D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99 (2000). As Professor Risinger predicts, “in ten years we will find that civil cases are subject to strict standards of expertise quality control, while criminal cases are not. The result would be that the pocketbooks of civil defendants would be protected from plaintiff’s claims by exclusion of undependable expert

testimony, but that criminal defendants would not be protected from conviction based on similarly undependable expert testimony.” *Id.* at 100.

To help avoid that result, and to mount aggressive challenges to government witnesses, it is necessary to first understand the fundamentals; the origins of expert testimony and the controlling Rule of Evidence.

A. *Frye*’s “General Acceptance” standard. In this short opinion the D.C. Circuit articulated what would become the predominant test for the admission of scientific testimony, until *Daubert*.

1. ***Frye v. United States***, 293 F.1013 (D.C. Cir. 1923) (upholding judgment of second degree murder when trial court refused to permit the defendant to admit testimony regarding a systolic blood pressure deception test (a predecessor to the modern lie-detector test)) .

a. **Facts:** In a second-degree murder trial, the defense sought to introduce testimony related to a systolic blood pressure deception test (a predecessor to the modern lie-detector test). The trial court refused.

b. **Issue:** Should the novel “deception test” be admitted into evidence?

c. **Held:** Judgment affirmed. “Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the court will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have *gained general acceptance in the particular field in which it belongs.*” *Id.* at 1014 (emphasis added)

d. **Worthy of note:** The passage above was the origin of the infamous *Frye* “general acceptance” test. That remained the most prevalent standard in federal courts until *Daubert*, and remains one of the factors in the *Daubert* and *Kumho Tire* analyses. The *Frye* “general acceptance” test is still the controlling standard in many state jurisdictions (i.e., California).

(1) **NB:** *Frye* preceded the Federal Rules of Evidence by over fifty years. The Supreme Court in *Daubert* held that *Frye* was inconsistent with Federal Rule of Evidence 702, regarding expert testimony.

B. The *Daubert* Trilogy: *Daubert*, *Joiner*, and *Kumho Tire*. Three Supreme Court decisions dramatically changed the approach of federal courts towards the evidentiary issue of expert testimony; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General*

Electric Company, et al., v. Joiner, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). These three cases are commonly referred to as the “*Daubert* Trilogy.”

1. ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993) (remanding civil case where district and appellate court had applied *Frye*’s “general acceptance” test and excluded plaintiff experts, contrary to the (comparatively) new approach adopted in Federal Rule of Evidence 702). Seminal Supreme Court decision that revolutionized the approach of federal courts to “expert” evidence.
 - a. **Facts:** Plaintiffs in a civil suit sought to admit the testimony of eight expert witnesses. *Daubert*, 509 U.S. at 583. Based on in vitro and in vivo studies, the experts would have testified that despite published studies to the contrary the drug at issue in the case caused birth defects. *Id.* The district court found that the Plaintiffs’ expert testimony was not admissible, because it did not have the “general acceptance in the field to which it belongs.” *Id.* The Ninth Circuit affirmed, citing *Frye v. United States*, 54 App. D.C. 46, 47 (1923). *Id.* at 584.
 - b. **Issue:** Is the *Frye* “general acceptance” test consistent with the (later adopted) Federal Rules of Evidence?
 - c. **Held:** The *Frye* test was superseded by the adoption of the Federal Rules of Evidence. *Id.* at 587. “Nothing in the text of [Federal Rule of Evidence 702] establishes ‘general acceptance’ as an absolute prerequisite to admissibility.” *Id.* at 588.
 - (1) Emphasized the “gatekeeping” function of the trial judge, and assigned to the trial judge “the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert*, 509 U.S. at 597.
 - (2) Provided specific factors to assist the trial judge in determining if an expert’s testimony rests on a reliable foundation:
 - (a) “Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.” *Id.* at 593.
 - (b) “Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.” *Id.*
 - (c) “Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique’s operation.” *Id.* at 594.

(d) “Finally, ‘general acceptance’ can yet have a bearing on the inquiry.” *Id.* at 594.

d. **Worthy of note:** The Court in *Daubert* began a theme echoed in *Kumho*: “The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission.” *Id.* at 594-95.

(1) *Daubert* sets up a two-level analysis that survives in *Kumho Tire*; reliability and relevance.

(a) “To summarize: ‘General acceptance’ is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.* at 597.

(2) The Court in *Daubert* used the following phrase: “The subject of an expert’s testimony must be ‘scientific . . . knowledge.’” *Id.* at 589-90. The Court’s emphasis on *scientific* knowledge would cause a split among the circuits regarding whether the *Daubert* factors should or could be applied to non-scientific, “technical” knowledge. *Kumho Tire* answered that question.

2. ***General Electric Company, et al., v. Joiner***, 522 U.S. 136 (1997) (holding that appellate court reviews trial court’s admission or exclusion of expert evidence for “abuse of discretion.”) The Court in *Joiner* adopts the deferential “abuse of discretion” standard for review of a district court’s evidentiary decisions regarding admission of expert evidence. This deferential standard makes *Daubert/ Kumho Tire* challenges by the defense extremely difficult on appeal.

a. **Facts:** City electrician brought civil suit alleging that chemical in electrical transformers accelerated his development of small-cell lung cancer. *Joiner*, 522 U.S. at 516. The electrician proffered the testimony of experts who had induced a different type of cancer in infant mice with the same drug. *Id.* at 144. The district court excluded the expert testimony, finding that the animal studies did not support plaintiff’s contention that exposure to the drug had contributed to his cancer. *Id.*

(1) The Eleventh Circuit reversed. *Id.* at 140. The circuit court explained, “we apply a particularly stringent standard of review to the trial judge’s exclusion of expert testimony.” *Id.* at 141.

b. **Issue:** What is the standard of review for a district court’s evidentiary ruling on the admissibility of expert testimony?

- c. **Held:** “We hold, therefore, that abuse of discretion is the proper standard by which to review a district court’s decision to admit or exclude scientific evidence.” *Id.* at 146. The Supreme Court reversed the Eleventh Circuit and held that the district court did not abuse its discretion in excluding the testimony of plaintiff’s experts. *Id.* at 147.
 - d. **Worthy of note:** As the post-*Kumho* authority discussed *infra* illustrates, the deferential “abuse of discretion” standard applies to *how* a district court evaluates an expert, the court’s view of the expert’s qualifications, its findings on the reliability of the expert’s methodology, and its rulings on the relevance or “fit” of the expert’s testimony. Strategically, therefore, it is particularly important to vigorously contest expert evidentiary issues at the district court level. A trial court’s admission or exclusion of expert testimony is rarely reversed at the appellate level, and even when erroneous can be “redeemed” by (questionable) harmless error analysis. See, e.g., *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999) (holding erroneous admission of expert opinions that child sex abuse had occurred was harmless error) (discussion, *infra*).
- (1) Relying on *Joiner*, the Ninth Circuit has held that the district court did not abuse its discretion in refusing to permit an *in limine* pretrial hearing on the admissibility of a government expert. See discussion on *Alatorre*, *infra* at pg. 49.
 - (2) The abuse of discretion standard presumes that there was a defense objection. In several appellate cases, the defense failed to object to the introduction of expert evidence at trial, and the standard of review was accordingly plain error. See, e.g., discussion of *Jolivet*, *infra* at pg. 20.
 - (3) The Seventh Circuit has adopted an interesting two-tiered structure of appellate review, first asking *de novo* if the district court followed the structure of *Daubert*, then asking if the district court abused its discretion in admitting or excluding the testimony. See discussion of *Brumley*, *infra* at pg. 46.
3. ***Kumho Tire v. Carmichael***, 526 U.S. 137 (1999) (upholding district court’s exclusion of testimony of plaintiff’s tire expert, who would have testified regarding manufacturing defects in tire leading to fatal accident). *Kumho Tire* is now the leading case on expert witnesses generally, and specifically is the controlling case on the evaluation of “non-scientific” or “technical” experts.
 - a. **Facts:** Plaintiffs bring a civil suit alleging a manufacturing defecting in a tire that blew out and caused a fatal accident. *Kumho Tire*, 526 U.S. at 142-43. In support of their theory of defective manufacture plaintiffs offered expert in tire failure analysis. *Id.* Expert had a masters in mechanical engineering, ten years experience at a tire company, and experience as an expert. *Id.* Plaintiffs’ expert examined tire on morning of depositions, *id.* at 155, and offered testimony regarding manufacturing defects versus tire damage

cause by “overdeflation,” *id.* at 144-45. Absent a finding of two out of four signs of “overdeflation,” the expert explained, he assumed a manufacturing defect.

(1) **Trial Court:** While this was not “scientific” testimony, the trial court employed the *Daubert* gatekeeping analysis, excluded the expert, and granted summary judgment for the defendants. *Id.* at 145. On a motion for reconsideration the court applied *Daubert* “flexibly,” held that the *Daubert* factors were simply illustrative, and that other factors could argue for admissibility. *Id.* at 145-46. The trial court nonetheless still excluded the expert.

(a) **Eleventh Circuit:** The Eleventh Circuit reversed, holding that the *Daubert* factors only applied in the scientific context. Because the expert’s testimony was not “scientific,” but “technical,” the trial court erred in applying the *Daubert* factors.

b. **Issue on cert.:** “Whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon ‘scientific’ knowledge, but rather upon ‘technical’ or ‘other specialized’ knowledge.” *Id.* at 146.

c. **Held:** *Daubert*’s gatekeeping requirements apply to expert matters described in Fed. R. Evid. 702—including “non-scientific,” or “technical” experts. *Id.* at 149.

(1) **The *Daubert* factors MAY be used with non-scientific or “technical” experts.** The objective of the *Daubert* requirement “is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at 152.

(a) “[S]ome of *Daubert*’s questions can help to evaluate the reliability even of experience-based testimony.” *Id.* at 151. The *Daubert* factors include:

- i) Whether a theory or technique can be (and has been) tested;
- ii) Whether it has been subjected to peer review and publication;
- iii) Whether, in respect to a particular technique, there is a high known or potential rate of effort, and whether there are standards controlling the technique’s operation, and

- iv) Whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.” *Id.* at 149-50 (internal quotations and citations omitted).
- (2) A district court enjoys the same latitude in determining *how* to test an expert’s reliability as it does in determining *if* the expert is reliable. *Id.* at 152.
 - (a) No automatic right to a *Kumho Tire* hearing: district court can avoid “unnecessary ‘reliability’ proceedings in ordinary cases,” or require “appropriate” proceedings in more complex cases where cause for questioning the expert’s reliability arises. *Id.* at 152-53.
- (3) The Court in *Kumho* distinguished between the *qualifications* and *methodology* of an expert. Both issues play into the gatekeeping analysis, but an expert who is qualified still may not have an acceptable methodology. *Id.* at 153.
 - (a) In *Kumho*, the district court did not question the *qualifications* of plaintiff’s tire expert. “Rather, it excluded the testimony because, despite those qualifications, it initially doubted, and then found unreliable, the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis.” *Id.* at 153 (internal citations and quotations omitted).

C. Federal Rules of Evidence Relating to Experts:

1. Fed. R. Evid. 104, Preliminary Questions.

- a. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
- b. Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
- c. Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
- d. Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

- e. Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.
2. **Fed. R. Evid. 401: Definition of "Relevant Evidence":** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
 3. **Fed. R. Evid. 702. Testimony by Experts: (New) Federal Rule of Evidence 702:** (Became effective Dec. 1, 2001) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
 - a. Note that the new FRE 702 – adopted to reflect the *Daubert* and *Kumho Tire* approach – appears more vigorous on its face than the old version of the rule. It may be possible to mount new challenges to expert testimony, such as cop testimony, under this revised rule.
 - b. **NB:** While the new FRE 702 may present new opportunities for defense challenges, the advisory committee to the amended rule appears to have anticipated these attacks:
 - (1) **Law Enforcement:** “The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.” FRE 702 Advis. Comm. Notes to 2000 Amendments.
 - (2) **Experiential Testimony (e.g., handwriting):** “Nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience

is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail) *Id.*

- (3) **But, Heightened Test for Experiential Testimony:** “If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply “taking the expert's word for it.” *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (“We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.”). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (“[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”).

- (4) **Prohibit the Term “Expert”** The Advisory Committee suggests a useful approach for the defense: prohibit the term “expert” in trial. “The amendment continues the practice of the original Rule in referring to a qualified witness as an “expert.” This was done to provide continuity and to minimize change. The use of the term “expert” in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an “expert.” Indeed, there is much to be said for a practice that prohibits the use of the term “expert” by both the parties and the court at trial. Such a practice “ensures that trial courts do not inadvertently put their stamp of authority” on a witness's opinion, and protects against the jury's being “overwhelmed by the so-called ‘experts’.” Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term “expert” in jury trials).” FRE 702 Advis. Comm. Notes 2000 Amendments.

4. **Fed. R. Evid. 703. Bases of Opinion Testimony by Experts:** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon

by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

- a. **NB:** The advisory Committee on the amended FRE 702 has distinguished the analysis between Rules 702 and 703: “There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert’s testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert’s basis cannot be divorced from the ultimate reliability of the expert’s opinion.

In contrast, the “reasonable reliance” requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information—whether admissible information or not—is governed by the requirements of Rule 702.” FRE 702 Advis. Comm. Notes 2000 Amendments.

5. Fed. R. Evid. 704. Opinion on Ultimate Issue :

- a. Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
- b. No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

6. Fed. R. Evid. 705. Disclosure of Facts or Data Underlying Expert Opinion: The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

7. Fed. R. Evid. 706: Court Appointed Experts

- a. Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which

shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

- b. Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
- c. Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
- d. Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

II. ***Kumho* Wrestlers: Post-*Kumho* Authority on Admission of Experts**

A. **Fingerprint analysis:** As Rob Epstein explained in his presentation, there is relatively little case law vigorously analyzing the admissibility of fingerprint expert testimony. One of the few post-*Kumho Tire* cases, unfortunately, admits the testimony with no real analysis. (See discussion below). Anticipate more published opinions in the field as Rob's fingerprint challenges are brought across the country.

1. ***United States v. Havvard***, 117 F. Supp. 2d 848 (S.D. Ind. 2000) (admitting testimony of fingerprint expert over defense *Mitchell*-type objections). For anyone that has seen AFPD Rob Epstein's fingerprint presentation, this is an extraordinarily aggravating opinion that parrots the government's position without fairly dealing with Rob's challenges.
 - a. **Facts:** In felon-in-possession case, the defense objects to introduction of expert testimony regarding latent print on gun found beneath the defendant's mattress. The defense at trial was lack of actual or constructive possession. The fingerprint evidence was admitted over defense objection, raising a *Mitchell*-type challenge to the fingerprint evidence.
 - b. **Issue:** Is fingerprint evidence sufficiently reliable to survive the gatekeeping requirements of *Daubert* and *Kumho Tire*?

- c. **Held:** “In sum, despite the absence of a single quantifiable standard for measuring the sufficiency of any latent print for purposes of identification, the court is satisfied that latent print identification easily satisfies the standards of reliability in *Daubert* and *Kumho Tire*. In fact, after going through this analysis, the court believes that latent print identification is the very archetype of reliable expert testimony under those standards.” *Id.* at 855.
- d. **Worthy of Note:** If you have seen Rob Epstein’s presentation and read his materials from *Mitchell* and *Choy*, the shortcomings of this opinion will be self-evident. For example, the district court in *Havvard* credits the hocus-pocus of the government’s “ACE-V” process. *Id.* at 853. In its opinion, the district court does not describe how “Analysis - Comparison - Evaluation - Verification” is reliable, consistent with scientific principles, or how the approach does anything to advance the accuracy of the identification. The court instead simply repeats the factors as support for admission. *Id.*
 - (1) “Publication” explains the court, is satisfied because fingerprint analysis has been subjected to adversarial testing for roughly 100 years, in cases with the “highest stakes possible.” *Id.* at 854. “That track record provides far greater assurance of reliability than, for example, publication of one peer-reviewed article describing a novel theory about the cause of a particular disease at issue in a civil lawsuit.”
 - (2) The court concedes that the government makes a “breathtaking” claim that its error rate is zero. *Id.* Despite that assertion, the court concludes that the error rate with latent print identification “is vanishingly small when it is subject to fair adversarial testing and challenge. It is certainly far lower than the error rate for other types of opinions that courts routinely allow, such as opinions about the diagnosis of a disease, the cause of an accident or disease, whether a fire was accidental or deliberate in origin, or whether a particular industrial source was the likely source of a contaminant in groundwater.” *Id.* at 854-55.
 - (3) If you are mounting a fingerprint challenge, anticipate the government’s reliance on *Havvard* and turn to Rob Epstein’s materials in *Mitchell* and *Choy* for a definitive rebuttal of this questionable analysis.

B. Handwriting analysis. District courts that have dealt with handwriting analysis after *Kumho Tire* have generally been willing to start with a fresh slate and disregard the traditional deference that has been given to the field. Courts have typically admitted handwriting expert testimony regarding the *mechanics* of comparing handwriting, but have excluded testimony regarding the ultimate issue--whether the defendant authored the questioned document. Beware of the Advisory Committee Commentary to the new Federal Rule of Evidence 702. It suggests that experiential testimony, such as handwriting, is not precluded by the new rule: “Nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert

testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail) *Id.*

1. ***United States v. Paul***, 175 F.3d 906 (11th Cir. 1999) (admitting the testimony of a handwriting expert witness and excluding testimony of defense handwriting expert). From the defense perspective, this is one of the worst of the post-*Kumho* cases because it confuses *qualifications* and *methodology*. In *Paul*, the Eleventh Circuit upholds the admission of the and admits the testimony of a “qualified” handwriting expert with no real analysis of the reliability of the expert’s approach.

a. **Facts:** An extortionist demanded payment from a bank or violence would ensue. *Paul*, 175 F.3d at 908-09. Fingerprints on the demand note and envelope did not match those of the defendant. *Id.* at 909. The defendant was asked to do a handwriting exemplar and was dictated words in the demand note. The defendant misspelled several words in a dictated exemplar in the same manner as misspelled on the note. *Id.* The jury hung in the first trial. In the second trial, the district court admitted the testimony of the government’s handwriting expert and excluded the testimony of a defense expert; a law professor. *Id.* at 909.

(1) **ASIDE--NB: Dictated “spelling” exemplars violate the Fifth Amendment!:** Dictated handwriting exemplars require the defendant to reveal spelling, and hence his or her mental processes. *Dictated* handwriting exemplars are really *spelling* exemplars, are “testimonial,” are protected by the Fifth Amendment and should not be compelled. *See United States v. Campbell*, 732 F.2d 1017 (1st Cir. 1984) (finding dictated handwriting exemplars the functional equivalent of a forced spelling test, and protected by the Fifth Amendment); *but see, United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976) (holding that “spelling” in a dictated exemplar is not testimonial and not protected by the Fifth Amendment).

(a) This issue is the subject of a cert. petition currently before the Supreme Court. Contact AFPD Steve Kalar, N.D. Cal. for briefing on dictated spelling exemplars. Note that it is the national policy of the FBI to *always* dictate handwriting exemplars. *See United States Department of Justice, F.B.I., Handbook of Forensic Services*, (visited Feb. 2, 2000) <<http://www.fbi.gov/programs/lab/handbook/examques.htm#anchor6960>>.

(2) **Issue**: Did the district court abuse its discretion in admitting the testimony of the government's handwriting expert, and excluding the testimony of the defense handwriting expert?

(3) **Held**: "[The defense] has not challenged on appeal [the government's expert's] qualifications as an expert on handwriting analysis Consequently, we hold that [the government's expert's] testimony could assist the jury." *Paul*, 175 F.3d at 911.

i) "Courts have long received handwriting analysis testimony as admissible evidence." *Id.* at 910 n.2.

(b) [The defense expert Denbeaux] was not qualified to testify as an expert in handwriting analysis because he: (1) did not possess an acceptable degree of 'knowledge;' (2) would not have assisted the jury; and (3) was not a qualified expert. Fed. R. Evid. 702." *Id.* at 912.

(4) **Worthy of note**: The Court in *Paul* improperly conflates the *qualifications* and *methodology* analysis. The court catalogued the handwriting expert's qualifications, and from that list jumped to the conclusion that "the [expert's] testimony could assist the jury." *Id.* at 911. The court in *Paul* rejected the defendant's Fed. R. 403 challenge because the defense "cited no authority excluding testimony from an expert handwriting examiner on the basis that it sounded scientific, but was not." *Id.* This, of course, would mean that all pre-*Kumho* "technical" expertise would automatically come in--handwriting, fingerprints, etc.--because there exists no post-*Kumho* authority excluding the expertise.

(a) The court in *Paul* excluded the testimony of defense expert Mark Denbeaux, who would have testified regarding the limitations of handwriting. See D. Michael Risinger, Mark Denbeaux and Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification Expertise*, 137 U. Pa. L. Rev. 731 (1989). Denbeaux was a law professor that had no expertise in the field of handwriting analysis.

i) **Query**: Perhaps Professor Denbeaux could have been cast in terms of an expert in scientific techniques, statistical analysis, or the scientific method? He might have qualified under these theories, and the relevance of his testimony would have been to aid the jury in gauging the reliability of the handwriting expert's testimony.

2. **United States v. Hines**, 55 F.Supp.2d 62 (D. Mass. June 11, 1999) (admitting testimony of handwriting expert re: methodology, but excluding opinion on ultimate issue of authorship). The district court's decision in *Hines* is one of the most thoughtful of the post-*Kumho*

decisions, and offers a candid evaluation of the shortcomings of *Daubert* and *Kumho Tire*. An excellent case for the defense.

- a. **Facts:** The only government evidence in an armed bank robbery prosecution was a (cross-racial) eyewitness identification and the handwriting analysis of the robbery note. *Hines*, 55 F.Supp.2d at 62. After a hung jury in the first trial, the government offered in the second trial the testimony of an FBI handwriting analysis.
- b. **Issues:** Should the district court admit the testimony of the FBI handwriting expert as to methods of comparisons, and as to the authorship of the hold-up note?
 - (1) Note: also at issue was the admissibility of a defense expert on “cross-racial identification.” That issue and holding is discussed in greater depth in the “psychological/ sociological” expert section, *infra*.
- c. **Held:** Permitted the expert to testify regarding her methodology in comparing known and questioned handwriting.
 - (1) Handwriting experts are “observational” experts, taxonomists-- “arguably qualified because they have seen so many examples over so long.” *Id.* at 69. The handwriting expert was permitted to testify “to the ways in which she found [the defendant’s] known handwriting similar to or dissimilar from the handwriting of the robbery note” *Id.*
 - (2) Excluded the expert’s testimony regarding the ultimate issue: the authorship of the note.
 - (a) There is no data, however, “that handwriting analysts can say, like DNA experts, that this person is “the” author of the document. There are no meaningful, and accepted validity studies in the field. No one has shown me [the witness’] error rate, the times she had been right, and the times she has been wrong. There is no academic field known as handwriting analysis. This is a “field” that had little efficacy outside of a courtroom. There are no peer reviews of it. Nor can one compare the opinion reached by an examiner with a standard protocol subject to validity testing, since there are no recognized standards. There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out.” *Id.* at 69.
- d. **Worthy of note:** Judge Gertner in *Hines* employed a particularly clear analytical approach that can help in attacking experts in other contexts. The court in *Hines* undertakes two layers of analysis; first, what is the *necessity* of the testimony. *Id.* at 64. This arises from the task of the district court to be a gatekeeper for relevant evidence,

under Federal Rule of Evidence 104. *Id.* The second layer of analysis “concerns the nature of the inferences to be drawn.” *Id.* at 65. This ties into Federal Rule of Evidence 702. “The issue then, is not only how objectively reliable the evidence is, but also the legitimacy of the process by which it is generated.” *Id.* at 65.

(1) Interesting distinction between “new” and “old” fields: “Traditional science, generally accepted by judges for decades, may not need the same kind of rigorous analysis as ‘new’ science which lacks the legitimacy of a chorus of sponsors. As to the latter, the *Daubert* analysis is critical, and the court should be an especially vigilant gatekeeper.” *Id.* at 66.

(2) “Again, a mixed message: Apply *Daubert* to technical fields, even though the scientific method may not really fit, but be flexible The court is plainly inviting reexamination even of “generally accepted,” venerable, technical fields.”

3. ***United States v. Santillan***, No. CR-96-40169 DLJ, 1999 WL 1201765 (N.D. Cal. Dec. 3, 1999) (admitting testimony of handwriting expert re: methodology, but excluding opinion on ultimate issued).

a. **Facts:** Government sought to introduce testimony of a handwriting expert in a case involving conspiracy to distribute false immigration documents. *Id.* at 1999 WL 1201765, *1

b. **Issue:** First, does the fact that the Ninth Circuit routinely accepted handwriting analysis before *Kumho Tire* preclude a challenge to a handwriting expert? Second, is the testimony of the handwriting expert admissible? *Id.* at 1999 WL 1201765, *3, *4.

c. **Held:**

(1) First, areas of expertise should not be “grandfathered” in from pre-*Kumho* approval.

(a) “The government is correct in their assertion that pre-*Daubert*/ *Kumho* Ninth Circuit precedent supports the admissibility of this [handwriting expert] testimony, *however, the world has changed.*” *Id.* at 1999 WL 1201765, *3 (emphasis added).

(b) “[P]ast history of admissibility does not relieve this Court of the responsibility of conducting *Daubert*/*Kumho Tire* analysis as to this proffered expert testimony.” *Id.* at 1999 WL 1201765, *3.

(2) Second, there is insufficient support for the proposition that handwriting examiners are better than lay persons at identifying handwriting.

- (a) Order criticizes (pro-government) *Kam Study* used in support of the admissibility of handwriting experts. *Id.* at 1999 WL 1201765, at *4 (repeating criticisms of Moshe Kam, Gabriel Fielding and Robert Conn, *Writer Identification by Professional Document Examiners*, 42 J. Forensic Sci. 778, 785 (1997).
- (3) The district court admitted the expert's testimony regarding the *mechanics* of comparing handwriting, but excluded her testimony regarding the ultimate issue--did the defendant author the questioned document. *Id.* at 1999 WL 1201765, *5.
- d. **Worthy of note:** The court in *Santillan* was sensitive to the fact that an "expert's" opinion on an ultimate issue can be particularly prejudicial. "[S]uch testimony, when it is buttressed by the fact that it comes from an 'expert,' would appear to be more prejudicial and misleading than probative in the Court's consideration of the application of Rule 403 of the Federal Rules of Evidence." *Id.* at 1999 WL 1201765, *5.
- 4. ***United States v. Jolivet***, 224 F.3d 902 (8th Cir. 2000) (upholding admission of testimony of government expert on handwriting comparison) In a brief opinion the Eighth Circuit upheld the admission of the testimony of an expert witness, where the defense did not object at trial.
 - a. **Facts:** The defendant Jolivet was convicted after trial of mail fraud, money laundering, and conspiracy in connection with an insurance scam run by her husband. *Id.* at 905. At trial the government offered the testimony of an expert in handwriting comparison to opine that signatory on some of the fraudulent documents was likely the defendant. *Id.*
 - b. **Issue:** Did the district court commit plain error by admitting this testimony? *Id.* at 906.
 - c. **Held:** "Because [the handwriting expert] was particularly well-qualified in analyzing questioned documents – having studied and taught internationally, written manuals, and practiced in the field for over two decades, performing several thousand comparisons – the district court did not abuse its discretion in finding [his] testimony to be reliable The district court thus committed no abuse of discretion, much less plain error, in admitting [the expert's] testimony." *Id.* at 906.
 - d. **Worthy of Note: OBJECT!** In *Jolivet*, the defense did not object at trial. "Without a timely contemporaneous objection at trial, a party cannot preserve an issue for appeal, and this court cannot reverse on appeal unless we find 'plain error.'" *Id.* at 905-06. Challenging experts on appeal is difficult enough with the deferential abuse of discretion standard; overcoming plain error is well nigh impossible.

5. ***United States v. Rutherford***, 104 F. Supp. 2d 1190 (D. Neb. 2000) (excluding testimony of forensic document examiner on opinions of ultimate authorship and the degree of certainty on which he bases his opinion). In the tradition of *Hines* and *Santillan* – both of which it cites – this is a thoughtful district court opinion that limits the testimony of a government expert forensic document examiner. Note that the defense expert is Michael Saks; the same expert used by Rob Epstein in his fingerprint challenges.
- a. **Facts:** The defendant Rutherford was charged with fraud. The government’s forensic document was proffered to testify as to similarities between genuine and challenged exemplars. The expert was also prepared to offer opinions on the true authorship of several documents, and offer probability assessments as to whether the defendant was the author. *Id.* at 1191-92.
 - b. **Issue:** “In the instant case, there is no dispute that testimony relating to handwriting analysis is relevant to proving a forgery case and the government’s [expert] qualifies as an expert in the technical field of handwriting analysis. There is also no dispute that testimony from a [forensic document examiner] is likely to be helpful to jurors. What counsel dispute is whether [the expert] should be permitted at trial to offer his opinions on the ultimate issue of authorship as well as to the degree of certainty on which he bases his opinion.” *Id.* at 1192.
 - c. **Held:** “[T]he Court concludes that handwriting analysis testimony on unique identification lacks both the validity and reliability of other forensic evidence, such as *fingerprints* [**ed. note: ???**] or DNA evidence. . . As such, the Court finds it is prudent to join an ever-growing number of federal district courts that have found it necessary to place limits on the proffered testimony of a handwriting expert.” *Id.* at 1193 (internal emphasis and commentary added, internal citations excluded).
 - d. **Worthy of Note:** The trial court emphasized the “well prepared and executed cross-examination” of the forensic document examiner (conducted by Clarence Mock, III). *Id.* at 1193. That cross not surprisingly follows the analytical approach found in Rob Epstein’s fingerprint challenge; the same defense expert, Michael Saks, assisted in both attacks. The *Rutherford* case drives home the need for the assistance of defense experts when attacking the reliability of otherwise-established technical fields, such as handwriting or fingerprint challenges.

C. Psychological or Sociological Experts: As the district court in *Hines* noted, (see discussion below), psychological or sociological experts can fare better than “venerable” traditional technical experts--like handwriting experts--because their expertise rests on a scientific basis. This means, however, that government psychological or sociological experts may be less vulnerable to defense attack under the more-flexible *Kumho Tire* analysis of technical experts. See, e.g., *United States v. Romero*, 189 F.3d 576, 585-86 (7th Cir. 1999) (admitting testimony of government expert to testify about “how child molesters operate.”)

1. ***United States v. Hines***, 55 F.Supp.2d 62 (D. Mass. June 11, 1999) (admitting testimony of expert on cross-racial identification). The district court’s decision in *Hines* is one of the most thoughtful of the post-*Kumho* cases, and offers a candid evaluation of the shortcomings of *Daubert* and *Kumho Tire*. An excellent case for the defense. See discussion above under “Handwriting” for a more complete discussion of the *Hines* case.

a. **Facts:** The only government evidence in an armed bank robbery prosecution was a (cross-racial) eyewitness identification and the handwriting analysis of the robbery note. *Hines*, 55 F.Supp.2d at 62. To attack the eyewitness identification the defense offered an expert on cross-racial identification and the impact of stress and other factors on the reliability of memory.

b. **Issues:** Should the district court admit the testimony of a defense expert on “cross-racial identification” and eyewitness testimony?

(1) Note: also at issue was the admissibility of a government handwriting expert. That issue in *Hines* is discussed in the “Handwriting” section, *supra*.

c. **Held:** Permitted the testimony of both the defense and government experts on cross-racial identification and eyewitness identification while under stress.

(1) “Unlike handwriting analysis, there is no question as to the scientific underpinnings of [the defense expert’s] testimony. They are based on experimental psychological studies, testing the acquisition of memory, retention, and retrieval of memory under different conditions.” *Id.* at 72.

(2) This testimony is necessary to aid the jury. “While jurors may well be confident that they can draw the appropriate inferences about eyewitness identification directly from their life experiences, their confidences may be misplaced, especially where cross-racial identification is concerned.” *Id.* at 72l. “All that the expert does is provide the jury with more information with which the jury can then make a more informed decision.” *Id.*

- (a) The court in *Hines* analogizes testimony of cross-racial identification expert to testimony regarding the “battered women syndrome.” *Id.*
- d. **Worthy of note:** In addition to being particularly well-written, the juxtaposition of the old and new--handwriting and cross-racial I.D. experts--in the *Hines* opinion makes it one of the best of the post-*Kumho* analyses. It provides a textbook setting for exploring the requirements for testing old, accepted fields, (such as handwriting), and the *Daubert* requirements for newer technical areas (such as cross-racial identification).
- (1) “Indeed, the central debate before the jury, eloquently articulated by . . . the government’s expert, is the polar opposite of the debate in the handwriting field--whether conclusions obtained in an experimental, academic setting with college students should be applied to a real life setting.” *Id.* at 72.
- (2) Note that the fact that the defense expert had *not* interviewed the eyewitness weighed *in favor* of admissibility. “[T]he fact that the expert has not interviewed the particular eyewitness makes it less likely that the jury will merely accept the expert testimony and more likely that the testimony will be appropriately cabined. The witness can only be providing the jury with the tools to analyze the eyewitness; he has no more specific information. The science makes no pretensions that it can predict whether a particular eyewitness is accurate or mistaken.” *Id.* at 73.
2. ***United States v. Charley***, 189 F.3d 1251 (10th Cir. 1999) (finding in child sex abuse case that district court had erred in the admission of expert testimony and opinion offered in the guise of fact witness testimony, but holding that any error was harmless). This case vies with *United States v. Waters*, 194 F.3d 926 (8th Cir. 1999), (*see discussion below*), for the distinction of most troubling post-*Kumho* authority. In a child sex abuse case with no physical evidence, no eyewitnesses, and testimony from the defendant adamantly denying the offense, the Tenth Circuit found the admission of expert testimony that the children has been abused erroneous--but “harmless error.” A politely-worded, devastating dissent by Judge Holloway hits upon each of the Tenth Circuit’s errors. **NB:** The Tenth Circuit may be backing-off of its endorsement of this type of testimony. See the discussion on *Velarde* at *infra* pg. 30, involving the same doctor who testified in *Charley*.
- a. **Facts:** A mother took her two Navajo daughters to a pediatrician and explained that they had accused their “uncle” of molestation. *Id.* at 1256. The girls’ pediatrician, Dr. Junkins, examined the girls and found no physical evidence of sexual contact. *Id.* He concluded, however, that the alleged sexual abuse would explain one of the girl’s puzzling medical history of bed-wetting, chronic stomach pain, urinary tract infections, and other symptoms. *Id.* The defendant, also a Navajo, (hence creating federal jurisdiction), was arrested and the girls were referred to mental health treatment and evaluation. *Id.* at 1256-57. The girls were examined by a second pediatrician, who also found no physical

symptoms of abuse but--after receiving information about the girls' medical history--concluded that they had been sexually abused. *Id.* at 1257.

- (1) Before trial, the government notified defense counsel of its intent to call health care professionals who had examined or treated the girls. *Id.* at 1257. While the government disclosed medical information, notes, and records, it did not designate any of these health care professionals as experts and thus did not disclose summaries of expert testimony in accordance with Federal Rule of Criminal Procedure 16(a)(1)(E).
 - (2) Before trial, the defense objected to the testimony of the health care professionals as undisclosed "experts." *Id.* at 1257. The district court denied the defense objection on the basis that the health care professionals were not "experts" under Fed. R. Evid. 702, but "lay" or "fact" witnesses under Fed. R. Evid. 701.
 - (3) At trial, pediatrician Dr. Junkins explained that sexual abuse "would" explain and "was" a unifying diagnosis for all of one of the girl's previous medical problems. *Id.* at 1263-64. He testified that the visit regarding molestation "caused it to become 'clear to [him] as a pediatrician what had been going on and what's the cause of all these problems.'" *Id.* at 1264. At the end of his testimony, however, he explained that sexual abuse "could" explain the medical problems of the child. *Id.* at 1263.
 - (4) At trial, pediatrician Dr. Ornelas testified that her "final conclusion was that [one girl] had been sexually abused, . . . and that [that the second girl] also had a normal examination and also she--my conclusion is that she was also sexually abused." *Id.* at 1266. The doctor further testified that "the kind of contact that occurred is what's called label coitus . . ." *Id.*
 - (5) At trial, two licensed mental health counselors testified, among other things, that one of the girls' symptoms were more consistent with the symptoms of children who have been sexually abused than with the symptoms of children who had witnessed physical abuse of their mother. *Id.* at 1269. One of the witnesses testified "it was becoming increasingly hard for the children to be in the[ir] house because some of the abuse had happened in the house." *Id.* at 1270.
- b. **Issues:** Did the district court abuse its discretion in admitting the testimony and opinions of pediatricians and mental health professionals who were not offered as nor qualified as experts?

- (1) If the district court did err, was that error harmless?

- c. **Held:** The district court erred in admitting the opinions of the doctors and mental health professionals regarding whether abuse had taken place.
 - (1) This was harmless error. “In light of the strength of the properly admitted testimony, admitted above, and the relatively modest amount of erroneously admitted testimony, we cannot say that the erroneously admitted portions of the testimony substantially affected the trial’s outcome, and we are not in grave doubt that the testimony had such effect.” *Id.* at 1272.
 - (a) The *Kumho Tire* decision came out after the trial in the district court and a *Daubert* challenge was not raised until a petition for rehearing. The Tenth Circuit in *Charley* accordingly declined to “make any kind of independent appellate determination that such “consistent with” statements--or any other statements, for that matter--pass muster under *Daubert* or *Kumho Tire*. *Id.* at 1256 n.16 (discussing defendant’s petition for rehearing).
- d. **Worthy of note:** The Tenth Circuit in *Charley* conceded that “Defendant took the stand in his own defense and categorically denied ever inappropriately touching either of the girls. There was no physical evidence of abuse, and no eyewitnesses to the alleged misdeeds.” *Id.* at 1271. Moreover, the court further conceded that “The admission of the expert conclusion of a highly credible physician that the girls were in fact sexually abused, coupled with the admission of the testimony of two counselors who assumed that the girls had been abused, and stated it as a fact, undoubtedly has some effect on the jury’s deliberation.” *Id.* at 1271. The court nonetheless concluded that these expert opinions--offered by witnesses who were never qualified as experts--did not rise above harmless error.
 - (1) Judge Holloway accurately catalogs the many disturbing errors in the Tenth Circuit’s analysis in *Charley*. *See id.* at 1273 (Holloway, J., *dissenting*). Judge Holloway agrees that the admission of the expert testimony was erroneous, but emphasizes that the district court completely abdicated in its responsibility to find pediatrician Dr. Junkins’s testimony “reliable” under *Daubert* and *Kumho Tire*. *Id.* at 1276. “I must disagree with any suggestion that this record supports a finding that any of these witness’ opinion were reliable under *Daubert*, and I am distressed by the majority’s suggestion that the district judge here undertook some such reliability inquiry. It is painfully obvious that the trial judge made no such determinations.” *Id.* at 1276. By finding that Dr. Junkins’s testimony had been found to be reliable, the Tenth Circuit avoided that testimony in its harmless error analysis. *Id.* at 1276.
 - (a) Judge Holloway offers an excellent explanation of the screening requirements of *Daubert* and *Kumho Tire*, and describes how the witnesses were allowed to

offer expert testimony without undergoing Fed. R. Evid. 702 scrutiny. *Id.* at 1278-79. The dissent is worth reading for ideas on how to articulate defense objections to expert testimony, and the prejudice such testimony can cause.

- (b) In dissent, Judge Holloway sums up the impact of the Tenth Circuit's decision: "Because of the lack of physical evidence, and the absence of other witnesses to the alleged conduct, this case turned almost entirely upon the credibility of [the two girls]. By the time the two victims took the stand, their credibility had been improperly enhanced by the testimony of four witnesses who, although not formally proffered as experts, likely were very impressive to the jurors because of their professional standing. Whether the improperly admitted opinion evidence is considered as vouching for [the girls'] testimony, or as lacking the proper foundation of a reliability determination by the judge, is not of controlling importance, once we reach the stage of determining whether the errors were harmless. Either way the expert opinions are analyzed, the result was unfairly prejudicial to Defendant." *Id.* at 1281.

- 3. ***United States v. Romero***, 189 F.3d 576 (7th Cir. 1999) (admitting testimony of government expert regarding methods and techniques employed by "preferential" child molesters). In a dangerous opinion for the defense, the Seventh Circuit in *Romero* upholds the district court's admission of a government expert on child molesters. The decision in *Romero* is particularly bad because the government expert was allowed to testify based on hypotheticals that exactly mirrored the defendant's behavior; hence, effectively testifying on the ultimate issue. Can be used, however, to support a *defense* expert's testimony on case-specific hypotheticals.

- a. **Facts:** "We start with the facts, which are rather bizarre, to say the least." *Romero*, 189 F.3d at 578. The defendant convinced two brothers who were "Christian faith healers" that he was genetically engineered by the National Security Agency, that he grew up in a laboratory, and that his body contained alien parts. *Id.* The two brothers believed at least part of the defendant's story, and allowed him to move in with them in Iowa. When the defendant explained that aliens had informed him of a cybernet "pot of gold" derived from tax returns, the brothers bought him a computer and AOL account to search for the treasure. With the computer the defendant downloaded child pornography and met, in a chat room, a minor named "Erich." After months of conversations between the defendant and the boy, the defendant flew to Chicago and convinced the boy to run away from home. The defendant convinced Erich to travel with him from Chicago to Florida on a bus; the pair were apprehended in Kentucky before any sexual contact had taken place. *Id.* at 578-80.

- (1) The defendant was charged with kidnaping, transporting a minor *with intent to engage in criminal sexual activity*, traveling in interstate commerce *for the*

purpose of engaging in a sexual act with a juvenile, and obstructing justice. At the first trial the jury acquitted the defendant traveling to Illinois for the purpose of engaging in a sexual act, and the jury hung on the kidnaping and interstate transportation charges. *Id.* at 581-82. These charges were tried before a second jury, and the defense argued that the minor consented to travel with the defendant. The defense further argued that the defendant never intended to follow through on his sexual fantasies. *Id.* at 582. The second jury convicted the defendant on the kidnaping and transportation charges.

b. **Issue:** Did the district court abuse its discretion when it admitted the testimony of the government's FBI expert on child molesters?

(1) The government proposed to have FBI expert Agent Lanning testify as to 1) the characteristics of "preferential" child molesters, and 2) his opinion that the defendant was a child molester with an interest in adolescent boys, and that the defendant had a sexual interest in the minor Erich.

c. **Held:** The district court did not abuse its discretion in admitting the testimony of the FBI agent/ expert. Moreover, the FBI Agent did not "cross the line" and offer an opinion on the ultimate fact when he concluded that a hypothetical man--with the same behavior as the defendant--was a child molester with a sexual interest in a minor.

(1) The testimony in general would be reliable and helpful to the jury. "This court has recognized the value of expert testimony in explaining a complicated criminal methodology that may look innocent on the surface but is not as innocent as it appears. Such modus operandi evidence has proved useful in drug trafficking cases In the same way, the main thrust of Agent Lanning's testimony described the modus operandi of modern child molesters" *Id.* at 585.

(2) While Federal Rule of Evidence 704(b) prohibits an expert from testifying about whether a defendant did or did not have a mental state or condition constituting an element of the crime charged, the FBI expert did not "cross that line." The Seventh Circuit turned to its previous authority that allowed an expert to testify regarding an *inference* that a defendant possessed crack to distribute rather than to use. *Id.* at 586, *citing United States v. Brown*, 7 F.3d 648 (7th Cir. 1993). The FBI expert in *Romero* did "not even approach the Rule 704(b) line drawn in *Brown*." *Id.* at 586.

(a) "While his redirect testimony addressed some of [the defendant's] actions served up in the form of hypotheticals, he never directly opined as to [the defendant's] mental state when he crossed state lines with Erich in tow." *Id.* at 586.

d. **Worthy of note:** The initial analysis in *Romero*--whether the expert qualified under *Daubert* and *Kumho*--is particularly unpersuasive. The Seventh Circuit simply defaults back to pre-*Kumho* *modus operandi* authority and analogizes the FBI Agent's testimony to drug trafficking experts. See *id.* at 584-85. After *Kumho Tire*, however, the district court should have undertaken a more rigorous analysis of the expert's qualifications and methodology.

(1) Particularly troubling is the Seventh Circuit's (dubious) reasoning regarding an expert's opinion on a defendant's ultimate mental state. The Court relied on its previous (questionable) decision in *Brown*, and concluded that as long as an expert does not *directly* comment on a defendant's mental state the testimony is unobjectionable. Because the FBI expert only opined on hypotheticals, (that happened to exactly mirror the defendant's actions), the testimony did not violate Federal Rule of Evidence 704(b).

(a) ***Sauce for the goose....*** If faced with the approach taken by the *Romero* court, consider a defense expert who opines on the defendant's mental state in the guise of hypotheticals. For example, offer a prison expert who testifies how an ex-convict would react to a set of hypotheticals (mirroring your case) in light of the "convict code."

(2) **New FRE 702 & Expert Hypotheticals:** After the *Romero* case, the Advisory Committee on the amended Federal Rule of Evidence 702 has weighed in on hypotheticals: "Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other." FRE 702 Advis. Comm. Notes 2000 Amendments.

4. ***United States v. Velarde***, 214 F.3d 1204 (10th Cir. 2000) (reversing conviction when district court refused to undertake *Daubert* analysis of doctors testifying that 8-year old's account of episode was consistent with sexual abuse). After the extremely unfair *Charley* opinion, the Tenth Circuit redeems itself somewhat in a case involving the same doctor "expert," and involving allegations of sexual abuse of a Native American child. In *Velarde*,

the Tenth Circuit emphasized that a district court must make *some* sort of *Daubert* analysis, and suggested that the expert's testimony constituted improper vouching.

- a. **Facts:** The defendant was convicted of aggravated sexual assault within Indian country. *Id.* at 1205. The alleged victim was an eight-year old girl, who complained that the defendant had touched or penetrated her "private parts." *Id.* at 1207. A physical examination of the girl revealed no bruising or tears or other evidence of physical injury. Dr. Ornelas, a pediatrician at the University of New Mexico, examined the girl and agreed that she had a "normal" hymen. Nonetheless, Dr. Ornelas was called at trial to testify that the child's statement as part of the medical exam was consistent with child abuse. *Id.* Over repeated and vigorous defense objection, Dr. Ornelas and another doctor were allowed to testify at trial, and Dr. Ornelas presented her opinion that the child's behavior was "consistent with child sexual abuse." *Id.* at 1209.

- (1) On the first day of trial, *Kumho Tire* was decided. The extraordinarily able defense attorney renewed the defendant's challenge to the expert testimony (who has time to read slip opinions on the first day of trial?) The district court nonetheless denied the renewed request, stating "I've had this testimony before in trials, and it's not new and novel"

- b. **Issue:** Did the district court err in admitting the expert testimony of the doctors, and in failing to first determine the reliability and relevancy of that testimony? *Id.* at 1208.

- c. **Held:** "Because we find that the district court erred in failing to conduct, on the record, any kind of reliability determination with respect to the government's expert witnesses, we reverse and remand." *Id.*

- (1) "While we recognize that the trial court is accorded great latitude in determining how to make *Daubert* reliability finding before admitting expert testimony, *Kumho Tire* and *Daubert* make it clear that the court must, on the record, make *some* kind of reliability determination. '[T]rial-court discretion in choosing the manner of testing expert reliability[] is not discretion to abandon the gatekeeping function.' *Kumho*, 526 U.S. at 158-59, 119 S. Ct. 1167 (Scalia, J., concurring)." (emphasis in original).

- d. **Worthy of Note:** The Court in *Velarde* suggested that the testimony of Dr. Ornelas might constitute impermissible vouching. *See id.* at 1211 & n.6. By basing her diagnosis of sexual abuse on the child's statements on what had happened, the doctor may have been impermissibly bolstering the child's testimony. *Id.*

- (1) The Tenth Circuit in *Velarde* rejected the district court's conclusion that if it has let in a type of expert testimony before *Daubert* and *Kumho Tire*, it was sufficiently

reliable to admit after those cases. This same analysis should apply to other traditional fields of expertise, such as cop “experts,” fingerprint experts, and handwriting experts.

5. ***United States v. Duhon***, 104 F. Supp. 2d 663 (W.D. La. 2000) (rejecting testimony from Bureau of Prisons in competency evaluations in light of *Daubert*). The district court in *Duhon* has written a particularly thoughtful opinion in support of its decision regarding the competency of a mentally retarded defendant. *Duhon* is one of the relatively few cases that stand for the proposition that the *Daubert* trilogy should extend beyond the trial context and should apply to pretrial proceedings as well.
 - a. **Facts:** The defendant Duhon was arrested after picking up pictures at a post office of two young girls (his cousins) in sexually explicit poses. *Id.* at 665. He was charged with sexual exploitation of children, and with receiving visual depictions of minors engaged in sexually explicit conduct. *Id.*
 - (1) Defense counsel immediately referred his client for a competency evaluation, which began a long series of evaluations by various doctors. *Id.* at 665-66. A local psychiatrist appointed as an expert by the court concluded that the defendant was mentally retarded from birth and was not competent to stand trial. *Id.* at 666. A subsequent evaluation by a second court expert reached the same conclusion. *Id.* at 667. When the district court found the defendant not competent to proceed, the government moved for his commitment to the custody of the Attorney General for hospitalization to determine whether he would achieve the capacity to proceed to trial. The court characterized the government’s approach as “absurd and harmful,” but concluded that it did not have the ability to not commit the defendant for an evaluation.
 - (2) The Bureau of Prisons at Butner, North Carolina enrolled the defendant in a “Competency Restoration Group,” and issued a certificate of competency. At yet another competency evaluation, the district court questioned whether the FCI considered all the necessary factors in determining the defendant’s competence. *Id.* at 674.
 - b. **Issue:** Does *Daubert* apply to competency proceedings?
 - c. **Held:** “Although there is little precedent on the issue, the undersigned concludes that there is nothing in the applicable statutes which exempts such certifications from the requirement that they be reliable under Rule 702 F.R.Evid. and the standards enunciated in *Daubert* . . . and *Kumho Tire* Furthermore, because the issue of competency for a criminal defendant is a critical one, with constitutional implications, it is even more important for the court to be vigilant in disallowing unreliable psychological evidence.”

Id. at 677 (internal citations and footnotes omitted). The Court rejected the testimony of the FCI expert, and found the defendant not competent.

- d. **Worthy of Note:** This is an interesting decision, with a great result for the defense, but it does have some analytical problems. Federal Rule of Evidence 702 and the *Daubert* Trilogy are primarily concerned with the impact of “junk” expert testimony on the jury. It is a fair question as to how a district court can play a gatekeeping function in excluding expert evidence from its own consideration? There is a solid argument that the appropriate analysis in the pre-trial or sentencing context should go to the weight of the expert’s testimony, rather than admissibility. This becomes a real issue when the defense relies on expert testimony in the pre - or post-trial context; for example, in the use of an eyewitness identification expert when challenging a suggestive line-up, or when calling a psychologist at a sentencing hearing. In those postures, the defense does not want to be bound by the strictures of *Daubert*

(1) This is an interesting evidentiary issue that has not been thoroughly litigated. For example, the Federal Rules of Evidence (and hence, FRE 702), generally apply to “criminal cases and proceedings.” See Fed. R. Evid. 1101(b). In general, however, hearsay is admissible at suppression hearings and sentencing hearings, and as described above it seems to make little sense to apply FRE 702 outside of a jury trial. Ultimately, the defense position on this issue will probably be case-specific.

(2) Compare the Fourth Circuit’s approach to the issue of *Daubert* at sentencing hearings in its *Barnette* decision. See discussion of *Barnette*, *infra* at pg. 65.

6. **United States v. Pendergraft**, 120 F. Supp. 2d 1330 (M.D. Fla. 2000) (granting government’s motion to exclude the testimony of a defense psychological expert, who would have testified that the defendant had a “underlying personality order (NOS) [‘not otherwise specified’ in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (“DSM-IV”)]”). The district court in *Pendergraft* adopted the magistrate’s recommendations, which found that the psychologists’ conclusions were not relevant because they did not negate the *mens rea* of the crime.

- a. **Facts:** The defendant Spielvogel was charged with several federal intent crimes, including conspiracy to commit extortion and mail fraud. *Id.* at 1340. The defense offered the testimony of Dr. Caddy, a clinical and forensic psychologist. *Id.* at 1341. Dr. Caddy examined the Mr. Spielvogel, and concluded that at the time of the events relevant to the case the defendant suffered from an “underlying personality disorder (NOS).” *Id.* This disorder caused a chronic propensity to self aggrandize and the defendant’s tendency to ingratiate himself with people to achieve a sense of personal power and worth. *Id.* While the defendant was easily prone to paranoia, this condition did not prevent him from understanding the difference between right and wrong. *Id.* at 1342. The government

moved to exclude this testimony, and the district court referred it to the magistrate for a hearing.

- b. **Issue:** Was the testimony of Dr. Caddy admissible under Federal Rule of Evidence 702?
 - c. **Held:** “Because the testimony does not negate *mens rea* the expert testimony does not satisfy the ‘fit’ or relevance prong of *Daubert* and Rule 702 and, therefore, the Defendant should not be permitted to use the testimony of Dr. Caddy because it will not be relevant in assisting the jury in determining a fact in issue.” *Id.* at 1344.
 - d. **Worthy of Note:** All parties in *Pendergraft* conceded that the expert, Dr. Caddy, was qualified to offer the opinion given. The magistrate focused, however, on the relevance prong of the *Daubert* analysis. *Id.* at 1343. Because the doctor’s testimony would not negate the intent of the crimes charged, it was not a good “fit” under *Daubert* and would distract the jury from focusing on the actual presence or absence of *mens rea*. *Id.* at 1344.
- (1) It is easy to become distracted in a *Daubert* analysis with the qualifications of an expert or his or her reliability. Often, however, it is the case-specific question of the relevance of the testimony that is the controlling issue on the admissibility of the expert’s testimony. *See, e.g., discussion of Ninth Circuit’s decision in Vallejo, infra* at pg. 53.

D. Cops as “Experts”: A frustrating aspect of pre-*Kumho* authority regarding expert testimony was federal courts’ routine admission of the opinions of cop and agent testimony, masquerading as “expert” evidence. Most post-*Kumho* authority, unfortunately, continues this disappointing trend. A *Kumho Tire* challenge, however, can force the government to abandon certain types of experts (such as ATF “interstate nexus” experts) who are notoriously sloppy and can increase the burden of litigation by forcing the AUSA to fly-in gun manufacturers in felon-in-possession cases. A *Kumho Tire* challenge can also be an effective means of pre-trial discovery, if the defense is given a pre-trial hearing to contest the “expertise” of the testifying cop or agent.

1. *But cf., United States v. Cooper*, No. Crim. 99-02666 (JHG), 2000 WL 246188 (D.D.C. Feb. 29, 2000) (Ord.) (finding that *Daubert* and *Kumho Tire* did not require the district court to conduct a pre-trial evidentiary hearing to determine the admissibility of expert testimony) (discussion under “Misc. Experts, *infra* at pg. 558).
2. *United States v. Volk*, 57 F.Supp.2d 888 (N.D. Cal. May 28, 1999) (upholding the magistrate’s admission of the results of “field sobriety tests” in a DUI case, despite magistrate’s refusal to hold a pre-trial *Kumho Tire* or *Daubert* hearing).

- a. **Facts:** Former N.D. Cal. AFPD Mary McNamara fought every aspect of a federal DUI case, including jurisdiction and the federal officer's "expertise" regarding field sobriety tests. The federal magistrate admitted the officer's testimony regarding the "walk and turn" test, the "one-leg stand" test, the alphabet test, and a finger-count test. *Id.* at 891. The defendant appealed to the district court, challenging the admission of the officer's testimony on the field sobriety tests.
- b. **Issue:** Did the federal magistrate abuse her discretion under *Kumho Tire* in admitting the testimony of a federal park police officer regarding the results of field sobriety test? *Id.* at 894-95.
- c. **Held:** No, "it cannot be said that the trial court abused its discretion in admitting the portion of [the officer's] testimony pertaining to the FSTs ("Field Sobriety Tests.")" *Id.* at 895.
 - (1) "[T]he inquiry on appeal cannot be grounded in the misapprehension that *Kumho Tire* somehow requires the trial court to undertake a mechanistic application of the *Daubert* factors or to conduct a pre-trial evidentiary hearing whenever one side disputes the foundation of the other side's expert testimony. Rather, the appellate court must simply review the trial court's admission of the testimony--and the process by which the trial court made its decision--for abuse of discretion." *Id.* at 894.
 - (2) The court in *Volk* observed that most of the officer's testimony cannot be considered "expert" testimony under the meaning of Federal Rule of Evidence 702. *Id.* at 894 n.3. For example, his testimony that the defendant's breath smelled of alcohol, that the smell of alcohol emanated from the vehicle, the defendant's denial that he had been drinking, the defendant's bloodshot eyes and swaying were "based on common observations that are not so technical or complex as to require qualification as the opinion of an expert." *Id.* "However, to the extent that Officer West testified about the *conclusion* he drew from the administration of the field sobriety tests, about which he had specialized knowledge, this evidence certainly appears to fall within the ambit of FRE 702." *Id.* (emphasis added).
- d. **Worthy of note:** The district court in *Volk* correctly identified the distinction between reporting lay observations--such as bloodshot eyes--and opining as to the *significance* of Field Sobriety Tests; testimony that falls within Federal Rule of Evidence 702. The court's decision, unfortunately, did not probe the magistrate's apparent error in declining to conduct a *Daubert* evaluation.
 - (1) The magistrate in *Volk* appears to have relied on the (now invalid) "scientific/ non-scientific" distinction from pre-*Kumho Tire* caselaw. See *Volk*, 57 F.Supp. 2d at

895 (citing *United States v. Everett*, 972 F.Supp. 1313 (D. Nev. 1997)). The reasoning appears to have been that because the officer's testimony wasn't "scientific," it needn't be subjected to a *Daubert* analysis. That distinction was rejected in *Kumho Tire*, and despite the district court's opinion application of that distinction was arguably an abuse of discretion in *Volk*.

3. ***United States v. Matthews***, 178 F.3d 295 (5th Cir. 1999) (avoiding issue of whether *Daubert* and *Kumho Tire* apply at sentencing by finding sufficient evidence of gang affiliation beyond government expert's testimony).
 - a. **Facts:** The defendant was convicted of carjacking at trial. *Id.* at 297. At sentencing he received an upward enhancement for his membership in a gang. *Id.* at 302-03. Over defense objection, at sentencing a police "gang expert" testified that the defendant was a member of a local gang. *Id.* at 303.
 - b. **Issue:** Do the requirements of *Daubert* and *Kumho* apply at sentencing?
 - c. **Held:** The court in *Matthews* avoided the issue by finding that sufficient *other* evidence supported the court's finding at sentencing that the defendant was a member of a gang. *Id.* at 304.
 - d. **Worthy of note:** In opposition to the defendant's motion the government argued that *Daubert* and *Kumho Tire* arise from Federal Rule of Evidence 702, and the Federal Rules of Evidence do not apply at sentencing. *Id.* at 303-04. This issue does not appear to have yet been decided in a post-*Kumho Tire* decision.
4. ***United States v. Harris***, 192 F.3d 580 (6th Cir. 1999) (finding that district court did not abuse its discretion in admitting the testimony of officer "as to the methods and operations of street level dealers.") A cursory analysis admitting an officer's testimony regarding drug dealing--devoid of *Kumho Tire* analysis.
 - a. **Facts:** The defendant was arrested after officer surveillance revealed the defendant walking erratically, removing something from his shoe or sock, and with one leg pant rolled up. *Id.* at 583. After the defendant was arrested, the police recovered two bags with crack cocaine from the defendant; the first weighing 3.056 grams and the second weighing 2.8 grams. *Id.* At trial, the arresting officer testified as to "methods of packaging and distributing crack cocaine and other methods and operations of street level drug dealers." *Id.* The officer's testimony included "the supposition that a rolled up pants leg often serves as a signal that a person has drugs for sale, that shoes and socks are common places to hide drugs, and that large pieces of crack are often broken into smaller pieces and wrapped individually for sale." *Id.*

- b. **Issue:** Did the district court abuse its discretion in admitting the testimony of a city police officer as both a fact witness and “expert” witness?
 - c. **Held:** “We find that the district court did not abuse its discretion in allowing Officer Snavely’s expert opinion testimony about the significance of Harris’s observed behavior.” *Id.* at 589.
 - (1) The court in *Harris* turned to pre-*Kumho* authority that had admitted the testimony of a police detective who had testified as both a fact and opinion witness. *Id.* at 589.
 - d. **Worthy of note:** The court in *Harris* undertakes an incredibly cursory *Daubert/Kumho Tire* analysis. The court properly recognizes that *Kumho Tire* broadened the *Daubert* analysis beyond scientific fields to include “technical” and “other specialized knowledge.” *Id.* at 589. The Sixth Circuit simply defaulted to pre-*Kumho Tire* authority, however, and did not undertake a *Daubert* analysis of the reliability of the “expert’s” testimony.
5. **United States v. Tocco**, 200 F.3d 401 (6th Cir. 2000) (upholding district court’s admission of FBI “expert’s” testimony regarding the structure, the organization, the rules, and the interpretation of phrases in an organized crime family).
- a. **Facts:** Defendant appealed convictions on two counts of conspiracy on RICO charges. The defendant was allegedly a member of the “Costra Nostra,” the “Outfit,” or “the Mafia.” 200 F.3d at 410. The district court admitted at trial the testimony of an FBI agent “expert” on the structure, the rules, and the interpretation of phrases and jargon used by organized crime families. *Id.* at 418. The same case agent testified as to substantive facts of the case. *Id.*
 - b. **Issue:** Did the district court abuse its discretion in admitting the testimony of the case agent as an expert witness?
 - (1) Was it an abuse of discretion to a government “fact witness” to also testify as an “expert” witness?
 - c. **Held:** “[The case agent’s] testimony was certainly relevant and reliable under the principles of *Daubert* This type of evidence regarding the inner-workings of organized crime has been held to be a proper subject of expert opinion because such matters are “generally beyond the understanding of the average layman.” *Id.* at 419.
 - (1) It was not an abuse of discretion to permit a “fact” witness to testify. “If the district court and the prosecutor take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, then the

officer's 'expert' testimony may be proper." *Id.* at 418 (citing to *United States v. Thomas*, 74 F.3d 676 (6th Cir. 1996)).

- d. **Worthy of note:** In *Kumho Tire*, the Court acknowledged the *qualifications* of the challenged expert but questioned the reliability of the expert's *methodology*. See *Kumho Tire*, 526 U.S. at 153. This distinction is a constant shortcoming in the analysis of cop and agent "expert" testimony. An agent may be "qualified" in that he or she has years of experience in the force, and yet his or "methodology" may be suspect. The *Tocco* case well-illustrates the (pro-government) approach of assuming reliability of method based on an agent's qualifications; an approach contrary to *Kumho Tire*.
6. ***United States v. Carroll***, No. CRIM. A. 99-88, 2000 WL 45870 (E.D. La. Jan. 20, 2000) (admitting "expert" testimony of FBI agent regarding entries in a drug journal, in light of pre-*Kumho* Fifth Circuit authority admitting narcotics agents as experts in the methods of drug dealers).
- a. **Facts:** Defendant faced charges of conspiracy with intent to distribute cocaine. *Carroll*, 2000 WL 45870 at *1. The government sought to admit into evidence a notebook seized in a car owned by the defendant's brother. *Id.* The notebook did not refer to the defendant by name, did not indicate that it was used to track narcotics sales, and did not expressly identify the dates of alleged transactions. *Id.* "Rather, the notebook contains a series of numerical notations and purported nicknames." *Id.* The government also sought to introduce the testimony of an FBI agent "expert" to explain the function and meaning of the notebook to the jury. *Id.*
 - b. **Issue:** Is the defense entitled to an evidentiary hearing to determine the admissibility of the testimony of an FBI narcotics "expert" regarding the significance of the notebook entries? 2000 WL 45870 at *6.
 - (1) Is the testimony of the FBI "expert" relevant and will it help the jury?
 - c. **Held:** "Based on [the FBI agent's] experience, training, and the proffered evidence of his methodology, the Court sees no reason to hold a *Daubert* hearing to determine the reliability of his testimony before trial. The government has made a sufficient showing of the reliability of his methodology. If [the agent] testifies at trial that he used the same methodology in this case, the Court will find that his methodology is sufficiently reliable to be admissible." 2000 WL 45870 at *8.
 - (1) "The numerous cases where expert testimony of this nature has been admitted indicate that [the FBI agent's] methodology is generally accepted by other law enforcement experts in his field This Court finds that the other *Daubert* factors are inapplicable to this case." 2000 WL 45870 at *8.

- (2) “Here, the government will rely on a combination of testimony from its fact witnesses and its expert witness to detail the function and meaning of the alleged drug notebook to the jury. The government maintains that the expert witness will fill gaps the fact witnesses cannot and vice versa. The Court rejects defendants’ arguments that the expert testimony will not help the jury.” 2000 WL 45870 at *9.
- d. **Worthy of note:** Though it doesn’t admit it, this opinion merely defaults back to the old (and discredited) *Frye* standard—if “generally accepted,” the expert is OK. While the *Frye* “general acceptance” test remains as one of the *Daubert* factors, standing alone it was rejected by the Supreme Court in *Daubert*. The court in *Carroll* relied on pre-*Kumho* authority that had admitted the testimony of police and agent “experts” on narcotics, found that the present agent’s methodology was “generally accepted” by other police and agents, and concluded, Q.E.D., the present agent’s testimony was admissible.
- (1) Reminiscent of the “logic” that was clearly rejected in *Kumho Tire*: “Nor, on the other hand, does the presence of *Daubert*’s general acceptance factor help show that an expert’s testimony is reliable where the discipline itself lacks reliability as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.” *Kumho Tire*, 526 U.S. 137, 151.
7. **United States v. Majors**, 196 F.3d 1206 (11th Cir. 1999) (finding no abuse of discretion when district court admitted the testimony of FBI financial “expert” regarding the amount of loss in a white collar case).
- a. **Facts:** Father and son are accused of fraud and money-laundering scheme involving a fuel additive and a cleaning solution that cured HIV. 196 F.3d at 1209. At trial the investigating FBI agent, a “financial analyst” who was not a certified public accountant, testified as an expert witness. *Id.* at 1209. He testified that the defendants committed roughly \$3.3 million worth of fraud. *Id.*
- b. **Issue:** Did the district court abuse its discretion in admitting the testimony of an FBI analyst who was not a certified public accountant?
- c. **Held:** No, the court did not abuse its discretion in admitting the agent’s testimony. *Id.* at 1215-16. The FBI agent had “previously performed financial analyses for the FBI in over fifty cases for more than eight and one-half years. He had testified in certain of these cases involving bank fraud, mail fraud, and money laundering investigations. By virtue of his training and experience, he possessed special knowledge and skill not available to the ordinary witness.” *Id.* at 1215.

- d. **Worthy of note:** The court's opinion in *Majors* well-illustrates the faulty reasoning in federal courts' perfunctory admission of FBI agents or officers as experts. The FBI "financial analyst" in *Majors* was *not* a certified public accountant. *Id.* at 1209. Unlike street cops who testify about drug sales, there existed a comparable civilian pool of expertise with which to gauge the FBI agent's qualifications: certified public accountants. The government did not show that the agent was qualified to perform complex financial analyses, did not show that the agent's methodology conformed with industry standards, did not present published authority endorsing the agent's procedure, and did not report the agent's error rate. Would a non-FBI "financial analyst" who presented these qualifications have been admitted as an expert under *Kumho Tire*?
8. ***United States v. Molina***, 172 F.3d 1048 (8th Cir. 1999) (finding that district court did not abuse its discretion in admitting the expert testimony of a police captain about the modus operandi of drug dealers).
 - a. **Facts:** Defendant Molina was one of three co-defendants convicted of conspiracy and various cocaine trafficking offenses arising from a series of controlled buys. *Id.* at 1052. Among the evidence was a handwritten note containing a tracking number that corresponded to an overnight package that contained a kilo of cocaine. *Id.* at 1053. That note was in Molina's handwriting. *Id.* One of the co-defendants accepted sole responsibility for the drugs and disclaimed Molina's responsibility, repeated that in an affidavit, and repeated that testimony at trial. *Id.* at 1053-54. At trial, a city police captain testified regarding the "modus operandi" of drug dealers. *Id.* at 1056.
 - b. **Issue:** Did the district court abuse its discretion in admitting the testimony of a city police captain "expert" regarding the modus operandi of drug dealers?
 - c. **Held:** No, there was "no abuse of discretion in the decision to permit [the captain's] expert testimony." *Id.* at 1056.
 - (1) "Molina's testimony was charged with drug distribution. [The captain's] testimony concerned the modus operandi of drug dealers. Such testimony provides a context for the jury. Moreover, the testimony undermined Molina's defense theory Fontana's testimony undercut Molina's innocent companion argument. Any prejudice that befell Molina as a result of Fontana's testimony was vastly outweighed by the testimony's probative value." *Id.* at 1056-57.
 - d. **Worthy of note:** As with the other cop/agent expert cases cited above, in *Molina* a government witness was permitted to offer opinion and hearsay evidence with no independent showing of reliability. A blind acceptance of cop/agent experts from pre-*Kumho* authority can be "equated with 'grandfathering old irrationality.'" *Hines*, 55 F.Supp.3d 62, 68 n.13, *quoting* D. Michael Risinger, Mark P. Denbeaux, Michael J.

Saks, *Exorism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting "Expertise,"* 137 U.Pa.L.Rev. 731, 771 n. 182 (1989).

9. **United States v. Scott-Emuakpor**, No. 1:99-CR-138, 2000 WL 288443 (W.D. Mich. Jan. 25, 2000) (denying motion to exclude testimony of Secret Service agents regarding computers without prejudice to defendant raising motion again at the time of trial).
- a. **Facts:** Defendant accused of participating in "Nigerian advance fee fraud" scheme, with letters purportedly from the Nigerian government seeking the payment of funds to tap into larger pools of government funds. In the pre-trial stage the defendant challenged the admissibility of the testimony of two Secret Services Agents who participated in the search of computers and "Zip" disks found in the course of a search. *Id.* 2000 WL 288443 at *11.
 - b. **Issue:** Is the testimony of agents who admit that they are not computer experts admissible under *Daubert* and *Kumho Tire*?
 - c. **Held:** "The Court will deny the motion at this time without prejudice to allow Defendant to raise his motion again at the time of trial if these witnesses are called upon to give expert opinions." *Id.* 2000 WL 288443 at *12.
 - (1) "The question before the Court at this time is not whether these witnesses have the expertise, for example, to develop sophisticated software programs. The question is whether they have the skill to find out what is on a hard drive or zip drive. Apparently, they have this skill because they determined what was on the drives. By analogy, a person need not be an expert on English literature in order to know how to read. Further, based upon these witness' qualification, it appears that they may indeed qualify as experts under Fed. R. Evid. 702. The fact that Agent Christy admitted that he is not an expert in the area of computer science is not binding on the Court in performing its *Daubert* gatekeeping function, as recently extended by the Supreme Court in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)."
 - d. **Worthy of note:** Not mentioned in the court's analysis is the fact that the agents did not simply select a hard or zip drive and open a file. Agent Christy "testified that he was able to restore files that had been deleted from the zip disks and some files that had been deleted from the hard drive." *Id.* at 2000 WL 288443, * 3. Christy "admitted that he is not an expert in the area of computer science." *Id.* at 2000 WL 288443, * 11. The better analogy is thus not the reader who is no expert on English literature, but rather a forensic evidence expert who can recover destroyed text from the faint impressions of pen on paper. That forensic evidence expert should not be allowed to testify absent a *Daubert/ Kumho Tire* showing, and neither should computer non-experts.

10. **United States v. Hankey**, 203 F.3d 1160 (9th Cir. 2000) (upholding district court's admission of testimony of police officer "gang expert" regarding gang "code of silence" requiring violent retribution against any member who testified against another). Thorough, but disappointing, Ninth Circuit decision that admits testimony of a police officer to show bias of a witness for the defense who testified regarding mistaken identity.

a. **Facts:** Defendant was convicted after a jury trial for distributing and conspiring to distribute PCP. *Id.* at 1164. At trial, a co-defendant testified that the defendant was not involved in the drug transactions and that another man with the same alias was the real drug dealer. *Id.* at 1166. In rebuttal the government called a police officer/ FBI drug task member, who proffered to testify that the defendant and co-defendant were gang members and that there was a code of silence in the gang. *Id.* This code of silence promised "that any affiliated gang member would be subject to violent retribution if one gang member testified against another." *Id.*

(1) After an *in limine* Fed. R. Evid. 104 hearing, the district court refused to allow the gang expert to testify regarding the defendant's gang affiliation. *Id.* The expert was, however, permitted to testify at trial regarding the code of silence. *Id.*

b. **Issue:** Did the district court abuse its discretion in admitting the testimony of a gang expert regarding a gang "code of silence," to show the bias of a defense witness?

c. **Held:** "The district court probed the extent of this knowledge and experience during the motion in limine-FRE 104 hearing, and therefore did not abuse its discretion in determining how best to conduct an assessment of the expert testimony." *Id.* at 1169.

(1) "In sum, the district court did not err in admitting the 'gang' related evidence for impeachment purposes. *Id.* at 1173.

d. **Worthy of note:** While this is a disappointing decision from the defense perspective, it must be conceded that the Ninth Circuit undertook a thorough *Daubert/ Kumho Tire* analysis. *See id.* at 1168-69 (gathering authority for the application of the Fed. R. Evid. 104 and 702 analysis). The *Hankey* decision can be useful to the defense, however, as arguably setting the bar for admission of cop/agent expert testimony.

(1) The Ninth Circuit emphasized the exhaustive voir dire conducted by the district court, *in limine*, before the government expert was allowed to testify. *Id.* at 1169. This is at least preferable to many other post-*Kumho* decisions that blindly admit cop/agent testimony. The court's decision in *Hankey* can be used for the proposition that a proper exercise of trial court discretion should *require* an *in limine Daubert/ Kumho Tire* hearing before admission of government expert testimony.

- (2) The Ninth Circuit's decision in *Hankey* can be used to support admission of defense witnesses. For example, there is no honest intellectual distinction between the gang expert in *Hankey* and a defense prison expert who will testify about the "convict code" and its tendency to foster false confessions from former inmates.
- (3) **Defense distinctions** : In future cases involving police witnesses, try to distinguish *Hankey* by emphasizing the extensive experience of the officer in that case. The expert-officer in *Hankey* had been a police officer for 21 years in Compton, had been working undercover with gang members for over ten years, had received formal training about gangs and had taught classes about gangs. Note also that despite this experience, the district court properly limited the witness' testimony in some fields. *Id.* at 1169
- (4) **OBJECT!** Although it did not ultimately make a difference in the *Hankey* opinion, the Ninth Circuit noted several times that not all co-defendants had objected to the expert testimony, and "plain error" review would accordingly be appropriate. See *id.* at 1171 & n.8, 1172 & n.10. Make sure to object to government expert testimony, and make sure that each co-defendant voices their objection. If the district court wants to avoid the time consumption that comes with a chorus of objections, the parties can stipulate at the outset of trial that an objection of one defendant is offered as to all co-defendants.
- (5) **Scientific vs. Technical Experts** : The Ninth Circuit in *Hankey* definitively rejects the brief "scientific" versus "technical" distinction that arose after *Daubert* but before *Kumho Tire*. "A number of Ninth Circuit cases have held that *Daubert* does not apply to 'non-scientific' testimony at all To this extent, these cases are no longer good law after *Kumho Tire*, which eliminated the analytical distinction between 'scientific' and 'non-scientific' testimony." *Id.* at 1169 & n.7.

11. ***United States v. Brumley***, 217 F.3d 905 (7th Cir. 2000) (upholding admission of DEA agent's testimony regarding personal use amounts of marijuana). Rather cursory analysis permitting introduction of DEA agent's testimony on issue of use amounts of meth. The case is most notable for its two-tiered level of appellate review for expert witnesses.

- a. **Facts:** Defendant Bob Brumley was convicted of conspiracy to distribute methamphetamine, and received a 151 month sentence. *Id.* at 907-08. Brumley was a drug user, who served as a middleman between a drug supplier and buyer. *Id.* at 907. According to the testimony of his two snitch co-defendants, Brumley transported roughly twenty pounds of meth from California to Indiana. At trial the government offered the testimony of a DEA agent, who would state that meth amounts in excess of one ounce indicated that the possessor was a dealer. *Id.* at 911.

- (1) The DEA agent had roughly seven years of law enforcement experience, and had conducted roughly one hundred methamphetamine investigations. *Id.*
- b. **Issue:** First, did the district court properly follow the framework set forth in *Daubert*? If it did, did the district court abuse its discretion in admitting the DEA agent testimony?
- c. **Held:** “However the argument is framed, the result is the same. The district court properly determined that Agent Schmidt had expertise in the matter of distinguishing user from dealer quantities, expertise gained through his extensive experience investigating crimes of this very nature. Brumley's argument goes not to the admissibility of this evidence but rather to its weight, and he was free to cross-examine the agent about the basis for his opinion. Through cross-examination and testimony from his own witness, Brumley was free to reveal any weaknesses or errors in the agent's opinion. Because the district court carried out the gatekeeper function appropriately and limited the evidence to those areas in which the agent had expertise gained through experience and training, we affirm the admission of Agent Schmidt's expert testimony.” *Id.* at 912-13.
- d. **Worthy of Note:** This decision is flawed in several respects. First, there is no review of analysis of whether the methodology of the DEA agent was reliable. Apply your own experience as a defense attorney to this testimony: is anyone who possesses over an ounce of methamphetamine really a dealer? By characterizing this as an issue of evidentiary weight – rather than admissibility – the Court skirts the obligation of a trial court to act as a gatekeeper.
- (1) **Opinion evidence:** The opinion offered by the DEA agent smacks of an opinion on a defendant's mental state, precluded by Federal Rule of Evidence 704(b). The Court in *Brumley* reassures that this was not the case, because the court made it clear that the expert's conclusion was based on “the expert's knowledge of common criminal practices and not on some special knowledge of the defendant's mental state.” *Id.* at 912. The Court thus articulates a distinction that no jury can realistically grasp.
- (2) **Tiered standard of review:** The Seventh Circuit uses an interesting tiered standard of review, adopted from a civil case. *Id.* at 911, citing *Walker v. Soo Line Railroad Co.*, 208 F.3d 581, 590 (7th Cir. 2000). Initially, the appellate court reviews *de novo* “whether the district court properly followed the framework set forth in *Daubert*.” *Id.* If the district court properly followed the *Daubert* framework, the Seventh Circuit reviews for abuse of discretion the district court's decision on whether to admit or exclude the expert testimony. *Id.* This is a much better standard for the defense than the typical abuse of discretion standard applied to *all* district court expert decisions in most circuits. If, for example, a district court completely abdicates in its responsibility to evaluate even a traditionally admissible government

expert, that initial approach would presumably be reviewed under the less deferential *de novo* review. The Seventh Circuit approach should be encouraged in other federal circuits.

12. ***United States v. Cruz-Velasco***, 224 F.3d 654 (7th Cir. 2000) (upholding admission of DEA Agent’s “expert” testimony regarding the nature, structure, and characteristics of drug trafficking operations.) Another appellate case that defaults to pre-*Kumho* authority for the proposition that law enforcement expert testimony regarding the methods and structure is admissible. The opinion is most notable for its discussion of race or ethnic-specific expert testimony. Note also the Seventh Circuit’s tiered structure of appellate review.

- a. **Facts:** Several defendants jointly appeal their conviction for conspiring to distribute heroin. *Id.* at 657. The multi-defendant conspiracy involved several trips from various cities in Texas to Chicago. *Id.* At trial the government offered the testimony of a DEA agent to testify about the “nature, structure, and characteristics of drug trafficking operations.” *Id.*
- b. **Issue:** Applying *de novo* review, did the district court err in its approach to the *Daubert* framework in considering the expert testimony? *Id.* at 659. If not, did the district court abuse its discretion in the admission of this testimony? *Id.*
- c. **Held:** “[W]e find no error in the district court’s decision to qualify Agent Reagan as an expert and admit his testimony regarding drug trafficking operations.” *Id.* at 661.
- d. **Worthy of Note:** As in *United States v. Brumley*, 217 F.3d 905 (7th Cir. 2000), the Seventh Circuit in *Cruz-Velasco* uses a tiered *de novo*, then *abuse of discretion* system of review. For a more thorough discussion of this approach, see the *Brumley* discussion in this outline.

- (1) **Race/ Ethnicity and Expert Testimony:** Although it is a cursory analysis, this is one of the few federal cases that discuss the racial and ethnic overtones of the expert’s testimony. The defense introduced a clever Catch-22 theory: first, that the expert had inadequate experience with Hispanic narcotic structures, and second, that the expert’s testimony improperly introduced ethnicity into the trial and should not have been admitted because it was too prejudicial. *Id.* at 660. The Court concedes that “testimony about the relevant characteristics of particular ethnic groups could be problematic,” and further agreed that the agent’s experience did not qualify him to speak authoritatively on the particular characteristics of Hispanic drug trafficking organizations.” *Id.* The Court ultimately concluded, however, that the agent did not offer an ethnically-based evaluation.

- (a) This might be an interesting new approach in cases involving ethnic conspiracies, such as Chinese or Vietnamese gangs. For example, if the agent's experience arises from contact with Latino gangs or white biker gangs, is that experience necessarily transferable to Asian gangs?
- (b) The inverse challenge is also possible: if the agent will testify, for example, that Asian gangs are typically structured in a given way, does that impermissibly introduce race or ethnicity into the trial? If so, that increases the FRE 403 prejudice, while adding little probative value.

13. **United States v. Alatorre**, 222 F.3d 1098 (9th Cir. 2000) (holding that trial courts are not compelled to conduct pretrial hearings before admitting expert testimony under *Daubert*, and upholding admission of testimony of Customs Agent regarding value and distributable quantity of marijuana). This case illustrates the dangers of the *Joiner* Supreme Court decision—*how* the district court's approach expert testimony is largely left to their discretion. *Alatorre* is a dangerous decision—the government will use it to try to avoid pretrial *in limine* hearings on the admissibility of government experts.

- a. **Facts:** The defendant Alatorre is arrested in a border bust, with over 68 pounds of marijuana in his car. *Id.* at 1099. The defendant's fingerprints aren't on the drugs. *Id.* At trial—over defense objection—the government calls a Customs Agent who testifies about the structure of drug organizations and sales, to explain why the prints were not on the bag. The Court refused to permit the defense to examine the expert in an *in limine* *Daubert* hearing, but allowed voir dire before the jury on the bases of the agent's opinions regarding the value of the drugs. *Id.* at 1100.
- b. **Issue:** “The Supreme Court's trilogy of cases—*Daubert*, *Joiner*, and *Kumho Tire*—provides the backdrop for analysis of the issue presented here: whether a separate pretrial hearing, outside the presence of the jury, is required before expert testimony may be admitted at trial.” *Id.* at 1100.
- c. **Held:** “In light of the Supreme Court's emphasis on the broad discretion granted to trial courts in assessing the relevance and reliability of expert testimony, and in the absence of any authority mandating such a hearing, we conclude that trial courts are not compelled to conduct pretrial hearings in order to discharge the gatekeeping function.” *Id.*
- d. **Worthy of Note:** There is little to salvage from this damaging opinion, but several points bear emphasis. First, this district court, defense counsel, and the government were extremely familiar with the prospective testimony of the Customs Agent. *See id.* at 1099 & n.2. Southern District of California district courts have the highest caseloads in the Ninth Circuit, and many of those cases involve border busts for drug smuggling. There is, therefore, a *sub silencio* reasoning that the defense request for an *in limine* hearing

was just a fishing expedition – the district court said as much. *Id.* *Alatorre* is thus distinguishable from cases where the government expert has not testified hundreds of times to the same conclusions before the same courts.

- (1) In that vein, the Ninth Circuit in *Alatorre* ended with a caveat that gave a lukewarm endorsement of *in limine* hearings for government experts: “Having held that neither the Supreme Court trilogy of cases nor any of our own compels trial courts to conduct separate, pretrial hearing to discharge their gatekeeping duties, we note that holding such hearings – or at least ensuring an opportunity for voir dire outside the presence of the jury – may be appropriate in certain cases. Trial courts should be mindful of the difficulties posed when counsel must explore an expert’s qualifications and the basis for the expert’s opinion in the presence of the jury and, depending on the circumstances of the case, should give due consideration to requests that questioning occur unconstrained by that presence.” *Id.* at 1105.
- (2) The Ninth Circuit in *Alatorre* distinguishes the Tenth Circuit’s decision in *Velarde*, where the district court made no finding whatsoever on the reliability and relevance of the government expert. *Id.* at 1105 (*see discussion on Velarde, infra* at pg. 30). The Court in *Alatorre* emphasized that the district court had the opportunity to explore the reliability and relevance of the proposed government expert testimony during the voir dire before the jury. *Id.*

14. ***United States v. Jordan***, 236 F.3d 953 (8th Cir. 2000) (upholding the admission of officer-expert on the distribution of Black Tar heroin). The *Jordan* case offers no analysis and essentially rubber-stamps the admission of cop testimony on drug distribution.

- a. **Facts:** After a traffic stop, St. Louis police officers allegedly see crack inside the defendant’s car and search the defendant – then discover tar heroin. At trial a police officer testified as to distribution of tar heroin.
- b. **Issue:** Did the district court abuse its discretion in admitting the testimony of a police officer regarding the distribution of tar heroin?
- c. **Held:** No, the district court did not abuse its discretion in admitting the expert testimony.
- d. **Worthy of Note:** There’s nothing much worthy of note in this case – the court admits the police expert without any real analysis. The court’s discussion of excluded impeachment evidence against the cops further supports the conclusion that this opinion is an ends-driven analysis. *Id.* at 955 (upholding exclusion of evidence that officers were under investigation for stealing money from defendants).

15. **United States v. Potts**, No. CRIM A. 00-060, 2000 WL 943219 (E.D. La. July 7, 2000) (admitting testimony of DEA agent regarding source cities for cocaine, and monetary and value of cocaine). The district court in this Louisiana case admits the testimony of a DEA agent regarding cocaine distribution. Unlike many other cases, however, the district court here at least undertakes a reliability and relevance review.
- a. **Facts:** The defendant Potts was stopped at a truck stop for a motor safety inspection. State Troopers then discovered 150 kilograms of cocaine inside the cab.
 - b. **Issue:** Should the district court permit the testimony of a DEA agent, who would describe Houston as a source city for drugs and who would further testify regarding the value and quantity of drugs seized? *Id.* at *1-*2.
 - c. **Held:** The *Daubert* factors do not apply to the testimony of a DEA agent. *Id.* at *3. Under a flexible *Daubert* approach, the DEA testimony is sufficiently reliable because the agent had fifteen years of experience investigating the illegal distribution of narcotics. *Id.* The testimony was also relevant, because it will help the jury to determine whether the defendant knew that he possessed drugs, and whether he intended to distribute the cocaine. *Id.* at *4.
 - d. **Worthy of Note:** While *Kumho Tire* emphasized the flexibility of the reliability analysis, it did not abandon the need for a vigorous review of expert qualifications described in *Daubert*. While this opinion does go into more analysis than many involving cops as experts, it repeats a common mistake: qualifications are not the same as methodology. The district court in *Potts* effectively concludes that because the agent has fifteen years of experience, his methodology is reliable. *Id.* at *3. The brief discussion of methodology does nothing to examine the reliability of the expert's methods. *Id.*
- (1) **Relevance and Apprendi:** The court in *Potts* concludes that the expert's testimony is relevant, because it will help the jury determine whether the defendant knew he possessed drugs, that he was participating in a drug conspiracy, and whether – assuming he intentionally possessed the cocaine – he intended to distribute it. After the Supreme Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), many defenders are raising new challenges to drug distribution statutes. If, after *Apprendi*, drug type and elements are to be treated as *elements*, defenders are arguing that the defendant had to knowingly possess a given type and amount of drug. As courts begin to adopt these heightened *mens rea* standards after *Apprendi*, anticipate even more law enforcement experts testifying on the structure of drug organizations and on distribution amounts.

16. ***United States v. Vallejo***, 237 F.3d 1008 (9th Cir. 2001) (reversing conviction when probative value of Customs agents' testimony was substantially outweighed by danger of unfair prejudice, and when the district court erroneously excluded testimony of defense psychological expert regarding communication difficulties of defendant). This is a *great* opinion argued by San Diego assistant defender Tood Burns of San Diego. In *Vallejo*, the Ninth undertakes a close analysis of the relevance of Customs agent expert testimony and finds that its prejudicial affect outweighed any probative value. The Court also held that the district court erred in excluding the testimony of a defense psychologist, who would have testified about the communication difficulties of the defendant. *Vallejo* is one of the few principled analyses of cop expert testimony, and (accordingly) holds that the testimony should have been excluded.

a. **Facts:** The defendant Vallejo was a senior in high school, stopped as he was driving across the border from Mexico into the United States at Calexico. *Id.* at 1012-13. He was stopped at the border and questioned, and a search of the car he drove revealed forty kilograms of marijuana. *Id.* at 1013. Vallejo was interviewed at the border in Spanish and English, and gave some answers were slightly inconsistent with his trial testimony. The defendant was charged with importation and possession with intent to distribute marijuana.

(1) At trial, the government offered the expert testimony of two Customs agents. The first testified regarding the structure of drug trafficking organizations and the wages earned by drug couriers. In the rebuttal case, the government called a second agent to testify about the amount of money that couriers were paid to smuggle drugs from Mexico into the United States. *Id.* at 1013-14.

(2) The defense offered the trial testimony of his high school's psychologist and director of special education. *Id.* at 1018-19. The expert would have testified about the defendant's long-standing severe language disorder, and the difficulties he experienced understanding and expressing English. *Id.* at 1019. The district court refused to permit the defense expert testify.

b. **Issues:**

(1) Did the district court abuse its discretion in admitting the Customs agent's testimony about the structure of drug trafficking organizations, and abuse its discretion in admitting expert testimony about the price paid to drug smugglers?

(2) Did the district court abuse its discretion by refusing to permit the defense to call the high school psychologist?

c. **Held:** “To admit [the testimony regarding the structure of drug trafficking organizations] on the issue of knowledge, the only issue in the case, was unfairly prejudicial, and an abuse of discretion under Rule 403.” *Id.* at 1017.

(1) “The district court . . . did abuse its discretion under Rule 403 by allowing [the customs agent] to testify regarding the fee paid to couriers within drug trafficking organizations.” *Id.* at 1018.

(2) “Because the Government does not advance any theory of prejudice that might outweigh the highly probative nature of the proffered expert testimony [of the high school psychologist], we conclude that the district court abused its discretion by excluding it.” *Id.* at 1022.

d. **Worthy of Note:** In *Vallejo*, the Court looks closely at the offense charged; importation and possession for distribution of marijuana. There was no allegation that the defendant was involved in a large drug conspiracy, and the testimony of the Customs agents was therefore unfairly prejudicial. That testimony implied that Vallejo knew how large international drug organizations operated, and therefore that he knew he was carrying the drugs. *Id.* at 1017. The government countered that it introduced this evidence to counter a defense that Vallejo had no knowledge because his fingerprints weren’t on the drugs – despite the fact that this defense was not mentioned or raised. *Id.* at 1016. The Ninth Circuit was unimpressed with this sort of anticipatory expert evidence. The Court distinguishes its earlier decision in *Alatorre*, in which expert testimony was relevant because exactly that defense was mounted. See *discussion of Alatorre* at pg. 49. One important lesson from *Vallejo* is that the relevance of an expert is *case-specific*: *Vallejo* and *Alatorre* involve similar facts but different defenses, and government expert testimony is relevant in one but not the other.

(1) A second lesson of *Vallejo* is that a defense expert can be relevant to explain communication difficulties of a defendant, and that exclusion of this type of expert is not harmless error.

E. Miscellaneous Experts: Most truly novel expert witnesses are defense witnesses, because most traditional government areas of expert expertise have already been sanctioned in pre-*Kumho* authority. The post-*Kumho* cases discussed below illustrate that defense experts should to be well-prepared to leap through *Daubert*’s hurdles.

1. ***United States v. Triplett***, 195 F.3d 990 (8th Cir. 1999) (upholding district court’s exclusion of defense “lighting expert” under *Daubert*).

- a. **Facts:** Defendant was convicted of two counts of possession with intent to distribute heroin, after officer testified that he saw the defendant conduct hand-to-hand sales and drive a car without headlights at night. 195 F.3d at 992-93. The district court denied the defendant's motion in limine proffering the testimony of an architectural engineer who would render an opinion on night-time lighting conditions at the sight of the defendant's two arrests. *Id.* at 993. The district court held an *in limine* hearing on the admissibility of the expert. *Id.* at 994.
 - b. **Issue:** Did the district court abuse its discretion in excluding the testimony of a defense "lighting expert?"
 - c. **Held:** The district court did not abuse its discretion in excluding the defense "lighting expert." *Id.* at 998. The district court expressed doubts about the reliability of the expert because the expert "repeatedly said that his efforts could not measure what people can see, that this was not a measurement of visibility." *Id.* at 998. When the expert expressed an opinion, however, about what could be seen he did not refer to his test, but "said it was based upon what he was visibly able to see by his own experience." *Id.*
 - (1) The district court in *Triplett* also expressed doubt about the relevance of the "lighting expert's" testimony because the street location in question was very similar to any other street or alley in St. Louis. The Eighth Circuit affirmed: "[w]e cannot say that the district court abused its discretion in excluding [the defense expert's] testimony, having concluded that the testimony would not assist the jury's understanding of the evidence." *Id.* at 998.
 - d. **Worthy of note:** This was a creative (attempted) use of experts by the defense. Note that in *United States v. Hines*, 55 F.Supp.2d 62, 72 (D. Mass. June 11, 1999), the district court admitted the testimony of an expert on cross-racial identification. The court in *Triplett* might have been forced to admit the testimony of a psychologist or sociologist to testify about mistaken identification by the police while under stress, or of a doctor about the ability of the human eye to perceive under a measured light level (if such experts exist).
2. **United States v. Cunningham**, 194 F.3d 1186 (11th Cir. 1999) (rejecting defendant's expert on the disposal of hazardous waste when expert did not view barium as a hazardous waste and was not familiar with the relevant regulations).
 - a. **Facts:** Defendant who stored barium-laced yellow sludge on his family farm was charged with transporting hazardous waste, conspiring to transport hazardous waste, and illegally disposing of hazardous waste. At trial, the defendant attempted to introduce the testimony of a manufacturing lab employee that concluded the yellow sludge was not "hazardous." 194 F.3d at 1196-97.

- b. **Issue:** Did the district court err in preventing the defendant to question the lab employee regarding his opinion on whether the substance was in fact “hazardous?”
 - c. **Held:** The district court did not abuse its discretion by preventing the defendant from asking the lab employee about his opinion.
 - (1) “In its cross-examination of [the lab employee], the government established that [the employee] had based his opinion on an unproven testing method, was unfamiliar with relevant regulations, and disagreed with the EPA’s regulatory determination that barium was a hazardous waste. Thus, [the defendant] failed to demonstrate that ‘the reasoning or methodology underlying’ [the expert’s] opinion was ‘scientifically valid.’” *Id.* at 1197, quoting *Daubert*, 509 U.S. at 592-93.
 - d. **Worthy of note:** This defense expert was admittedly a stretch, in light of his unfamiliarity with EPA procedures and his opinion that barium was not a hazardous material. Should, however, the defense be allowed more leeway under the Sixth Amendment to admit “expert” testimony? The admission of defense expert testimony in the context of the Sixth Amendment has not been litigated.
3. **United States v. Cooper**, No. Crim. 99-02666 (JHG), 2000 WL 246188 (D.D.C. Feb. 29, 2000) (Ord.) (finding that *Daubert* and *Kumho Tire* did not require the district court to conduct a pre-trial evidentiary hearing to determine the admissibility of expert testimony).
- a. **Facts:** Capital case out of the District of Columbia, with charges of racketeering, robbery, murder, conspiracy, and firearm offenses. 2000 WL 246188 at * 1. Roughly two months before trial, the defense moved for a pre-trial hearing to determine the admissibility of expert witnesses. *Id.* at *1-*2. Proposed government experts included ballistics and fingerprint experts, and medical examiners. *Id.* at *2.
 - b. **Issue:** Is the defense entitled to a pre-trial evidentiary hearing on the admissibility of expert testimony under *Daubert* and *Kumho Tire*?
 - c. **Held:** No, the defense is not entitled to a pre-trial hearing. “Although the Court must ensure that expert testimony is reliable and admissible, there is nothing in *Kumho Tire* or *Daubert* that requires the Court to conduct a pre-trial evidentiary hearing if the expert testimony is based on well-established principles.” 2000 WL 246188 at *2.
 - (1) “Certainly the interests of justice do not require the Court to conduct lengthy hearings when the admissibility of well-established principles can be readily determined at trial.” *Id.* at 2.

- d. **Worthy of note:** The court's decision in *Cooper* may be distinguishable in light of the court's concerns regarding time constraints. "Unless necessary, it would be extremely time-consuming for this Court to conduct evidentiary hearing to determine the admissibility of the testimony of each government and defense expert in the case, as well as equally time consuming for the defendant and all counsel two months prior to trial." *Id.* at 2. In a non-capital case that only involved a single expert, the time constraints of *Cooper* would not apply.
4. ***United States v. Waters***, 194 F.3d 926 (8th Cir. 1999) (finding that district court did not abuse its discretion in excluding polygraph evidence that exonerated defendant, and did not abuse its discretion in admitting testimony of social worker who described a typical child's reaction to sexual abuse and willingness to discuss the issue). This analysis in *Waters* is unimpressive and is particularly disturbing in light of the fourteen-year sentence ultimately imposed on the defendant. Aptly-named Judge Bright, however, adds a very thoughtful dissent.
- a. **Facts:** Before being indicted the defendant took a polygraph exam and answered that he had not placed his finger's in a child's vagina or touched her in a sexual way. 194 F.3d at 928. The administering agents believed that the answers were not indicative of deception. *Id.* The defendant was indicted and, at trial, the nine-year victim testified inconsistently regarding where the defendant had touched her and whether he had touched her directly or over her clothing. *Id.* at 929. The district court refused to allow the admission of the results of the polygraph exam, and instead "simply" excluded the polygraph evidence under Federal Rule of Evidence 403.
- (1) The government did not respond to the defendant's pre-trial request for the results and data from the polygraph exam. *Id.* at 930.
- (2) The defendant moved pre-trial for a *Daubert* hearing and to admit the results of the polygraph exam. *Id.* at 929. The government opposed the admission of the polygraph evidence. and the district court conditionally granted the government's motion to exclude, subject to further ruling at trial. *Id.*
- (3) At trial, the government presented the testimony of a clinical social worker who specialized in sexual abuse. The social worker testified that "children rarely tell you everything about an abuse the first time they are asked" and "the more information may come over a period of time." *Id.* at 929-30.
- (4) The defendant testified in his defense. *Id.* at 929. After conviction the defendant was sentenced to fourteen years. *Id.* at 937 (Bright, J., *dissenting*).

- b. **Issue:** Did the district court abuse its discretion in excluding the results of the polygraph exam?
 - (1) Did the district court abuse its discretion in permitting the social worker to opine regarding a child's gradual disclosure of details regarding sexual assault?
 - c. **Held:** Upheld the district court. "We need not address any *Daubert* or discovery issues. The district court independently excluded the evidence under Fed. R. Evid. 403, which provides for exclusion of evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by consideration of undue delay, waste of time . . .'"
 - (1) Found that the district court did not abuse its discretion in admitting the testimony of the social worker. "The social worker 'never gave [her] opinion as to whether [the victim] was telling the truth.'" *Id.* at 931, quoting *United States v. Running Horse*, 175 F.3d 635, 638 (8th Cir. 1999). "Although on appeal [the defendant] suggests that the testimony did not meet the *Daubert* standard for reliability, because he did not raise this argument in the district court, we do not consider it." *Id.* at 931.
 - d. **Worthy of note:** The Eighth Circuit in *Waters* permits the district court to skip the Fed. R. Evid. 702 analysis and hold--almost presumptively--that polygraph evidence does not satisfy the requirements of Federal Rule of Evidence 403. Judge Bright in his dissent offers a particularly thoughtful and thorough criticism of this approach. *See id.* at 936-37 (Bright, J., dissenting). Judge Bright correctly observes that *Kumho Tire* requires "particularized" findings regarding reliability. *Id.* at 936. "The district court must enable the parties to develop the facts necessary to make a particularized determination of reliability. Such is the role of 'gatekeeper' required by *Daubert*." *Id.*
 - (1) The district court's exclusion of the polygraph results under F.R.Evid. 403 is effectively a "per se" exclusion and, as such, "commits an error of law." *Id.* at 936.
 - (2) "One wonders, however, why the government so often uses polygraph tests if it believes its results are unreliable." *Id.* at 937.
 - (3) Sobering conclusion to Judge Bright's dissent: "The trial judge sentenced Waters to fourteen years imprisonment for a crime in which his guilt remains in serious question." *Id.* at 937.
5. ***United States v. Salimonu***, 182 F.3d 63 (1st Cir. 1999) (upholding district court's exclusion of linguistic expert's testimony that voice on surveillance tape was not the voice of the defendant).

- a. **Facts:** Defendant was convicted of, among other offenses, conspiracy to import heroin. Among the evidence admitted against the defendant at trial were recorded phone calls between the defendant and a cooperating witness. 182 F.3d 63, 66. The defendant attempted to admit the testimony of a linguist, who would have testified that the voice in the tape was not the defendant's. *Id.* at 66-67.
 - b. **Issue:** Did the district court abuse its discretion in excluding the testimony of the defense expert, a linguist?
 - c. **Held:** No, the district court did not abuse its discretion. "[The defense expert] stated that an ordinary lay person without training in linguistics would be able to discern that the two voices were different without knowing why. It was not important, however, that the jurors be able to identify exactly which vowel sounds or intonations were different in the two tapes: their job was simply to determine whether the two voices were different. By [the defense expert's] own admission, the jurors were perfectly well-equipped to do that. The court did not, therefore, abuse its discretion in excluding [the defense expert's] testimony." *Id.* at 74.
 - d. **Worthy of note:** The *Salimonu* case was decided on the heels of *Kumho Tire*, and while it cites the Supreme Court decision it does not apply it. Interestingly, the district court *did* admit the testimony of a developer of a spectrogram computer program which plots the frequency and magnitude of speech signals, to testify that substantial differences between the spectrograms of the two voices indicated that the tapes were of two people. *Id.* at 73.
6. ***United States v. Van Wyk***, 83 F.Supp.2d 515 (D. N.J. 2000) (excluding testimony of FBI "forensic stylistics" expert regarding authorship of questioned documents, but admitting testimony of expert regarding method of analysis and specific similarities and idiosyncracies between the known writings and questioned writings). The court's decision in *Van Wyk* is a thoughtful analysis of a novel field of expertise that bases its approach on other post-*Kumho* decisions on handwriting analysis. A useful decision from the defense perspective.
- a. **Facts:** Defendant was charged with four counts of conspiring to make and making threatening communications to various women victims. 83 F.Supp.2d at 516-17. The government offered an FBI Agent who was an expert in "forensic stylistics." *Id.* at 517. "Forensic stylistics is the examination of writing style 'for the express purpose of resolving litigated questions related to disputed authorship or meaning.'" *Id.* Proffered testimony included an opinion on the ultimate authorship of the questioned documents, testimony on the similarities and idiosyncracies between known and questioned text, ("internal evidence testimony"), and an opinion based on a review of the history of the defendant and the victimology of the four women who were recipients of these documents. *Id.* at 523-24.

- b. **Issue:** What--if any--of the testimony of the “forensic stylistic” expert should be admitted?
- c. **Held:** The forensic stylistic expert has FBI training in the field, has attended seminars on the area, and has worked on text analysis in a number of high-profile matters. “He arguably qualifies as an ‘observational’ expert because he has examined so many examples over an extended period of time. *Cf. United States v. Hines*, 55 F.Supp.2d 62, 69 (D.Mass. 1999). Because the expert need not have complete knowledge about the field in question, [the FBI agent] qualifies as an expert in text analysis under the flexible requirements of *Daubert*, *Kumho*, and *Paoli II*.”
 - (1) Authorship testimony is not admissible. “Because of the lack of scientific reliability of forensic stylistics, the Court is not satisfied that the jury would benefit from [the FBI Agent’s] testimony as to his subjective opinion that the questioned writings were written by the same individual and that that individual is Defendant Roy Van Wyk.” *Id.* at 523.
 - (2) The *internal evidence* testimony is, however, admissible. “Unlike his opinion on authorship, [the FBI agent’s] expertise in text analysis can be helpful to the jury by facilitating the comparison of documents, making distinctions, and sharing his experience as to how common or unique a particular “marker” or pattern is.” *Id.* at 524.
 - (3) The *external evidence* testimony is inadmissible. “Finally, Defendant objects that Agent Fitzgerald draws his conclusion not only from documents submitted to him, but also on “a review of the history of Van Wyk and the victimology of the four women who were recipients of one or more of these documents.” *Id.* at 524.
- d. **Worthy of note:** The district court’s decision in *Van Wyk* offers an excellent overview of the *Daubert/Kumho Tire* analysis. The court is critical of this novel field and of the literature offered in support of the field. *Id.* at 522. The district court turns to federal authority on handwriting analysis, a field that “seems to suffer similar weakness in scientific reliability” *Id.* at 522-23. After applying the *Daubert* factors, the court held that “the reliability of text analysis, much like handwriting analysis, is questionable” *Id.* at 523. The admission of the “similarities and idiosyncracies” evidence is disappointing, however. The court did not explain why an attorney could not simply draw those similarities out from the authenticating witness and argue the unique characteristics in closing argument. A jury is as capable of comparing sporadic use of apostrophes, for example, as is the “forensic stylist.” Nonetheless, the opinion is better than the unquestioning admission of government experts found in other cases.

7. **United States v. Norris**, 217 F.3d 262 (5th Cir. 2000) (upholding admission of videotape re-creation and testimony by government “expert” witness on the burn rate of cash). This fascinating case out of Louisiana has a former DA claiming he burnt a half-million dollars worth of cash to spite his former law partners – and the ATF rebutting the claim by *actually* trying to burn 4,950 \$5 bills. In upholding the conviction the Fifth Circuit employs a particularly disingenuous approach towards the district court’s evaluation of this evidence.
- a. **Facts:** The defendant Norris was a former DA and member of a law firm in Louisiana. After a dispute with his law partners, Norris disbursed \$500,000 of the law partnerships money market accounts – the funds ended up as cash in his safe deposit box. *Id.* at 264. After his partners obtained a judgment against him, Norris withdrew the cash from the safe deposit box. The partners then sought an involuntary bankruptcy proceeding against him. When testifying in a bankruptcy proceeding, Norris testified under oath that he had “incinerated the some 4,900 \$100 bills that he had withdrawn from the bank safe deposit box.” *Id.* at 264. The defendant said he had burned the money by pouring gasoline over it and burning it in a metal trash barrel. *Id.*
- (1) In subsequent perjury proceedings, the government sought to admit a videotape of an ATF agent recreating the defendant’s version of events by trying to burn 4,900 \$5 bills under similar conditions. The videotape showed that only about 10% of the cash was destroyed. *Id.* at 266-67. The agent offered testimony that Norris’ version of events would have only burnt a small portion of the cash. *Id.* at 267.
- (2) The district court admitted the testimony over the defendant’s objection, concluding that *Daubert* did not apply. *Id.* at 266. The district court concluded, however, that the re-enactment accurately portrayed the events as the defendant portrayed them. *Id.*
- b. **Issue:** Did the district court abuse its discretion in admitting the videotape and testimony of the ATF expert?
- c. **Held:** While the district court erred in holding that *Daubert* did not apply to the re-creation videotape and the agent’s testimony, it did not err in admitting the evidence. *Id.* at 269.
- d. **Worthy of Note:** The Fifth Circuit correctly observes that *Daubert* and *Kumho Tire*’s gatekeeping principles apply to “all expert testimony, and the district court erred in concluding that the videotape re-creation and [the agent’s] testimony about the re-creation did not trigger a *Daubert* inquiry.” *Id.*
- (1) The Court in *Norris* concluded, however, that “[b]y making a finding of ‘substantial similarity,’ the district court effectively conducted a *Daubert* inquiry by ensuring that

the evidence was relevant and reliable, despite not expressly addressing the four non-exclusive factors listed in *Daubert*” *Id.* at 270.

(2) The intellectually dishonest approach in *Norris* suggests that “close enough” to a *Daubert* inquiry will satisfy the gatekeeping functions of the district court. To illustrate the fallacy of that position, change the facts of the case slightly. Assume that this was a personal injury suit, and the plaintiff offered a re-creation video and testimony from an “expert” who had no training in the area, who didn’t repeat his experiment or subject it to peer review, and whose experiment differed from the underlying events in several respects. If a district court admitted that testimony without *Daubert* review, and if the plaintiff won a sizable verdict, no federal court in the country would uphold that award.

(3) ***Daubert* Applies to Recreation Videos:** *Norris* is useful for the proposition that *Daubert* and *Kumho Tire* applies to re-creation videos and animations. As the DOJ more aggressively relies on FBI crime-scene animations and recreations, expert challenges to tech in trial will be an important new defense new field.

8. ***United States v. Smithers***, 212 F.3d 306 (6th Cir. 2000) (reversing conviction for bank robbery when district court did not admit the testimony of defense “eyewitness identification” expert) In an area of caselaw replete with shoddy reasoning and results-driven analysis, *Smithers* is a welcome exception. The Sixth Circuit in *Smithers* provides a comprehensive review – and endorsement – of eyewitness identification experts who question the reliability of I.D.’s. Perhaps more importantly, the Court recognizes a defendant’s Sixth Amendment right to present such experts in support of his defense, and offers harsh words for a district court that failed to recognize that right.

a. **Facts:** A handful of eyewitnesses from a bank robbery describe a tall, white, robber, but give mediocre descriptions. Only one of the three witnesses could identify defendant Smithers from a photo line-up. *Id.* at 309. A month before trial, the defense proffered the testimony of an expert witness on eyewitness identification, and renewed that proffer at trial.

(1) The district court excluded the defense expert. *Id.* at 310. At a oral hearing, the district court said it would make for an “interesting experiment,” “I’m also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case.” *Id.*

b. **Issue:** Did the district court abuse its discretion in excluding the testimony of the defense eyewitness identification expert?

- c. **Held:** “We find that the district court abused its discretion in excluded [the defense expert’s] testimony, without first conducting a hearing pursuant to *Daubert*. . . . Although the decision of whether to admit a witness’s testimony is left to the sound discretion of the trial court, a trial court cannot make an arbitrary decision. When a defendant’s liberty is at stake, it is incumbent upon the trial court to apply the correct law, follow the appropriate decision-making steps and articulate the bases upon which its decision rests. Here, the district court should have applied the analytical principles set forth in *Daubert*, but it did not.” *Id.* at 314-15.
 - d. **Worthy of Note:** The Court in *Smithers* provides a very useful overview of eyewitness identification expert testimony, and gives a positive endorsement of that testimony. *See id.* 311-13. If you intend to call an eyewitness identification expert, begin with the *Smithers* opinion for legal support for that testimony.
 - (1) **Right to review:** What is particularly offensive in *Smithers* – as emphasized by the appellate court – is that the district court did not honestly consider the testimony of a defense expert critical to the defense case. *Smithers* is thus useful for the broad principle that the district court must undertake a serious *Daubert* inquiry on the admissibility of a defense expert – even if the court is disinclined to admit the testimony.
9. ***United States v. Barnette***, 211 F.3d 803 (4th Cir. 2000) (upholding admission of government’s expert testimony regarding “Psychopathy Checklist Revised” research in a capital case). The *Barnette* decision addresses a question raised in *Duhon* above: does *Daubert* apply outside of a jury trial? *See discussion on Duhon, supra* at pg. 49. The Fourth Circuit declines to reach the answer in *Barnette*, concluding that – even if *Daubert* does apply – the district court did not abuse its discretion in admitting government expert testimony regarding a test for “psychopathy.” The decision is particularly disturbing because, in this capital case, the defense was not permitted to call its own witness at sentencing to rebut this “psychopathy” testimony.
- a. **Facts:** The defendant Barnette was convicted of murdering two people and of carjacking. *Id.* at 810. At sentencing in this capital case, the defense presented witnesses who testified that Barnette would not present a future danger in prison. *Id.* In rebuttal, the government called Dr. Scott Duncan, who testified regarding the “Psychopathy Checklist Revised.” *Id.* at 811. According to this test, Barnette would be a future danger in prison. *Id.* The doctor offered his opinion that the defendant was a psychopath. *Id.*
 - (1) In response to this testimony, the defense asked to recall his own risk assessment expert to rebut the government expert and the testimony regarding the Psychopathy Checklist Revised. *Id.* The district court denied that motion. *Id.*

- b. **Issue:** Does *Daubert* apply to sentencing hearings, and if so, did the district court abuse its discretion in permitting testimony regarding the Psychopathy Checklist Revised?
- c. **Held:** “We need not address whether *Daubert* applies to sentencing hearings, because, even assuming that it does, we find the evidence meets the standard for admissibility.” *Id.* at 815.
- d. **Worthy of Note:** The *Barnette* decision is disturbing in light of the cursory analysis of the government’s expert’s reliability and relevance by both the district and appellate court – particularly in light of the huge stakes in this capital case. In essentially a paragraph of analysis, the Fourth Circuit concluded that the district court adequately evaluated the reliability of the “Psychopathy Checklist Revised” when it considered defense objections to the test and two articles written by the defense expert. The Court shifts the burden to the defense – which “only proffered two articles written by his expert . . . as evidence disputing the scientific validity of the Psychopathy Checklist Revised.” *Id.* at 816. If *Daubert* applied, however, it would be the government’s burden to establish the reliability of this novel test, not the defense burden to refute it. Notably, the Court of Appeals quotes language from *Daubert* that “vigorous cross examination and the presentation of contrary evidence” are appropriate methods of challenging shaky but admissible evidence. *Id.* at 815. The Court then neglects to discuss the fact that the defense was not permitted to present the contrary evidence of its own witness in rebuttal.

(1) As discussed in *Duhon*, *supra* at pg. 32, the question of whether *Daubert* applies outside of the context of a jury trial has yet to be resolved. For the defense, a position on that issue will be case-driven. In both *Duhon* and *Barnette*, the defense obviously sought a rigorous *Daubert* analysis for government witnesses. When defense experts are testifying at pretrial or sentencing hearings, however, it obviously is preferable to avoid *Daubert* review – particularly in light of the deferential appellate standards for *Daubert* rulings.

10. ***United States v. Taylor***, 239 F.3d 994 (9th Cir. 2001) (upholding the admission of an academic government expert who testified regarding the relationships between prostitutes and pimps). In *Taylor*, the Ninth Circuit upheld the admission of an unusual expert; an academic who testified about the relationships between pimps and their prostitutes. The relevance of this testimony is interesting – it was offered to show why a sixteen-year old prostitute would have previously given false testimony about an alleged pimp. It is accordingly testimony not on bias, but on credibility – suggesting a similar approach for defense experts on lying police officers, for example.

- a. **Facts:** The defendant Taylor worked as a consultant for a documentary about pimps, cut a CD called “The Big Pimp,” and ran an escort service that involved illegal prostitution in San Francisco and Las Vegas. He was convicted of transporting a minor for the

purposes of prostitution, and specifically of transporting a sixteen-year old girl from Florida to Las Vegas, and from Las Vegas to Phoenix. *Id.* at 996.

(1) At trial the government offered the testimony of Dr. Lee, an academic who testified regarding the relationship between pimps and prostitutes. The district court admitted this testimony over defense objection.

b. **Issue:** Did the district court abuse its discretion in admitting the testimony of Dr. Lee?

c. **Held:** The district court did not abuse its discretion in admitting this testimony, because it held a *Daubert* hearing before the expert was permitted to testify. In addition, the testimony was relevant to assist the jury in understanding the relationship between a pimp and prostitute, a subject with which the jury is not typically familiar. *Id.* at 998.

d. **Worthy of Note:** The expert in this case was called to testify regarding the credibility of the sixteen-year old girl: “The government wanted to include Dr. Lee’s testimony primarily to shed light on [the girl’s] credibility, in particular to explain why a person in [her] position might not have testified truthfully in previous proceedings about her relationship with her pimp.” *Id.* at 998. This expert is accordingly similar to a police officer/expert who is called to testify about a “code of silence” among gang members.

(1) Using this same rationale, however, the defense should be entitled to call defense experts about the pressure to lie and cover for other officers on a police force, or the Convict Code in prison and the false confessions it encourages.

11. **United States v. Benavidez-Benavidez**, 217 F.3d 720 (9th Cir. 2000) (upholding district court’s exclusion of defense polygraph evidence under Federal Rule of Evidence 403). This opinion illustrates the Ninth Circuit’s hostility toward polygraph evidence. While there is no *per se* bar to polygraph evidence after *Daubert*, a district court will be permitted to exclude this evidence under any one of a number of evidentiary grounds.

a. **Facts:** Mr. Benavidez-Benavidez was stopped as he drove a van across the border from Mexico into the United States. *Id.* at 722. In this van was found 169 pounds of marijuana, hidden in the doors and walls. *Id.* Customs agents would testify at trial that the defendant admitted to knowingly driving the marijuana across the border.

(1) The defendant, however, denied that he made that statement and further denied that he knew marijuana was in the van. He accordingly proffered the results of his polygraph examination regarding those issues. The district court held a *Daubert* hearing on the admissibility of this evidence.

- b. **Issue:** Did the district court properly exclude the evidence under Federal Rules of Evidence 403, 702, or 704(b)?
- c. **Held:** “Having found exclusion of the evidence proper under Rule 403, we need not reach the issue of whether the district court also properly excluded the evidence under Rules 702 or 704(b), or improperly credited the government’s polygraph expert.” *Id.* at 725.
- d. **Worthy of Note:** The Ninth Circuit in this decision gives a detailed history of polygraph evidence, and the Court’s traditional hostility towards this type of evidence. *Id.* at 723-25. While the Court concedes that, after *Daubert*, there is no *per se* exclusion of polygraph evidence, it signals that will uphold any exercise of a district court’s discretion in excluding it. *Id.* at 724-25. The Ninth Circuit ultimately relies on the district court’s brief mention of FRE 403 to exclude the evidence altogether, and not even reach the expert analysis question. *Id.* at 726.

SHIFTING THE FOCUS TO WIN JURY TRIALS

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I. Trial Tips

1. Use the initial interview and preliminary hearing to set up impeachments.
2. Have client and witnesses write out detailed statement of their version of the case.
3. Number discovery, and give it to client, investigator, client's family, etc.
4. Get investigator fully involved (visit scene, examine vehicle and pertinent documents).
5. Review pretrial services report and client's financial affidavit.
6. Have a mock jury – family members.
7. Walk through case – what would you have thought, felt, done?
8. Do directs and crosses of client and witnesses – you, co-counsel, and investigator.
9. During jury selection, get jury to promise you to apply beyond a reasonable doubt standard.
10. Do what works best for you during opening statement.
11. Listen to Government's case carefully so that you do not lose anything.
12. Make your direct examination is so detailed and comprehensive that there is nothing left for the Government to cross-examine.
13. If practical, put on a reputation witness so that you can argue the instruction.
14. Remember, juries love diagrams and photographs.

15. Do not reveal anything to Government at any time, let them reveal any strengths and weaknesses to you.
16. If you have an investigator with law enforcement background, use him to rebut the Government's evidence and conclusions.
17. Government's rebuttal--file a motion in limine to require the Government make an offer of proof to make sure that evidence is truly rebuttal.
18. Government's argument-- be ready to object, asking for curative instruction, and mistrial.
19. Argue client's innocence repeatedly throughout your argument. "Ladies and gentlemen, I'm asking you to find my client not guilty for the best of all possible reasons--he is truly innocent."
20. Argue the presumption of innocence, burden of proof resting exclusively on government, and the fact that guilty must be proven beyond a reasonable doubt.
21. While awaiting jury verdict, watch your mouth.

II. Closing Argument Tips

1. Keep your argument simple and focused.
 - a. Argue your client's innocence at the beginning of and throughout your argument.
 - b. Explain that knowledge is the only issue in the case.
 - c. Explain that just because a person drives a vehicle does not mean he has knowledge of the drugs.
2. Emphasize that your client's actions were the actions of an innocent man.
 - a. Argue that your client did not attempt to flee when he saw the inspector with a canine nor did he attempt to flee when he had the opportunity.
 - b. Argue that your client was not nervous and that instead, he was calm and cooperative because he had nothing to hide.
3. Argue your strengths, *e.g.* the facts that verify your client's testimony.

4. Explain your theory of what happened.
 - a. Argue that the client was used/manipulated/exploited.
 - b. Argue that the owners of the drugs did not want your client to know about the drugs so they would not have to pay him.
5. Prosecute the prosecutors.
 - a. Argue that the government jumped to conclusions.
 - (1) Instead of presuming he was innocent, they presumed he was guilty.
 - (2) The government twisted the facts to fit their theory that the defendant was guilty. If the evidence did not fit their theory, the government's approach was to discard it, discount it, and discredit it.
 - b. Show that the government's investigation was incomplete and misleading. Argue that the government didn't take the time to: collect fingerprints, collect fingernail scrapings, put the dog on the defendant, investigate information given by the defendant, call the defendant's family to verify the defendant's statement, and preserve the defendant's statement.
 - (1) Argue that the government's investigation essentially ended when they were not able to get a confession. Point out that while this case began so many months ago, the government witnesses admitted that they were out investigating this case yesterday or this morning.
 - (2) Argue that the government didn't take the time to bring certain evidence, *e.g.*, certain witnesses, physical evidence, exact times, written statements from every agent/inspector involved, etc. Point out that if they, as a jury, would have wanted to hear from a certain witnesses, see certain physical evidence, or know exactly what the defendant said, they have to hold that against the government because it is their burden to bring everything to court. If they have unanswered questions or want certain explanations, they have to hold that against the government.
 - c. Argue that the government's actions speak louder than words, *e.g.*, point out that no one escorted the defendant to secondary, that the primary inspector did not comment on the routing slip that the defendant appeared nervous or suspicious nor did he comment that the vehicle appeared altered, and that no one kept an eye on the defendant while he waited for an hour while the vehicle was inspected or x-rayed.

- d. Remind the jury that the truth never changes and it doesn't improve.
 - (1) Specifically point out conflicting stories given by government witnesses and point out instances where government witnesses were suddenly able to recall information during the trial that was not included in their written statements.
 - (2) Argue that the defendant has said the same thing all along and that only the government's story has changed.
- e. Argue that even the government has doubts, e.g., remind the jury of all of the times the agent testified that he couldn't remember exactly what was said, that he couldn't recall exactly what was done, etc.
- f. Argue that the government failed to preserve the defendant's statement.
 - (1) Point out that despite 31 hours of interrogation, the defendant never confessed. Instead, he answered their each and every question truthfully.
 - (2) Argue that the government failed to preserve the defendant's statement. Point out they could have used a video or cassette recorder or they could have given the defendant a pencil and paper to write his statement. Argue what's the point of giving a statement if it is not preserved. Remind the jury that the agent could not recall exactly what the defendant said.
 - (3) Argue that the government wants to hang the defendant by his exact words but they failed to bring you his exact words.
 - (4) Argue that despite the fact that the government witnesses all swore to tell the whole truth and nothing but the truth, they did not bring you the whole truth because they didn't preserve it.
 - (5) (If the defendant used an interpreter.) Argue that one can just imagine the translation errors that must have occurred between the agent and the defendant especially because the agent is only rated as a 2 out of 5 in Spanish proficiency. Remind the jury of the translation errors that occurred in court despite the fact that a certified court interpreter was used.
 - (6) Argue how the reason the court reporter has been typing every single word said in court is because exact words are critical in every case and no one can remember exactly what was said unless it was recorded.

- (7) Remind the jury that our US currency says "In God we trust," not in government we trust because we are all human and we all make mistakes.
6. Remind the jury about the differences in the government and defense witnesses.
 - a. Argue that the defendant and his family are not professional witnesses, that they are slow, humble people and, despite being very nervous and afraid, came to court to tell the truth.
 - b. Argue that the government witnesses are professional witnesses, that they testify all the time, and they have a vested interest in the outcome of the case and they want a conviction. (If they are sitting together in court, point to them.)
 7. Tell the jury not to compromise! Remind them that they have the same issue (knowledge) in both counts and logically the verdict should be the same on both counts. It is all or nothing.
 8. Appeal to the jury's emotion, e.g., tell the jury that while your client is uneducated, he is a proud man, that he is proud to have raised five kids, and that you are proud to be representing him.
 9. Reemphasize reasonable doubt, e.g., remind the jury that if they are thinking that the client might have known, could have known, or probably knew, then that means they have reasonable doubt and they must come back with a verdict of not guilty.
 10. Finally, ask the jury to find your client not guilty for the best of all possible reasons--because he is truly innocent.

Final note: Never, ever concede that your client might be guilty.

THEORY INSPIRED VOIR DIRE

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Voir Dire is considered by many to be "the most significant part of any trial."¹ Others declare that "there is no aspect of a trial more important to the ultimate outcome,"² than jury selection, and even the United States Supreme Court acknowledges that voir dire "represents the jurors first introduction to the substantive factual and legal issues in a case ... the influence of the voir dire process may persist through the whole course of the trial proceedings."³

Do we really win and lose cases in Voir Dire?

Who knows, really? But, we do know this: we know that it is through voir dire that we must select a group of 12 people with whom we **can** win.

We have all heard, no doubt, the undocumented claim that most jurors make up their minds about the case in opening statement. If we truly believe this, then we don't give jurors much credit for taking their duties and oaths seriously. And, if we really believe this, why do we spend so much time on killer cross examinations and dynamic closings?

More recent research perhaps asks a better question than when do most jurors "make up their minds," and that question is "When do jurors first lean toward one side or the other?" Results of the research shows that all phases of the trial are influential, so all phases of the trial are potentially "the most important part of the trial." However, the largest segment of jurors initially lean even before the opening statement, in voir dire.⁴

Trial attorneys are becoming increasingly aware of the importance of jury selection, however, this phase of the trial is often pursued without a great deal of understanding, expertise or preparation. Perhaps this occurs because, while we know voir dire is important, we aren't sure exactly all that we are supposed to accomplish, and how to go about it.

Three Goals of Voir Dire

Most experts and practitioners alike agree that there are three main goals in voir dire.⁵ We have an opportunity to :

- (1) Learn about the jurors, so we know which jurors we must challenge for cause or strike,

- (2) Establish credibility and rapport with the jurors,
- (3) Indoctrinate jurors to the theory of the case, and, if possible, alienate them to the prosecution's theory of the case.

At first blush, these goals may seem that they are competing, and impossible to achieve all at once. In fact, when voir dire is conducted properly, these goals are complementary, and achieved in concert with each other.

Learning About Jurors

There is only one way for us to learn about jurors, and that is to get them to TALK. We want jurors to talk about themselves, their experiences, their beliefs and in short, their world views.

We accomplish this by asking open-ended questions.

When asking general questions of the panel, of course, we must ask questions that can be answered in the affirmative. Our goal is to make these questions as broad as possible, so that we will get as many hands raised as possible. If we are fishing for answers, then we must think of ourselves as using a big net with little holes, not a fishing pole. We must also make it as safe and comfortable as possible for jurors to respond. For example:

Don't ask: Who has ever been sexually abused?

Rather, ask: Who has experience with, or knows something about, people who have been affected by sexual abuse. This may mean that you have learned something about the subject from a class or a television show or reading, or it may mean that you know someone who has been personally affected by sexual abuse.

We want to talk to AS MANY jurors as possible. And, if a juror follows news and television programs about a topic that is central to your case, you want to know that information about that juror as well.

When you are allowed to speak to jurors individually, DON'T CROSS EXAMINE THEM. This is the part of the voir dire where we MUST ask open-ended questions, rather than leading questions that suggest a desired response. Sometimes giving up "control" is not comfortable for attorneys, and perhaps it is not appropriate during any other phase of the trial, but we MUST not try to control the jurors responses in voir dire.

Sometimes we forget that jury selection is really a misnomer. It would more accurately be called jury *deselection*. We are not selecting a jury like we used to choose a kickball team in school. We are

not choosing who we want, we are getting rid of the jurors that we cannot live with. So, we must ***learn to love the answers we hate.***

- ‘ **Give jurors permission NOT to share your world view.**
- ‘ **Give them permission NOT to be receptive to your theory.**
- ‘ **Give jurors permission to have biases and prejudices.**
- ‘ **Don't try to change them.**

Sometimes these are the most difficult things for trial attorneys to do. We are so accustomed to being able to make witnesses say what we want them to say. Don't do this is jury selection. If jurors oppose your side of the case, and are inherently biased against you, you must honor these jurors and their beliefs. And strike them.

Establishing rapport and credibility

Aristotle taught about three aspects that were central to persuasion in spoken words. They were the ethos, or the character of the speaker; the logos, or the appeal of the argument itself, and the pathos or the emotion that the audience feels when they hear the words spoken. Aristotle judged that the ethos, the credibility or character of the speaker was the most important.⁶

Centuries and centuries later, social scientists have found Aristotle to be correct. Audiences are more likely to disbelieve a speaker more readily when they know that the speaker has a vested interest in the OUTCOME of the audience's decision. (That's us.) HOWEVER, if they trust and LIKE the speaker, they don't care if he or she has a vested interest in the outcome.⁷

As simplistic as it may be: we only have one chance to make a first impression, and with a jury, voir dire is it.

You can establish your credibility with the jury by:

- ‘ **Showing interest and concern for what they have to say.**
- ‘ **Actively listening to them.**
- ‘ **Revealing your humanness and not your *lawyerness*.**

Many times, in jury selection, as in other parts of the trial, language gets in our way more than it helps us. GET RID OF LAWYER WORDS. Talk to jurors like you do a neighbor that you see when you are going out to get the mail, or a friend that you are sharing a cup of coffee or a beer with.

We like people, and are more readily persuaded by them, when we can relate to them.

Indoctrinate jurors to your theory of the case.

First, it is important to talk about "theory of the case."

A case theory is not an add-on. It is not a frill. It is essential.

A compelling, cohesive, congruent theory of the case is nothing more than a story of innocence that jurors must understand, believe and relate to. It connects us, as advocates, to the case and our client. It invigorates, energizes and inspires us.

How a theory of the case works for us

- A theory allows the jurors to see with our vision.
- A theory allows us to reach beyond the minds of the jurors and touch their hearts.
- A theory allows the jurors to vote "not guilty" and feel good about themselves.

A theory is not a defense. Entrapment is not a theory. Insanity is not a theory. Self-Defense is not a theory. The genius of the lawyers who have successfully used these defenses lies not in the defense, but in the THEORY that surrounded the defense.

How to develop a "theory of the case"

Most often, we develop a winning theory of the case by answering our own questions. Who is this person? Why was she in this situation? How does he feel? Why would she say this? How would I feel? How do I feel? What do I have a difficult time believing?

Use your client as a resource.
Allow yourself to be curious.
Indulge yourself in the mystery of the case.

***Infinite possibilities exist within discipline.
There are endless mysteries within a set of rules.***

I.M. Pei, Architect

A theory of the case must, of course, encompass all the of facts beyond change. We must weave these facts into a "story" that allows the jurors to see, along with us, how and why things happened the way they did. We must enable them to see these facts in a new light ... a light that illuminates innocence.

From your case theory, themes begin to emerge. Themes are usually expressed in phrases, and sometimes in a single word. Themes are like the threads that weave into the fabric of the theory. Many "scenes" and relationships in our story have emotional themes running through them. They are the glue.

We communicate our theory of the case in voir dire by asking the jurors questions that center around the themes of our case.

DEVELOPING A THEORY INSPIRED VOIR DIRE

Since voir dire is our first order of business with jurors in the courtroom, many times we feel as though we should address it first in our trial preparation.

NOT.

Until we know what our theory of the case is, until we know what themes we will weave throughout our opening statement, cross and direct examinations and closing argument, we cannot begin to know what kind of questions we need to ask the prospective jurors. Until we are intimate with our theory of the case, we cannot begin to picture the kind of jurors we would love to have, and more importantly, the kind of jurors we can't live with.

Basically, we want to indoctrinate the jurors to our theory of the case, as we have said, and by carefully listening to and observing them, deselect the jurors who we believe will not be receptive to our theory.

It actually helps to work backwards when conceptualizing your voir dire. You probably have an idea on the law that the judge will agree to charge the jury. Flow backwards from there ... what do you want to say to the jurors in closing. What stories can you tell from your own experience, or from literature, that make our client's story real. (What are the common themes in those stories?) What points do we need to make in cross and in direct so that we can argue these to the jury? How have you characterized each witness? What is the emotional theme for each witness? How do you feel about the snitch? Anger? Disgust? How do you want the jury to feel? What is the emotional theme of your client's testimony, if he or she testifies? How do we want to sensitize (or desensitize) the jury in opening to what they are about to experience?

The words, concepts and characterizations that we arrive at in brainstorming our theory of the case in this fashion, and the themes that emerge, direct us as to what to ask in voir dire. They also direct us as to language choices, and perhaps our own demeanor, so that we present congruence to the jurors.

Conducting theory inspired voir dire

How do we find out if jurors can relate to themes, perspectives, emotions and dynamics in our case?

Ask them.

Focus on emotional themes

If in an abuse case, your theory is that the complaining witness is lying to get attention, then you have some decisions to make. Are you angry at this person, or do you pity him or her? If pity is an emotional theme, and if you, yourself pity the complaining witness, because of her own psychological problems or whatever the reason, then a juror who appears to be a sympathetic person is nothing for you to fear. You will mirror his sympathy; he can remain sympathetic and share your world view, your perspective of the case.

Determine whose experience and belief systems are congruent with your theory and themes

If your theory is: the child is lying because her parents are getting a divorce, and the child needs attention, then we need to talk about the kinds of effects that divorce has on children. Jurors know these stories, through their own experience or that of a friend or family, and they will tell you. In creating a dialogue about this topic generally, you will have the jurors talking about why children lie, about the desperation they feel when families break up, about things that you never even thought of when brainstorming your theory of the case.

If they are receptive to your themes, then they begin to create the prism through which they will view the rest of the case.

Also, listen, listen, listen, for what you don't hear. If a juror doesn't offer that he knows something about children and divorce, find out what his beliefs are.

"Mr. Jones, you have heard some people say that children will lie to get attention. Many people, however, don't believe that children will lie about important things. What do you believe?"

When drafting the theory-specific voir dire questions, make sure that you use powerful language, words that communicate. Refer to the "characters" or witnesses as you plan to in your opening and closing. If the complaining witness is "a woman scorned" then, by all means, voir dire on the subject of "a woman scorned" not "a young woman who was formerly involved with the defendant." If your client was "the fall guy", then voir dire on what that name means to people. Get the jurors to start using the

language you want them to use in the jury room, when they deliberate.

A final word, about stereotypes ...

In many state jurisdictions where voir dire conditions are particularly oppressive, or in Federal Courts where attorneys do not get to participate in voir dire and the judge may do a wholly inadequate job, lawyers may be forced to rely on stereotypes when striking jurors.

Most stereotypes about jurors are nothing but myth and folklore and many times are contrary to logic. One published trial technique guide suggests that artists, musicians, actors, laborers, carpenters, mechanics and office workers will make good civil plaintiff's jurors, while bankers, school teachers, clergymen's wives, farmers and cabinet makers will make good civil defense jurors.⁸ Other "authorities" believe that women are sympathetic, while others label them unpredictable, and still others warn against "old women who wear too much makeup" as being "unstable and bad for the prosecution."⁹

Clarence Darrow believed that Presbyterians, Baptists and Scandinavian Lutherans were prone to conviction, and likewise, the English and Germans should be struck, while the Irish should remain. Logical reasoning, applied to these stereotypes, would suggest that if "the Irish are most desirable to the defense, inevitably one must conclude that Ireland, where jurors are monotonously Irish, is the most utopian for the practice of criminal law ... an examination of the prisons of Ireland reveals that, as a general proposition, however, the cells are occupied."¹⁰

AN EXAMPLE

To illustrate the suggested method of working a case "backwards", it might be helpful to briefly, thematically walk through a case ... backwards.

CHARGE: Trafficking in Cocaine Conspiracy

THEORY OF DEFENSE: "The Girls Can't Dance Naked in My Jurisdiction"

ESSENTIAL FACTS: Dexter's friend Floyd is a big-time drug dealer. Floyd is having Tina and James drive 30 pounds of cocaine from Houston to Atlanta in his own Chevy.

Like most prudent drug dealers, Floyd is most concerned about the mileage that this is going to put on his Chevy. So, he has Dexter disconnect the speedometer.

Floyd buys Dexter a \$700 round-trip ticket from Houston to Atlanta, so that Dexter can accompany him when he goes to receive the cocaine. Dexter, of course, knew nothing at all about the cocaine, nor did he know that his friend was a big-time drug dealer.

The cops stop Tina and James in Louisiana for speeding. They notice the lumps in the back seat of the Chevy. You know the rest. Tina makes a controlled delivery, and there is Dexter to unwittingly receive the goods.

"But Dexter," we ask, "why did you think Floyd was spending \$700 for you to fly to Atlanta and back in one day?"

"So we could watch the 'ho's' dance naked. They can't dance all-the-way-naked in Houston."

That was his story. And he was sticking to it.

Themes and Storylines that emerged from the Theory of Defense:

- ‘ Dexter is a bit of a chump.
- ‘ Dexter was dealing with people who were much smarter and more sophisticated than he.
- ‘ Dexter was duped.
- ‘ Dexter wanted to be a bigshot like his friend Floyd.
- ‘ Flying to Atlanta just to watch the girls dance was the most exciting thing that had ever happened to Dexter.
- ‘ Dexter was in a situation he didn't know how to get out of.
- ‘ Dexter was in over his head.

In approaching Dexter's case on a thematic, rather than factual, level, most of us can probably find things about Dexter that we can relate to. Most of us have been in a situation where people are smarter and more worldly than we are, and tried not to let our lack of sophistication show. Most of us have been flattered to get an invitation to do something that is beyond our own means. Most of us have been in a situation and had that "uh-oh" feeling (that we try to get our children to respond to) and ignored it.

If it is on this level that we can relate to Dexter, it is on this level that jurors can relate to Dexter and his situation. They can begin to understand his actions and words which, on the surface, may seem incriminating.

By putting himself in Dexter's place dynamically, the defense attorney recalled a very genuine story about when he was a child, which became a thematic template for his closing argument. As a 12-

year-old, the attorney was invited to go with a friend and the friend's dad to a professional baseball game, his first ever. He was beyond excited. The friend's father (an alcoholic) however, took them to a seedy bar near the stadium ... and they stayed and stayed and stayed. They never made it to the game. The child knew he shouldn't be there, he knew the game was over and he should've been home, but he didn't know how to get out of the situation he was in without looking like a ... child. By telling this story as a parallel to Dexter's ordeal, Dexter became more closely related to an innocent child than a drug trafficker.

In Dexter's direct examination, we were able to offer events irrelevant to a drug conspiracy but relevant for no other purpose than to illustrate a client-related theme. For example, the trip to Atlanta was actually Dexter's first time flying on an airplane. He was able to relate to the jurors his nervousness, and how he had kept this from Floyd, until the flaps retracted and he thought the plane was falling. Apparently not only Floyd, but at least one flight attendant and several passengers in earshot were aware of Dexter's naive reaction to the mechanical routine. Dexter got all the free peanuts he wanted for the rest of the flight, which, of course, made a big impression on him.

Not surprisingly, by trial time, Floyd had flipped and decided that Dexter was actually the mastermind behind the drug cartel. While it wasn't difficult NOT to see Dexter as a mastermind, Floyd wasn't going to wittingly help us paint the picture of the naive Dexter that we needed the jury to see. He couldn't resist however, in his own cross-examination, agreeing with the flattering characterization of himself as a rather sophisticated, playboy-type Dexter envied. He also didn't mind talking about Dexter's excitement and anticipation of seeing ACTUAL NAKED GIRLS dance. (Surely this can't be HELPING Dexter?!) And besides, what does any of this have to do with whose cocaine it actually is?

In the opening statement, the defense attorney was able to offer the jury characterizations of the defendant and the events that cast him in a light that illuminated innocence. There was no real disagreement between the defense and prosecution about any fact other than who owned the cocaine. It was essential, however, for the jury to see the events through our eyes, with our vision, rather than from the prosecution's perspective.

One way in which we were able to characterize the defendant and the events in a favorable light was to refer to them by names and phrases that we had decided upon, and established during our dialogue with the jurors. In short, we were able to fertilize the seeds that we planted in voir dire.

By now, since we have worked backwards through the case, the questions and issues that we need to raise in voir dire are very apparent. Other than questions we would normally ask in any criminal case, and in a case involving drugs, we must ask questions that relate to our theory of defense, and the themes that support that theory. Not only do we plant the seeds of the theory of defense in voir dire, we discover which jurors will be receptive and which will not be receptive. **WE ARE GRATEFUL FOR THOSE JURORS WHO LET US KNOW THAT THEY ARE NOT RECEPTIVE TO OUR CASE THEORY AND OUR CLIENT.**

AN EXAMPLE OF A THEORY-SPECIFIC Q&A IN VOIR DIRE:

Defense Lawyer: Can you tell us of a time when you or someone that you know has been in a situation where you felt you were in over your head?

Juror: *This may not be the kind of thing you mean, but ... I was in Las Vegas, and I didn't really know a lot about gambling ... but I decided to play craps and it was all so fast ... I had no idea all that was going on, and I stayed in the game about an hour longer than I meant to because I didn't know how to get out.*

Lawyer: How did you finally get out of the game?

Juror: *My friend, who I had gone with, who knows about gambling, finally came along, and told me what to do.*

Lawyer: Why do you think you didn't ask someone else at the table or who worked at the casino how to get out of the game?

Juror: *I know this sounds stupid, because I didn't even know any of them, but I just didn't want to look like an idiot. I had been trying so hard not to let them know that I didn't really know what I was doing when I was playing ... and I thought I had pulled that off.*

Lawyer: So, then, do you think the other people you were playing with had no idea that you were in over your head.

Juror: *I really don't think they did . . . I hope not.*

Lawyer: Did the people playing craps use words and phrases that you weren't familiar with?

Juror: *Yeah . . . and I just tried to say the things they said. I tried to sound like I knew what I was doing, anyway . . .*

Lawyer: So, how did you do?

Juror: *I won about a hundred bucks . . . beginner's luck.*

Lawyer: Let me ask you one more question. If I'd had a video tape of you at that craps table, do you think it would be obvious to me that you didn't really know what you were doing?

Juror: *I really don't think so.*

Not only is this dialogue more interesting to other jurors that legal concepts and their prior juror experience, they begin asking themselves the questions that you are asking the juror that you are talking to. As the dialogue with this one juror progressed, I'll bet most other jurors were searching their minds, if not hearts, to recall experiences where they were in over their heads. They don't realize it, of course, but they are searching for ways to relate to your theory of the case, and your client.

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TRYING CASES WITH A THEORY

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Trials are story-telling contests. Whoever tells the most persuasive story, wins. The way to win a criminal case is to develop your legal theory into a story and to tell your story so it will be believed. You must start with a theory of the case. Without that you are lost. You can have a few theories. You can have an “if *a* then *x*, but if *b* the *y* theory”, but you must have a theory. You need to tell the jury your theory so they will understand what you are doing. Generally most of a criminal defense comes in through your cross of the government. Not always, but usually. Your cross, then, is what tells the defense side of the story. Remember expository writing; tell them what you are going to tell them (opening), tell them (testimony), tell them what you told them (closing). I find it very hard to prepare without at least some potential case theories, even if I have not yet decided on the final theory. Usually I will have a number of concepts and as I read the discovery, talk to the client and interview witnesses I will be testing the various theories. Do they hold up? Where are the weaknesses? Similarly I look at what the informant will be saying and ask, can any of this help me? Does it fit into my theory. Can I take the government’s witness and make him or her mine?

FACTS BEYOND CHANGE

The theories you develop must account for all the facts the jury will find, or they will not be viable. Frequently you are confronted with a bad fact that you can not explain away. This is called a **fact beyond change** (FBC)—the money was in fact stolen, the child was sexually abused, the decedent was shot four times with bullets from your client’s gun. You often find yourself spinning your wheels trying to explain away a fact that you just cannot credibly eliminate. The only way out of this quandary is to integrate the FBC into your case theory. Once you have established that certain facts are beyond change, you must adopt them as yours and weave them into your case story. Include them in your opening statement. Work them into your witness testimony. Confront these negative facts head on and make them a believable aspect of your theory.

WHAT IS A THEME?

A theme is a slogan, a song, a dominant emotion, metaphor of the case, a moral dilemma. Country and western songs often give ideas for good themes; *That’s my story and I’m sticking to it*, for the liar; *Devil went down to Georgia*, deal with a informant, *Night moves*, consensual sex. The two basic defense theories are (1) I didn’t do it. (2) I did it but...

In the “I didn’t do it” defense we hear:

I did not do it.
It's not me, it was X.
It's not me, and no one knows who it is.
I have an alibi so it couldn't be me.
I was there, but I wasn't involved in the crime.
I had no reason (motive) to be involved in this.
The police hate me.
The police pick on me because in the past I did something bad, etc.

These are all variants of “I didn’t do it”. In the “I didn’t do it” defense, we do not have to conclusively prove that our client didn’t do it. Rather, we utilize reasonable doubt and take the offensive. For example, a bad fact in a bank robbery case has our client arrested with the bait money; good facts include there is no confession, and the robber wore a mask and cannot be identified. The defense rests on the believability of the story that explains how our client came into possession of the bait money. “I found it in the street” doesn’t work very well. This is where brainstorming comes into play. We must first generate every possible idea, theory, thought, and explanation (in keeping with the uncontraverted facts of the case) that might explain how our client ended up with the marked bills. Then we must winnow these ideas and select the one that most powerfully and plausibly fits with the actual facts of the case, and the reasonable inferences that can be drawn from those facts. For example, perhaps our client claims he recently sold something of value. Could the bait money have come into his possession from the sale? What is the background of the person who bought this item? Perhaps the person who claimed to have recently bought your client’s car/leather jacket/ guitar, etc., is a thief. Make the informant into the bank robber. Is this an alternative suspect theory? Will the judge let you tell this story? Can the story be told through the State’s witnesses or does your client have to testify? When the defense is “I didn’t do it”, and our client’s explanation of how he ended up with the marked bills is believable, then reasonable doubt should prevail and garner an acquittal. As you work these thoughts out and the case theory solidifies, you don’t abandon reasonable doubt, you create it.

When the defense is “I did it but...”, we hear:
It was self defense
I was crazy
My boyfriend forced me to
It is not against the law
It was a mistake
I was working as an undercover cop (for the CIA, FBI etc.)
I had permission, etc.

In “I did it but” cases, your story is everything. You concede that something occurred that might even be illegal, but you argue that your client is not guilty of the crime for a specific reason. Often, you do not and can not prove that certain acts did not occur. But guilt is not a fact question. Guilt is a legal concept. Crimes can occur without anyone’s being guilty. You must explain in a logical and emotionally appealing way why there is not guilt.

This is a case about a woman who for three weeks in January thought she was working undercover for the Youngstown police. She bought crack believing that she was taking the police to the door of the dealer. Jane thought that she was a soldier in the war on drugs. Jane is a casualty of that war and this is her story.

Jane knew that Mark had been murdered. Jane knew how Mark had been murdered. Jane knew who murdered Mark. The morning of January 17th, Jane went and met with Detective Smith. Jane told Smith who murdered Mark. Smith gave Jane his card. Call me, let me know anything you see or hear on the street Smith told her. From January 17th on, Jane knew what her job was. She was working for Detective Smith and the Youngstown police. She would help them catch Mark's killer.

Detective Smith kept in contact with Jane. He spoke to her while she slept. He spoke to her over the radio. He spoke to her from the TV. Jane listened. Detective Smith needed Jane. Detective Smith was depending on Jane. Detective Smith was watching Jane.

Mark was killed on January 17th by crack cocaine and Jane knew where it came from. Jane found the phone number. She called the dealer. She took others with her and went to Lowell where the dealer lives. Jane felt sure Detective Smith was with her. He was watching and when the time was right he would arrest the dealers, those responsible for Mark's death. Unfortunately Jane is the one Detective Smith arrested. Jane was not working for the police. What Jane thought and what was real were different.

Jane has a mental illness called bi-polar disorder. She is a manic depressive. Jane's illness can be treated, but it requires that she take medicine every day. In December, a month before Mark's death, Jane found out she was pregnant. It was to be her first child and she was elated. Jane had always wanted a child, but, at age 32, thought that perhaps she was unable to conceive. Dr. Sparks told Jane she could not take her medicine during the pregnancy, it would harm the baby. Jane had been haunted by voices for years, but the medicine had made the voices go away. Without her medicine the voices returned. Jane is not crazy, but she does have an illness, an illness treatable with medicine. Today Jane no longer hears those voices. Debra, a healthy baby girl, was born to Jane on July 3. Jane takes her medicine again, but medicine alone can not cure Jane's problem. For that she depends on you.

*This story explains how a person involved in buying drugs is not guilty of a crime. She did it, but.... This is not an insanity case. The "legal" defense is apparent governmental authority. The story is true, it tells what really happened. Your case needs a title. Tabloid headlines are good sources for titles. *I Thought I Was an Undercover Cop* might be a good title for this story. If you cannot give your defense a title it is probably incomplete. No title means no story. *Deal with the Devil* might be the title in a case*

where the government's witness is bad and gets a big break. *Cheating Heart* could tell the tale of the adulterous mother who pushes the kids to claim sex abuse to help in the divorce. We all remember the recent *Rush to Judgment* story that was so persuasive in proving the cops did not fully investigate. *I Sold My Soul to the Company Store* might describe a bad check case. Think about cases you have handled and cases you have pending. Give each case a title. Use pencil. As time goes by, the name may change and that is fine. Work your story, your theme, your case name.

In the end, trials are won through hard work, not brilliant courtroom performances. To win, you need to do three things;

- 1. Know your facts;**
- 2. Believe in your case;**
- 3. Tell your story.**

PREPARATION

Effective cross examination requires preparation. Once you know your case theory you need to decide what portion of your case you will try and put before the jury through your cross examination of the informant. Additionally you may need to undercut or impeach some or all of the informant's direct testimony. Impeaching the informant without offering the jury a defense theory will not be very successful. "I'm guilty but they have not proved it" just does not play so well coming from the defendant. You should expect that the government has rehearsed with the informant several times and prepared him or her well. Many informants are tough witnesses because they are such good liars. They have lots of experience, frequently from an early age. An informant will take you on so don't give them any opportunities. You must be prepared and have the documents or records needed at the ready. You need to outline your questioning. Sequencing of your questions will be very important. How do you want your cross to flow? Do you want to have an angry witness or a calm one? Will you start softly and build? Do you need to get certain favorable evidence in through the informant early in the cross? Be prepared for governmental or judicial objections, particularly once they see where you are going. This can mean laying the foundation for your informant questions through an earlier witness. Some of the information you need you will be able to get from the government. Don't count on prosecutors to play by the rules when it comes to Brady/Giglio. They just don't get it. Obtain everything you can but realize you will need to conduct your own investigation and information gathering.

Brady

Due process requires that the Government disclose to the accused any favorable evidence in its possession that is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Favorable" evidence includes not only that evidence tending to exculpate the accused, but also any evidence adversely affecting the credibility of the government's witnesses." *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). The issue is not "admissible" evidence. The cases do not refer to "credible" evidence. Government disbelief of evidence is not a ground to hide *Brady* material. In the discharge of its obligations under *Brady*, the Government must actively

search out the requested material in its files, and in the files of related agencies, reasonably expected to have possession of such information. *Kyles v. Whitley*, 514 U.S. 419 (1995). Trial courts have routinely found F.B.I. Form 302's, to be "evidence" which must be provided to the defense if sought pursuant to the Government's *Brady* obligation. *United States v. Taylor*, 956 F.Supp. 622 (D.S.C. 1997); *United States v. Jackson*, 850 F.Supp. 1481 (D.Kans. 1994). Promises, rewards and inducements, such as proffer letters are *Brady*.

The First Circuit has noted that "prosecutors have an obligation to furnish exculpatory and impeachment information to the defense in a timely fashion. Although the Government's obligation goes beyond good faith requirements of civil discovery, its bounds are not limitless. Patrolling these boundaries is primarily the duty of the *nisi prius* court." *U.S. v. Sepulveda*, 15 F.3d 1161, 1178 (1st cir. 1993). The *Brady* doctrine applies both to evidence that directly supports the defense theory as well as evidence that indirectly exculpates the defendant because it can be used effectively to impeach the credibility of a prosecution witness. See *United States v. Bagley*, 473 U.S. 667 (1985). The government must disclose any information that could be "used to impeach the Government's witnesses by showing bias or interest." *Id.*, at 490. If a deal has been made between a prosecutor and a witness through which the witness has received any kind of break or leniency, the defense is entitled to know about it. *Giglio v. United States*, 405 U.S. 150 (1972).

You must ask for *Brady* material. If defense counsel does not make a specific *Brady* demand, the government will have to turn over potentially useful information only if the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). By contrast, if defense counsel does make a specific *Brady* request, then the government must turn over any information that is "material," a more inclusive standard. It is therefore essential that you make both a general request for information as well as specific requests for types of information that could be helpful, such as promises made by the government to prosecution witnesses or evidence of personal animosity between the witnesses and the defendant. If the defense makes a specific request, then the prosecutor must search through the government's files, including police records and records of other agencies, to determine whether the requested material exists. See *Kyles v. Whitley*, 514 U.S. 419 (1995) (reversing conviction because government failed to disclose, among other things, some prior inconsistent statements of government eyewitnesses and inculpatory statements made to the police by an informant who was never called to testify at trial). For an excellent and recent decision on *Giglio* disclosures see *U.S. v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999) ordering the government to produce a wide range of materials relating to the testimony of informers.

SOURCES OF INFORMATION

This is a big list. It provides ideas. You will not need, nor will you be able to obtain every item as to every informant. I have no secret that makes private medical records available to you. I have on occasion gotten them, by hard work or sheer luck. The important thing is to be creative and open to possibilities. Newspaper archives, clerk's offices, the Internet, public libraries, neighbors all can be a wealth of information. I have found an informant's medical records in a municipal clerk's files, stapled to a traffic court request for a continuance. I have obtained reams of information from civil attorneys who had a case

against informant in the past. I have come across entire web sites dedicated to exposing a informants.

Criminal History

- a. pre-sentence reports
- b. police reports
- c. grand jury transcripts
- d. guilty plea transcripts
- e. trial transcripts
- f. sentencing transcripts
- g. letters to the judge
- h. probation records
- i. parole records
- j. Department of Corrections reports
- k. Drug test results
- l. witness protection program information
- m. interviews with people who know informant
- n. interview with informant

Lies and con jobs

- a. all of the sources for criminal history
- b. civil suits
- c. family court proceedings, including abuse, neglect, divorce
- d. employment records and resumes
- e. credit and loan applications
- f. insurance policy applications
- g. marriage license applications
- h. professional license applications
- i. business license applications
- j. driver's license applications
- k. vehicle registration applications
- l. tax returns
- m. military records
- n. better Business Bureau files
- o. letters to customers
- p. school applications and records
- q. utility bills
- r. newspaper articles
- s. Unemployment claims
- t. Disability, social security and workers compensation claims

Medical information

- a. doctors notes
- b. psychiatric records for schools

- c. psychiatric records for correctional institutions
- d. psychiatric records for military
- e. other psychiatric records
- f. welfare records showing medical treatment
- g. medical records relating to case
- h. reports relating to neglect/child abuse proceedings
- i. drug and alcohol treatment records

Information about the deal

- a. records of agents working with informant
- b. prison visitor logs
- c. telephone bills and logs

The Informant's Story

- a. reports in possession of government
 - Proffer notes
 - Agent 302's
 - Grand jury transcripts
 - Police reports from state case
 - Police reports from other cases
 - Transcripts from Rule 11 and Prosecution version
 - Statements to probation in PSR
 - Video and audio of interviews
 - Informant authored statements
- b. other witnesses
- c. people who know informant

The snowball effect of investigation

Most documents obtained about the informant will include the names of other people. Those people should be interviewed. When they are, they will give you even more names, and you will learn about more sources of records. As you follow up with more interviews and more subpoenas, you will gain even more information. From the preceding list it is apparent that you will have to interview many people and subpoena lots of records in order to prepare to destroy the informant. Start early, and don't be lazy.

ORGANIZING AND STRUCTURING YOUR CROSS

How will you track inconsistent statements? You can make charts or tables. The following is an example using conflicting police reports. You can use folders, tabbed notebooks, flip charts, index cards, or hyperlinked computer files. Pick a system that you can visualize and will work for you under pressure. A good system can often become a demonstrative aid for the cross or in closing. If your courtroom has a video presenter (Doar or Elmo) you can literally take your file flow chart and put it up on a monitor in closing.

TED SARGENT Statements			
ISSUE	<i>PD Internal Report</i>	<i>AG Interview</i>	<i>Bail Hearing Testimony</i>
WEAPONS HISTORY SHOTGUN AT SCENE	Toderico told him about, 1 Thought GJ might be dangerous because of, 3 Readied weapon in case GJ had a gun, 3 Saw shotgun barrel pointed at Barlow (Though light was dim); fired at stock, 3	Toderico relayed info about, 7,10 Sawyer told him about weapons warrants, 8, 14 Expected danger, uncertain whether GJ had gun, 9, 18, 19, 20 Felt GJ was a 10-44 so readied weapon, 9 Saw shotgun getting closer to Barlow's head, 9, 23, 26 GJ never said he had a gun, 24, 25 GJ never fired his weapon, 27 Ammo/fake grenade visible in GJ's house, 34	GJ's failure to appear on weapons warrant, 7 Uncertainty of GJ's possession of weapon on 4/24, 18 Saw shotgun aimed at cop's head when cops broke in, 20, 28, 38, 39, 45 Learned after the fact that shotgun was loaded, 34 Didn't see GJ holding shotgun, 20, 29 Saw grenade and shotgun and a .45 round, no other weapons, 22, 23, 42, 43
LIGHT ILLUMINATION VISIBILITY	Only light was from hallway, 3	Only light was from hallway, 25 Pitchdark in GJ's apt., but for hall light, 25, 26 Webster alone had flashlight ready, 9, 26 Webster shone his light into apartment after shooting, 21	Webster had flashlight, 18 but didn't use it, 44 Barlow didn't have flashlight, 44 Only light was from hall, 19, 26, 34 No lights on in GJ's apt., 19 Someone turned on lights after shooting, 21
WALL DESCRIPTION		There's a half wall near entry, 26 Although it was dark and there was an intervening wall, Sargent saw gun barrel moving toward his right and assumes GJ standing there, 26, 27	Wall obstructed his view, 20 Wall did not extend all the way to ceiling, 26 Fired through wall, 28, 29 GJ's gun protruded from wall, 35
TIME ELAPSED			time between forced entry and end of shooting barrage was 1-2 seconds, 25

TED SARGENT Statements			
LOCATION		Even tho it was dark and there was an intervening wall, Sargent saw gun barrel moving toward his right and assumes GJ was standing there, 26/27	Sargent guessed at GJ's location from angle of shotgun, but his view was obstructed, 20 When he saw the gun, it seemed to be a yard from Barlow's head, but he learned later that it was more than 8 ft away, 26/7 Sargent never saw GJ as he shot, didn't know who he was shooting at, doesn't know if GJ was standing or sitting, 29 - 31, 33, 34, 38 Lack of light prevented him from seeing GJ.
CLOTHING	GJ wore solid green t-shirt and green camouflage fatigues, 34	GJ wore green t-shirt and fatigue pants, and an army helmet was on floor, 34	

EXAMPLE OF ORGANIZING FOR CROSS OF A WITNESS

UNITED STATES V. DOE CR 99-00 <i>Work Product-Privileged</i>		JORDAN EXHIBIT LIST			
WITNESS	EX. #	BATES #	DOCUMENT/DESCRIPTION	PURPOSE	ADMIT (DATE)
Klouthis Peyton Jordan Hargesheimer Porter	D 1	PPC 1708	Klouthis Memo - 7/12/90	Shows commingling PPC and Trust expense; Thornton paid; relative payments made to attorneys	
Jordan Schneider Klouthis Raesler	D 2	from client	GJ's letter re: Plan Administrator's Responsibilities	Independence of Trust; Concern for conflicts	

To create a witness specific exhibit list using a WordPerfect table

1. Highlight the witness column
2. Go to Tools, Sort
3. Click "New..." at the Sort dialogue box
4. At the NEW SORT dialogue box, find the Extract Records entry (towards bottom)
5. At Extract Records, enter "key g =" and then enter the name of the witness whose exhibits you are extracting. ("Key = g" is the command that tells WordPerfect to search throughout the highlighted column for the name you want.)
6. Click OK and the New Sort box will disappear.
7. Now click Sort at the Sort box and wait for your new witness specific table to appear.

Consider why the informant has become an informant. What is his or her motive? Fear, revenge, retaliation, ego, money, perks, protection, reformation, family, leniency, showmanship, something to do, thrills. Can you show that the informants motive to lie is more important than his or her ability to be truthful? Tailor your cross to revealing the motive. Then the jury has a reason to root for you. The informant is lying for a reason rather than here is a lawyer beating up a witness. You need the jury's permission to attack a witness.

AREAS FOR EXAMINATION

Attacking Credibility

Bias

Interest

Motive to Lie

Previous Criminal History

Prior Felony Convictions

Drug Use

Alcoholic

Prior Inconsistent Statements

Informant's Deal

I usually like to end my cross with the informant's deal. This is a safe area. I know the deal. I have the deal in writing. The government already put the deal before the jury. Case law requires the trial judge to let me cross on the deal. The deal makes both the informant and the prosecutor look like sell-outs. The deal is almost the major motivator for the informant's testimony. Who can put a price on a year in prison? Two years? Five years? What might you be willing to say if it meant you would be home with your wife and children 2, 3, 5 years sooner?

Examples of some Cross-Examinations

1. **Merrill Firshing** (transcript attached). Firshing was a classic “jailhouse” informant. He claimed to have been in a cell near the defendant for a few days during which time the defendant allegedly volunteered that his entire PTSD defense was a sham. The cross starts by showing that Furshing was facing a potential 16 year federal sentence, had previously been to prison, was in custody, bail had been denied and Furshing did not like being in jail. Pretty good reason to lie. Note the prosecutor sees this and tries to cut me off. He loses, and I get to repeat the good stuff as a result. That leads to my next segment on his record of prison escapes, both felonies, dishonest, and shows how much he hates being in prison. The cross runs through his escape, and numerous convictions for dishonest. We then arrive in Maine and get into the facts of the charge underlying his need for a deal. He researches old obituaries, finds names and obtains social security numbers and identification under the dead person’s name! It that a professional liar and thief. He steals the identity of the dead. Relatively short cross on his plea and deal with focus on the requirement that he testify for the government.
2. **James Erskine** (transcript attached). Erskine along with Thomas Blackburn (an attorney) were codefendants who plead to very favorable informations and agreed to testify against the others all charged in a large fraud case. The defense agreed a fraud had occurred but we placed the responsibility on Blackburn the lawyer. Erskine an insurance agent turn financial guy, was a friend of Blackburn and was brought into the scheme by Blackburn. The cross starts by using Erskine to establish Blackburn’s ability as a lawyer, Erskine’s trust and faith in Blackburn and their friendship. That friendship including using drugs together. Having quickly opened the cross with my theme, I then tarnish both Erskine and Blackburn with the joint dope and coke use. I then use a transition to move to an different topic. Once you are done with a subject, just end. Then begin your next topic of cross. You do not need to be chronological or in any order which is apparent to the jury or the government. I work out my topics then move them around in my outline until I have the order of topics I want so I can keep up the flow of the examination. Next I elicit many of the favorable facts which supports our theory that Blackburn is the mastermind of this fraud and my client, Petit, is a victim, not the ringleader. I then start going through individual transactions putting documents into evidence which support our theory and show that the government has only shown the jury a portion of the evidence. I show how on each transaction Erskine and Blackburn make money. I show how Erskine cheated a different client of his, Mrs. Turmenne out of over \$100,000, and how he forged Turmenne’s name on checks, stole her money. I move to Erskine’s debts. I go through each debt, then show how he came into money and paid his debts off through this fraud and theft. However he did not pay taxes. But he did drive a BMW and was using expensive cocaine. I use his deposition from a civil case to impeach him, and he admits he lied at his deposition! This was after he had entered his plea agreement. After he had agreed to no further crime he lies under oath in a deposition. This testimony was occurring during the entire Clinton impeachment hearings and here was the government’s cooperating

witness lying under oath and the government was still sponsoring him. Next I show he lies to the government case agent, Osterrieder. Moving forward at page 1932 of the transcript, Erskine admits he made \$446,719 as his share. This moves into the final portion of the cross which shows lie after lie and ends with his plea deal and the fact that the government continued to honor its deal with him even though he kept lying and lying.

3. **Scott Ford, Clinton Bates and George Gatcomb** (transcript attached). Scott Ford is another jailhouse informant. Ford claimed that while in the county jail housed near the defendant Paul Blodgett, Blodgett confessed to possessing the guns at issue. Ford was a very feisty witness and tough on the stand. I only found out about him hours before his testimony due to Jencks. I then interviewed by telephone several other inmates who my client said would impeach Ford. Bates and Gatcomb were still in state facilities and brought in by writ the next day (after a long night). The judge allowed me to put on inmates Bates and Gatcomb to impeach Ford's reputation for truthfulness under rule 608(a). The judge found that Ford was in jail so much that the other inmates were his community.
4. **Joel Barter.** This was a felon in possession case. Defense was self defense, client was looking down the wrong end of a rifle barrel so pulled the gun away during the confrontation but never possessed it. Government contended client kept gun and later was shooting it at people. Barter is a government eye witness. I use Barter to support defense theory that it is Jimmy Lee who is see holding the rifle. I also use Barter to impeach other government witnesses, Lynn and Donna (drug addicted prostitutes which Barter is as well), and Robert Caron who is the gun pointer from whom gun was taken. We contend Caron's testimony is the result of a drug deal gone bad and Barter ties Caron in to Dominican drug dealers. Court later lets me ask Caron about drug issues, over government objection.

I would like to acknowledge the guidance and materials of many other attorneys upon whom much of this article is built including David Lewis, Hank Asbill, Larry Posner, Gerry Spence, Terry MacCarthy, Ivan Fisher, Mario Conte, and many others.

III. SENTENCING

**ENHANCEMENT PROVISIONS
CAREER OFFENDER**

	Career Offender
Sources of law	USSG §4B1.1, §4B1.2 28 U.S.C. § 994 (h)
Requirements	(1) Defendant is at least 18 (2) Instant offense is felony conviction for “crime of violence” or “controlled substance offense” (3) 2 prior convictions for “crime of violence” or “controlled substance offense.”
Predicate Offense Defini-tions	“Crime of violence” = any felony for burglary of a dwelling, arson, extortion, other conduct involving serious risk of physical injury, or with an element of the use or threatened use of force. “Controlled substance offense” = any state or federal offense involving manufacture, distribution. Or intent to distribute.
Result	Criminal history category becomes VI. Offense level is raised to near statutory max.
Notes	Predicate must count separately under § 4A1.1(a), (b) & (c); Doctrine of “related cases” §4A1.2, comment. (n.3) applies; Staleness provisions (10 or 15-year priors don’t count) in § 4A1.2(e) apply; Notice not required before trial/plea.

CAREER OFFENDER CHECKLIST

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CAREER OFFENDER CHECKLIST

1. Be on the lookout

- a. Pursuant to 28 U.S.C. § 994(h), the Sentencing Commission was directed to assure that the guidelines specify a sentence at or near the statutory maximum for defendants who commit a third crime of violence or drug trafficking crime after having been twice convicted of such crimes in the past. As a result of this directive, the Commission promulgated the career offender guidelines at Sections 4B1.1 and 4B1.2 of the United States Sentencing Guidelines.
- b. Pursuant to U.S.S.G. § 4B1.1 "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance

offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." If these elements are met, the defendant faces an enhanced offense level and a criminal history category of VI.

2. Get the facts

- a. Impress upon your client the importance of disclosing to you his entire criminal history, including any convictions which may have been entered under an alias.
- b. File a motion for disclosure of the defendant's prior record pursuant to Rule 16(a)(1)(B) of the Federal Rules of Criminal Procedure.
- c. Investigate the prior convictions, securing copies of the charging documents, plea forms, judgments, and verdict forms. Get a copy of the relevant criminal statutes as they appeared on the dates the prior offenses were committed. If there are any ambiguities regarding the precise offenses of conviction, it will be necessary to order transcripts of the jury instructions or the guilty plea colloquies.

3. Advise your client of the risk

- a. Calculate the various guideline scenarios, from best to worst.
- b. Discuss those scenarios with the client, notifying him of the risk that he will be sentenced as a career offender.
- c. To protect against a claim of ineffective assistance, repeat your advice in a letter to the client, with a copy to the file.

4. Consider a plea agreement which limits the defendant's exposure

- a. Pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the parties may enter into a plea agreement which binds the district court to an agreed-upon sentence.
- b. Consider pleas to several lesser offenses, so as to achieve a predictable and reasonable statutory maximum.
- c. Ask the government to agree in the plea agreement to concur in a defense motion for a downward departure from the career offender guideline.

5. Do a geographically limited search on Westlaw
 - a. Log onto Westlaw.
 - b. On the "Welcome to Westlaw" screen, locate the "Database" box near the bottom of the screen.
 - c. In the "Database" box type in FED3-ALL.
 - d. Click on "search" or press enter.
 - e. In the "Query Editor" box, type in the following: SY,DI ("4B1.1" "4B1.2")
 - f. Click on "search" or press enter.
 - g. This query will retrieve all cases where the career offender guideline was discussed in the syllabus or digest of a reported decision in the Supreme Court, in the Third Circuit, and in district courts within the Third Circuit.
 - h. At the top of the page, click on "View," then click on "Document List," then print out the list of cases.
 - i. Review these cases, and make a list of both the successful career offender claims and the unsuccessful career offender claims.
 - j. Consider adding to your "success" list one or more of the following career offender challenges.
6. Consider challenging "crimes of violence"
 - a. Pursuant to U.S.S.G. § 4B1.2(a), the term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
 - b. In interpreting the "otherwise" clause of Section 4B1.2(a)(2), circuit courts have reached differing conclusions on whether non-residential burglary is properly considered a crime of violence. See United States v. Wilson, 168 F.3d 916 (6th Cir. 1999) (collecting cases); United States v. Hicks, 122 F.3d 12 (7th Cir. 1997) (collecting cases).
 - c. In applying the "otherwise" clause, the First Circuit focuses on the degree of risk, expressed in terms of the probability of physical harm presented by the "mine-run" of conduct that falls within the heartland of the statute . . . in other words, whether the offense, in general, carries an inherent

risk of violent outbreak. United States v. Winter, 22 F.3d 15 (1st Cir. 1994) (holding that sports bribery and travel in aid of racketeering, as charged in the indictment, failed to qualify as a crime of violence under the "otherwise" clause).

- d. The Tenth Circuit has held that the "otherwise" clause should be narrowly interpreted and applied, and that any factual inquiry is limited. United States v. Smith, 10 F.3d 724 (10th Cir. 1993).
- e. Look for over-inclusive statutes and charging documents. For example, state burglary statutes may include burglaries which are both residential and non-residential, violent and non-violent. Career offender sentencing may be defeated where the government fails to prove that the defendant was convicted under the statutory sub-clause which meets the definition of a "crime of violence." United States v. Dueno, 171 F.3d 3 (1st Cir. 1999); United States v. Bennett, 108 F.3d 1315 (10th Cir. 1997); United States v. Spell, 44 F.3d 936 (11th Cir. 1995); United States v. Jackson, 22 F.3d 583 (5th Cir. 1994).

7. Consider challenging "controlled substance offenses"

- a. Pursuant to U.S.S.G. § 4B1.2(b), the term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- b. Simple possession is not a controlled substance offense. United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995).
- c. A conviction for "attempting to obtain by the use of a forged prescription controlled substances" is not a controlled substance offense. Young v. United States, 936 F.2d 533 (11th Cir. 1991).
- d. Look for over-broad statutes. In United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999), the court of appeals reversed a career offender sentence where one of the two predicate convictions had been entered under a California drug statute which criminalized both distribution and personal use, and the government had not proven under which subsection the defendant had been convicted. See also United States v. Neal, 27 F.3d 90 (4th Cir. 1994) (same).
- e. Look for over-broad charging documents. In United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998), a career offender sentence was vacated where one of the prior state convictions was for "sale or purchase" of drugs, and the government had failed to prove that the defendant was convicted under the sale prong of the statute. See also United States v. Baker, 16 F.3d 854 (8th Cir. 1994) (career offender sentence reversed where defendant had been convicted of managing a residence for the purpose of "distributing or using crack cocaine," and verdict didn't establish whether the conviction was under the "distribution" prong or the "use" prong).

- f. Put the government to its burden of proof. In United States v. Hernandez, 218 F.3d 272 (3rd Cir. 2000), the government sought career offender sentencing based, in part, upon two prior New York convictions for drug distribution. Defendant argued that the prior convictions were for possession, not distribution. At sentencing, the government introduced two "Certificates of Disposition" prepared by the state court clerk, reflecting that the prior convictions involved drug sales. The government did not, however, introduce the actual judgments of conviction. On appeal, the career offender sentence was vacated and the case was remanded so that the government could attempt to meet its burden of proof by introducing copies of the judgments of conviction. Absent such proof, career offender sentencing was not be applied.

8. Consider challenging "related cases"

- a. The definitions and instructions for computing criminal history at guideline section 4A1.2 are applicable to the counting of convictions under the career offender guideline. See U.S.S.G. § 4B1.2, application note 3.
- b. Pursuant to Section 4A1.2, application note 3, prior sentences are not considered related if they were for offenses that were separated by an intervening arrest. Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing.
- c. Determine whether the two prior convictions were related to each other. In United States v. Breckenridge, 93 F.3d 132 (4th Cir. 1996), prior convictions were considered related if they exhibited the same modus operandi, were committed close in time and place, and were committed for the same motive. In United States v. Houser, 929 F.2d 1369 (9th Cir. 1990), two drug sales, a month apart, to the same undercover government agent, were considered part of a "single common scheme or plan."
- d. Determine whether a prior conviction is related to the current conviction. In United States v. Garecht, 183 F.3d 671 (7th Cir. 1999), a prior drug conviction was deemed "related" to the instant drug conspiracy conviction; the underlying acts occurred during the same time frame, defendant relied on the same drug supplier, and both crimes involved a common purpose, to-wit, the resale of controlled substances for profit. See also United States v. Kenyon, 7 F.3d 783 (8th Cir. 1993) (same).

9. Consider challenging the timeliness of prior convictions

- a. As previously noted, the provisions of Section 4A1.2 are applicable to the counting of convictions under the career offender guidelines. U.S.S.G. § 4B1.2, application note 3.
- b. Pursuant to guideline section 4A1.2(e): (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period. (2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted. (If the prior sentence was not within one of the two time periods specified above, it is not counted. Offenses committed prior to age 18 are governed by Section 4A1.2(d)(2)).
- c. If the government fails to introduce evidence showing the timeliness of the prior conviction, the career offender sentence may be vulnerable. United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999); United States v. Covington, 133 F.3d 639 (8th Cir. 1998) (applying plain error standard).

10. Consider the sequence of convictions

- a. Pursuant to guideline section 4B1.2(c)(1), the defendant must commit the instant offense of conviction "subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . ."
- b. Pleas of guilty and verdicts of guilty, if occurring prior to the instant federal offense, are prior convictions even if sentencing does not occur until after the federal offense. United States v. Gonzalez, 220 F.3d 922 (8th Cir. 2000).

11. Consider a motion for downward departure

- a. A downward departure from the career offender guidelines is permissible if the defendant's career offender status significantly over-represents the seriousness of his criminal history under Section 4A1.3.
- b. The Second and Third Circuits have held that departure authority extends to both a criminal history category reduction, and an offense level reduction. United States v. Rivers, 50 F.3d 1126 (2nd Cir. 1995); United States v. Shoupe, 35 F.3d 835 (3rd Cir. 1994).

12. Examples of successful downward departure motions

- a. United States v. Collins, 122 F.3d 1297 (10th Cir. 1997) – downward departure to unenhanced sentencing range affirmed, court of appeals relies on following combination of factors: first, given the defendant's old age and ill health, he was considered less likely to recidivate than the ordinary career offender; second, his prior conviction for marijuana distribution was almost beyond the applicable time limit; and third, the prior conviction for marijuana distribution resulted in a relatively lenient sentence.
- b. United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991) – downward departure to unenhanced sentencing range affirmed, court of appeals relies on combination of three factors: first, the prior offenses were committed when the defendant was 20 years old; second, the prior offenses were committed within two months of each other; and third, the offenses were punished by concurrent state court sentences.
- c. United States v. Senior, 935 F.2d 149 (8th Cir. 1991) – court of appeals upholds downward departure to ten year statutory minimum sentence based on combination of two factors: first, the relatively lenient sentences received for the prior convictions reflected the state's assessment of the seriousness of the crimes committed; and second, the short period of time actually served in prison further suggests that the seriousness of the criminal history was overstated.
- d. United States v. Smith, 909 F.2d 1164 (8th Cir. 1990) – downward departure upheld based upon the relatively minor nature of defendant's prior crimes, the briefness of his criminal career, and his age at the time the crimes were committed.
- e. United States v. Hall, 40 F. Supp. 2d 340 (D. Md. 1999) – district court departs downward to sentence within unenhanced range based upon the following combination of factors: first, the two prior offenses involved very small amounts of drugs; two, the defendant was a young man when he committed both offenses; three, the two prior offenses were committed within two years of one another; and four, the defendant received very light sentences for both offenses.
- f. United States v. Ayers, 971 F. Supp. 1197 and 1201 (N.D. Ill. 1997) – downward departure to unenhanced guideline range based upon proof that defendant's father had inflicted psychological and emotional abuse which rose to the level of sadistic torture.
- g. United States v. Taylor, 843 F. Supp. 38 (W.D. Pa. 1993) – district court rules that downward departure will be granted based upon defendant's age and immaturity at the time of the prior burglary convictions, the short time span between the prior convictions, the factually related pattern involved in the two convictions, the time span between the prior convictions and the instant conduct, defendant's actual conduct in all past convictions, the lack of physical violence or weapons in the past offenses, the state sentencing judge's assessment of the seriousness of the

prior convictions as reflected in the modest sentences imposed, and an optimistic prognosis by a drug treatment expert who had examined the defendant.

- h. United States v. Williams, 78 F. Supp.2d 189 (S.D.N.Y. 1999) (relatively minor nature of defendant's prior and current drug convictions warranted departure from career offender guideline).

13. Use the guidelines as a checklist

- a. Review the text and commentary at Sections 4B1.1 and 4B1.2.
- b. Review the text and commentary at Sections 4A1.1 and 4A1.2.
- c. If the prior offense cannot be counted under Sections 4A1.1 and 4A1.2, it cannot be counted under the career offender guidelines. See U.S.S.G. § 4B1.2, application note 3.

14. Review the treatises

- a. McFadden, Clarke & Staniels, Federal Sentencing Manual (Matthew Bender), Section 7.04.
- b. Hutchison, Yellen, Hoffman & Young, Federal Sentencing Law and Practice (West Group), Sections 4B1.1, 4B1.2.

15. Try to influence your probation officer and prosecutor

- a. If you have an arguably meritorious career offender objection, or if you have a good ground for a downward departure, discuss it with the probation officer *before* the initial draft of the presentence report is submitted.
- b. Let the probation officer know that you have shared your analysis with the prosecutor.
- c. The probation officer may contact the prosecutor, so do your best to persuade him or her of the merits of your position.

16. Objections and motions for downward departure should be preserved in writing

17. Federal post-conviction remedies

- a. Post-conviction relief under 28 U.S.C. § 2255 has been granted where trial counsel was ineffective in failing to raise meritorious objections to the career offender guideline. United States v. Williamson, 183 F.3d 458 (5th Cir. 1999), United States v. Breckeneridge, 93 F.3d 132 (4th Cir. 1996); United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995).

- b. There is also the possibility of post-conviction relief under 28 U.S.C. § 2255 where the defendant is prejudiced by counsel's ineffectiveness in failing to inform him of the risk of career offender sentencing. United States v. Thompson, 27 F.3d 671 (D.C. Cir. 1994) (remand to determine whether, if the defendant had received timely notice of the career offender risk, he would have entered an early guilty plea, thereby entitling him to an extra point off for acceptance of responsibility); United States v. Day, 969 F.2d 39 (3rd Cir. 1992) (case remanded for a hearing to determine whether defendant would have accepted five year cooperation deal had he been told of career offender risk); United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000) (on direct appeal, held that counsel was ineffective in failing to advise of career offender sentence prior to guilty plea; district court erred in not permitting plea to be withdrawn); United States v. Kates, 930 F.Supp. 189 (E.D. Pa. 1996) (where defendant passed up a favorable plea deal because counsel failed to inform him of career offender risk, defendant would be resentenced without career offender enhancement).
- c. Additionally, a defendant who successfully attacks a predicate state conviction may thereafter seek review of the career offender sentence which was imposed as a result of that state conviction. United States v. LaValle, 175 F.3d 1106 (9th Cir. 1999); United States v. Nichols, 30 F.3d 35 (5th Cir. 1994).

18. If you need help, call the Defenders' Hotline

- a. The Defender Services Training Branch is located in Washington, DC.
- b. The attorneys in the Training Branch have expertise in the guidelines, and are there to offer suggestions and support.
- c. Their toll-free number is (800) 788-9908.

ENHANCEMENT PROVISIONS - ACCA

	Armed Career Criminal Act
Sources of law	USSG §4B1.4 18 U.S.C. §924(e)
Requirements	(1) violation of §922(g) (felon in possession of a firearm) (2) 3 prior convictions for “violent felony” or “serious drug offense” committed on different occasions.
Predicate Offense Definitions	“Violent felony” = any felony that (I) has an element the use, threat of use, or attempted use of physical force against another person, or (ii) is burglary, arson, extortion, explosives use, or otherwise involves conduct that presents a serious potential risk of physical injury to another. “Serious drug offense” = fed. drug offenses with 10 year + max, or state drug offenses involving manufacture/distribution and at least 10 year max.
Result	Criminal history becomes at least IV. Offense level is raised to 33 or 34. Under §924(e), 15 year mandatory minimum; maximum life.
Notes	No time limit on priors. No notice required before trial/plea.

DEFENDING AGAINST §922(G): ISSUE SPOTTING IN FELON-IN-POSSESSION CASES¹

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Of the multitude of firearms offenses contained in the United States Code, 18 U.S.C. § 922(g), outlawing possession of firearms by certain categories of people, towers above the rest in terms of the numbers of prosecutions and cases sentenced. Over the past four years, the federal courts have sentenced approximately 7,000 of our clients for § 922(g) violations, or over 40 percent of all those convicted of firearms offenses. These numbers will only increase with the institution of prosecutorial initiatives such as “Project Exile” in Richmond, VA, and Rochester, NY, “Operation Sunrise” in Philadelphia, PA, and “Operation Cease-Fire,” coming soon to Albuquerque, NM—initiatives that are likely to spread to all areas of the country. Consequently, the chances that you will represent a client charged under § 922(g) increase every day.

In this article, we will cover the basics of defending a § 922(g) case. Although § 922(g) covers nine categories of “prohibited persons,” the focus here will be on the so-called “felon-in-possession” prong, § 922(g)(1); however, with the exception of the discussion concerning prior convictions as an element of the offense, what is covered here will apply equally to non-felon categories. Further, due to the sheer number of issues involved, we will only touch on each. Please feel free to call us at (800) 788-9908 for more information on particular points.

THE ELEMENTS OF § 922(G)

Section 922(g)(1) provides that

[i]t shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(a)(2) provides that “[w]hoever knowingly violates [subsection (g)] of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” Thus, the elements of the felon-in-possession offense are: (1) knowing possession or receipt (2) of a firearm (3) that has traveled in interstate commerce (4) by a person previously convicted of a felony.

Possession. A number of issues arise in litigating whether your client “knowingly possessed” a firearm.

Scienter requirement. As applied to § 922(g) prosecutions, the “knowing” element requires only that your client knew that he or she possessed a firearm. *E.g., United States v. Field*, 39 F.3d 15 (1st Cir. 1994). It does not require your client to know that he or she could not legally possess or receive the firearm because of the prior conviction, nor does the element require that your client know that the gun traveled across state lines. *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995); *United States v. Dancy*, 861 F.2d 77 (5th Cir. 1988); *United States v. Miller*, 105 F.3d 552 (9th Cir. 1997); *United States v. Capps*, 77 F.3d 350 (10th Cir. 1996).

Possession versus ownership. Mere ownership of a firearm is not sufficient to establish possession of it. The government must prove that your client either actually or constructively possessed it. *United States v. Casterline*, 103 F.3d 76 (9th Cir. 1996). In *Casterline*, for example, although there was evidence to suggest that the defendant owned the guns at issue, there was insufficient evidence to prove that he possessed them at the time alleged in the indictment because he had been in prison before and at the time charged and the guns were in the custody of the sheriff during that period.

Actual versus constructive possession. To prove that your client had “actual” possession of a firearm, the government will have to show that the gun was in your client's immediate possession or control. In contrast, to prove that your client had “constructive” possession, the government will have to show that he or she had the power and intention to exercise dominion and control over the gun, either directly or through someone else. *United States v. Beverly*, 750 F.2d 34, 37 (6th Cir. 1984).

Creative lawyering can do a lot to diminish or even defeat the government's theory of constructive possession. In *United States v. Mooney*, 788 F. Supp. 592 (D.D.C. 1992), for example, the government put on evidence that the defendant would sleep at his girlfriend's apartment, that he was sleeping there when police seized a gun from a dresser drawer in which an envelope belonging to him was also found, and that his waist pouch was found on top of the dresser. In the face of this evidence, the defense established that the gun seized was of a weight, configuration, and caliber that would be easily handled by a small person (i.e., the girlfriend) and that it was not likely to be the kind of gun that a man portrayed by the government as a drug dealer would use. The district court ruled that the government's evidence was insufficient.

Proof of possession. The best evidence of possession will generally be provided by fingerprints found on the firearm. The Integrated Automated Fingerprint Identification System (IAFIS), the FBI's fingerprint processing center located in Clarksburg, WV, became officially operational in July 1999. As a result, it is now possible to conduct computerized fingerprint match searches in as little as two hours' time. Although a major use of the service will be to assist in pre-trial release determinations, the government could well use it to try to link your client to a firearm.

If the government opts to use fingerprint match evidence, whether computerized or manual, the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), have opened up challenges to the use of fingerprint evidence that could prevent the jury from hearing testimony by experts. Robert Epstein, an

Assistant Federal Defender in Philadelphia, has been litigating this issue for some time and has developed extensive evidentiary and legal arguments that he is willing to share. He can be reached at (215) 928-1100. At a minimum, you will want to file detailed discovery requests for forensic evidence and information about any experts the government plans to call at trial. See Fed. R. Crim. Pro. 16(a)(1)(C), (D), (E). Sample language is provided in Tony Gallagher, *Unlawful Possession of a Firearm*, in 1998 WINNING STRATEGIES FOR DEFENDING FEDERAL CRIMINAL CASES 357, 383-84 (available from the Training Group).

Legal defenses. If the evidence that your client possessed the firearm (or the evidence of your client's prior conviction or the interstate commerce nexus) is not subject to realistic attack, there are several possible defenses to consider.

A defense of entrapment by estoppel can arise if your client claims that a federal official said that he or she could possess a firearm notwithstanding the prior conviction. You will have to show that it was reasonable for your client to rely on that information. In one case, the defendant claimed that he had been given an oral grant of immunity by a federal prosecutor in return for cooperating and that he had been led to believe by other law enforcement officers that he could possess firearms, or at least that he would not be prosecuted for doing so. The appellate court ruled that the proffer of this evidence was sufficient to warrant presenting the defense to the jury. *United States v. Thompson*, 25 F.3d 1558 (11th Cir. 1994); see also *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987) (reversing conviction where defendant reasonably relied on assurances from federally licensed firearms dealer that purchase was lawful because defendant's conviction had later been reduced by operation of state law to misdemeanor). But see *United States v. Billue*, 994 F.2d 1562 (11th Cir. 1993) (federal license to sell firearms does not transform dealer into federal official).

A traditional entrapment defense may also be possible if your client can demonstrate that he or she (1) was induced to possess a firearm by federal agents and (2) was not predisposed to commit the offense. *United States v. Lessard*, 17 F.3d 303 (9th Cir. 1994). The D.C. Circuit has permitted use of this defense where, in an undercover fencing operation where one of the stolen items was a gun, the defendant was aware of the extra penalties imposed on convicted felons for possessing guns and expressed his concern to the undercover agents, even though the defendant had a predisposition to fence stolen property. *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978).

A defense arising from a theory of justification, such as self-defense, coercion, or duress, may be another option. To support it, you will have to show that your client (1) faced an imminent and unlawful threat of death or serious injury; (2) did not recklessly place himself or herself in the situation giving rise to the threat; (3) had no legal alternative; and (4) there was a direct causal connection between the possession of the firearm and the avoidance of harm. See *United States v. Paolello*, 951 F.2d 537 (3d Cir. 1991); *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995); *United States v. Newcomb*, 6 F.3d 1129 (6th Cir. 1993); *United States v. Blankenship*, 67 F.3d 673 (8th Cir. 1995); *United States v. Gomez*, 92 F.3d 770 (9th Cir. 1996).

Firearm or Ammunition. To prove its case, the government will have to show that your client knew that the object he or she is alleged to have possessed was a firearm or was ammunition. 18 U.S.C. § 921(a)(3) contains the basic definition of “firearm;” “ammunition” is defined in § 921(a)(17). The term “firearm” includes mufflers, silencers, and destructive devices, but excludes antique firearms. For the technical definitions of these terms, see respectively §§ 921(a)(24), (a)(4), and (a)(16). For more on firearms definitions, see *Firearms Nomenclature: A Primer on Mechanics and Statutory Definitions*, THE DEFENDER'S ADVOCATE, Summer 1999, at 6.

The government may charge your client with several counts of § 922(g), each based on a different gun. If the counts are based on the same act, only a single conviction can be supported. *E.g.*, *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998). Similarly, an indictment charging separate counts of possession of the same firearm on separate dates should give rise to only one conviction if your client maintained a continuing possessory interest in the gun. *See United States v. Dudley*, 779 F. Supp. 1581 (D. Kan. 1991) (finding continuing possessory interest in pawned firearm too tenuous to constitute level of dominion contemplated for possession). In contrast, separate charges for possessing one gun on a particular day and possessing a different gun on another day will be legitimate.²

Interstate Commerce Nexus. Section 921(a)(2) contains the definition of “interstate or foreign commerce.” As a practical matter, all that the government must show to meet this prong of the offense is that at some point before your client came into possession of the firearm or ammunition, it traveled in interstate commerce. Proof that the gun was manufactured outside of the state in which it was possessed is sufficient.³ *Scarborough v. United States*, 431 U.S. 563 (1977).

The government frequently relies on its BATF agents as experts to prove the interstate commerce element. With the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), you may be able to do more than has been possible in the past to challenge an agent's qualifications as an expert on interstate commerce. As with the fingerprint evidence, you should make a discovery request for information on the government's potential experts.

Should the evidence that the weapon was manufactured in another state or country come in, another potentially fruitful line of attack is to attempt to establish that the weapon could be an illegal counterfeit or a legitimate replica that was actually produced within the state. You can do this through cross-examination of the government agent and/or using an expert of your own. Even if you cannot actually prove this point such that you would win a Rule 29 motion, you may succeed in creating a reasonable doubt in the mind of a juror.

Prior Conviction. The government must prove beyond a reasonable doubt that your client has been previously convicted of an offense punishable by a term of imprisonment exceeding one year. Section 921(a)(20) contains several exceptions to the term “offense:” “Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” do not count as priors. Similarly, “any State offense classified by the

laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less” does not count. Further,

[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

This definition gives rise to a number of possible challenges. First, determine whether your client was “convicted” under state law. For example, although it would count as a prior conviction for criminal history purposes under the sentencing guidelines, a plea of *nolo contendere* with adjudication withheld under Florida law does not qualify as a prior conviction for a felon-in-possession charge. *United States v. Willis*, 106 F.3d 966 (11th Cir. 1997). In contrast, a jury verdict of guilty, even if no formal order of judgment is entered, does qualify. *United States v. Faison*, 61 F.3d 22 (11th Cir. 1995).

Another challenge to a prior conviction turns on the maximum length of a sentence that could have been imposed. Section 922(g) requires that the prior conviction be for a felony offense punishable by more than a year's imprisonment. A number of states, however, have abolished blanket offense maximums in favor of maximums determined by individual offender and offense characteristics. If your client's prior conviction was obtained under such a system, determine whether there is any scenario in which the state court could have imposed a sentence of more than twelve months. If there is not, you can argue that as a matter of law the prior conviction cannot be used as the basis for a felon-in-possession prosecution, thus requiring that the indictment be dismissed for lack of jurisdiction. The Training Group has available a clear and concise appellate brief that makes this argument in regard to North Carolina law; please call us to request a copy. (Unfortunately, however, the Fourth Circuit rejected this argument in *United States v. Jones*, 195 F.3d 205 (4th Cir. 1999).) Variations of this argument can also be used to challenge prior convictions used to enhance sentences.

Expungement. If your client says that the prior conviction has been expunged, you will need to determine whether, under the laws of the state, expungement is automatic or must be requested. If the latter, you must then determine whether your client in fact followed the request procedure and whether the request was granted. Further, keep in mind that if the expungement of a conviction did not occur until *after* your client's alleged possession of a firearm, it will not preclude use of that conviction in the § 922(g) prosecution. *E.g.*, *United States v. Lee*, 72 F.3d 55 (7th Cir. 1995).

Restoration of rights. Restoration of civil rights in some states may be automatic; in others, a convicted person must apply for reinstatement of them. In some states, restoration may be complete, but in others only partial. Researching this issue can be challenging. An excellent starting point is *Civil Disabilities of Convicted Felons: A State by State Survey*, prepared by the Office of the Pardon Attorney, U.S. Department of Justice. The document provides state-by-state summaries of what rights a person loses upon conviction and how they may be restored, including specific sections on loss and

restoration of firearms privileges. To obtain a copy, contact the Pardon Attorney at 500 First Street, NW, 4th Floor, Washington, DC 20530, (202) 616-6070.

If a state has restored your client's right to possess firearms, determine whether the restoration is for all types of firearms, or only certain types. If the latter, your client still cannot possess a firearm legally for federal purposes, even if possession of the particular type of weapon is permitted under state law. *Caron v. United States*, 118 S. Ct. 2007 (1998).

If the prior conviction charged is for a federal offense, state restoration of civil rights does not suffice. The procedure for federal relief from firearms disabilities is found in 18 U.S.C. § 925(c); however, because Congress does not appropriate funds to BATF for the necessary investigation of applications for relief, as a practical matter the only available avenue of relief is through a presidential pardon. For information on the pardon procedure, contact the Office of the Pardon Attorney at the address and phone number provided above.

If none of your legal challenges to the prior conviction succeed, then look for challenges based on the sufficiency of the evidence of the prior conviction. Typically, the prosecution will introduce a certified copy of the judgment against your client. The prior conviction can be proved in other ways, however. For example, in *United States v. Grinkiewicz*, 873 F.2d 253 (11th Cir. 1989), evidence concerning the facts of the arrest on the prior charge and the defendant's admission of the state proceedings when arrested on the instant charge was held to be sufficient.

Another potential challenge is that your client is not the person named in the judgment of conviction. This succeeded in a recent case out of the Tenth Circuit, *United States v. Green*, 175 F.3d 822, 834-36 (10th Cir. 1999), where the defendant faced a mandatory life sentence for a drug offense on the basis of two prior convictions. Rather than requiring the government to provide fingerprints or original photographs for either conviction, the district court relied instead on the defendant's failure to object in the presentence report to the listing of his aliases, on the similarity of birthdays and street addresses, and on the fact that the defendant had been convicted of several offenses in the particular state at around the time of the conviction at issue. The appellate court found this evidence insufficient to establish the prior conviction beyond a reasonable doubt.

Motions practice. Although the “prior conviction” element has been discussed last, it is in fact the first element that you should begin investigating. Under Fed. R. Crim. P. 16(a)(1)(B), you can move to request copies of your client's criminal history records from the government as part of discovery. However, even if you do so, you should always conduct your own investigation of your client's criminal history and obtain all documents pertaining to the cases. It is critical to do this early on, both because of the amount of time it can take to obtain conviction records and because you must determine as quickly as possible whether your client is subject to sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (see below for more on this topic).

A motion for dismissal of the indictment should be filed if you have determined that your client's civil rights, including full firearms privileges, were restored before he or she allegedly possessed the gun. Similarly, if you find that your client's prior conviction was expunged or was overturned on appeal or in post-conviction proceedings prior to the firearm possession, file a motion to dismiss. Even if not appealed, if the conviction is constitutionally invalid because of a complete lack of counsel, move to dismiss the indictment on the ground that if an uncounseled conviction cannot be used to enhance a sentence, it likewise cannot be used as proof of guilt. *See Custis v. United States*, 511 U.S. 485, 494-96 (1994) (discussing prior decisions holding that uncounseled conviction cannot be used to enhance sentence). As discussed above, you should also move to dismiss the indictment if the prior conviction was for an offense that was not punishable by a term of imprisonment exceeding a year.

To keep the jury from hearing about the nature of the prior conviction, file a motion *in limine* offering to stipulate to the prior. *See Old Chief v. United States*, 519 U.S. 172 (1997) (finding that district court abused discretion in admitting evidence of name and nature of defendant's prior conviction where defendant had offered to stipulate to existence of conviction).

If the government and district court refuse your client's offer to stipulate to the prior conviction, and your client is charged with additional, non-felon-in-possession offenses, consider making a motion to sever the § 922(g) charge from the others. *See United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (finding that trial court abused discretion in refusing to sever § 922(g) count). This is especially important where the prior conviction is for the same kind of conduct as the other charges, for example, a prior drug conviction and current drug charges. If the court denies the motion, then request that the government be prevented from referring to the nature of the prior conviction during the presentation of evidence and arguments. If the indictment goes before the jury, be sure that any reference to the nature of the prior has been redacted. Similarly, check the jury instructions to be sure that they are silent on this point. *See United States v. Jones*, 67 F.3d 320 (D.C. Cir. 1995); *cf. United States v. Fryer*, 974 F.2d 813 (7th Cir. 1992) (admission at trial on robbery and felon-in-possession charges of nature of defendant's prior conviction for robbery was not prejudicial where evidence on instant robbery charge was overwhelming). If, despite your best efforts the nature of the prior does come up, whether through the government or through the court, move for a mistrial.

SENTENCING ISSUES

Application of the Guidelines. As with most firearms offenses, your client will be sentenced under U.S.S.G. § 2K2.1. The base offense level will be at least 14 because your client is a prohibited person, due to the prior felony conviction. *See U.S.S.G. § 2K2.1(a)(6) & comment. (n.6) (Nov. 1998)*. Whether the base offense level will be any higher depends on two factors: the nature of your client's prior convictions, and the type of firearm involved, as provided in § 2K2.1(a)(1)-(4).

Nature of prior conviction. If your client has a prior conviction for either a crime of violence or a controlled substance offense, the base offense level will be at least 20, and if your client has two such

convictions, the base offense level will be at least 24. Several issues arise in connection with this determination.

First, the definitions of “crime of violence” and “controlled substance offense” are those used in § 4B1.2, the career offender guideline. U.S.S.G. § 2K2.1 comment. (n.5). Second, the prior conviction must receive criminal history points under § 4A1.1 to be used in determining the base offense level. *Id.* Consequently, the ten- and fifteen-year time limits on the age of convictions that are set forth in § 4A1.2(e) apply.

However, the courts are split on whether someone must have been convicted of the crime of violence or controlled substance offense before committing the § 922(g) offense. In the Fifth, Tenth, Eleventh, and D.C. Circuits, a defendant may commit a firearms offense and only after that offense commit (and be convicted of) a crime of violence or controlled substance offense; despite occurring after the firearms offense, the conviction can be used to increase the base offense level. *United States v. Gooden*, 116 F.3d 721 (5th Cir. 1997); *United States v. McCary*, 14 F.3d 1502 (10th Cir. 1994); *United States v. Laihben*, 167 F.3d 1364 (11th Cir.), *cert. denied*, 119 S. Ct. 2383 (1999); *United States v. Pugh*, 158 F.3d 1308 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1782 (1999). Only the Sixth Circuit, to date, has required that a conviction used to increase the base offense level must have occurred before the commission of the instant offense. *United States v. Barton*, 100 F.3d 43, 46 (6th Cir. 1996). At the time we went to press, the Sentencing Commission was about to send to Congress an amendment that adopts the 6th Circuit position. The amendment will take effect on November 1, 2001 unless Congress disapproves it.

Type of firearm. Just as the base offense level may be greater based on your client’s criminal history, so too it may start at 18, 20, 22, or 26 based on the type of weapon your client possessed, specifically weapons meeting the statutory definitions contained in 18 U.S.C. § 921(a)(30) and 26 U.S.C. § 5845. For an article addressing definition issues, see *Firearms Nomenclature: A Primer on Mechanics and Statutory Definitions*, THE DEFENDER’S ADVOCATE, Summer 1999, at 6.

Other guidelines issues. Once your client’s base offense level has been determined, specific offense characteristics may apply to increase or decrease it. The Training Group has available case outlines explaining the operation of the specific offense characteristics contained in § 2K2.1(b)(2), (b)(4), and (b)(5) and the cross reference contained in (c)(1); please contact us at (800) 788-9908 if you would like copies.

Application of ACCA. Under 18 U.S.C. § 924(e), the Armed Career Criminal Act, your client will face a minimum sentence of fifteen years if he or she has sustained three convictions for either a violent felony or a serious drug offense before committing the instant offense. Two important points to remember are (1) the government is *not* required to give notice that this statutory enhancement will apply (that is, its application is automatic unless the government agrees to drop the § 922(g) charge altogether—except in a district such as the District of Oregon, where the federal courts so far have treated ACCA as a matter of prosecutorial discretion); and (2), there are no time limitations on the age of the prior convictions

(convictions that are too old to count for criminal history points under the guidelines can still support an ACCA sentence). However, the convictions must be sustained prior to the illegal firearm possession.

Although similar to the guidelines terms “crime of violence” and “controlled substance offense,” the ACCA terms “violent felony” and “serious drug offense ” are different in some crucial ways. Understanding these variances may enable your client to avoid a fifteen-year or longer sentence. For example, “crimes of violence” under the guidelines that are prosecuted and sentenced together may qualify as related cases under § 4A1.3, comment. (n.3). On the other hand, under ACCA, “violent felonies” that are prosecuted together count separately as long as they occurred on occasions separate from one another. Thus, a spree of robberies all committed on the same day can serve as ACCA predicates. In contrast, for a “controlled substance offense” to qualify for career offender purposes under the guidelines, it need only be punishable by more than one year in prison. A “serious drug offense” under ACCA, however, must be punishable by at least ten years in prison.

Sentencing under the guidelines for ACCA clients involves the application of § 4B1.4 as well as § 2K2.1. Under § 4B1.4, the minimum base offense level is 33, and the minimum criminal history category is IV. As with § 2K2.1, the type of firearm involved may result in a greater base offense level. Similarly, the offense level may be higher if the firearm was used in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2, the career offender guideline. Points for acceptance of responsibility can be deducted, if appropriate. Departures under § 5K1.1 and under § 5K2.0 are possible, down to the mandatory minimum sentence of fifteen years; however, the only way to go below the statutory minimum is via a substantial assistance departure motion made pursuant to 18 U.S.C. § 3553(e). (For more on substantial assistance matters, see the Summer 1999 issue of this newsletter.)

In conclusion, you may frequently come up against situations in which the government will charge your client under § 922(g) in what appears to be a solid case. Our hope is that this article has provided you with a checklist of issues that will turn that airtight case into one full of holes.

FOR FURTHER READING

Compared to many types of cases, there are a large number of resources available in firearms prosecutions. For a listing of selected resources, contact the Training Branch (800) 788-9908. For an excellent and comprehensive treatment of § 922(g) issues, ask for *Unlawful Possession of a Firearm*, by Tony Gallagher (the Federal Defender for Montana), in 1998 WINNING STRATEGIES FOR DEFENDING FEDERAL CRIMINAL CASES 357. For extensive treatments of ACCA issues, see Shannon A. McAuliffe, *Firearms Offenses*, in DEFENDING A FEDERAL CRIMINAL CASE § 13.7 (Federal Defenders of San Diego, Inc. 1998), and *The Federal Three Strikes Law, the Armed Career Criminal Act, and the Career Offender Guideline*, in 1999 WINNING STRATEGIES FOR DEFENDING FEDERAL CRIMINAL CASES 531, 541-75.

NOTES

1. This article originally appeared in the Fall 1999 issue of *The Defender's Advocate*, the periodic newsletter published by the Defender Services Division Training Branch. If you would like to subscribe to it, please mail to the Training Group a letter, on your office letterhead, stating that you are a member of the CJA panel in your district and requesting that you be placed on the mailing list. Please provide your e-mail address.
2. Note that when counts charge different provisions of § 922(g) arising out of the same conduct, such as both felon-in-possession and fugitive-from-justice-in-possession, the circuits are split as to whether convictions can be entered on both counts. Compare *Dunford*, 148 F.3d at 388-89 (reversing seven of fourteen convictions) with *United States v. Peterson*, 867 F.2d 1110 (8th Cir. 1989) (rejecting multiplicity claim for prosecution under several subsections).
3. A starting point for research on production locations is the directory of manufacturers contained in a firearms catalog or reference book such as *SHOOTER'S BIBLE 2000* (Stoeger Publishing 1999).

ENHANCEMENT PROVISIONS - THREE STRIKES

	Three Strikes
Sources of law	No guideline yet. 18 U.S.C. §3559(c)
Requirements	(1) Instant offense must be “serious violent felony” (2) 2 prior convictions for “serious violent felony” <u>or</u> 1 Prior “serious violent felony” + 1 prior “serious drug offense”
Predicate Offense Definitions	“Serious violent felony” = murder, sex crimes, kidnaping, extortion, arson, firearms use, firearms possession as described in §924(c), attempts, conspiracies or solicitations thereof, conviction, or any other offense punishable over 10 years with a force element or which by its nature involves substantial risk of physical force being used. “Serious drug offense” = anything punishable under 21 USC 841(b)(1)(A) (1K heroin, 5K cocaine, 50g crack, 50g meth)
Result	Mandatory life imprisonment. Note that 18 USC §3582(e) may provide relief to defendants over 70 who have done at least 30 years.
Notes	No time limit on priors. Priors must occur after previous prior conviction (conduct ÷ conv. ÷ conduct...) Gov. must give written notice before trial/plea under 21 U.S.C. §851(a). Robberies do not count as S.V.F.’s if def. proves that no one was hurt and no dangerous weapon was used/threatened; <u>but see US v. Gatewood</u> , 184 F.3d 550 (6th Cir. 1999) (unconstitutional to place burden on def to disprove violent nature of prior) Similar exception for arson.

DOWNWARD DEPARTURES AFTER KOON -- A FACT-BASED INQUIRY

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DOWNWARD DEPARTURES AFTER KOON -- A FACT-BASED INQUIRY

Carmen D. Hernandez

A district court may depart from the sentence determined under the applicable sentencing guideline if the court finds that there exists “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s.

I. DEPARTURES AFTER KOON

In *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996), the Supreme Court held that an appellate court owes substantial deference to a district court’s decision to depart from the sentencing guidelines range and may not reverse unless the district court abuses its discretion. “[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.” *Koon*, 116 S.Ct. at 2046. In reaffirming the judicial independence to grant departures, the Supreme Court explained that there is room under the guidelines for federal judges to exercise traditional sentencing discretion “to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Id.* at 2053.

Koon also explains that a departure potentially may be based on any ground that the Sentencing Commission has not proscribed. Federal courts may not categorically rule out departure factors because that would usurp the Commission’s policy-making authority. *Id.* at 2050.

Lastly, *Koon* makes it clear that the departure inquiry is fact-based. “The relevant question, however, is not, as the Government says, ‘whether a particular factor is within the ‘heartland’ as a general proposition, but whether the particular factor is within the heartland given all the facts of the case.’” *Id.* at 2047 (internal citation omitted).

After *Koon*, it is more important than ever for defense counsel to investigate mitigating facts pertaining to the offense and the defendant. Facts, singly or in combination, must be gathered and presented by counsel in a manner that establishes the unusual nature of each defendant and his crime. Indeed, since *Koon*, a number of courts of appeals have upheld previously rejected departure grounds. Case law changes wrought by *Koon* are discussed below.

A. Identifying Factors That Take the Case Outside the Heartland

After *Koon*, a district court considering a departure must first ask: “What features of this case, potentially, take it outside the Guidelines’ ‘heartland’ and make of it a special, or unusual, case?” *Koon*, 116 S.Ct. at 2045, citing, *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). Upon identifying

distinguishing features, the court must next ask a series of questions to determine whether it should depart:

1. Forbidden Factors

Has the Commission forbidden departures based on those features? . . . If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure.

2. Encouraged Factors

If not, has the Commission encouraged departures based on those features? . . . If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account.

3. Discouraged Factors

If not, has the Commission discouraged departures based on those features? . . . If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.

4. Unmentioned Factors

If a factor is unmentioned in the Guidelines, the court must, after considering the ‘structure and theory of both relevant individual guidelines and the Guidelines taken as a whole’ decide whether it is sufficient to take the case out of the Guideline’s heartland.”

Id.

B. Defining the Role of District Courts

1. Discretion to Impose Individualized Sentences

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and to reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. It has been uniform and constant in the federal

judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge.

Id. at 2053 (emphasis added).

2. Owed Substantial Deference

A district court's decision to depart from the Guidelines, by contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.

Id. at 2046.

3. Special Competence to Assess Facts

Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases.

District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. . . . To ignore the district court's special competence -- about the 'ordinariness' or 'unusualness' of a particular case -- would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case

Id. at 2046-47 (citations omitted).

C. Departure Factors Are Potentially Unlimited

The Guidelines, however, "place essentially no limit on the number of

potential factors that may warrant departure.” The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it “does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departures in an unusual case.” 1995 U.S.S.G. ch. I, pt. A, intro. comment. 4(b). Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policy-making authority vested in the Commission.

Id. at 2050.

D. Fact-Finding Saves the Day -- Departure Factors Upheld in *Koon*

1. Victim Provocation - U.S.S.G. § 5K2.10

Koon upheld a five-level downward departure based on an encouraged departure ground: victim provocation. See U.S.S.G. § 5K2.10. The district court in *Koon* found as a mitigating factor warranting departure that the victim’s “wrongful conduct contributed significantly to provoking the offense behavior.” *Koon*, at 2048.

Mr. King’s provocative behavior eventually subsided. The Court recognizes that by the time the victim’s conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger. Nevertheless, the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King’s initial misconduct.

Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a manner of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force.

The two situations are clearly different. . . .The Guidelines do not adequately account for the differences between such ‘heartland’ offenses and the case at hand.

...

The punishment prescribed by § 2A2.2 contemplates

unprovoked assaults, and as a consequence, the District Court did not abuse its discretion in departing downward for King's misconduct in provoking the wrong.

Koon at 2048-2050.

Note that in upholding this departure, the Supreme Court did not restrict its analysis to the encouraged departure identified in § 5K2.10. In part, the Court relied on the fact that Koon did not fall within the "heartland" of civil rights offenses. The Court defined the "heartland" as an unprovoked assault, one where a "jailor, correctional officer, police officer or other state agent ... intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force". *Id.* Accepting the district court's finding that Koon involved "conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a manner of seconds, during the course of a dynamic arrest situation", the Court reasoned that the conduct in Koon fell outside the "heartland" because the assault was provoked. *Id.*

It is significant, for purposes of advocating departures, that despite the absence of any textual reference to provocation in § 2A2.2, the applicable guideline for assaultive civil rights violations, the Supreme Court defined its "heartland" by reference to provocation. For a number of reasons, this definition of the "heartland" makes sense. First, in a system concerned with just punishment, provoked and unprovoked assaults provide a fact-based distinction that should result in different punishment. Second, § 2A2.2 makes no reference to this distinction -- no specific offense characteristic addresses provocation and nothing in the commentary or background note prohibits consideration of this factor. Lastly, because the § 5K2.10 encouraged departure denotes that the Commission was unable to give adequate consideration to this factor in formulating the guidelines, it is logically consistent with the structure and theory of the guidelines to define the "heartland" of aggravated assaults by reference to victim provocation.

Koon's consideration of this departure provides a valuable framework for obtaining departures. First, identify the factual differences in the case at hand that justify mitigating the punishment. Next, formulate a definition of the "heartland" that incorporates the unique facts of your case. Lastly, if you find no case law support, rely on the court's day-to-day consideration of cases and your own experience to support your contention that the facts are unique and should mitigate the punishment. Indeed, the absence of case law reflects the uniqueness of your circumstances.

Be creative. There is considerable leeway in defining a "heartland" where the applicable chapter two guideline is silent as to the "heartland" that the Commission considered when it formulated the guideline. There is also a growing body of authority which reaffirms the discretionary authority of district courts in sentencing. After *Koon*, once you have convinced the district court that a departure would yield a more just sentence, the only requirements are that the Guidelines do not categorically prohibit a departure on that ground and that you present it in a manner that acknowledges a heartland from which your case may be distinguished.

2. Combination of Factors: Successive Prosecutions

Koon also upheld a departure based on the successive federal prosecution, after the acquittal in the state prosecution. Despite the fact that there is no double jeopardy or other legal bar under federal law to such successive prosecutions, this ground was upheld:

As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. Nonetheless, the District Court did not abuse its discretion in determining that a "federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants." The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court.

Id. at 2053.

The *Koon* defendants may have paid an emotional, physical or financial toll, or perhaps a combination of all three. It is not clear. It was sufficient that the district court was willing to take cognizance of the "significant burden" on the defendants. The Supreme Court upheld this departure in part because it determined that successive prosecutions are rare. Again, this shows the need to structure the departure argument in terms that make the case out-of-the-ordinary. *See e.g., United States v. Lieberman*, 971 F.2d 989, 998 (3d Cir. 1992) (upheld downward departure for a defendant that was charged with both embezzlement and tax evasion for the moneys he embezzled where the district court noted that while there was no prosecutorial misconduct in charging both offenses it had never seen a case charged in this fashion though most fraud-type cases would be subject to such charges).

The successive prosecution departure upheld in *Koon* may also be viewed as upholding departures that amount to imperfect defenses — not enough to be a complete defense but mitigating enough to warrant a reduction in sentence.

3. Combination of Factors: Susceptibility to Prison Abuse

Koon upheld the defendants' susceptibility to abuse in prison as an additional ground, in combination with other factors, to depart downward:

The extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make *Koon* and Powell unusually susceptible to prison abuse. Petitioners' crimes, however brutal, were by definition the same for purposes of sentencing law as those of any other police officers convicted under § 2H1.4, and

receiving the upward adjustments petitioners received. Had the crimes been still more severe, petitioners would have been assigned a different base offense level or received additional upward adjustments. Yet, due in large part to the existence of the videotape and all the events that ensued, “widespread publicity and emotional outrage . . . have surrounded this case from the outset,” which led the District Court to find petitioners “particularly likely to be targets of abuse during their incarceration”.

The District court’s conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts.

Id. at 2053.

E. Post-Koon Case Law: Reassessing Departure Grounds

Since *Koon*, the courts of appeals have explicitly stated that a different analysis must be applied in determining the availability of grounds for departures. In several instances, these courts have reversed pre-*Koon* precedents in their circuits.

1. Post-Offense Rehabilitation & Remorse

Overruling case law in light of *Koon*, the Fourth Circuit in *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997), held that post-offense rehabilitation is a proper ground for downward departure. All circuits to have considered the issue since *Koon*, have held this to be a permissible ground:

United States v. Bradstreet, 2000 WL 298570, No. 99-1267 (1st Cir. 2000);
United States v. Core, 125 F.3d 74 (2d Cir. 1997);
United States v. Sally, 116 F.3d 76, 80 (3d Cir.1997);
United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999);
United States v. Jaroszenko, 92 F.3d 486, 491 (7th Cir. 1996) (remorse);
United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997)
United States v. Green, 152 F.3d 1202 (9th Cir. 1998);
United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (drug rehabilitation);
United States v. Pickering, 178 F.3d 1168 (11th Cir.) (may reduce criminal history level but not offense level), *cert denied*, 120 S.Ct.433 (1999).
United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998)

Note: An amendment prohibiting departures based on post-sentencing rehabilitation will take effect November 1, 2000. The proposed amendment, U.S.S.G. § 5K2.19 does not prohibit post-offense rehabilitation as a departure ground.

2. Courier's Lack of Control Over Purity Level

In *United States v. Mendoza*, 121 F.3d 510 (9th Cir. 1997), the 9th Circuit reversed where district court concluded that it lacked authority to depart on ground that defendant lacked “control over, or knowledge of, the purity of the methamphetamine because the Guidelines already took purity into account in establishing the offense level....*Koon* makes clear, however, that section 3553(b), in conjunction with the Guidelines, does not restrict the power of the district courts that severely....Applying the *Koon* analysis, we conclude that the district court did have legal authority under the Guidelines to consider a downward departure on the ground that Mendoza had no control over, or knowledge of, the purity of the methamphetamine that he delivered. That ground does not involve one of the few factors categorically proscribed by the Sentencing Commission.”

3. Sentence Disparity Among Codefendants

In *United States v. Meza*, 76 F.3d 117 (7th Cir.), vacated and remanded, 117 S. Ct. 448 (1996) the Supreme Court vacated, for reconsideration in light of *Koon*, the 7th Circuit's holding that departure is prohibited because of disparity among codefendants' sentences; accord *United States v. Daas*, 198 F.3d 1167 (9th Cir. 1999) (departs down to equalize sentencing disparity); *United States v. Martinez-Maldonado*, No. 99-CR-10272, 2000 WL 1801851, (Nov. 8, 2000) (granted departure to defendant based on his personal efforts to cooperate and his truthful testimony during a 4-hour polygraph examination administered by the government so as to equalize his sentence with that of his codefendants who had received substantial assistance motions; defendant had no new evidence to provide to government because his codefendants had already provided information).

4. Reasonableness of Departure

In *United States v. Sablan*, 114 F.3d 913 (9th Cir. June 5, 1997) (en banc), the Ninth Circuit abandoned its “mechanistic approach to determining whether the extent of a district court's departure was unreasonable;” now if district court “sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed.” *Id.* at 919.

II AUTHORITY FOR OBTAINING DEPARTURES - U. S. CODE

18 U.S.C. § 3553. Imposition of a sentence

- (a) Factors to be considered in imposing a sentence.-The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]. . .
- (2) (A) . . . just punishment for the offense;
- (B) . . . adequate deterrence . . . ;
- (C) . . . protect the public . . . ; and

(D) . . . provide the defendant with needed educational or vocational training, medical care, or other correctional treatment . . .

(b) Application of guidelines in imposing a sentence.--The Court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . .

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

[The Safety Valve]

(f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Consider also:

18 U.S.C. § 3661. Use of Information for Sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

**28 U.S.C. § 991. United States Sentencing Commission;
establishment and purposes**

...

(b) The purposes of the United States Sentencing Commission are to-

(1) establish sentencing policies and practices for the Federal criminal justice system that-

(A) assure the meeting of the purposes of sentencing as set forth, in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

28 U.S.C. § 994. Duties of the Commission

...

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

...

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

III. SUBSTANTIAL ASSISTANCE TO AUTHORITIES IN THE INVESTIGATION OR PROSECUTION OF OTHERS

- A. **18 U.S.C. § 3553(e).** Permits departures from the statutory mandatory minimum.
- B. **28 U.S.C. 994(n).** Directs Commission to ensure reduced sentences for substantial assistance.
- C. **Rule 35(b), Fed.R.Crim.P.** Permits departures from the statutory mandatory minimum and from the guidelines sentence based on assistance provided after sentencing.
- D. **U.S.S.G. § 5K1.1.** Permits departures from the guidelines range.

18 U.S.C. § 3553 Imposition of a Sentence

...

(e) Limited authority to impose a sentence below a statutory minimum.-Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

28 U.S.C. § 994. Duties of the Commission

...

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Federal Rules of Criminal Procedure

Rule 35. Correction or Reduction of Sentence

...

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under §28 U.S.C. 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's

pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence."

U.S.S.G. § 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
 - (5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

- 1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.
- 2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.
- 3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded

the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 290).

< ***Melendez v. United States***, 116 S.Ct. 2057 (1996). District court is not authorized to sentence below a statutory mandatory minimum unless the government motion certifies a defendant's substantial assistance and requests a departure, pursuant to 18 U.S.C. § 3553(e), below the statutory minimum. If the government motion is only pursuant to U.S.S.G. § 5K1.1, the court is only authorized to depart below the guideline range but not below the statutory minimum.

< **Practice Pointer:** The plea agreement should include language that binds the government, in the event the defendant provides substantial assistance, to file a motion pursuant to both 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1.

In General, No Authority to Depart Without Government Motion

The general rule is that a district court may not grant a downward departure for substantial assistance absent a motion by the government. *E.g.*, *United States v. Cruz-Guerrero*, 194 F.3d 1029 (9th Cir. 1999); *In re Sealed Case*, 181 F.3d 128 (D.C. Cir.) (en banc), *cert. denied*, 120 S.Ct. 453 (1999); *United States v. Solis*, 169 F.3d 224 (5th Cir.), *cert. denied*, 120 S.Ct. 112 (1999); *United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), *cert. denied*, 119 S.Ct. 1479 (1999); *United States v. Schaefer*, 120 F.3d 505, 508 (4th Cir.1997).

A. Court May Review Govt Conduct for Unconstitutional Motivation

< ***Wade v. United States***, 112 U.S. 1840 (1992). Where no plea agreement obligates government, district court may grant remedy if government's refusal to file motion is based on unconstitutional motive, such as defendant's race or religion

B. Hearing To Determine Govt's Bad Faith or Irrational Motive

< ***United States v. Isaac***, 141 F.3d 477, 484 (3d Cir. 1998). Government may rebut allegation that it acted in bad faith by explaining its reasons for refusing to file motion; defendant is entitled to hearing if it makes a showing that government acted in bad faith by contradicting government's explanation, supported by some evidence.

< ***United States v. Rounsavall***, 128 F.3d 665 (8th Cir. 1997). Remanded case for evidentiary hearing to determine whether government, though filing § 5K1.1 motion, acted irrationally or in bad faith

in failing to file motion pursuant to § 3553(e) to allow a sentence below the statutory minimum of 20 years. Defendant, who pled guilty to money laundering and drug charges testified for a total of 5 days against her brother, who received a life sentence after his conviction. The 8th Circuit found that defendant had made a threshold showing requiring a hearing on two separate grounds – (1) that representations made to the defendant by the prosecuting attorney that if she fully cooperated she should receive a sentence of from 7 to 10 years were part of the plea agreement which the government breached by not filing the § 3553(e) motion to allow imposition of a sentence below the 20-year mandatory; and (2) that the government may have impermissibly based its decision on factors other than the defendant's cooperation, in this instance, its expectation that if the defendant cooperated, her brother also would cooperate; before resentencing after district court had announced it would compel government to file motion, government filed a motion pursuant to 18 U.S.C. § 3553(e).

< ***United States v. Pipes***, 125 F.3d 638 , 641-42 (8th Cir. 1997), *cert. denied sub. nom.*, ***Waldrip v. United States***, 523 U.S. 1012 (1998) Remanded for evidentiary hearing to determine whether prosecutor's failure to file downward departure motion based on defendant's substantial assistance was irrational where defendant had written cooperation agreement, it was undisputed that defendant "cooperated with the government and that this cooperation, at least in part, contributed to the government's case against [a defendant prosecuted in another district] and government had done an "about face" about defendant's cooperation based on a conclusory statement from the prosecutor from the other district.

< ***United States v. Leonard***, 50 F.3d 1152, 1157-1158 (2d Cir. 1995) Remand for hearing to consider "any evidence with a significant degree of probative value" to determine whether government breached its duty of good faith based on cooperation agreement on the theory that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled" citing, *Santobello v. New York*, 404 U.S. 257, 262 (1971); government reliance on change in defendant's story and contact with target were in dispute based on agent's report.

C. Hearing Where Parties Disagree as to the Terms of Plea Agreement

< ***United States v. Barresse***, 115 F.3d 610 (8th Cir. 1997). Remanded for evidentiary hearing to determine what parties meant by term "complete cooperation" in the plea agreement.

D. District Court Must Exercise Independent Discretion

< ***United States v. Campo***, 140 F.3d 415 (2d Cir. 1998). Vacates and remands for re-sentencing where the district court "made it 'abundantly clear' that it would not consider the 5K1.1 government motion filed by the government in the absence of a specific sentencing recommendation" by the government; error for judge to "refuse[s] to exercise the discretion accorded him by law" and that government's failure "to recommend a specific below-Guideline sentence may not prevent the court from exercising its own informed discretion in considering 5K1.1 motions; " separation of powers prohibits court from compelling govt to change policy.

Departure Without Government Motion in Limited Circumstances

A. Cooperation with State or Local Authorities

< *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), *vacating*, 65 F.3d 240 (2d Cir. 1995). Holds that district court may grant departure, even without govt motion, pursuant to § 5K2.0 for a defendant who cooperated with local law enforcement authorities because “offense” as used in § 5K1.1 applies to federal offenses only and does not address assistance relating to state offenses.

< *Contra United States v. Emery*, 34 F.3d 911, 913 (9th Cir. 1994) (§5K1.1 controls cooperation to local authorities so that departures available only upon govt motion); *United States v. Love*, 985 F.2d 732 (3d Cir. 1993) (same).

B. Cooperation that Facilitates the Administration of Justice

< *United States v. Dethlefs*, 123 F.3d 39 (1st Cir. 1997). “In an appropriate case a defendant’s timely entry of a guilty plea might facilitate the administration of justice in such an unusual way, or to so inordinate a degree, that it substantially exceed the reasonable expectations the sentencing commissioners likely harbored when formulating the guidelines;” here, downward departure reversed and case remanded for resentencing because record did not support departure

< *United States v. Garcia*, 926 F.2d 125, 128 (2d Cir. 1991). Upheld a downward departure even in absence of govt motion where guilty plea led others to plead guilty which “broke the log jam” in multi-defendant case thus facilitating the administration of justice.

C. Counsel’s Conflict of Interest Obstructed Opportunity to Provide Assistance

< *United States v. Gonzalez-Bello*, 10 F. Supp.2d 232 (E.D. N.Y. 1998) Granted five-level downward departure to first-time drug defendant where counsel’s conflict of interest (his fees were paid by kingpin against whom defendant/client would have cooperated) obstructed defendant’s opportunity to provide substantial assistance to government.

D. Personal & Truthful Efforts Warranted Departure Where No Assistance Because Last to Cooperate & to Avoid Unwarranted Disparity

< *United States v. Martinez-Maldonado*, No. 99-CR-10272, 2000 WL 1801851, (Nov. 8, 2000). Granted departure from range of 87-108 months to sentence of 42 months (the same as imposed on codefendants) based on defendant’s personal efforts to cooperate and his truthful testimony during a 4-hour polygraph examination administered by the government so as to equalize his sentence with that of codefendants who had received substantial assistance motions; defendant had no new evidence to provide to government because his codefendants had already provided information.

Timing of Rule 35 Motion

< *United States v. McDowell*, 117 F.3d 974 (7th Cir. 1997). Court of Appeals sua sponte addressed whether Rule 35 motion was timely in a case where defendant appealed the extent of post-sentencing substantial assistance departure granted by district court then held that one-year limitation, and its express exception, are jurisdictional so that district court lacks power to grant the motion if filed after one year and it does not meet the exception to the one-year rule. Remanded case for evidentiary hearing to determine if the one-year exception applies, i.e., where “the defendant’s substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence.” Fed.R.Crim.P. 35(b).

< *United States v. Morales*, 52 F.3d 7, 8 (1st Cir. 1995). District court may depart under Rule 35(b) pursuant to motion filed more than one year after sentencing if the defendant “was not asked [about the late-disclosed information], or was otherwise unaware of its value.”

IV. DEPARTURE AUTHORITY UNDER THE SENTENCING GUIDELINES

CH 1, PT. A, INTRO. COMMENT. 4(b) - "HEARTLAND"

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland", a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. With . . . specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

U.S.S.G. § 5K2.0 - GROUNDS FOR DEPARTURES (POLICY STATEMENT)

ENCOURAGED DEPARTURES

Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively

listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

* * *

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

Commentary (effective Nov. 1, 1998)

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. *Koon v. United States*, 518 U.S. 81 (1996) Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Id.* at 98.

DISCOURAGED DEPARTURES

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable

guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the “heartland” cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

COMBINATION OF FACTORS - 5K2.0, COMMENT.

The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the “heartland” cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. . .

<*Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996).

<*United States v. Decora*, 177 F.3d 676 (8th Cir. 1999). Affirmed downward departure from sentencing range of 37-46 months to 3 years probation in a case involving assault with a dangerous weapon by a young man living on the Rosebud Sioux Tribal Reservation, who kicked an officer with shod feet, on the basis of combination of the difficulty of life on the reservation and the extraordinary and unusual nature of defendant’s educational record (one semester shy of bachelor’s degree) and post-offense rehabilitation (successfully completed intensive in-patient treatment program, after-care program and attended AA meetings).

<*United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996) Affirmed downward departure based on combination of defendant’s serious medical condition and charitable and civic good deeds.

< *United States v. Ribot*, No. 98-10061, 11 Fed. Sent. R. 333, 1999 WL 165919, (D. Mass. Mar 19, 1999) (unpublished) (Gertner, J.). Departs down to probation from range of 24-36 months based on combination of aberrant behavior and mental illness/diminished capacity for defendant convicted of nearly \$200,000.

< *United States v. Delgado*, 994 F. Supp. 143 (E.D. N.Y. 1998) (Weinstein, J.). Three level downward departure to a first-time offender, drug courier who transported drug based on coercion from a creditor and combination of aberrant behavior, defendant’s fragility, and defendant’s exceptionally difficult life.

<*United States v. Mena*, 968 F. Supp. 115 (E.D. N.Y. 1997) (Weinstein, J.) Downward departure of 15 levels to a safety valve defendant, who was subject to deportation, based on a number of factors, singly and in combination, including:

- (a) § 5K2.0, agreement to voluntary deportation;
- (b) § 5K2.12, coercion & duress (defendant was dominated, manipulated and pressured

by his older brother, who remained a fugitive by the time of sentencing; brother and another hatched a plan to purchase 100 kgs of cocaine; defendant attended a single meeting while brother engaged in over 20 conversations with informant); also received a 4-level downward adjustment for minimal role, § 3B1.2(a);

(c) § 5K2.13, diminished capacity (IQ of 67; dropped out after 6th grade at age 14 after; unchallenged psych evaluation characterized defendant's "thinking as naive, child-like, concrete and simplistic"; a "person who is easily overwhelmed, is highly dependent on others, and tends to excessively look to others for approval, reassurance and direction because he has few inner resources to draw upon when confronted with new or challenging situations"; and "prone to suggestibility and gullibility";

(d) "potential for victimization" while incarcerated due to his mental retardation, citing, *Lara*, 905 F.2d 599, 602-03 (2d Cir. 1990); and

(e) the "need for defendant to provide for and support his family both financially and emotionally", citing, *cf. United States v. Johnson*, 964 F.2d 124, 128-29 (2d Cir. 1992) (defendant had two children by his common law wife of ten years and prior to his arrest, was employed as an Amway salesperson earning \$400 per month) but not expressly mentioning § 5H1.6.

<***United States v. Lombard***, 72 F.3d 170, 183-84 (1st Cir. 1995) Remands because district court failed to recognize authority to depart for combination of factors: including defendant's state court acquittal on murder charges; fact that federal sentence for subsequent gun prosecution arising out of conduct underlying state murder acquittal may exceed state sentence that would be available for murder conviction; magnitude of the enhancement; disproportionality between sentence (life) and offense of conviction as well as between enhancement and base sentence; and absence of statutory maximum for offense of conviction, which makes case "unusual" and removes it from "heartland" of §2K2.1 that yielded the mandatory life sentence. "It seems ...unlikely that the Commission could have envisioned the particular combination of circumstances that in this case culminated in the mandatory life sentence and the corresponding institutional concerns. Whether or not constitutional concerns were raised by these circumstances, as we think they are, we conclude that their combination here gave the court power to depart under U.S.S.G. § 5K2.0. That the application of the Guidelines that produced the mandatory life sentence does raise constitutional concerns only reinforces our conclusion. This case may be viewed--virtually by definition-- as an "unusual" one falling outside the heartland of section 2K2.1(c). To decide otherwise would be to assume that the Commission intended that the application of section 2K2.1(c)'s cross- reference provisions could, even in a heartland case, produce sentences raising serious constitutional issues."

<***United States v. One Star***, 9 F.3d 60, 61 (8th Cir. 1993) Granted downward departure to Native American who had strong family ties, employment record, and community support.

<***United States v. Bowser***, 941 F.2d 1019 (10th Cir. 1991). Combination of factors, none of which alone warranted departure, justified downward departure from career offender designation.

<defendant was 20 years old when he committed two priors

<the priors were committed within 2 months of each other

<sentences in the 2 priors were imposed to run concurrently

< ***United States v. Blackwell***, 897 F. Supp. 586 (D. D.C. 1995). Grants departure based on combination of diminished capacity, significant family circumstances and aberrant behavior.

<***United States v. Shadduck***, 889 F. Supp. 8, 11-12 (D. Mass. 1995), modified on other grounds, 112 F.3d 523 (1st Cir. 1997). Grants downward departure in a bankruptcy fraud case based on combination of factors including defendant's health problems and teenage children.

<See also **Unmentioned Factors**, below.

U.S.S.G. § 4A1.3 - ADEQUACY OF CRIMINAL HISTORY CATEGORY

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range.

...

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes.

...

However, a prior arrest record itself shall not be considered under § 4A1.3.

...

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes.

Facts which have supported a downward departure:

<defendant's youth at time of prior felonies

<proximity in time of prior felonies

<consolidation of prior felonies

<short length of time served

<"relatively minor nature" of prior offenses

A. Courts May Depart Down from Career Offender Designation

<*United States v. Bechkam*, 968 F.2d 47 (D.C. Cir. 1992)

<*United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996)

<*United States v. Rivers*, 50 F.3d 1126, 1131 (2d Cir. 1995)

<*United States v. Shoupe*, 35 F.3d 835 (3d Cir. 1994)

< *United States v. Adkins*, 937 F.2d 947 (4th Cir. 1991)
 < *United States v. Fletcher*, 15 F.3d 553, 556-57 (6th Cir. 1994)
 < *United States v. Jones*, 55 F.3d 289, 292 (7th Cir.), *cert. denied*, 116 S.Ct. 161 (1995)
 < *United States v. Brown*, 903 F.2d 540 (8th Cir. 1990)
 < *United States v. Lawrence*, 916 F.2d 553 (9th Cir. 1990)
 < *United States v. Bowser*, 941 F.2d 1019 (10th Cir. 1991)
 < *United States v. Webb*, 139 F.3d 1390 (11th Cir. 1998)

< ***United States v. Mishoe***, 241 F.3d 214 (2d Cir. 2001). Although priors involving street-level dealing cannot be the basis for an automatic downward departure, district courts are authorized to depart upon consideration of a several factors, including, the amount of drugs involved in the prior offense, the amount of time previously served, the sentence previously imposed and the defendant's role in the prior offense.

< ***United States v. Collins***, 122 F.3d 1297 (10th Cir. 1997). Upholds departure from career offender guideline on basis that defendant's career offender status "overstates his criminal past and likely criminal future," thus removing him from the heartland of the career offender guideline; [defendant's] age, infirmity, and the circumstances surrounding his 1986 predicate conviction [involving conduct committed beyond the 10-year time limit which resulted in a relatively lenient sentence], taken together, justified the court's finding over-representation under section 4A1.3."

B. Departure Available Under Immigration Guideline Does Not Limit Departure Authorized under § 4A1.3

< ***United States v. Delgado-Reyes***, No. 99-2121, __ F.3d __, 2001 WL 292162 (1st Cir. Mar. 29, 2001). Requirements of departure authorized under §2L1.2, comment. (n. 5) do not limit a departure for overrepresentation of criminal history as authorized by §4A1.3.

C. Racial Disparities in State Sentencing Schemes Ground For Downward Departure

< ***United States v. Leviner***, 31 F. Supp. 2d 23 (D. Mass. 1998) (Gertner, J). Holds that criminal history V, based on 7 criminal history points for traffic violations, overrepresents the relatively minor and non-violent nature of record and replicated disparities in state sentencing scheme particularly racial disparities; relies on studies that reflect the incidence of pretextual traffic stops (the offense of "driving while black") and fact that defendant's offenses received points based on jail sentences for more than 30 days for offenses not involving erratic driving.

**V. OTHER MENTIONED DEPARTURES GROUNDS:
 SELECTED CHAPTER 2 COMMENTARY**

< § 2A1.1, comment. (n.1) (The commentary to the first degree murder guideline

provides that a downward departure may be warranted "[i]f the defendant did not cause the death intentionally or knowingly")

< **United States v. Prevatte**, 16 F.3d 767, 784 (7th Cir. 1994). Reversed imposition of life sentences in a case involving convictions on fourteen counts of explosives and firearms violations arising from a bombing-burglary scheme that resulted in the unintended death of an elderly woman who died when she was hit by shrapnel from a pipe bomb that the defendants had detonated in an alley to gauge the response time of emergency services so they could later plan their burglaries. It was reversible for the district court to fail to “undertake further analysis of the mental state of each defendant in imposing sentence.”

< **United States v. Ryan**, 9 F.3d 660, 671 (8th Cir. 1993), modified, 41 F.3d 361 (8th Cir. 1994). Upheld 5-level downward departure which had been granted to an arson defendant whom the court found had acted recklessly and wantonly but had not intentionally caused the death of two firemen who died while attempting to extinguish the fire.

<§ 2D1.1, comment. (n.14) (The commentary to the drug trafficking guideline provides for a 2-level downward departure for defendants with offense levels above 36 who qualify for a mitigating role adjustment and who satisfy other criteria).

< **United States v. Lara**, 47 F.3d 60 (2d Cir. 1995). Upholds departure granted to defendants, whose offense was committed before promulgation of above commentary, on ground that aggregating small quantities distributed over a long period of time overrepresents a defendant’s culpability.

< § 2F1.1, comment. (n.11). The commentary to the fraud guideline provides for a departure, up or down, where the “loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct ...[or where it] may overstate the seriousness of the offense.”; see also n. 8(b).

< **United States v. OlgmueLLer** , 198 F.3d 669 (8th Cir. 2000) Upheld downward departure where actual loss amount of \$829,000, stemming from fraudulent loan application, significantly overstated risk to defrauded bank, thus warranting departure to base offense level corresponding to a loss figure of \$58,000, and placing defendant at sentencing level of 11, where defendant had sufficient unpledged assets to support the loan amount and to pay the bank most of the amount it was owed, as shown by the fact he had paid the bank \$836,000 of the \$894,000 owed when the fraud was discovered; also departed based on extraordinary restitution undertaken before defendant was indicted.

<**United States v. Walters**, 87 F.3d 663 (5th Cir. 1996). Downward departure based on fact that defendant did not personally profit from money laundering scheme.

< **United States v. Broderson**, 67 F.3d 452 (2d Cir. 1995) (Defense counsel: Lawrence Goldman). Downward departure was based on a “confluence of circumstances [that] was not taken into account by the guidelines”, including loss overstates seriousness of fraud and that defendant had not

personally gained financially from fraudulent conduct; benefit was to his employer.

< ***United States v. Gregorio***, 956 F.2d 341 (1st Cir. 1992). Downward departure because losses were not caused solely by the defendant's misrepresentation in obtaining loan.

< ***United States v. Oakford Corp.***, 79 F. Supp. 2d 357 (S.D. N.Y. 2000) Downward departure of 13 levels granted where offense level would substantially overstate the seriousness of the offense: district court considered that "each defendant personally realized only a small portion of the overall gain or profits of \$15 million; the Exchange "tacitly encouraged floor brokers" to "push the envelope" in this area; and that "the parties' negotiated plea bargains did not seek to hold the defendants responsible for this object of the conspiracy." although court was aware that plea agreement did not prevent it from considering any conduct that might be relevant conduct.

< § 2L1.2, comment. (n.5) - effective Nov. 1, 1997. (The commentary to the reentry after deportation guideline provides for a downward departure in cases where the prior aggravated felony overstates the severity of the prior: "Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.")

< ***United States v. Delgado-Reyes***, No. 99-2121, __ F.3d __, 2001 WL 292162 (1st Cir. Mar. 29, 2001). Requirements of departure authorized under §2L1.2, comment. (n. 5) do not limit a departure for overrepresentation of criminal history as authorized by §4A1.3.

< ***United States v. Alfaro-Zayas***, 196 F.3d 1338 (11th Cir. 1999) Remands case to district court to consider nature of prior aggravated felony as ground for departure even where defendant did not meet prerequisites for departure under § 2L1.2, comment. (n.5).

< ***United States v. Sanchez-Rodriguez***, 161 F.3d 556 (9th Cir 1998) (en banc) (FPD Barry J. Portman). Ninth Circuit held that district court did not abuse its discretion in departing down from the reentry-after-deportation guideline where defendant's prior aggravating felony which triggered a 16-level upward adjustment fell outside the heartland of aggravating felonies. See U.S.S.G. § 2L1.2. The prior offense consisted of the sale of \$20 worth of heroin. The Court expressly reached its conclusion "without reference to the new amendment [in U.S.S.G. § 2L1.2, comment. (N.5)], and without deciding whether the amendment is clarifying or substantive." This en banc opinion reverses ***United States v. Rios-Favela***, 118 F.3d 653 (9th Cir. 1997), cert. denied, 118 S.Ct. 730 (1998) which had held that no such departures were permissible because the Sentencing Commission adequately considered the nature of the aggravated priors before establishing the 16-level bump under U.S.S.G. § 2L1.2.

< ***United States v. Diaz-Diaz***, 135 F.3d 572 (8th Cir. 1998). Upholds downward departure based on fact that 16-level upward adjustment that applied because defendant had a prior aggravated

felony overstates the seriousness of prior (sale by defendant of 8.3 grams of marijuana) for which he received a sentence of 22 days confinement; district court granted departure before this application note went into effect.

< ***United States v. Ortega-Mendoza***, 981 F.Supp. 694 (D.D.C. 1997). Grants downward departure based on U.S.S.G. § 2L1.2, comment. (n.5).

Contra

< ***United States v. Marquez-Gallegos***, 217 F.3d 1267 (10th Cir. 2000) Downward departure based on nature of aggravated prior may only be granted where defendant meets requirements of § 2L1.2, comment. (n.5); ***Tappin United States v. Tappin***, 205 F.3d 536 (2d Cir. 2000) (same).

< ***United States v. Hinds***, 803 F. Supp. 675 (W.D. N.Y. 1992), aff'd, 992 F.2d 321 (2d Cir. 1993). Granted a downward departure in a reentry after deportation case to a defendant with a criminal history IV and three prior convictions -- a manslaughter offense and two sales of small quantities of marijuana -- based on the fact that the criminal history overstated the seriousness of the priors.

< **2Q1.3(b)(1)**. "Depending on the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction ... may be appropriate."

< ***United States v. Rapanos***, 235 F.3d 256 (6th Cir. 2000). Affirms 2-level downward departure for defendant convicted of using sand to fill in wetlands on his property but reversed additional one-level departure granted by district court.

U.S.S.G. § 5C1.1, COMMENT. (N.6) - SPECIFIC TREATMENT PURPOSE

There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.

U.S.S.G. § 5C1.2 - THE "SAFETY VALVE" (18 U.S.C. § 3553(f))

"Court shall impose a sentence ... without regard to any statutory minimum sentence" if five criteria are met:

- (f)(1) - no more than 1 criminal history point
- (f)(2) - defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon
- (f)(3) - offense did not result in death or serious bodily injury
- (f)(4) - defendant was not an organizer, leader, manager, or supervisor
- (f)(5) - not later than time of sentencing, defendant has disclosed information to the government

< Applies only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, 963.

Possession of Firearm by Other Does Not Disqualify Defendant for Safety Valve

< A defendant may be eligible for the safety valve so long as he personally does not possess the firearm, even if codefendants possess firearms and even if the defendant receives gun adjustment under §2D1.1(b)(1). ***United States v. Clavijo***, 165 F.3d 1341 (11th Cir. 1999); ***United States v. Wilson***, 114 F.3d 429 (4th Cir. 1997); *In re Sealed Case*, 105 F.3d 1460 (D.C. Cir. 1997); ***United States v. Wilson***, 105 F.3d 219 (5th Cir. 1997).

Two-Level Downward Adjustment

< U.S.S.G. § 2D1.1(b)(6) provides a two-level downward adjustment if the defendant “meets the criteria set forth in subdivisions (1)-(5) of § 5C1.2 . . . and the offense level . . . is greater than 26.

< ***United States v. Osei***, 107 F.3d 101 (2d Cir. 1997). The adjustment in the drug guideline applies to defendants who meet the five “safety valve” criteria and whose offense level is 26 or greater even if the defendant is not facing a mandatory minimum penalty. In this case, although defendant had been charged with a mandatory minimum offense he pleaded guilty to an offense that did not carry a mandatory minimum. He otherwise met the five, safety-valve criteria and had an offense level greater than 26; ***United States v. Mertilus***, 111 F.3d 870 (11th Cir. 1997) (same).

VI. DISCOURAGED DEPARTURES - NOT ORDINARILY RELEVANT

U.S.S.G. § 5H - SPECIFIC OFFENDER CHARACTERISTICS (POLICY STATEMENTS)

The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. . . . Furthermore, although these factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases.

5H1.1 - Age (Policy Statement) [See also 5H1.4 – Physical Condition]

Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

< ***United States v. Hildebrand***, 152 F.3d 756 (8th Cir. 1998) Upheld downward departure from sentencing range of 51-63 months to a sentence of 5 years probation with 6 months in home confinement to be followed by 18 months of home confinement. Defendant, the bookkeeper for a group that were convicted of mail fraud, conspiracy to commit mail fraud, and conspiracy to launder money for their part in a fraudulent scheme that offered to file claims in a purported federal class action lawsuit, was a 70-year old with life-threatening health conditions. The 8th Circuit deferred to the district court's judgment finding no abuse of discretion though it noted that the issue was close because it "doubtless would have granted no downward departure or a far less generous departure."

< ***United States v. Baron***, 914 F. Supp. 660, 662-665 (D. Mass. 1995) (Gertner, J.) - Granted a downward departure from a guideline range of 27 to 33 (level 18) months to a sentence of probation (level 10) to a 76-year old defendant with substantial medical problems convicted of bank fraud.

< ***United States v. Dusenberry***, 9 F.3d 110 (6th Cir. 1993) - Downward departure granted due to defendant's age and medical condition -- he had had both kidneys removed and was required to undergo dialysis three times a week.

Unreported cases:

< ***United States v. Moy***, 1995 WL 311441 (N.D. Ill. 1995) - District court granted a downward departure to a 78-year old defendant who suffered from coronary artery disease, a recent hernia repair, and a history of depression.

< ***United States v. Libutti***, 1994 WL 774647 (D. N.J. 1994) - District court granted a downward departure to a 62-year old defendant who was suffering from coronary problems, a personality disorder and several psychiatric conditions and phobias.

< ***United States v. Maltese***, 1993 WL 222350 (N.D. Ill. 1993) - District court granted a downward departure to a 62-year old defendant who had been suffering from liver cancer for a year prior to the sentencing and whose life expectancy had been shortened due to the operation for the cancer and whose chemotherapy treatment would be extremely expensive for the government to provide.

5H1.2 - Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

< *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996) - Loss of jobs to innocent employees occasioned by defendant's imprisonment was not categorically excluded as basis for departure nor was it encompassed as a discouraged departure within the meaning of § 5H1.2; though mere fact of job loss to others is not alone enough to take case out of heartland, the issue is one of degrees, involving quantitative and qualitative judgments, which at some point may rise to the level of an appropriate basis for downward departure.

5H1.3 - Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental healthy program (see §§ 5B1.3(d)(5) and 5D1.3(d)(5)).

< *United States v. Ostin*, 1998 WL 416079, (9th Cir. June 17, 1998) (unpublished). Mental and emotional conditions warranted departure where at time of offense defendant had suicidal ideation, wanted help, and lacked anti-depressant medication,.

< *United States v. Shasky*, 939 F. Supp. 695 (D. Neb. 1996). Grants downward departure for combination of reasons to state trooper convicted of receiving pornography involving minors in well-publicized case: trooper was homosexual, was of diminutive stature (5'7" & 135 lbs.), was susceptible to abuse in prison, had engaged in extraordinary rehabilitative efforts, was drawn to pornography on internet because he was prohibited under the job regulations from engaging in a consensual homosexual relationship, and over 90% of the pornography did not involve minors.

5H1.4 - Physical Condition (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily

relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see § 5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

<***United States v. Rioux***, 97 F.3d 648 (2d Cir. 1996). Affirmed downward departure for defendant who had serious kidney ailment and other medical problems and had previously had kidney transplant.

<***United States v. Greenwood***, 928 F.2d 645 (4th Cir. 1991). Departure granted to double amputee whose required treatment at VA Hospital would be jeopardized by incarceration.

< ***United States v. Gigante***, 989 F. Supp. 436, 441 (E.D. N.Y. 1998) (Weinstein, J.). Grants downward departure from a sentence of 262 - 327 months (level 38) to a sentence of 12 years for defendant of advanced age (69), physical infirmity (aortic operations), and limited life expectancy; court determines that defendant had a “substantial chance of surviving more than ten years in prison” and thus imposing a 12-year sentence, less good time credit, “would probably be short of a life sentence.” Defendant, after “decades of vicious criminal tyranny” as gang boss in Genovese Family and in the Mafia generally, but “no longer that maleficent,” stood convicted of five counts including RICO and related offenses.

5H1.5 - Employment Record (Policy Statement)

Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).

<***United States v. Milikowsky***, 65 F.3d 4 (2d Cir. 1995). Adverse effect on 150-200 employees of companies in which defendant was a principal if defendant were imprisoned was extraordinary circumstance justifying downward departure.

<***United States v. Tsosie***, 14 F.3d 1438 (10th Cir. 1994). Defendant who had been steadily employed and supported family through his employment and whose conduct was aberrational warranted

a departure.

<**United States v. Jagmohan**, 909 F.2d 61 (2d Cir. 1990). District court granted downward departure based on defendant's solid employment record and naivete displayed in offense.

< **United States v. Thompson**, 74 F. Supp.2d 69 (D. Mass. 1999) (Gertner, J.) Departs down in crack cocaine case for combination of extraordinary family obligations and work history; in granting departure judge draws on her own experience as a judge, and compared presentence reports for offenders similarly situated to defendant with respect to place (the Bromley Heath projects), time (1998), and offense (sale of crack cocaine), and more generally, reviewed the PSR's of those convicted of crack cocaine sales in the jurisdiction in 1998 and 1999.

5H1.6 - Family Ties and Responsibilities, and Community Ties (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

<**United States v. Aguirre**, 214 F.3d 1122 (9th Cir. 2000). Affirms 4-level downward departure for extraordinary family circumstances where defendant's common-law husband's death during time of defendant's pretrial detention left her child without a caretaker.

<**United States v. Gauvin**, 173 F.3d 798 (10th Cir.), cert. denied, 120 S. Ct. 250 (1999) Affirms district court's exercise of discretion in granting 3-level downward departure based on family circumstances where defendant supported wife and four children and since his incarceration wife has been working 14 hours per day, 55 miles from home leaving children unsupervised by a parent during that period which had caused Navajo Housing Authority to initiate investigation to determine if custody of children should be taken from mother; mother's income is barely able to support family so that she is at risk of losing car; and there is no extended family to take custody of children or assist financially.

<**United States v. Owens**, 145 F.3d 923 (7th Cir. 1998). Upholds departure down to statutory 10-year minimum from range of 168-210 months for defendant convicted of crack cocaine distribution on basis of family circumstances (defendant in 13-year common law relationship; 3 children aged 6, 7, & 11; cares for children after school and helps them with homework, employed in several jobs; without his income family would have to move to public housing; and defendant also spent time every day with a brother who suffered from Downs Syndrome). **See also United States v. Wright**, 218 F.3d 812, 815-16 (7th Cir. 2000) ("Today, we conclude that a downward departure for extraordinary family circumstances cannot be justified when, even after the reduction the sentence is so long that release will come too late to promote the child's welfare;" and distinguishing **Owens** on the basis that issue was not raised.)

< ***United States v. Galante***, 111 F.3d 1029 (2nd Cir.), reh'gen banc denied, 128 F.3d 788 (2d Cir. 1997) (AFPD Philip L. Weinstein). Affirms departure in deference to district court's finding of exceptional family circumstances (41-year old married; first time offender, primary source of financial support; two children, ages 8 and 9; wife had limited earning capacity as she spoke little English); departure from OL 23 to OL 10; sentence to time served (8-days prior to release on bail) to prevent disintegration of family and financial hardship to dependents; heroin distribution cases.

< ***United States v. Thompson***, 2000 WL 126772, No. 99-Cr. 153 (N.D. Ill. Feb. 1, 2000) Grants downward departure in bank fraud case to single father who had special relationship with teenage son who would be at risk of severe emotional harm if father sent to jail

< ***United States v. Thompson***, 74 F. Supp.2d 69 (D. Mass. 1999) (Gertner, J.), see above under § 5H1.5.

< ***United States v. Bissell***, 954 F. Supp. 841 (D. N.J. 1996). Although financial hardship is generally present where single parent is sentenced, the highly publicized suicide of children's father constituted a unique circumstance warranting departure.

< ***United States v. Sclamo***, 997 F.2d 970 (1st Cir. 1993). Downward departure based on defendant's special relationship with young boy, who had psychological and behavioral problems and "would risk regression and harm if defendant were incarcerated".

< ***United States v. Rivera***, 994 F.2d 942 (1st Cir. 1993) (Breyer, C.J.) Remands because district court did not recognize discretion to determine whether family responsibilities were so "extraordinary" as to warrant departure in case where defendant was single-mother with sole responsibility for raising four small children; opinion compiles cases in this area.

< ***United States v. Johnson***, 964 F.2d 124 (2d Cir. 1992). Departure granted to defendant with sole responsibility for raising four young children.

< ***United States v. Alba***, 933 F.2d 1117 (2d Cir. 1991). Downward departure granted to defendant who had been married for 12 years and lived with disabled, dependent father & grandmother.

< ***United States v. Gaskill***, 991 F.2d 82 (3d Cir. 1993). Downward departure warranted where defendant was sole caretaker of seriously mentally ill wife; there were benefits in non-custodial sentence and lack of any threat to community.

< ***United States v. Haversat***, 22 F.3d 790 (8th Cir. 1994). Downward departure granted to defendant whose wife "suffered severe psychiatric problems, which have been potentially life threatening," and his presence was crucial to her treatment.

< ***United States v. Big Crow***, 898 F.2d 1326 (8th Cir. 1990). Solid family and community ties, and "consistent efforts to lead a decent life in difficult environment" of Indian reservation warranted

downward departure.

<Practice pointer: Departure is less likely to be granted if an alternative caretaker is available. But recent post -Koon cases have granted departures where other parent available as caretaker see Gauvin, Owens, & Galante, supra.

5H1.11-Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

< amendment 386 - effective 11/1/91

<United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). Defendant's exceptional charitable efforts (had brought two troubled young women into her home, paid for them to attend private high school and helped them become productive members of society; also assisted elderly friend to move from nursing home to an apartment where she helped care for him so he could live out his remaining years independently) supported one-level downward departure.

< United States v. Crouse, 145 F.3d 786 (6th Cir. 1998). After the Supreme Court remanded for reconsideration in light of *Koon*, the 6th Circuit held that a departure based on defendant's good works and community activities was not precluded but again reversed the district court's departure on the grounds that the extent of the departure (9 levels) was unreasonable as defendant's civic contributions did not support such a drastic departure; the other grounds upon which the district court departed -- exemplary behavior during pendency of appeals, for one -- were not valid.

<United States v. Rioux, 97 F.3d 648 (2d Cir. 1996). Affirmed downward departure based, in addition to medical problems, on defendant's extensive efforts in fund raising for charity.

VII. PROHIBITED DEPARTURES

5H1.4 - Drug or Alcohol Dependence or Abuse

...

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. . . .

< Compare United States v. Carvell, 74 F.3d 8 (1st Cir. 1996) Grants departure under "lesser

harm” policy statement because defendant grew marijuana to reduce his suicidal depression; court explained that the suicidal ideations were not the byproduct of drug dependence but vice versa.

5H1.10 - Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

5H1.12 - Lack of Guidance as Youth and Similar Circumstances (Policy Statement)

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant ...

< amendment 466 - effective 11/1/92

< *United States v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997). “At the time of [defendant’s] offense, youthful lack of guidance was a valid basis for a downward departure. Such a departure recognizes that lack of adult guidance “may have led a convicted defendant to criminality.” While the Sentencing Commission later decided that youthful lack of guidance was not relevant to sentencing decisions, U.S.S.G. § 5H1.2 (1992), this departure was available to [the defendant] and continues to do so.” (internal citations omitted).

< *Compare United States v. Ayers*, 971 F. Supp. 1197 (N.D. Ill. 1997). Departure granted based on exceptionally cruel childhood abuse; relentless physical, sexual and psychological abuse inflicted over extended period of years was sadistic torture of an extraordinary nature; rejected government’s argument that the departure was precluded by § 5H1.12.

5K2.12 - Economic Hardship (Last sentence of Coercion and Duress departure ground)

. . . The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.

5K2.19 - Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. §§ 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. §§ 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo.

NOTE: This amendment became effective November 1, 2000.

Pre-Amendment Case Law

Post-sentence Rehabilitation Majority of circuits recognize exceptional rehabilitative efforts as basis for downward departure at resentencing on remand after appeal, after successful prosecution of collateral attack on separate grounds, or based on retroactive guideline amendment.

< ***United States v. Bradstreet***, 2000 WL 298570, No. 99-1267 (1st Cir. 2000) Permissible to depart downward based on extraordinary post-offense rehabilitation.

< ***United States v. Hasan***, 205 F.3d 1072 (8th Cir. 2000), affirming, 41 F. Supp. 2d 1004, (D. Neb. 1999) Upholds downward departure for extraordinary post-sentencing rehabilitation at resentencing on a retroactive amendment, 18 U.S.C. § 3582(c)(2); but see ***United States v. Sims***, 174 F.3d 911, 912 (8th Cir.1999) (post-sentencing rehabilitation not appropriate basis for a downward departure).

< ***United States v. Rudolph***, 190 F.3d 720 (6th Cir. 1999). Holds that post-sentence rehabilitation may be basis for downward departure.

< ***United States v. Roberts***, No. 98-8037, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpublished). Holds that post-sentence rehabilitation may be basis for downward departure.

< ***United States v. Green***, 152 F.3d 1202 (9th Cir. 1998). Holds that post-offense drug rehabilitation may form basis for downward departure on remand after appeal at resentencing two years after original sentence based on defendant's exemplary behavior.

<***United States v. Rhodes***, 145 F.3d 1375 (D.C. Cir. 1998). Holds that sentencing courts may consider post-conviction rehabilitation at resentencing, although sentencing departures based on that

factor will be available only in extraordinary cases.

<*United States v. Core*, 125 F.3d 74 (2d Cir. 1997) (AFPD Henriette Hoffman). Defendant's post-conviction rehabilitation during his incarceration on the original sentence may be a ground for downward departure at resentencing. Remanded for reconsideration of departure because district court believed it had no discretion to depart on this ground. Defendant was appearing to be resentenced after his § 924(c) conviction was reversed on the basis of *Bailey v. United States*, 116 S. Ct. 501 (1995).

<*United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997). "Post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." Defendant had earned a GED and nine additional college credits.

Contra

<*United States v. Sims*, 174 F.3d 911, 912 (8th Cir.1999) Holds that post-sentencing rehabilitation is not an appropriate basis for a downward departure.

VIII. ENCOURAGED DOWNWARD DEPARTURES

1

5K2.10 - Victim's Conduct

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. . .

<*Koon v. United States*, 116 S. Ct. 2035 (1996).

<*United States v. Whitetail*, 956 F.2d 857 (8th Cir. 1992). Remanded because district court erred when it believed it lacked discretion to depart based on battered-woman syndrome because jury had rejected defense and found defendant guilty; departure available even where facts do not amount to complete defense.

5K2.11 - Lesser Harms

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

< ***United States v. Clark***, 128 F.3d 122 (2d Cir. 1997). Remands case for reconsideration where district court believed it lacked discretion to depart down under the lesser harms (U.S.S.G. § 5K2.11) provision in a felon-in-possession case where defendant had purchased gun as gift for his brother and thus offense could be said to involve lesser harm than what Congress sought to prevent -- keeping guns out of felons' hands because of recidivism potential.

< ***United States v. Barajas-Nunez***, 91 F.3d 826 (6th Cir. 1996). Not plain error to depart under "lesser harms" provision of § 5K2.11 where defendant had illegally reentered after having been deported because he believed that his girlfriend was "in grave danger of physical harm" and wanted to secure needed surgery for her; remanded for explanation of magnitude of departure; also reverses as "plain error", the diminished capacity departure based on defendant's lack of education and inability to speak English.

< ***United States v. Bernal***, 90 F.3d 465 (11th Cir. 1996). Upholds departure for defendants convicted of violating Lacey Act and Endangered Species Act for attempted export of endangered primates to Mexico; defendants' conduct did not threaten harm sought to be prevented by statutes as defendants did not intend to harm the primates but intended to use the gorilla for breeding purposes to help perpetuate the species; one defendant was a conservationist and held a position with a Mexican state Commission of Parks and Resources and of Foreign Fauna.

< ***United States v. Carvell***, 74 F.3d 8 (1st Cir. 1996). Downward departure granted under "lesser harm" policy statement because defendant grew marijuana to reduce his well-documented & long-standing suicidal depression.

< ***United States v. White Buffalo***, 10 F.3d 575, 576 (8th Cir. 1993). Affirms departure because defendant possessed unregistered sawed-off shotgun not for purpose of committing other crimes but to shoot animals that preyed on his chickens and often hid in crawl spaces underneath the shacks next to his house thus conduct did not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue."

5K2.12 - Coercion and Duress

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.

< ***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997). Remands because unclear “whether the district court believed that the three grounds for departures (lack of youthful guidance, coercion & duress, diminished capacity) were duplicative and therefore could not be considered separately. Because the court clearly took the history of abuse into consideration, we remand for the district court to make findings on imperfect duress and diminished capacity as it relates to battered woman syndrome, and to exercise its discretion to depart under these two additional departure....[C]oercion or duress was and is a separate ground for downward departure. The duress policy statement allows that “[i]f the defendant committed the offense because of serious coercion ... or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence....[I]t has been held that the injury threatened need not be imminent” in order to apply this departure. The guideline’s statement “directs the sentencing court to the defendant’s subjective evaluation of the circumstances in which the defendant was placed.” (internal citations omitted).

< ***United States v. Delgado***, 994 F. Supp. 143 (E.D. N.Y. 1998) (Weinstein, J.) Three level downward departure to a first-time offender, drug courier who transported drug based on coercion from a creditor and where other mitigating factors were present.

<***United States v. Mena***, 968 F. Supp. 115 (E.D. N.Y. 1997) (Weinstein, J.) Downward departure of 15 levels to a safety valve defendant, subject to deportation, based on number of factors, singly and in combination, including § 5K2.12, coercion & duress because defendant was dominated, manipulated and pressured by his older brother, who remained a fugitive at the time of defendant’s sentencing; brother and another hatched a plan to purchase 100 kgs of cocaine; defendant attended one meeting, brother engaged in over 20 conversations with informant; also granted 4-level downward adjustment for minimal role, § 3B1.2(a);

< **United States v. Hall**, 71 F.3d 569, 73 (6th Cir. 1995). Remanded to district court based on “overwhelming evidence that the Defendant’s criminal actions resulted, at least in part, from the coercion and control exercised by her husband....[S]he had not been involved in any bank fraud schemes before she met [her husband], and . . . she continued her criminal activity only after he threatened to kill himself, to kill her, to hurt her friends and pets, and to commit bank robbery using violent means.” In remanding, the Sixth Circuit noted that “failure of the probation report and the district court to take note of these circumstances or to discuss this issue indicates that it was not aware of the applicability of § 5K2.12 and of its discretion to depart downward. It must consider coercion as a basis for departure.”

< **United States v. Amor**, 24 F.3d 432, 437-440 (2d Cir. 1994). Upheld downward departure after jury rejected duress defense; notably duress did not relate to offense that determined the offense level; defense (retaliation against government witness) but related to firearms charge. Defendant purchased and possessed firearms because he “was fearful of potential violence on the part of the union in an impending strike, ... his car was shot up”, he received a note threatening him with violence to his person have contributed to his state of mind at the time the weapon offense was committed.” The Second Circuit agreed that although the defendant’s conduct was “not wholly caused by duress, if [the defendant] had not been under duress at the outset, none of the events in the chain, including the retaliation, would have occurred.”

Incomplete defense: A departure on this ground is available even in cases where the jury has rejected duress as a defense to the crime:

< **United States v. Henderson-Durand**, 985 F.2d 970, 976 (8th Cir. 1993). Upheld district court’s denial of departure but noted that a 5K2.12 “ground for departure is broader than the defense of duress, as it does not require immediacy of harm or inability to escape, and allows the district court to consider the subjective mental state and personal characteristics of defendant in its determination.”).

< **United States v. Amparo**, 961 F.2d 288, 292 (1st Cir. 1992). In dicta, First Circuit stated that “a jury’s rejection of a duress defense does not necessarily preclude a ... departure under § 5K2.12.”

< **United States v. Cheape**, 889 F.2d 477 (3d Cir. 1989). Third Circuit remands because district court did not understand that it could depart where jury had rejected defense of coercion. Jury instruction for defense of coercion differs from the standard for granting departure as § 5K2.12 does not “require proof of immediacy or inability to escape; nor does it limit the feared injury to bodily injury.” 889 F.2d at 480. Here, defendant had been involved in a 3-year relationship with one of the two codefendants, her car was used in the robbery, and while robbery took place, she sat in back seat of the car, in parking lot out of sight of the bank; there was evidence that the other codefendant had put a gun to her head prior to the robbery; robbery had been planned and executed by the two male codefendants; she had no prior convictions.

5K2.13 - Diminished Capacity (effective Nov. 1, 1998)

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

"Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

<*United States v. Askari*, 159 F.3d 774 (3d Cir. 1998) (en banc), vacating and superseding on reconsideration 140 F.3d 536 (3d Cir. 1998) (en banc). In bank robbery cases, vacates en banc opinion and remands to district court in light of the amendment to § 5K2.13 that went into effect on November 1, 1998, “so that it may reconsider the sentence in light of the Guidelines amendment, and, in particular, make findings or draw legal conclusions in the first instance about the two facts that will likely determine whether [defendant’s] sentence will be reduced: (1) whether [defendant’s] offense involved “actual violence or a serious threat of violence”; and (2) whether [defendant’s] criminal history indicates “a need to incarcerate the defendant or protect the public.” See U.S.S.G. § 5K2.13.” (reversed *United States v. Rosen*, 896 F.2d 789 (3d Cir. 1991) that held that “non-violent offense” in § 5K2.13 is governed by definitions in the career offender guideline).

< *United States v. McBroom*, 124 F.3d 533 (3rd Cir. 1997). Reversed the district court’s denial of a downward departure under § 5K2.13 where district court had determined that a departure was not appropriate because the defendant “was able, at the time of the offense, to absorb information in the usual way and to exercise the power of reason”. The Third Circuit held that in considering a departure, the district court “could have considered the possibility that [the defendant] suffered from a volitional

impairment which prevented him from controlling his behavior or conforming it to the law.”

< ***United States v. McBroom***, 991 F. Supp. 445 (D. N.J. 1998). On remand, district court departed down one level for diminished capacity and two-levels for post-offense rehabilitation.

< ***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997). Ninth Circuit remands to permit district court to consider evidence of “battered woman syndrome, a form of post-traumatic stress disorder” resulted in defendant’s diminished capacity. The 9th Circuit explained that one symptom of battered woman syndrome “is learned helplessness, which may prevent an abused woman from leaving her batterer. *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992) (citing Leonore Walker, *The Battered Woman Syndrome* 33, 94 (1984). This perceived inability to leave may have contributed to [defendant’s] commission of the offense.” The 9th Circuit held that the same evidence of abuse could form the basis for three “separate and distinct” departures — youthful lack of guidance, coercion and duress, and diminished capacity. “The three potentially applicable departures are founded in distinct policy rationales and recognize separate reasons for reduced culpability.”

< ***United States v. Ribot***, F. Supp. 2d ,_No. 98-10061, 1999 WL 165919, (D. Mass. Mar 19, 1999) (Gertner, J.) Departs down to probation from range of 24-36 months based on combination of aberrant behavior and mental illness/diminished capacity for defendant convicted of nearly \$200,000.

<***United States v. Mena***, 968 F. Supp. 115 (E.D. N.Y.) (Weinstein, J.) Downward departure of 15 levels to a safety valve defendant, who was subject to deportation, based on a number of factors, singly and in combination, including § 5K2.13, diminished capacity defendant had an IQ of 67; dropped out after 6th grade at age 14; unchallenged psych evaluation characterized defendant’s “thinking as naive, child-like, concrete and simplistic”; a “person who is easily overwhelmed, is highly dependent on others, and tends to excessively look to others for approval, reassurance and direction because he has few inner resources to draw upon when confronted with new or challenging situations”; and “prone to suggestibility and gullibility”. See further discussion of *Mena* in section on combination of factors, above.

“Non-violent offense” - consider all facts & circumstances

<*United States v. Weddle*, 30 F.3d 532 (4th Cir. 1994). Diminished capacity departure may be considered in a case involving threatening communication.)

<***United States v. Chatman***, 986 F.2d 1446 (D.C. Cir. 1993). Diminished capacity departure not precluded in a case where bank robber presented a note and no gun was involved.)

Causation

< ***United States v. Ruklick***, 919 F.2d 95 (8th Cir. 1990) Diminished capacity does not need

to be the sole cause of the offense as long as it was a contributing factor to commission of the offense.

Low I.Q.

<*United States v. Adonis*, 744 F. Supp.. 336 (D. D.C. 1990). Downward departure granted on basis of defendant's significantly reduced mental capacity--IQ of 64, placed him below the dividing line for mental retardation which is defined as having an IQ below 69. This case reports that the average IQ of the prison population is 93.2, a helpful fact when seeking a downward departure for diminished capacity.

5K2.16 - Voluntary Disclosure of Offense

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. . . .

< *United States v. Jaroszenko*, 92 F.3d 486 (7th Cir. 1996) Reverses district court that believed remorse was not proper basis for departure.

< *United States v. Bestler*, 86 F.3d 745 (7th Cir. 1996) Clarified that district courts should apply objective test in determining whether offense was unlikely to be discovered — not whether defendant believed discovery was unlikely.

5K2.17 - (Firearms That Are Neither Automatic Nor Semiautomatic)

"According to data reviewed by the Commission, semiautomatic firearms are used in 50-70 percent of offenses involving firearms. Thus, offenses involving a semiautomatic firearm represent the typical or "heartland" case under the guidelines."

U.S.S.G. App. C, Amendment 531.

Note: This is the explanation given by the Sentencing Commission for promulgating § 5K2.17 encouraging an upward departure for offenses involving "high-capacity, semiautomatic firearms". To the extent that the Commission explains that semiautomatic firearms represent the heartland of offenses involving firearms, a downward departure should be available

in any case that involves an older type of firearm, one that is neither a semiautomatic nor an automatic. As the Commission formulated the gun guidelines for offenses involving more dangerous automatic and semiautomatic firearms, cases involving single-shot firearms are atypical or fall outside the “heartland” and warrant a downward departure.

§§5K2.20. Aberrant Behavior (Policy Statement)²

A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

Commentary

Application Notes:

1. For purposes of this policy statement--

"Aberrant behavior" means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.

"Dangerous weapon," "firearm," "otherwise used," and "serious bodily injury" have the meaning given those terms in the Commentary to §§1B1.1 (Application Instructions).

"Serious drug trafficking offense" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. §§ 844, that, because the defendant does not meet the criteria under §§5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

2. In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing

the offense; and (E) efforts to mitigate the effects of the offense.

Historical Note: Effective November 1, 2000 (see Appendix C, amendment 603).

NOTE: This new amendment took effect on November 1, 2000. It will enlarge this departure ground in the 3d, 4th, 5th, 6th, 7th, 8th and DC circuits which permitted aberrant behavior departures only where the defendant's conduct amounted to a single "spontaneous or thoughtless" act. On the other hand, it may serve to limit the discretion that courts had enjoyed when applying the "totality of circumstances" test in the 1st, 2nd, 9th and 10th Circuits. As an additional hedge in these types of cases, rely on the "combination of factors" departure authorized in the commentary to § 5K2.0.

Case Law under Old Formulation

1. Totality of Circumstances Standard

Circuit split: The First, Second, Ninth and Tenth Circuits permit a district court to consider the totality of a defendant's conduct during his lifetime, including: (1) the singular nature of the criminal act; (2) the defendant's criminal record; (3) psychological disorders from which the defendant was suffering at the time of the offense; (4) extreme pressures under which the defendant was operating, including the pressure of losing his job; (5) letters from friends and family expressing shock at the defendant's behavior; and (6) the defendant's motivations for committing the crime. *Zecevic v. U.S. Parole Commission*, 163 F.3d 731, 735 (2d Cir. 1998) (internal citations omitted). The D.C., Third, Fourth, Fifth and Seventh Circuits permit a departure only where defendant's conduct amounts to a thoughtless or spontaneous single act and preclude departure where defendant's conduct necessarily involves multiple acts.

< *United States v. Working*, 224 F.3d 1093 (9th Cir. 2000) (en banc). Holds that district court did not abuse its discretion in granting 21-level downward departure to a defendant who pled guilty to assault with intent to commit murder and using a firearm in a crime of violence on ground that defendant's conduct was in attempting to kill her estranged husband was aberrant but vacates sentence and remands case for an explanation of the degree of departure. The district court based its findings on a psychiatric report that concluded that defendant was suffering from severe depression and was under extreme pressure at time of shooting because her husband had filed for custody of their children on the basis of false charges that she had engaged in sexual misconduct with his son; had no criminal record; and based on several letters in her behalf among them letters from the two sons of the estranged husband who wrote about their father's abusive personality.

< *Zecevic v. U.S. Parole Commission*, 163 F.3d 731 (2d Cir. 1998). In calculating release date of transfer prisoner -- American citizen convicted of drug offenses in Sweden transferred to US to serve out his sentence -- Parole Commission is required to treat defendant as if sentenced under federal sentencing guidelines and so erred when it did not consider totality of circumstances of defendant's life in assessing downward departure for aberrant behavior.

< *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996) (departure may be granted even

where defendant engaged in multiple acts leading up to the commission of offense (mail fraud by local alderman who deprived citizens of his honest services) if, in light of totality of defendant's life, committing the offense amounts to aberrant behavior; spontaneity or thoughtless act is not a prerequisite).

<*United States v. Kalb*, 105 F.3d 426 (8th Cir. 1997). Holds that "single act of aberrant behavior" analysis must be reconsidered in light of *Koon*; but see, *United States v. Weise*, 128 F.3d 672 (8th Cir. 1997), reversing downward departure where defendant's conduct over a period of time did not amount to a "single act of aberrant behavior".

< *United States v. Ribot*, 11 Fed.Sent.R. 333, No. 98-10061, 1999 WL 165919, (D. Mass. Mar 19, 1999) (Gertner, J.). Departs down to probation from range of 24-36 months based on combination of aberrant behavior and mental illness/diminished capacity for defendant convicted of nearly \$200,000.

<*United States v. DelValle*, 967 F. Supp. 781 (E.D. N.Y. 1997) (Weinstein, J.). Holds that defendant's involvement in drug conspiracy on two different days, separated by a week, could be understood as unitary instance of behavior; found offense was aberrant in two senses: "First, it was aberrational in comparison to the conduct of other drug conspirators covered by the applicable Guidelines. See *United States v. Kalb*, 105 F.3d 426, 429 (8th Cir. 1997) (particular behavior falling outside of heartland; "aberrational" drug dealer). Second, it was aberrational in the sense that the offense conduct deviated from defendant's own typical behavior. See, e.g., *United States v. Pena*, 930 F.2d 1486, 1495 (10th Cir. 1991) (defendant's conduct an aberration from usual conduct). As to the first point, it is uncontested that defendant was reluctantly doing a favor for a friend, was only a driver, had no interest or involvement in possession or distribution of the contraband, and did not know the specifics of what was being transported — differentiating him from drug conspirators that fall into the "heartland" cases. As to the second point, defendant's brief meander into criminal activity stands in stark contrast to his posture as a responsible, hard working, fully employed member of the community and a loving, involved and reliable husband and family member. See *Pena* (defendant's "behavior here was an aberration from her usual conduct, which reflected long-term employment, economic support for her family, no abuse of controlled substances, and no prior involvement in the distribution of such substances...[This] justified a departure").

<*United States v. Fairless*, 975 F.2d 664 (9th Cir. 1992) (convergence of factors)

<*United States v. Takai*, 941 F.2d 738 (9th Cir. 1991) (multiple incidents over 6-weeks)

<*United States v. Tsosie*, 14 F.3d 1438 (10th Cir. 1994) (aberrational conduct).

<*United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991) (aberration from usual conduct).

Aberrant Behavior facts which have supported a downward departure:

<long-term, full-time employment

<charitable activities

<impulsive or unpremeditated conduct

<no prior criminal record

<return of stolen property almost immediately after crime

<cooperation in subsequent police investigation

<extent of pecuniary gain to defendant
<prior good deeds
<efforts to mitigate the effects of the crime
<convergence of factors
<manic depression, suicidal tendencies, recent unemployment
<employment, no prior abuse or distribution of drugs, economic support of family

2. Spontaneous/Single-Act Standard:

<*United States v. Weise*, 128 F.3d 672 (8th Cir. 1997). Reverses aberrant behavior departure where district court, relying on psychologist's report and other evidence that defendant "was not prone to violence," departed down for a defendant convicted of second degree stabbing murder; aberrant behavior "must be more than merely something 'out of character;'" a "single act of aberrant behavior contemplates a 'spontaneous and seemingly thoughtless [act]';" also remands for a "refined assessment" of other departure ground: record of steady employment and maintenance of family ties and responsibilities despite the difficult conditions of life on reservation.

<*United States v. Dyce*, 91 F.3d 1462 (D.C. Cir. 1996).
<*United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994)
<*United States v. Glick*, 946 F.2d 335 (4th Cir. 1991).
<*United States v. Williams*, 974 F.2d 25 (5th Cir. 1992).
<*United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992).
<*United States v. Allery*, 175 F.3d 610, 614 (8th Cir. 1999).

IX. UNMENTIONED FACTORS - Departures Authorized

A. Acquitted Conduct or Uncharged Relevant Conduct

<*United States v. White*, 240 F.3d 127 (2d Cir. 2001). Remands for consideration of departure where district court stated that it had no "leeway" to depart in a drug case where stacking provision of U.S.S.G. §5G1.2 required consecutive sentence based on uncharged relevant conduct.

<*United States v. Cordoba-Murgas*, 233 F.3d 704 (2d Cir. 2000). Remands to permit district court to apply preponderance standard but also to consider downward departure where district court, applying clear and convincing standard, rejected government's request for life sentences based on uncharged relevant conduct that government claimed proved defendant had committed murder during attempts to collect drug-related debts; government asked court to apply cross reference to murder guideline or alternatively to depart upwardly pursuant to §5K2.1 (where death results).

< ***United States v. Patterson***, 215 F.3d 776 (7th Cir. 2000). Remands for district court to consider whether a departure was warranted in case where guideline sentence resulted in mandatory life as a result of imposition of gun bump in the drug guideline based on possession of firearm by drug coconspirators despite fact that jury had acquitted defendant of gun offense charged under 18 U.S.C. §924(c); had he been convicted of §924(c) count, guideline calculation would have resulted in 360-life range with consecutive 5-year sentence for §924(c) rather than mandatory life.

< ***United States v. Lombard***, 72 F.3d 170 (1st Cir. 1995). Remands for court to consider granting a departure from sentence that was enhanced to life in prison based on acquitted conduct.

B. Collateral Consequences - Immigration

1. Consent to Deportation

< ***United States v. Hernandez-Reyes***, 114 F.3d 800, 802 (8th Cir. 1997). “The district court here had the authority to depart downward on the basis that [the defendant] consented to an administrative deportation.” *United States v. Cruz-Ochoa*, 85 F.3d 325, 325 (8th Cir. 1996).

Available even if government opposes departure

< ***United States v. Rodriguez-Lopez***, 198 F.3d 773 (9th Cir. 1999). Reverses district court that believed it lacked discretion to depart based on defendant’s offer to stipulate to deportation where govt opposed departure as defendant had not pled early enough for the ‘fast-track’ plea agreement.

Only if non-frivolous defense to deportation

< ***United States v. Marin-Castañeda***, 134 F.3d 551, 555-56 (3d Cir.), cert. denied, 118 S.Ct. 1855 (1998). “A defendant [convicted of heroin trafficking] without a nonfrivolous defense to deportation presents no basis for downward departure by simply consenting to deportation.”

< ***United States v. Flores-Uribe***, 106 F.3d 1485, 1486 (9th Cir. 1997). Defendant convicted of unlawful re-entry not eligible for departure because stipulation had no practical effect.

2. Cultural Assimilation

< ***United States v. Lipman***, 133 F.3d 726 (9th Cir. 1997). Recognized authority to depart downward based on deportable alien’s cultural assimilation into American society in reentry after deportation case. Court explained that factor of “cultural assimilation” “was akin to “family and community ties” under § 5H1.6 and thus may be basis for departure if present to an unusual degree. Until his deportation for conviction of various felonies, defendant had legally resided in the United States for an uninterrupted period of 23 years, having been brought here from Jamaica by his mother when he was 12 years old; he attended NYC public schools; married a US citizen with whom he raised 5 US citizen children; and his entire family including his mother, 3 siblings, wife and children reside in the US as American citizens.

3. Effect of defendant's status as alien on BOP custody

◁ **United States v. Farouil**, 124 F.3d 838 (7th Cir. 1997). Reverses district court for failing to consider that defendant “would be ineligible to serve any part of his sentence in a minimum security facility, that his entire family resides in France, that he has not friends in the United States, that he will be unable to have any regular contact with his family or friends, and the cost to the United States of his incarceration will approach one half of one million dollars.” Departure on this ground only when offense of conviction involves offense of reentry after deportation.

◁ **United States v. CharryCubillos**, 91 F.3d 1342 (9th Cir. 1996). Remanded for further findings to determine whether departure was warranted on the basis of the effect that defendant's status as a deportable alien would have on his BOP custody.

◁ **United States v. Smith**, 27 F.3d 649 (D.C. Cir. 1994). Remanded to permit district court to grant downward departure to the extent that deportable alien would face more serious prison conditions, i.e., denial of half-way house placement.

◁ **United States v. Bakeas**, 987 F. Supp. 44 (D. Mass. 1997) (Gertner, J.). Departed down from a 12-month sentence in an embezzlement case to a sentence of probation with a number of restrictions that would approximate imprisonment in a prison camp for a lawful permanent resident alien, who nevertheless would have been denied minimum security classification.

Contra

◁ **United States v. Veloza**, 83 F.3d 380, 382 (11th Cir. 1996). Only extraordinary consequences of defendant's alienage may serve as basis for downward departure. The ordinary consequences, such as, “(1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of the sentence, and (3) the effect of deportation as banishment from the United States and separation from family” did not warrant departure. Citing **United States v. Restrepo**, 999 F.2d 640, 644 (2d Cir. 1993).

◁ **United States v. Mendoza-Lopez**, 7 F.3d 1483 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994) (same); **United States v. Nnanna**, 7 F.3d 420 (5th Cir. 1993) (same); **United States v. Restrepo**, 999 F.2d 640, 644 (2d Cir. 1993) (same).

C. Conditions of Pretrial Confinement

◁ **United States v. Brinton**, 139 F.3d 718 (9th Cir. 1998). Did not have to determine whether district court abused its discretion when it granted 30 months departure based on 2-1/2 month incarceration in harsher non-federal institution because government waived its challenge by failing to object below; on remand, district court ought to consider whether departure appropriate.

◁ **United States v. Sutton**, 973 F. Supp. 488 (D. N.J. 1997). Permissible to depart but

rejected departure because facts did not support finding of extraordinary conditions.

D. Crack Cocaine Disparity

< *United States v. Coleman*, 188 F.3d 354 (6th Cir. 1999) (en banc). Reversed district court that believed it could not consider as ground for downward departure the alleged improper investigative techniques by government which targeted African-American parolees and those on supervised release with offers to engage in drug and other offenses. The panel opinion at 138 F.3d 616 (6th Cir. 1998) which was vacated when reh'g en banc was granted, 146 F.3d 1051 (6th Cir. 1998), had also determined that district court erred when it categorically rejected crack cocaine disparity, in combination with other grounds, as a departure ground: "Thus, while the disparity alone may not indicate that a crack cocaine case is outside of the "heartland," the disparity coupled with the improper targeting and inducement of individuals to commit those crimes may well do so. Accordingly, we hold that the district court erred by failing to consider the cocaine disparity coupled with the particular circumstances of this case to determine whether the case was removed from the "heartland" of crack cocaine cases." 138 F.3d at 622. The en banc opinion makes only passing reference to crack cocaine holding only that the district court on remand must consider all the particular circumstances of the case to determine whether the case is outside the "heartland of crack cocaine cases;" the en banc court does not explicitly address the disparity in sentencing between crack and powder cocaine as a departure ground. 188 F.3d at 360-362.

E. Disparity Arising from Charging Or Plea Policies

< *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000) (en banc). In a case involving a violation of § 1326 (illegally reentering US after being deported), the 9th Circuit en banc vacates panel opinion and holds that sentencing disparity that arises from different plea-bargaining policies of United States Attorneys in California's Central and Southern Districts is categorically prohibited as a basis for downward departure. The defendant prosecuted in the Central District of California was sentenced to a prison term of seventy months; in the Southern District of California, the Government offers "fast-track" plea agreements that result in reduced sentences of twenty-four months.

< *United States v. Bonnet-Grullon*, 212 F.3d 692 (2^d Cir. 2000) (same).

< *United States v. Armenta-Castro*, __ F.3d __, No. 99-4155, 2000 WL 1283318 (10th Cir. Sept. 12, 2000). Inter-district plea policies cannot form basis of downward departure because such practices are not "mitigating circumstances" as to a defendant's crime; involve an approach at odds with the fact-bound heartland analysis required for departures; and the impact of plea bargaining and charging practices have been adequately taken into account by the Sentencing Commission.

< *United States v. Contreras-Gomez*, 991 F. Supp. 1242, 1247-48 (E.D. Wash. 1999). District court departed downward on the basis that the government had arbitrarily decided to charge this defendant under 8 U.S.C. 1362(b) which carried a maximum penalty of 20 years and a guideline enhancement of 16 levels while it had charged every other similarly situated defendant to appear before the court with a § 1362(b)(1) offense which caps the sentence at 2 years. When the government failed to explain its charging decision beyond stating that it had charging discretion, the departing downward on

the ground that the Sentencing Commission had not contemplated unexplainable, arbitrary charging decisions by the government.

F. Disparity Among Defendants' Sentence

< **United States v. Daas**, 198 F.3d 1167 (9th Cir. 1999) Reversed district court which believed it lacked discretion to depart to equalize sentences of codefendants in meth lab case.

< **Meza v. United States**, 117 S. Ct. 478 (1996). Remanded for reconsideration by the 7th Circuit, in light of *Koon*, of its holding that disparity between co-defendants' sentences could not form basis of downward departure. **On remand: United States v. Meza**, 127 F.3d 545, 549 (7th Cir. 1997). After *Koon*, district courts may no longer categorically decline to consider a departure based on a disparity in sentences between co-conspirators. If the disparity between sentences is justified result of a proper application of the Guidelines to the particular circumstances of that case, then it is not a valid basis for departure..” No departure proper where disparity between coconspirators results from cooperation of some with government and others’ refusal to do so; **see also United States v. McMutuary**, 217 F.3d 477 (7th Cir. 2000) (only where unjustified disparity exists between defendant’s sentence and “sentences of all other similarly situated defendants nationwide” may downward departure be based on disparity; unjustified disparity relative to a co-defendant may not be basis for departure as that would create the type of unjustified disparity between their sentences and those of all similarly situated defendants that the Guidelines seek to avoid).

< **United States v. Miranda**, No. 94 Cr. 714-2, 1998 WL 173300 (N.D. Ill. Apr. 10, 1998) (unreported). Downward departure for less culpable defendant who stood to receive longest sentence where he was convicted only of PWID but acquitted of conspiracy of which more culpable defendants were convicted, yet stood to be sentenced to the longest sentence partially because he received a 2-level obstruction enhancement for his false testimony at trial.

Contra: United States v. McKnight, 186 F.3d 867 (8th Cir. 1999) (disparity among co-defendants’ sentences cannot be basis for downward departure); **United States v. Contreras**, 180 F.3d 1255, 1271-72 (10th Cir.), cert. denied, 118 S. Ct. 116 (1997) (reversed district court downward departure to a defendant whose disparate sentence was not “unwarranted” because codefendant similarly situated as had pleaded guilty to a lesser charge while defendant had gone to trial and been convicted on four counts); **United States v. Lawrence**, 179 F.3d 343 (5th Cir. 1999) (same).

G. Due Process

< **United States v. Ray**, 950 F. Supp. 363 (D. D.C. 1996) (Oberdorfer, J.). District court granted 1-level downward departure at re-sentencing of defendant who was successful in collateral attack of § 924(c) conviction based on *Bailey v. United States*, 116 S. Ct. 501 (1995). Defendant who had served significant portion of original term of drug sentence stood to have that term increased because of 2-level gun bump (§ 2D1.1(b)(1)) applicable to drug sentence once § 924(c) conviction vacated. Departure warranted because Sentencing Commission had not adequately considered the due process concerns that would arise if defendants . . . were resentenced with the full two-level “gun bump” – after

having nearly completed their original terms of imprisonment attributable to the narcotics offenses.” 950 F. Supp. at 368.

H. Extraordinary Acceptance of Responsibility

< *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000). Affirms 2-level downward departure to defendant who was not eligible for acceptance of responsibility adjustment because he had gone to trial but whose conduct demonstrated a “non-heartland acceptance of responsibility” in that he had made early and consistent offers to the government to determine the legality of his business and immediately discontinued business following verdict against him and froze his inventory, offered negotiations with the government concerning disposal of inventory and offered full assistance to the government with respect to access to inventory; defendants were engaged in the business of selling electronic chips and modules for use in cable television scrambler boxes and were convicted of multiple counts of wire fraud.

I. Fraud, Money Laundering & Similar Offenses

1. Defendant Did Not Personally Profit

< *United States v. Walters*, 87 F.3d 663 (5th Cir. 1996). Departure upheld where defendant did not personally profit from money laundering scheme.

< *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995) (Defense counsel: Lawrence Goldman). Departure was based on a “confluence of circumstances ... not taken into account by the guidelines,” including loss overstated seriousness of fraud and defendant had not personally profited financially from his fraudulent conduct; benefit was derived by corporation which employed him.

2. Uncertainty of Loss Determination

< *United States v. Henry*, 136 F.3d 12, 20 (1st Cir. 1998). Upheld 1-level downward departure which district court granted because of its uncertainty that loss had been properly calculated in a case involving conspiracy to transport hazardous waste to a facility that does not have a permit to receive such waste and related wire and mail fraud offenses resulting from a scheme that falsely represented to the customers that facility could lawfully receive the hazardous waste.

3. Outside Heartland

< *United States v. Smith*, 186 F.3d 290, 300 (3d Cir. 1999) (internal citations omitted). Vacates sentence where district court believed that it lacked discretion to apply fraud guideline rather than money laundering in a case that was atypical for money laundering cases: “Ultimately, we conclude that the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime. That is not the type of conduct implicated here. In this case, the money laundering convictions were based on 15 checks sent by Benchmark to Smith's creditors. This left a paper trail, conduct inconsistent with planned concealment. The money laundering activity, when evaluated against the entire course of conduct, was an “incidental

by-product" of the kickback scheme.” Significantly, the 3rd Circuit applied the heartland analysis not as a basis for departure but pursuant to U.S.S.G. § 1B1.2(a), (comment. n.1) to select the guideline “most applicable to the nature of the offense conduct charged” which in this case should have been the fraud guideline.

< ***United States v. Woods***, 159 F.3d 1132 (8th Cir. 1998) (AFPD Nancy Graven). Affirmed district court which departed downward from money laundering and applied fraud guideline in a bankruptcy fraud case where defendant had failed to disclose to the bankruptcy court her ownership of some stock which she sold and used the proceeds to pay personal expenses and repay a personal loan to a relative. The government charged her with money laundering for depositing into her husband’s bank account the check representing the proceeds of the stock. The district court which also departed downward one-level based on defendant’s charitable activities sentenced defendant to probation when it determined that the case fell outside the heartland of the money laundering statute which was primarily concerned with combating drug trafficking and organized crime offenses.

< ***United States v. Hemmingson***, 157 F.3d 347 (5th Cir. 1998) (Defense counsel: Gerry Goldstein & Bob Glass). Fifth Circuit upheld departure granted because defendant’s offenses did not fall within the heartland of the money-laundering guideline, and instead applied the fraud guideline in campaign contribution case where convicted of interstate transportation of stolen property, money-laundering, and engaging in a monetary transaction with criminally derived property, and one of them was also convicted of making false statements to a federal agent. Money-laundering guideline primarily targets large-scale money-laundering, which often involves the proceeds of drug trafficking or other types of organized crime, while present case involved use of conduit to conceal the infusion of corporate funds into political campaign. District court relied in part on DOJ manual in determining heartland .

< ***United States v. Buchanan***, 987 F. Supp. 56 (D. Mass. 1997) (Gertner, J.) Granted a five-level downward departure in a case involving misapplication of bank funds and currency structuring on ground that offense fell outside the heartland of money laundering -- no other independent, serious criminal activity, no drugs, no allegations of “mob influence” and the amount involved less than \$100,000, the minimum necessary to trigger an offense level increase in the money laundering guideline.

< ***United States v. Gamez***, 1 F. Supp. 176 (E.D. N.Y. 1998) (Weinstein, J.). Proceeds to defendants were limited (\$5250 in fees over a number of months) and relatively small scale of the operation was more akin to a structuring offense than to the mainstream money laundering schemes contemplated by Commission.

4. Money Laundering Tangential to Gambling Offense

< ***United States v. Threadgill***, 172 F.3d 357 (5th Cir. 1999). Affirmed downward departure (reducing sentences from between 40% to 75% of presumptive range) based on fact that defendants’ money laundering activities “were incidental to the gambling operation” (laundered only \$500,000 of \$20,000,000 in gross wagers) and that “defendants’ conduct was atypical because the defendants never used the laundered money to further other criminal activities”; in the process 5th Circuit expressly abrogates *United States v. Willey*, 57 F.3d 1374 (5th Cir.), cert. denied, 516 U.S. 1029 (1995) (departure cannot

be justified on finding that the subject crime was “disproportionately small part of the overall criminal conduct”) in light of *Koon*.

5. Bribery Underlying RICO Prosecution

< *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998). In applying bribery guideline (U.S.S.G. § 2C1.1) which incorporates the loss table in the fraud guideline, a district court may refer to the application notes to § 2F1.1 which explain or limit the loss table. Thus the district court had discretion based on the application notes to § 2F1.1 to depart from the bribery guideline if it overstated the severity of defendant’s offense. However the 7th Circuit remanded for re-sentencing because the district court’s reasoning was “inadequate to support a seven-level [downward] departure. 159 F.3d at 1031.

J. Government Conduct

< *United States v. Jones*, 160 F.3d 473 (8th Cir. 1998). In a case that was remanded for re-sentencing on other grounds, the Eighth Circuit also held that “if the district court on remand determines that any of the appellants were directly prejudiced by the government’s conduct significantly enough to take the case out of the heartland. . . it may exercise its discretion” to depart downward. 160 F.3d at 484. Though it did not find that the government’s conduct required reversal of the conviction and it did not clearly specify what conduct was potentially prejudicial, the 8th Circuit did comment on two troubling aspects of the government’s conduct -- its decision to grant substantial assistance motions to more culpable defendants in exchange for their testimony against lesser members of the conspiracy which results “in the principals receiving substantially lower sentences than the lesser members” and its less than forthright disclosure of the deals it made with the cooperators. 160 F.3d at 483.

< *United States v. Parker*, 158 F.3d 1312 (D.C. Cir. 1998). Declined to remand case where it determined that “departing downward on the basis of alleged reckless overdeployment of SWAT teams would be an abuse of discretion given that there is no evidence showing that SWAT personnel in any way caused appellant’s injuries;” opinion reports that government acknowledged that district court would err if it determined that it lacked authority to depart “based upon reckless police conduct because there was no ‘precedent’ for a departure on that ground.”

K. Low Purity of Heroin

< *United States v. Mikaelian*, __ F.3d __ (9th Cir. 1999). Holds that low purity of heroin cannot be categorically excluded as departure ground but affirms district court’s denial of departure and denial of funds to hire expert to testify as to purity level because defendant had presented no evidence in support of request.

L. Outside Heartland

< *United States v. Sicken*, 223 F.3d 1169 (10th Cir. 2000). In case involving conviction for breaking into and damaging secured intercontinental ballistic missile site by anti-nuclear protesters, the Tenth Circuit affirms a 4-level downward departure where district court based departure on ground that

case was outside the heartland of such prosecutions because the offense did not involve a significant threat to the national security, did not create a substantial risk of death or serious injury, occurred during peacetime, did not involve a foreign power and the guideline lacked offense severity gradations to take such factors into consideration.

M. Remorse & Drug Rehabilitation Post-Offense (new amendment promulgated to prohibit post-sentencing rehabilitation departures discussed under prohibited factors above).

< *United States v. Newlon*, 212 F.3d 423 (8th Cir. 2000). Post-offense rehabilitation (pre-arrest intensive drug/alcohol treatment) sufficient to warrant departure and district court's reference to defendant's low IQ and home and environmental circumstances were not the basis for the departure but merely extraneous matters noted by the court only to support its conclusion that rehabilitative efforts were extraordinary.

< *United States v. DeShon*, 183 F.3d 888 (8th Cir. 1999). Post-offense rehabilitation (radical lifestyle change revolving around daily counseling, good acts and attendance at church) appropriate basis for departure despite govt's claim that court had improperly relied on religion as factor.

< *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998). Holds that extraordinary or exemplary post-offense drug rehabilitation may be a ground for downward departure, reversing *United States v. Ziegler*, 39 F.3d 1058, 1061 (10th Cir. 1994) in light of *Koon*.

< *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997). Reversing pre-*Koon* circuit precedent, the Fourth Circuit holds that post-offense rehabilitation may be a ground for a downward departure.

< *United States v. Jaroszenko*, 92 F.3d 486 (7th Cir. 1996). Remands case because court incorrectly believed that it could not depart on post-offense extraordinary remorse.

< *United States v. Griffiths*, 954 F. Supp. 738 (D. Vt. 1997). Post-offense rehabilitative efforts—significant work and educational achievements—after arrest for LSD offense warrants downward departure.

< *United States v. Williams*, 65 F.3d 301, 303-309 (2d Cir. 1995). Affirmed a departure to permit defendant to avail himself of an intensive drug rehabilitation program in prison to which he would only be eligible if he received a reduced sentence.

< *United States v. Maier*, 975 F.2d 944, 946-49 (2d Cir. 1992). Affirmed downward departure based on defendant's post-offense drug rehabilitation.

Sentencing Postponed to Permit Rehabilitation

< *United States v. Flowers*, 983 F. Supp. 159, 172-73 (E.D. N.Y.) (Weinstein, J.) At request of defense, district court deferred sentence for one year to assure itself that defendant has been

rehabilitated, to allow court to have a full and fair sense of the person it is to sentence, and to permit the court to “explore the full range of acceptable sentencing alternatives.” Defendant was to remain free under close supervision of pre-trial services. Defendant is a 21-year-old, first-time offender, “Safety-Valve” eligible, single mother convicted of one count of conspiracy to import cocaine for her role in acting as courier in exchange for money.

N. Tax-Evasion Cases

Atypical - Defendant’s Intent To Pay

◁ *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998). Tax evasion outside the “heartland” as defendant’s intent was “not as wicked as that of the typical tax evader because, despite some conscious wrongdoing, he did not intend permanently to deprive the government of the funds he failed to pay;” before financial difficulties engulfed him, the defendant had exhibited a pattern “to retain the use of the funds in question for periods of four to six months and then to pay over the funds, adding penalties and interests;” remands for further explanation of district court’s reliance on another departure ground and extent of departure.

Atypical – IRS Voluntary Disclosure Negotiations Broke Down

◁ *United States v. Tenzer*, 213 F.3d 34 (2d Cir. 2000). Remands because district court erroneously believed that it lacked discretion to depart based on defendant’s attempted negotiations with IRS to make payments through the IRS voluntary disclosure program which resulted in criminal prosecution when negotiations broke down; fact that attempts at negotiation was not defense to prosecution did not foreclose their consideration as mitigation factor that warranted departure.

O. Sentencing Entrapment/Manipulation

The majority of courts recognize the existence of this beast. But few, except the Ninth Circuit, have actually upheld a departure on this ground. Some courts use the terms sentencing entrapment and manipulation interchangeably. Others draw a clear distinction between the two.

◁Sentencing Entrapment

outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant.

United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994), quoting *United States v. Rogers*, 982 F.2d 1241, 1245 (8th Cir. 1993).

occurs when ‘a defendant, although predisposed to commit a minor or lesser offense, is entrapped in[to] committing a greater offense subject to

greater punishment.’

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995).

<Sentencing Factor Manipulation

where government agents have improperly enlarged the scope or scale of the crime,” the sentencing court has power to exclude “the tainted transaction” from the guideline computations and for purposes of any mandatory minimum statute.

United States v. Egemonyeu, 62 F.3d 425 (1st Cir. 1995).

when the government engages in improper conduct that has the effect of increasing the defendant’s sentence.

United States v. Gomez, 103 F.3d 249 (2d Cir. 1997), *quoting United States v. Okey*, 47 F.3d 238, 240 (7th Cir. 1995).

Downward Departure Granted

<*United States v. McClelland*, 72 F.3d 717 (9th Cir. 1995) 6-level downward departure granted based on imperfect entrapment after jury rejected entrapment defense and found defendant guilty in a murder-for-hire case

<defendant’s vulnerable emotional state (recent separation from wife)
<repeated expressions of reluctance
<frequent efforts made by govt cooperator to prod and encourage defendant whenever he expressed hesitation

<*United States v. Naranjo*, 52 F.3d 245 (9th Cir. 1995)
<CI and agent induced defendant to supply 5 kilos of cocaine
<agent offered to “front” four of the five kilos
<CI agreed to buy three or four of the 5 kilos

<*United States v. Stauffer*, 38 F.3d 1103 (9th Cir. 1995)
<defendant was target of a sting operation
<induced to buy 10,000 doses of LSD
<departure permissible although jury rejected the entrapment defense

<*United States v. Martinez-Villegas*, 993 F. Supp. 766 (D. CA. 1998) (government’s “aggressive encouragement” of wrongdoing by defendants who had no prior convictions, by initially proposing illegal activity, persistently contacting defendants over several weeks, offering considerable sums and concerted enticements and setting all the terms of the deal

including the 92 kilos that undercover agent asked defendants to transport warranted 2-level downward departure)

Authority to Depart Noted

<*United States v. Bala*, 236 F.3d 87, 92 (2d Cir. 2000). A departure based on “aggressive encouragement of wrongdoing by government is not prohibited and §5K2.12 (departure encouraged based on serious coercion, blackmail or duress) may be reasonably be read to authorize such a departure but held that district court’s misapprehension that it could depart on this ground was harmless in this case.

ENDNOTES

1. There are also a number of encouraged upward departures:

- 5K2.1 - Death
- 5K2.2 - Physical Injury
- 5K2.3 - Extreme Psychological Injury
- 5K2.4 - Abduction or Unlawful Restraint
- 5K2.5 - Property Damage or Loss
- 5K2.6 - Weapons and Dangerous Instrumentalities
- 5K2.7 - Disruption of Governmental Function
- 5K2.8 - Extreme Conduct
- 5K2.9 - Criminal Purpose
- 5K2.17 - High-Capacity, Semiautomatic Firearms
- 5K2.18 - Violent Street Gangs
- §5K2.19 - Post-Sentencing Rehabilitative Efforts
- §5K2.21 - Dismissed and Uncharged Conduct

2. Until the new policy statement on aberrant behavior becomes effective on November 1, 2000, the Guidelines Manual refers to aberrant behavior in one sentence in Chapter 1, as follows:

The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

Ch. 1, Pt. A, Intro. Comment. 4(d): Aberrant Behavior.

**A CRITICAL GUIDE TO THE “SAFETY VALVE”
SENTENCING ISSUES UNDER 18 U.S.C. § 3553(f) AND U.S.S.G. §5C1.2**

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*I know not whether laws be right,
Or whether laws be wrong;
All that we know who lie in gaol
Is that the wall is strong;
And that each day is like a year,
A year whose days are long.*

-- Oscar Wilde
The Ballad of Reading Gaol

Safety Valve: (1) An automatic escape or relief valve (as for a steam boiler). (2) An outlet for pent up energy or emotion (A safety valve for many of the frustrations of life).

-- Webster’s New Collegiate Dictionary

Since the enactment of the safety valve, a significant jurisprudence has developed over its operation. When the safety valve applies, what needs to be done, and who must do it, even the very definitions, have all been the subject of litigation. This is not surprising because there is nothing like the safety valve in federal sentencing. Under it, a defendant can avoid mandatory minimum sentences if he or she meets certain requirements. A government motion is not even necessary. The safety valve can even occur after trial. This article hopes to explain how the safety valve operates and cautions against some of the more prevalent dangers. It should be thought of as a manual for smooth safety valve operation.

I. AUTHORITY: Who Manufactured The Safety Valve?

Subsection (5) of the Mandatory Minimum Sentencing Reform Act, 18 U.S.C. § 3553(f) is known as the “safety valve” provision. This section provides for relief from an otherwise applicable mandatory minimum sentence if:

1. The defendant does not have more than one criminal history point, as determined under the sentencing guidelines;
2. The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
3. The offense did not result in death or serious bodily injury to any person;

4. The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
5. Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that defendant has no relevant or other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

This section appears verbatim in the Sentencing Guidelines at §5C1.2. The safety valve has survived a constitutional challenge.¹

II. LEGISLATIVE HISTORY: Why We Have This Safety Valve.

Until Congress passed the safety valve, defendants convicted of certain drug crimes triggering a mandatory minimum sentence could receive a sentence below the statutory minimum only on the government's motion to depart downward based on a defendant's substantial assistance to the prosecutor.² Congress enacted the safety valve to rectify the inequity in this system, whereby more culpable defendants who could provide the government with new or unusual information about drug sources fared better under § 3553(e) or §5K1.1 than lower level offenders such as drug couriers or mules, who typically have less knowledge.³ As the legislative history reads:

Ironically, for the various offenders who most warrant proportionately lower sentences -- offenders that by guideline definitions are the least culpable -- mandatory minimum generally operate to block the sentence from reflecting mitigating factors.⁴

The safety valve tries to remedy this situation by allowing the sentencing court to disregard the statutory minimum in sentencing first-time non-violent drug offenders who have played a minimal or minor role in the offense and who, in the words of one court, "had made a good faith effort to cooperate with the government."⁵

The safety valve is a legislative enactment. Congress set its terms. As such, even though it appears in the guidelines, it is not a product of the Commission. Its terms are set in congressional concrete. While the Commission can not change the terms, it could however change the definition or determination of certain terms that are referred in the safety valve. Examples would be how criminal history is calculated or what constitutes a "leadership role".⁶

The effective date of the safety valve is September 23, 1994. It is not retroactive.⁷ One court, however, has held that it is applicable on resentencings for offenses that occurred before that date.⁸ The guidelines account for the safety valve by allowing a two-level reduction. This is contained in §2D1.1(4). This reduction, as the safety valve itself, is not retroactive.⁹

The safety valve as enacted applies only to offenses brought under 21 U.S.C. §§ 841 (possession with intent to distribute), 846 (conspiracy), 961 (shipment), and 963 (attempt in conspiracy).¹⁰ It does not

apply to other drug statutes or non-drug mandatory minimums.¹¹ The safety valve, therefore, does not authorize a departure from a guideline range nor does the safety valve apply to a defendant who does not have a mandatory minimum.¹² Despite an unfortunate characterization by some courts as a departure from the guidelines, the safety valve is not.¹³ It does not create a departure from the guidelines, but rather allows the guidelines to operate by allowing the court to ignore mandatory minimum sentences. As such, the safety valve can be said to advance the guidelines' goals of fairness.

III. PROCEDURAL BURDENS: Who Turns The Valve?

Not surprisingly, the defendant has the burden of satisfying the safety valve requirements by a preponderance of evidence.¹⁴ Recently, the Second Circuit in *United States v. Gambino* held that the defendant has the burden.¹⁵ He must make out a prima facie case. Once he has done that, the government then must show that the defendant has not told the truth. The defendant then has the ultimate "burden of persuasion."

This burden of persuasion also requires the defendant not just to say he has met the burden, or could have, but to actually take a first step. The Fourth Circuit, in *United States v. Ivester*,¹⁶ faced the issue of a defendant arguing that he would have provided information if only he had been requested. The Fourth Circuit was not persuaded, holding that the defendant must take affirmative conduct to satisfy the requirements. Once the defendant has put the issue in play, the court must make factual findings.¹⁷ For the court to refuse to make findings is error. On appeal, the court's factual findings are reviewed under a clearly erroneous standard.¹⁸ The application of the safety valve, however, is reviewed *de novo*.¹⁹ Indeed, because the safety valve is statutory, the court is not afforded the deferential discretion standard concerning departures.²⁰

IV. SAFETY VALVE PROVISIONS: How The Valve Works.

A. Criminal History.

The safety valve requires that the defendant must be in criminal history category I. This means, that under the guidelines, he can only have 0 to 1 criminal history points. Unfortunately one point means only one point. Courts have held that departures on the basis of over-representation are not allowed.²¹ Thus, even though a court might find that under §4A1.3 (adequacy of criminal history category) that a defendant's criminal history is over-representative, a departure is not permitted. The reasoning is that Congress, in enacting the guideline terms, explicitly stated that the defendant must be in the lowest possible category. This strict requirement, however, does not account for the guidelines' own workings, which recognize that criminal history might be over-represented, and that such flexibility is needed.

On the other hand, even if there is no departure, a defendant can still end up in criminal history I by use of other guideline means. For example, a defendant can establish under the criminal history rules that prior sentences were related and thus should be consolidated or if prior convictions are time barred.²² Thus, as long as a departure is not involved, a defendant only has to be in criminal history category I by the workings of the guidelines for the safety valve to work.²³

B. Firearms.

An offense of conviction which includes a firearm precludes safety valve consideration. However, a co-conspirator's firearm possession does not bar safety valve application. This is so because §5C1.2(2) limits the defendant's accountability to his own acts. This tracks the relevant conduct language of

§1B1.3(a)(1)(A) but omits the broader language of §1B1.3(a)(1)(B) which encompasses jointly undertaken criminal activity. The D.C. Circuit in *In re Sealed Case* and the Fifth Circuit in *United States v. Wilson* both have endorsed this interpretation.²⁴ Thus, even if firearms are present in co-defendants' hands, the safety valve still can be triggered for your unarmed defendant. The defendant nonetheless must be wary of stipulations or plea agreements in which guns abound in the factual basis, or co-conspirators alleging that the defendant was using or carrying a firearm.

C. Leadership.

By the safety valve's terms, the defendant cannot have been a leader, organizer, or manager in the conspiracy. He cannot qualify for any aggravating role adjustments under §3B1.1 (role in the offense). The defendant must have a minor, or better yet, a mere minimum role.²⁵ This is not a requirement, however. Thus, a defendant may either be a manager or may neither receive aggravating adjustments or mitigating adjustments yet still qualify for the safety valve. The defendant's role is assessed under a relevant conduct analysis.²⁶ It becomes essential therefore that counsel understand the defendant's role in a conspiracy, and does not jeopardize safety valve determination with off the cuff remarks.²⁷

V. TRUTHFULNESS OF SENTENCING INFORMATION: When the Safety Valve Is Turned On, How Pure Is The Stream?

One of the key elements of the safety valve, and where most of the litigation has occurred, concerns the truthful disclosure of information prior to sentencing. To repeat, to be able to take advantage of the safety valve, a defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses. This can occur up until the sentencing hearing. It does not matter that the government may have had this information, or that it is not useful. The focus is on the defendant's truthfulness.

A. Is Requirement for Information Constitutional?

The safety valve's information requirement survived a constitutional challenge. The Fifth Circuit in *United States v. Stewart*²⁸ found no due process or self-incrimination violation in requiring a defendant to provide the government with information in exchange for leniency. Simply because a defendant would receive a lesser sentence if she gives information is not compulsion or coercive. A defendant could refuse the option and receive the required statutory sentence.²⁹

B. Who Is "The Government"?

Surprisingly, one of the questions arising is "who is the government" for purposes of truthful disclosures. Obviously the prosecutor on the case qualifies as "the government." Revelations to a prosecutor not directly on the case still satisfies this requirement.³⁰ In *Real-Hernandez*, for example, the Ninth Circuit held that the truthful disclosure to another Assistant U.S. Attorney, even though he was not the prosecutor directly on the matter, still satisfied the requirement.³¹ The government in that case was construed broadly

. Any truthful statement to a prosecutor or case agent will likely be considered the government. Both the First and Fifth Circuits have held, however, that revelations to a probation officer do not satisfy "the government" requirement. For safety valve purposes, a probation officer is not "the government."³² This is so despite the fact that the probation officer who is preparing the presentence report may have a better knowledge of the offense and, in some ways, may have a better ability to assess truthfulness than by the

government case agent.

C. How The Information Is Revealed.

The disclosure of information required under the safety valve is not a debriefing. The cases have made clear that that is not the purpose.³³ The disclosure is not the occasion for the government to develop a case or receive substantial assistance. That is the purpose of the substantial assistance departures under the guideline and statute. Rather, it is the opportunity for the defendant to truthfully state his knowledge. It is, in effect, the defendant's show.

How the debriefing takes place is also in the defendant's hands. The debriefing does not necessarily have to be a face to face meeting. The First Circuit, in *United States v. Montanez*, held that a letter sent to the government stating the defendant's information and role satisfied the safety valve.³⁴ The debriefing furthermore can take place when the defendant is first apprehended (as all too frequently happens) or up to the time of sentencing.³⁵ If a defendant asks for a debriefing, and the government promises that it will set one up, it must provide one.³⁶

D. Truthfulness And Timing of Disclosure

1. Complete Candor

It is essential for the operation of the safety valve provision that the defendant's information be truthful. As the Ninth Circuit stressed in *United States v. Real-Hernandez*, and as every other court has underscored, complete candor is necessary.³⁷ It does not have to be new, it does not have to be useful, but it has to be correct. Truthfulness, however, has a different ring to different listeners.

The scope of truthfulness, moreover, has been much disputed. As an initial matter, the defendant must be truthful about his role in the offense. In this, it is little different from the requirement for acceptance of responsibility under §3E1.3. However, under safety valve jurisprudence, truthfulness also requires the defendant to reveal the source of drugs.³⁸ A refusal to identify the source, even though all other information is truthful, will cause the safety valve to stick and the defendant will lose the benefit.³⁹

2. Lack of Knowledge

The Seventh Circuit, in *United States v. Rodriguez*,⁴⁰ recognized that a defendant may not know who the source was. In such a case, a truthful shrug and a "I don't know" will probably suffice. The lack of knowledge in itself can be a truthful admission.

The Seventh Circuit, moreover, recognized that the ability to be truthful, or to provide information, may be limited by one's mental abilities. In *United States v. Thompson*,⁴¹ the court faced a situation in which the defendant suffered from a diminished capacity and simply could not provide more than the barest recitation of facts. Under her abilities, at that time, this extent of her truthfulness was sufficient.

3. Revealing the Role of Codefendants

The safety valve is to provide relief for the small fry or minnows in a large conspiracy. The courts, therefore, have shown no hesitancy in requiring defendants to name names not only of their source, but of their codefendants. The First Circuit in *United States v. Wrenn*, the Sixth Circuit in *United States v. Maduka*, and the Tenth Circuit in *United States v. Acosta-Olivas*, all denied safety valve relief because

the defendant refused to discuss and reveal the role of fellow codefendants.⁴² Both courts, in similar language, stressed that the safety valve's requirement of truthfulness compelled a defendant to identify others, even fellow codefendants, and to discuss his or her knowledge of their activities.

The difficulty in this situation if a difficulty in this requirement was highlighted in *United States v. DeJesus-Gaul*,⁴³ where the D.C. Circuit affirmed the refusal of a safety valve. The defendant refused to speak about his fellow codefendant, who also happened to be his fiancé. The D.C. Circuit paid no mind to his gallantry, finding that he did not fulfill the safety valve requirements.⁴⁴

The problem this poses for counsel in a multi-defendant case is readily apparent. The views, and extent of truthfulness, can vary with each codefendant.⁴⁵ If there are several defenders trying to turn on the safety valve, and each one is telling different versions, the government can easily play one off against the other. Each may be found untruthful.

In addition, this judicial gloss on truthfulness requiring the naming of codefendants or sources, smacks of requiring cooperation. Even the guidelines, under its §3E1.1 (acceptance of responsibility) jurisprudence, only requires the defendant to reveal his or her role in activities. Here, the defendant must come clean, naming names, and thereby risking his safety, and aiding the government, for the safety valve benefit. A case by case, defendant by defendant, analysis is required. The safety valve, after all is considered, may just not be worth it.

4. Prior Inconsistent Statements

Our clients have a tendency to make statements to law enforcement that, shall we say, differ from what the truth eventually may turn out to be. The issue then comes to be whether the truthfulness component of the safety valve requires that no false statements have been made. The several circuit courts that have considered this issue do not look kindly on permitting the safety valve if the defendant had made misstatements to law enforcement and then, only after a plea, came clean. The Fourth, Fifth, and Eighth Circuits all have held that there is a government interest in truthful disclosures, and that false information undercuts this benefit, even if the later statements are true.⁴⁶

These cases present an interesting continuum. On one end is *Fletcher*, where the Fourth Circuit considered a defendant who supposedly perjured himself at trial.⁴⁷ Prior to sentencing, however, the defendant made a "truthful statement." The Fourth Circuit found neither acceptance of responsibility nor safety valve availability given the untruthfulness at the court proceeding. The court reasoned that the truthfulness was just not to allow the defendant to come clean, but had to be of some benefit to the government, and in this case the obfuscation of the truth through allegedly perjured testimony barred the safety valve.

In both *Edwards*⁴⁸ and *Long*,⁴⁹ the defendants made false disclosures when first arrested by law enforcement. Later, during the course of the proceedings, they made truthful statements. These later truthful statements did not overcome their prior false disclosures. According to the Eighth Circuit, writing in *Long*, the government's interest in truthful disclosure at the outset, so that it does not pursue false leads or substantial resources, out trumps any later "coming clean" by the defendant.

These decisions appear to misread the whole intent of the safety valve, which is a focus on the defendant's accepting responsibility *prior to sentencing*. This is not an instance where the safety valve is designed to assist the government. Indeed, as the legislative history makes clear, frequently minimal and minor players have no substantial information to give. Thus, the fears of the courts that false information

will lead agents astray is just not true. Moreover, these courts' readings makes the flow of information provided by the safety valve on the same line as a substantial assistance motion. It should be separate.

The Ninth Circuit recognizes this in *United States v. Shrestha*.⁵⁰ In *Shrestha*, the Ninth Circuit underscores that the focus the safety valve is on the truthfulness of the defendant's statements at the time it is made and as long as it is prior to sentencing. The defendant in *Shrestha* was arrested transporting heroin. He gave a statement to the agents admitting his role and revealing his source. Later, he recanted, and continued his recantation through trial. Aside from his first statement, he refused to assist the government further. The district court withheld acceptance of responsibility, but did give him the safety valve. The Ninth Circuit affirmed, holding that the focus is on the truthfulness of the defendant's statement when he makes it, and not on either acceptance of responsibility or the substantial assistance he affords to the government. The Ninth Circuit recognized the other circuits' concern about the giving of false information, but sidestepped it here, stating that the defendant gave a truthful statement from the first. While this was neat footwork on the part of the court, its reasoning does run counter to *Fletcher*, *Long*, and *Edwards*. *Shrestha*, however, is more attuned to the purpose of the safety valve. It recognizes that it is the occasion for the defendant to give a truthful statement: nothing more and nothing less.

Recently, the Ninth Circuit has reaffirmed that the safety valve can apply even after trial. In *United States v. Sherpa*,⁵¹ the Ninth Circuit held that a jury verdict did not bar the application of the safety valve. The safety valve could still apply even if the defendant professed all along that he did not "know" there were drugs hidden in a suitcase he carried. Despite the jury's guilty verdict, the court applied the safety valve. The government argued on appeal that a jury verdict precluded a finding of truthfulness. The Ninth Circuit found that a sentencing court could disagree with a verdict yet still not grant a direct verdict under Fed. R. Crim. P. 29. As the Ninth Circuit reasoned, the court had access to more information than the jury. The court could find that indeed the defendant truthfully told all he "knew" to the government "at the time." Therefore, for *sentencing* purposes, the court could apply the safety valve despite a jury's guilty verdict.⁵²

5. The Determination of "Truthfulness"

As stated above, the sentencing court makes the decision in applying the safety valve. The defendant makes the first step, showing that he has complied with the safety valve criteria. The burden then is placed on the government to disprove the truthfulness of the defendant's statement. If the government comes forth and contests the veracity of the statement, then the defendant bears the ultimate burden, which is by a preponderance of evidence.⁵³ To prove truthfulness may require a hearing, with witnesses, and a mini-trial. What is sauce for the goose is sauce for the gander however, and given that the government frequently can prove their sentencing points with slight evidence, defense counsel hopefully can secure the same benefits here.

VI. THE SAFETY VALVE AND RELEVANT CONDUCT

Congress inserted the safety valve into the guidelines. It may look like a guideline provision, and it may talk like a guideline provision (especially with criminal history), but the fact is it is not a guideline provision. This is essential in understanding one of the key dangers in trying to take advantage of the safety valve benefits.

A critical component of guideline calculations is relevant conduct. Relevant conduct is the net thrown by the guidelines over conduct of codefendants or past or present conduct of the defendant which is in the same course of conduct or general scheme.⁵⁴ Thus, if a defendant is convicted of possession with

intent to distribute under 21 U.S.C. § 841, he will be sentenced on what he has in possession and, possibly, other possessions he had the prior week, month or even year. If it is a conspiracy, he will be responsible for the contraband his co-conspirators moved which were foreseeable and in which he jointly participated. There has been extensive litigation, and a great many defendant tears have been shed over the terrible workings of relevant conduct.

The one safeguard from relevant conduct the guidelines provide is in §1B1.8, which prevents relevant conduct information disclosed as part of a cooperation agreement or in the course of cooperation with the government. This protection is vital for a defendant who, if he truthfully discusses all of his activity, runs the risk of expanding his relevant conduct greatly and receiving a much higher sentence.

Furthermore, a defendant is not required to assist the government or discuss his activities as part of sentencing. The Fifth Amendment, despite efforts to erode it, still holds true.⁵⁵ The safety valve, however, does not provide for §1B1.8 protection. If the defendant gives a truthful accounting of his actions, he runs the risk of significantly raising his guidelines exposure. For example, a defendant may be held accountable for possession with intent to distribute a shipment in which he was acting as a courier. This may expose him to a mandatory five years. The government, however, may have suspicions that he has acted as a courier in the past. These suspicions can be born out in a safety valve debriefing, in which the defendant admits prior trips. This could significantly raise his guideline exposure from 30 to 37 months to something much higher and far above even the mandatory 60 months he would have faced under the mandatory minimums. He also stands to be assessed a minor rather than a minimum role because of past activities.

In factoring this in, defense counsel should seek to have §1B1.8 protection afforded to any discussions or disclosures made to the government. This can be by letter agreement, or in the plea agreement itself. Such protection is essential to avoid winning the safety valve battle, but losing the sentencing war.

VII. COORDINATION OF THE SAFETY VALVE WITH OTHER DEPARTURES

The safety valve is not a departure. What the safety valve does is remove the mandatory nature of certain sentences. The safety valve essentially clears the pipe of the mandatory minimum blockage. The defendant however still must deal with the guidelines.

The safety valve, as stated at the very beginning, is legislative in nature. It is a part of Congress. Nonetheless, it is set within the federal guidelines. Indeed, it occurs at §5C1.2, which is the chapter on the determination of the sentence.

Under federal sentencing guidelines, sentencing proceeds sequentially through the guidelines. Accordingly, the safety valve, occurring at §5C1.2, takes effect before the Chapter 5 departures, significantly §5K1.1 (substantial assistance). It would appear, therefore, that the safety valve would take effect, and then any later departure would occur within the normal (if anything can be said to be normal) machinations of the guidelines. It may not be this clear.

There is some question concerning whether the defendant must choose either the safety valve determination or a substantial assistance motion. This situation arises where a defendant has the benefit of both, makes a choice, and then on appeal, argues that the court erred. This has occurred in the Eighth Circuit in *United States v. Goodwin*⁵⁶ and in the Tenth Circuit in *United States v. Belt*.⁵⁷

In both *Goodwin* and *Belt*, the defendant's guidelines were higher than the mandatory minimum. The government made the motion for substantial assistance, which the court granted, and then sentenced the defendants. On appeal, the argument was that the court failed to apply the safety valve. In *Goodwin*, the Eighth Circuit blithely dismisses this argument as saying that the defendant received the most benefit. The Tenth Circuit, in *Belt*, gave equal short shrift to the argument, in saying that the defendant wisely chose the procedural vehicle that gave him the opportunity for a lesser sentence. Therefore, he had no cause to complain.

Both of these cases missed the point. The safety valve does not present an either/or option, in which a court has to choose the safety valve or has to choose substantial assistance. It can choose both. Indeed, it advantages the defendant to have safety valve consideration, which, in most cases, will take him below the mandatory minimum, and make any subsequent substantial assistance motion that much more lenient. This is especially true in those districts where substantial assistance motion is not left to the discretion of the court, but is a negotiated fact where certain levels are taken off the ultimate offense level. Counsel, when she has the benefit of a multitude of departure riches, should argue that the safety valve should be allowed to work, and then the substantial assistance motion be made.

The safety valve is also a benefit for the workings of other departures. Although the safety valve does not authorize a departure from a guideline range, it does get rid of the mandatory minimum. As such, other departure bases, aside from substantial assistance, can then work. Therefore, departures on the basis of coercion and duress under §5K2.12 or diminished capacity §5K2.13 can operate. Moreover, a departure for aberrant behavior, especially if the defendant truly has acted this one time, is a possibility under Chapter 1, Part A.⁵⁸ Other sentencing possibilities, such as the shock incarceration program (i.e., boot camp) or drug rehabilitation.⁵⁹

VIII. THE SAFETY VALVE AND PLEA NEGOTIATIONS

The safety valve is a statutory right. As other constitutional and statutory rights, a defendant can waive it as part of a plea negotiation. Conversely, the government can agree in its Rule 11 negotiations, to stipulate or recommend safety valve consideration. The government can stipulate or it can agree to oppose it.⁶⁰

In addition to it being put into play in negotiations, counsel should be wary of the relevant conduct trap door, which was discussed above. It is easy for a defendant to find himself in worse shape, after describing various trips, than before safety valve determination. To protect the defendant, §1B1.8 protection should be negotiated in any plea.

This is not to say that you need a plea for a safety valve. The safety valve, under its terms, is applicable even after trial. Of course, some courts have held that any false statements, even before trial, bars safety valve application because the government has an interest in relying on the veracity of any given statements.⁶¹ This appears to be a very crabbed and narrow reading, and not at all in the spirit of the safety valve application.⁶²

IX. THE SAFETY VALVE AND SUPERVISED RELEASE

The safety valve operates with the mandatory minimum sentences as well as mandatory minimum supervised release. If safety valve relief occurs, there is no mandatory requirement for supervised release. The court is required to impose the guideline term of supervised release pursuant to §5D1.2(b) unless there is a reason to depart.

CONCLUSION

The safety valve is not a cure-all. It does not sweep away the heavy-handed approach of mandatory minimums for many, if not most, drug defendants. Neither does it soften the choke hold of the federal sentencing guidelines. What the safety valve does, in a small measure, is to give hope back to a few defendants who, through bad judgment and worst luck, face mandatory minimum sentences. It is also a small step toward a return to individualized sentencing, where a court takes a look at the person's offense, and then takes a look at the person him or herself, and fashions a just and lenient sentence.⁶³ The safety valve allows just a bit of this fairness and justice to return to federal sentencing.

*I never saw a man who looked
With such a wistful eye
Upon that little tent of blue
Which prisoners call the sky.*

-- Oscar Wilde
The Ballad of Reading Gaol

ENDNOTES

1. *E.g., United States v. Stewart*, 93 F.3d 189 (5th Cir. 1996)(upholding constitutionality of information requirement in safety valve).
2. 18 U.S.C. § 3553(e); U.S.S.G. §5K1.1; *Melendez v. United States*, 116 S. Ct. 2057 (1996)(requiring the government to file a motion pursuant to 18 U.S.C. § 3553(e) for substantial assistance for departure below mandatory minimum sentence). On strategies for avoiding mandatory minimums, see Jon Sands.
3. *See, e.g., United States v. Arrington*, 73 F.3d 144 (7th Cir. 1996); *United States v. Acosta-Olivas*, 71 F.3d 375 (10th Cir. 1995).
4. H.R. Rep. No. 103-460, 103rd Cong., 2d Sess., 1994 WL 107571 (1994).
5. *Arrington*, 73 F.3d 144.
6. §4A1.2 (calculation of criminal history); §3B1.4 (leadership role).
7. *United States v. Mullanix*, 99 F.3d 323 (9th Cir. 1996); *United States v. Marshall*, 83 F.3d 866 (7th Cir. 1996).
8. *United States v. Ekwunoh*, 888 F.Supp. 364 (E.D.N.Y. 1994).
9. *United States v. Sanchez*, 81 F.3d 9 (1st Cir.), *cert. denied*, 117 S. Ct. 201 (1996).
10. 21 U.S.C. §§ 841, 846, 961, 963.
11. *See, e.g., United States v. McQuilkin*, 78 F.3d 105 (3d Cir.)(safety valve does not apply to mandatory minimum sentences triggered by school yard statutes), *cert. denied*, 117 S. Ct. 89 (1996); *see also Mullanix*, 99 F.3d 323 (mandatory minimum bars resentencing on retroactive guideline amendment as the safety valve is not retroactive and does not provide an independent basis).

12. *United States v. Gaston*, 68 F.3d 1466 (2d Cir. 1995)(safety valve not applicable to guideline range); *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996)(safety valve does not apply when quantity does not trigger a mandatory minimum).
13. See, e.g., *United States v. Rodriguez*, 69 F.3d 136, 144 (7th Cir. 1995); *United States v. Edwards*, 65 F.3d 430 (5th Cir. 1995); *United States v. Hart*, 876 F.Supp. 4 (D.D.C. 1995).
14. *United States v. Ajugwo*, 82 F.3d 925 (9th Cir. 1996) *cert. denied*, 117 S. Ct. 742; *United States v. Flanagan*, 80 F.3d 143 (5th Cir. 1996); *United States v. Ivester*, 75 F.3d 182 (4th Cir.), *cert. denied*, 116 S. Ct. 2537 (1996); *Hart*, 876 F.Supp. 4.
15. No. 96-1125, ___ F.3d ___ (2d Cir. 1997); see also *Arrington*, 73 F.3d 144, 148 (defendant must demonstrate good faith efforts to cooperate).
16. 75 F.3d 182.
17. *United States v. Real-Hernandez*, 90 F.3d 356 (9th Cir. 1996).
18. *Thompson*, 76 F.3d 422; *Rodriguez*, 69 F.3d 136; *Edwards*, 65 F.3d 430.
19. *Real-Hernandez*, 90 F.3d 356.
20. E.g., *Ivester*, 75 F.3d 182. (See generally *Koon v. United States*, 116 S. Ct. 2035 (1996)(great discretion afforded to sentencing court in departures).
21. *United States v. Resto*, 74 F.3d 22 (2d Cir. 1996); *United States v. Valencia-Andrade*, 72 F.3d 770 (9th Cir. 1995).
22. A defendant can establish under §4A1.2(a)(2) that prior sentences were related by showing that the prior sentences: (1) occurred on the same occasions; (2) were part of a single common scheme or plan; or (3) were consolidated for trial and sentencing. A note of caution must be sounded when a defendant is facing parallel proceedings in state and federal court. If the defendant is eligible for safety valve consideration, it is essential that counsel ensure that the state or local proceedings do not bar him. For example, a defendant facing a federal drug charge where the safety valve is possible would be precluded if he pleaded guilty to a state or local proceedings prior to the federal sentencing in which his sentence would result in two criminal history points. Moreover, a withholding of adjudication on a *nolo contendere* plea counts as a conviction for federal sentencing guideline purposes.
23. *Booker*, 73 F.3d 706 (7th Cir. 1996)(remand required when exclusion of prior conviction made the defendant eligible for safety valve).
24. *In re Sealed Case*, No. 95-3206, ___ F.3d ___, (D.C. Cir. Feb. 7, 1997); *Wilson*, 105 F.3d 219 (5th Cir. 1997).
25. *United States v. Flanagan*, 80 F.3d 143 (5th Cir. 1996); *United States v. Thompson*, 76 F.3d 166 (7th Cir. 1996).
26. See U.S.S.G. §1B1.3.

27. As with firearms, defense counsel must be wary of stipulated facts in the plea agreement which have the defendant interacting with other co-conspirators, especially in terms of recruitment, inducements and solicitations.
28. 93 F.3d 189 (5th Cir. 1996).
29. This issue is analogous to similar challenges to §3E1.1 (acceptance of responsibility).
30. *Real-Hernandez*, 90 F.3d 356.
31. *Id.*
32. *United States v. Martinez*, 83 F.3d 488 (1st Cir. 1996); *United States v. Rodriguez*, 60 F.3d 193 (5th Cir.), *cert. denied*, 116 S. Ct. 542 (1995).
33. *Flanagan*, 80 F.3d 143.
34. 82 F.3d 520 (1st Cir. 1996).
35. *See, e.g., United States v. Shrestha*, 86 F.3d 935 (9th Cir. 1996)(disclosures upon arrest which were later recanted still count as truthful for safety valve purposes). *But see United States v. Long*, 77 F.3d 1060 (8th Cir.)(first account must be truthful), *cert. denied*, 117 S. Ct. 161 (1996) and *United States v. Fletcher*, 74 F.3d 49 (4th Cir.), *cert. denied*, 117 S. Ct. 157 (1996).
36. *United States v. Beltran-Ortiz*, 91 F.3d 665 (4th Cir. 1996). *But cf. Ivester*, 75 F.3d 182 (defendant's argument that he would have provided information if only requested by the government was unavailing as defendant must take affirmative steps). It may be appropriate, in a plea agreement, to insist upon the government providing such a debriefing or allowing disclosure in a proffer letter.
37. 90 F.3d 356 (9th Cir. 1996)(collecting cases).
38. *United States v. Arrington*, 73 F.3d 144 (7th Cir. 1996)(source of drugs); *United States v. Rodriguez*, 69 F.3d 136 (7th Cir. 1995); *United States v. Wrenn*, 66 F.3d 1 (1st Cir. 1995); *United States v. Rodriguez*, 60 F.3d 193 (5th Cir.), *cert. denied*, 116 S. Ct. 542 (1995).
39. *E.g., Rodriguez*, 60 F.3d 193.
40. 69 F.3d at 143.
41. 76 F.3d 166.
42. *Wrenn*, 66 F.3d 1 (1st Cir. 1995); *Maduka*, 104 F.3d 891 (6th Cir. 1997); *Acosta-Olivas*, 71 F.3d 395 (10th Cir. 1995).
43. 73 F.3d 395 (D.C. Cir. 1996).
44. *Accord Maduka*, 104 F.3d 891. In *Maduka*, the defendant argued that the safety valve only required him to reveal his involvement, and not that of his companion "friend" who was coincidentally with him at the two drug sales. The Sixth Circuit rejected this interpretation, requiring truthful and complete disclosure of the immediate chain of distribution.

45. Cf. *Rashomon* (Akira Kurosawa 1950)(possible crime told from several vantage points).
46. *Long*, 77 F.3d 1060 (government has interest in truthful information); *Fletcher*, 74 F.3d 49 (defendant's perjury at trial bars both acceptance of responsibility and safety valve); *Edwards*, 65 F.3d 430 (5th Cir. 1995)(defendant's contradiction of government information and lying to the agents at arrest barred safety valve).
47. 74 F.3d 49.
48. 65 F.3d 430.
49. 77 F.3d 1060.
50. 86 F.3d 935 (9th Cir. 1996).
51. 97 F.3d 1239 (9th Cir. 1996).
52. I am appreciative of Assistant Federal Public Defender Michael Gordon, District of Arizona, for his insight and comments in this section.
53. See e.g., *United States v. Gambino*, No. 96-1125, ___ F.3d___ (2d Cir. 1997).
54. See §1B1.3. See generally Thomas Hutchison & David Yellen, *Federal Sentencing Law & Practice* (2d ed. 1996); Jefri Wood & Diane Sheehey, *Guideline Sentencing* 20-28 (1995)(Fed. Jud. Center); Jon Sands, *The Devil Cites Scripture: Mandatory Minimums, Sentencing Guidelines and Relevant Conduct*, *The Champion*, Dec. 1993, at 29.
55. See generally Jefri Wood & Diane Sheehey, *supra* at 20-28; Jon Sands & Cynthia Coates, *The Mikado's Object: The Tension Between Relevant Conduct and Acceptance of Responsibility in the Federal Sentencing Guidelines*, 23 *Ariz. St. L. J.* 61 (1991).
56. 72 F.3d 88 (8th Cir. 1995).
57. 89 F.3d 710 (10th Cir. 1996).
58. U.S.S.G. Ch. 1, Pt. A(d)(probation). See *United States v. Green*, No. 96-50127, ___ F.3d ___ (9th Cir. Jan. 30, 1997)(district court applied safety valve and then departed downward for aberrant behavior; reversed for failure of district court to give notice to government of its intent to depart).
59. See §5F1.7 (shock incarceration program) and §5C1.1 n.6 (drug rehabilitation).
60. *Ajugwo*, 82 F.3d 925.
61. See *Long*, 77 F.3d 1060; *Fletcher*, 74 F.3d 49; see also *Arrington*, 73 F.3d 144 (defendant can get acceptance of responsibility with no safety valve).
62. See, e.g., *Shrestha*, 86 F.3d 935.
63. Cf. §1B1.3; Thomas Hutchison & David Yellen, *supra*, note 54; Jon Sands, *supra*, note 54 at 29.

RELEVANT COMMENTS ON RELEVANT CONDUCT

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I. THE TEXT OF THE RELEVANT CONDUCT RULES

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) **Chapters Two (Offense Conduct) and Three (Adjustments)**. Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

(b) **Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence)**. Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

II. WHAT CONSTITUTES RELEVANT CONDUCT UNDER § 1B1.3(a)(1)

A. **Introduction**. The concept of relevant conduct represents the U.S. Sentencing Commission's resolution of one of the major issues in the development of the Guidelines: whether to sentence a defendant based upon actual conduct ("real offense" sentencing) or upon the conduct comprising the elements of the offense(s) for which the defendant was indicted and convicted ("charge offense")

sentencing). See U.S.S.G. Ch. 1, Pt. A(4)(a). The Commission ultimately adopted a system in which the offense of conviction determines the applicable offense guideline and relevant conduct is used to apply that guideline as well as Chapter Three adjustments. U.S.S.G. §§ 1B1.2(a)-(b); 1B1.3(a); see United States v. Watterson, 219 F.3d 232 (3d Cir. 2000); United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999) (error to apply § 2D1.2 to § 841(a) conviction); United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000) (extending Crawford analysis to conspiracy cases).

- B. Defendant's Own Acts, and Acts Defendant Aids or Abets. A defendant is accountable for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused, by the defendant" if those acts or omissions occurred within certain temporal limits discussed in section II(D). U.S.S.G. § 1B1.3(a)(1)(A).
1. A defendant is accountable for his own actions regardless of whether he has been convicted of a substantive offense or only of conspiracy; foreseeability does not limit accountability under § 1B1.3(a)(1)(A). See, e.g., United States v. de Velasquez, 28 F.3d 2 (2d Cir.1994) (where defendant convicted of importing heroin, proper to hold her accountable both for quantity she swallowed and for quantity in shoes despite her claim she did not know of latter amount); United States v. Charlarca, 95 F.3d 239 (2d Cir. 1996) (conspiracy); United States v. Cochran, 14 F.3d 1128 (6th Cir. 1994) (conspiracy); United States v. Corral-Ibarra, 25 F.3d 430 (7th Cir. 1994) (conspiracy and attempt); United States v. Strange, 102 F.3d 356 (8th Cir. 1996) (conspiracy); United States v. Mesa-Farias, 53 F.3d 258 (9th Cir. 1995) (substantive); United States v. Lockhart, 37 F.3d 1451 (10th Cir. 1994).
 2. A defendant may be held accountable for his own actions even when they are unintentional. In United States v. Wright, 215 F.3d 1020 (9th Cir. 2000), the defendant received an upward adjustment for discharging a weapon in a bank robbery case where he accidentally shot himself in the foot on his way into the bank.
 3. At least one court has found that there must be some logical connection between the conduct alleged to be relevant and the offense of conviction. In United States v. Ritsema, 31 F.3d 559 (7th Cir. 1994), the defendant pleaded guilty to possession of an unregistered silencer that had been attached to a gun that the defendant showed to his retarded victim in order to intimidate her after he sexually assaulted her. The court held that despite the fact that a literal reading of § 1B1.3(a)(1)(A) would require it to proceed to the obstruction of justice guideline, via a cross reference in the firearms guideline, the court would decline to do so because the connection between the silencer and the threat was too attenuated—there was no evidence that the victim was aware that the gun with which she was threatened bore a silencer.
- C. Jointly Undertaken Criminal Activity. A defendant is accountable for the acts and omissions of another person that were in furtherance of jointly undertaken criminal activity (i.e., "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy") and that were reasonably foreseeable, as long as the acts or omissions occurred within the temporal limitations discussed in section II(D). U.S.S.G. § 1B1.3(a)(1)(B) & comment. (n.2).

1. It is not necessary that there be a conspiracy count for conduct to be deemed jointly undertaken. E.g., United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).
2. The relevant conduct attributable to each participant in jointly undertaken criminal activity is not the same as the criminal liability of each participant. U.S.S.G. § 1B1.3, comment. (n.1); United States v. Ferguson, 23 F.3d 135 (6th Cir. 1994) (reiterating rule that scope of conduct for which a defendant can be held liable under guidelines is significantly less than that for which a defendant may be liable under general law of conspiracy). Therefore, watch for issues regarding the scope of the activity in which a participant is involved and the foreseeability of the other participants' actions.
 - a. Scope of defendant's agreement. The Seventh Circuit remanded a case for further hearing where the district court held street dealers in an extensive cocaine conspiracy responsible for the entire 214 kilograms of cocaine dealt by the larger conspiracy without determining the scope of the defendants' agreements and ignoring the Commission's illustrations in application note 2 of § 1B1.3. The court of appeals found it highly questionable that street dealers would have been aware of the full extent of the conspiracy, even if they understood that it was larger than the individual amounts each was selling. United States v. Willis, 49 F.3d 1271 (7th Cir. 1995); see also United States v. Hammond, 201 F.3d 346 (5th Cir. 1999) (finding defendant not responsible for loss caused by others because not part of joint undertaking); United States v. Pagan, 196 F.3d 884 (7th Cir. 1999) (truckload of drugs fell within scope of agreement of one defendant, but not of another); United States v. Palafox-Mazon, 198 F.3d 1182 (9th Cir. 2000) (upholding district court's refusal to aggregate amounts of marijuana imported by individual backpackers; even though defendants were hired by same person, picked up drugs at same time, and crossed border together with same guide, district court's finding of no jointly undertaken criminal activity was not clearly erroneous); United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (reversing, on plain error review, for failure to determine scope of defendant's agreement where smaller scope would drop offense level).
 - b. Foreseeability. The D.C. Circuit has held that reasonable foreseeability, by itself, cannot be the basis for attributing drug quantities to coconspirators. In the situation where a defendant is a member of a "hub and spoke" conspiracy, a sentencing court may attribute only the drugs reasonably foreseeable to that defendant in furtherance of his particular, small, conspiratorial agreement. United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995); accord United States v. Eybuomwan, 992 F.2d 70 (5th Cir. 1993) (without "absolute prerequisite" of findings on existence and scope of defendant's agreement to undertake activity, findings of foreseeability are "simply irrelevant"); United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993).
3. Specific findings required. The sentencing court must make findings as to conduct attributable to each defendant. See, e.g., United States v. Gilliam, 987 F.2d 1009 (4th Cir. 1993) (no amount of cocaine from second conspiracy to which defendant pled could be attributed to him where no evidence was presented, nor information contained in presentence report, as to amount for which defendant was responsible); United States v. Wilson, 116 F.3d 1066 (5th Cir. 1997); United States v. Navarro, 979 F.2d 786 (9th Cir. 1992); United States v. Green, 175 F.3d 822 (10th Cir. 1999) (remanding for more particularized findings on scope of conspiracy).

However, the D.C. Circuit has found that particularized findings were not required where the defendant's involvement in a drug ring was overwhelming. See United States v. Thomas, 114 F.3d 228, 260-61 (D.C. Cir. 1997). Further, the failure of a sentencing court to make a foreseeability determination, where the issue was not raised below, is not plain error. United States v. Ruiz, 43 F.3d 985 (5th Cir. 1994); see also United States v. Lewis, 117 F.3d 980 (7th Cir. 1997) (appellate court will not remand for resentencing on basis of district court's failure to make foreseeability findings where appellate court can verify district court's conclusions as to quantities).

4. Pursuant to a November 1994 amendment to the last paragraph of application note 2 (U.S.S.G. App. C, amend. 503), the conduct of conspiracy members before a defendant joined it can never be relevant conduct for that defendant. This gives rise to issues regarding when a defendant joined a conspiracy. See, e.g., United States v. Narviz-Garcia, 148 F.3d 530 (5th Cir. 1998); United States v. Cain, 128 F.3d 1249 (8th Cir. 1997); United States v. Word, 129 F.3d 1209 (11th Cir. 1997); see also United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (discussing circuit split prior to amendment). However, where a defendant's own actions prior to joining a conspiracy are part of the same course of conduct or common scheme or plan as the conspiracy, those acts will count as relevant conduct under § 1B1.3(a)(2). United States v. Nesbitt, 90 F.3d 164 (6th Cir. 1996); United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996).
5. Although foreseeability comes up most frequently in drug cases, the issue can arise whenever there are multiple defendants. See, e.g., United States v. Charroux, 3 F.3d 827 (5th Cir. 1993) (each codefendant responsible for foreseeable tax losses caused by other); United States v. Dillard, 43 F.3d 299 (7th Cir. 1994) (defendant responsible for all losses caused by stolen check conspiracy because, although he did not actively participate in the cashing of first three stolen checks, they were within scope of conspiracy and reasonably foreseeable to him); United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998) (defendant accountable for discharge of codefendant's gun during bank robbery where another robber provided a gun to defendant the previous day).
6. Scope of agreement and foreseeability as limitations on accountability.
 - a. The examples in application note 2 of the commentary to U.S.S.G. § 1B1.3 are often more helpful than the cases.
 - b. United States v. Studley, 47 F.3d 569 (2d Cir. 1995). The defendant worked for a "bucket shop" as a telephone solicitor for a short period of time. No evidence indicated that his involvement with the operation extended beyond the solicitation he conducted. Unless the government could produce evidence to the contrary, the defendant could not be held responsible for the fraudulent activity of other telephone solicitors. See also United States v. Morrow, 177 F.3d 272 (5th Cir. 1999) (where employment was prerequisite for participation in conspiracy, salespeople not responsible for losses incurred outside period of employment). But see United States v. Thomas, 199 F.3d 950 (7th Cir. 1999) (runner in telemarketing fraud case held accountable for all losses where he was lifelong friends of two

ringleaders, his activities spanned more than two years, and there was at least some cooperation between him and other runners).

- c. United States v. James, 998 F.2d 74 (2d Cir. 1993). The defendant was the getaway driver in a bank robbery who did not know his friend intended to rob the bank when he drove him there. He did allow his friend to enter the car, gun in hand, after the robbery. Because the defendant did not know the robbery would occur when he dropped his friend off, he could not have foreseen that the associate would strike a bank employee with the gun, so he could not be given the four-level enhancement for use of a firearm. He could, however, have foreseen when he let the gun-bearing friend into the car that his friend would point the gun at a pursuing bank employee, so the three-level enhancement for brandishing a weapon was proper. Cf. United States v. Cover, 199 F.3d 1270 (11th Cir. 2000) (carjacking and kidnapping by accomplice foreseeable to robbery defendant who provided getaway car, even though that car was not actually used).
 - d. United States v. Smith, 13 F.3d 860 (5th Cir. 1994). The court of appeals remanded the case for a determination of whether a quantity of crack found at a residence where the defendant took undercover agents for a purchase was activity which the defendant agreed to jointly undertake with the resident of the house; the defendant's conspiracy with the resident of the house did not automatically make him accountable for that quantity.
 - e. United States v. Redig, 27 F.3d 277 (7th Cir. 1994). The defendant's sentence could not be enhanced for his coconspirator's use of a firearm in a robbery, absent the government establishing that it was foreseeable, where the defendant's plea agreement provided that the government would strike from the count to which he pled language alleging his own use of the handgun. But see United States v. Hamilton, 19 F.3d 350 (7th Cir. 1994) (where defendant a willing participant in a bank robbery, it was reasonably foreseeable to him that codefendant would carry a firearm); United States v. Luna, 21 F.3d 874 (9th Cir. 1994) (assaultive conduct of coconspirator in a bank robbery was foreseeable to defendant who did not participate in assaults).
 - f. United States v. Conkins, 9 F.3d 1377 (9th Cir. 1993). The sentencing court could sentence only for conduct undertaken by, or reasonably foreseeable to, defendants who made only three or four of twenty-six marijuana smuggling trips; if other trips were not foreseeable, amounts for which the defendants could be held responsible would reduce mandatory minimum from ten to five years.
7. Foreseeability and expansion of liability.
- a. United States v. Lacroix, 28 F.3d 223 (1st Cir. 1994). The defendant was the titular head of a real estate firm whose members conspired to defraud lenders by making secret loans to buyers needing funds for down payments. The court held that as the titular head of the firm that oversaw the marketing, building, and financing of the homes, the defendant could foresee, when entering into the illicit loan scheme, that ninety of the homes could be sold in such a fashion, and was therefore responsible for the entire loss amount.

- b. United States v. Morris, 46 F.3d 410 (5th Cir. 1995). The defendant, who served as banker for his brother's drug organization, could foresee the entire 285-kilogram scope of the conspiracy. See also United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999) (holding enforcer liable for all drugs that passed through conspiracy during month that he was involved); United States v. Robbins, 197 F.3d 829 (7th Cir. 1999) (holding defendant responsible for all drugs in conspiracy where he was trusted lieutenant, was involved in conspiracy from beginning, and knew generally that large quantities of drugs were involved).
 - c. United States v. Plescia, 48 F.3d 1452 (7th Cir. 1995). The defendant was responsible for the entire volume of cocaine distributed by the larger conspiracy from whose leader the defendant purchased smaller quantities of drugs on a regular basis. The foreseeability determination was based on the fact that the leader was loquacious in discussing the scope of his operation with an undercover agent, and therefore *likely* also described its scope to the defendant. Furthermore, the defendant's success as a mid-level dealer was dependant on the success of the larger venture.
 - d. United States v. Rice, 49 F.3d 378 (8th Cir. 1995). The defendant was responsible for the quantities of drugs distributed by another dealer despite his lack of direct participation in that dealer's enterprise. The defendant introduced the dealer to his supplier and provided the dealer with an address to which the supplier could ship cocaine. On occasion, the dealer fronted cocaine for the defendant. Even when working separately, they each gave each other tips on how to better run a drug business. Thus, it was foreseeable to the defendant that his behavior was facilitating the other dealer's activities. Cf. United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (reversing sentence where district court held defendant accountable for quantities of drugs sold by friend to undercover agent whom defendant had introduced to friend, where lower court did not make findings that sales were part of an agreement between defendant and his friend and were reasonably foreseeable).
 - e. United States v. Youngpeter, 986 F.2d 349 (10th Cir. 1993). The defendant, who distributed 1.5 pounds of methamphetamine, was responsible for 26.6 pounds that his coconspirator tried but failed, due to ineptitude, to manufacture.
8. Mandatory Minimum Sentences. A number of courts have applied the § 1B1.3(a)(1)(B) standard in determining the drug quantity on which a mandatory minimum for a conspiracy conviction should be based. See United States v. Martinez, 987 F.2d 920 (2d Cir. 1993); United States v. Irvin, 2 F.3d 72 (4th Cir. 1993); United States v. Ruiz, 43 F.3d 985 (5th Cir. 1993); United States v. Pruitt, 156 F.3d 638 (6th Cir. 1998); United States v. Young, 997 F.3d 1204 (7th Cir. 1993); United States v. Jones, 965 F.2d 1507 (8th Cir. 1992); United States v. Becerra, 992 F.2d 960 (9th Cir. 1993). For substantive drug offenses, however, only the quantity of drugs involved in the offense of conviction is used to determine whether a mandatory minimum sentence applies. See, e.g., United States v. Santos, 195 F.3d 549 (10th Cir. 1999).

D. Temporal Limitations on Relevant Conduct Rules in U.S.S.G. § 1B1.3(a)(1).

1. In order to be considered relevant conduct under § 1B1.3(a)(1), the act or omission must have occurred during commission of the offense of conviction, in preparation for that offense, or during the course of attempting to avoid detection or responsibility for that offense. E.g., United States v. Kubick, 199 F.3d 1051 (9th Cir. 1999) (finding that attorney's passing of money through law firm trust account at direction of codefendant was in preparation for bankruptcy fraud).
2. Defendant's withdrawal. United States v. Schorovsky, 202 F.3d 727 (5th Cir. 2000) (finding facts supporting withdrawal from conspiracy ("affirmative actions inconsistent with the object of the conspiracy") sufficient to limit defendant's relevant conduct for drug quantity determination).
3. Defendant's arrest. Although the arrest of a defendant will usually operate to limit his accountability for his own actions under § 1B1.3(a)(1)(A), it does not necessarily limit his accountability for jointly undertaken activity. Compare United States v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993) (defendant properly held responsible for heroin transactions conducted subsequent to his arrest where there was no showing that he disavowed conspiracy prior to his arrest) with United States v. Melton, 131 F.3d 1400 (10th Cir. 1997) (excluding value of money involved in reverse sting that began after defendant's arrest).
4. Defendant's incarceration. United States v. Diaz, 176 F.3d 52 (2d Cir. 1999) (defendant's incarceration does not preclude inclusion of drug quantities distributed after he was incarcerated).
5. Other. United States v. Morrow, 177 F.3d 272 (5th Cir. 1999) (where employment was prerequisite for participation in conspiracy, salespeople not responsible for losses incurred outside period of employment).
6. These temporal limitations do not apply to § 1B1.3(a)(2).

III. WHAT CONSTITUTES RELEVANT CONDUCT UNDER § 1B1.3(a)(2)

- A. Offenses to Which § 1B1.3(a)(2) Applies. In general, the application of § 1B1.3(a)(2) operates for certain types of offenses to bring in conduct outside the offense(s) of conviction that are part of the same or a similar pattern of activity.
1. The provision applies only to offenses covered by a guideline that determines offense level "largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm," such as the guidelines for theft, fraud, and drug offenses. See U.S.S.G. § 1B1.3, comment. (n.3); § 3D1.2(d); United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000). Thus, because sexual assault offenses are excluded under § 3D1.2(d), a defendant's additional assaults on his niece could not be considered as relevant conduct even though the assaults were clearly part of a pattern of activity. United States v. Cuthbertson, 138 F.3d 1325 (10th Cir. 1998); see also United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998).

2. If a defendant sustained a conviction for similar conduct and the sentence was imposed prior to the conduct comprising the offense of conviction, then the earlier conduct counts as criminal history, not as relevant conduct. U.S.S.G. § 1B1.3, comment. (n.8); see also section V(E)(1).

B. Same Course of Conduct; Common Scheme or Plan. Under § 1B1.3(a)(2), a defendant is accountable for “all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction” without regard to whether the acts or omissions occurred during the offense of conviction, in preparation for it, or in avoiding detection or responsibility for it.

1. Common scheme or plan.

- a. Definition. To be part of a common scheme, the offenses “must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi.” U.S.S.G. § 1B1.3, comment. (n.9); United States v. Brierton, 165 F.3d 1133 (7th Cir. 1999).
- b. Limits on “common scheme”. Not all similar behavior constitutes a common scheme. Some examples of this include United States v. Wall, 180 F.3d 641 (5th Cir. 1999) (finding 1996 and 1997 incidents not relevant conduct to 1992 offense); United States v. Moored, 997 F.2d 139 (6th Cir. 1993) (where fraud of which defendant was convicted was motivated by his desire to pay obligations owed stemming from earlier fraud, earlier fraud was not part of relevant conduct); and United States v. Sykes, 7 F.3d 1331 (7th Cir. 1993) (credit card fraud schemes in 1989 and 1991, using same or similar false name and social security number, not part of common scheme with 1988 credit card fraud to which defendant pleaded guilty, and acts not sufficiently repetitive to constitute same course of conduct). In contrast, see United States v. Hulshof, 23 F.3d 1470 (8th Cir. 1994) (defendant bank officer convicted of transferring assets, in 1988, from the credit line of a customer into the loan account of his father; sentencing court properly considered as relevant conduct a series of transactions occurring between 1985 and 1988 in which defendant transferred assets from his father’s checking account into his own personal account).

2. Same course of conduct.

- a. Definition. To be part of the same course of conduct, offenses must be “sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” Some factors to consider include the similarity of, the number of, and the amount of time between, the offenses. U.S.S.G. § 1B1.3, comment. (n.9); see, e.g., United States v. Ramsey, 165 F.3d 980 (D.C. Cir. 1999); United States v. Santiago, 906 F.2d 867 (2d Cir. 1990). When one component is missing, then the others must be stronger. United States v. Wall, 180 F.3d 641 (5th Cir. 1999); United States v. Ruiz, 178 F.3d 877 (7th Cir. 1999); United States v. Hahn, 960 F.2d 903 (9th Cir. 1992).

- b. Limits on “same course of conduct”. In United States v. Pinnick, 47 F.3d 434 (D.C. Cir. 1995), dismissed counts involving the defendant’s use of counterfeit checks to open a brokerage account under an alias and to purchase a car were part of the same course of conduct as, and thus relevant conduct to, the count of conviction for cashing five counterfeit checks using a false name. However, a dismissed count alleging the use of two aliases to file a fraudulent credit card application was not part of the same course of conduct, because it was of a different nature than the counterfeit check fraud. The fact that both counts involved fraud to obtain money was not a sufficient connection to make the credit card count relevant conduct to the counterfeit check counts: the conduct must relate to the offense of conviction, not simply to other offenses offered as relevant conduct. Likewise, in United States v. Gomez, 164 F.3d 1354 (11th Cir. 1999), where the defendant supplied cocaine to a conspiracy operating out of a carwash, it was error to include an amount sold to a person not part of the carwash conspiracy; the fact that both the instant offense and the conduct offered as relevant involved drugs was not enough to make them part of the same course of conduct. But see United States v. Lawrence, 915 F.2d 402 (8th Cir. 1990) (proper to include quantities of cocaine distributed during time frame of offense of conviction, conspiracy to distribute marijuana); United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) (proper to include marijuana obtained from Columbia even though conspiracy charged involved marijuana from Mexico, where defendant stored Columbian marijuana in coconspirator’s barn during Mexican conspiracy).
- c. Distinction from “common scheme”. Whereas “common scheme” requires a connection among participants and occasions, “same course of conduct” requires only that a defendant have been engaged in a particular, identifiable criminal behavior over a period of time. United States v. Svacina 137 F.3d 1179 (10th Cir. 1998). Not all courts have drawn a clear distinction between “common scheme” and “same course of conduct,” but it appears that more conduct can be deemed relevant under “same course of conduct” than “common scheme.” See, e.g., United States v. Martin, 157 F.3d 46 (2d Cir. 1998) (in case involving multiple thefts of airplane parts, finding that even if defendant’s conduct did not constitute part of a “common scheme or plan,” it would qualify as “same course of conduct”).

IV. “UNLESS OTHERWISE SPECIFIED”

- A. The introductory clause to § 1B1.3(a), “Unless otherwise specified,” enables the Sentencing Commission to modify the application of the relevant conduct rules in particular circumstances.
- B. When it has made modifications, the Commission typically has limited the scope of relevant conduct to a defendant’s own acts or omissions. See, e.g., U.S.S.G. § 3C1.1, comment. (n.9) (obstruction of justice adjustment); § 3C1.2, comment. (n.5) (reckless endangerment during flight); § 3E1.1(a) & comment. (n.1) (acceptance of responsibility); § 5C1.2(2) & comment. (n.4) (safety valve). Compare U.S.S.G. § 2D1.1(b)(1) (“If a dangerous weapon (including a firearm) was possessed . . .”) with § 2D1.1(b)(2) (“If the defendant unlawfully imported or exported a controlled substance . . .”). Occasionally, however, the Commission has expanded the scope of relevant conduct. E.g., United States v. Lovaas, ___ F.3d ___, 2001 WL 199860 (7th Cir. Mar. 1, 2001)

(No. 00-1862) (enhancement in § 2G2.2 for pattern of sexual activity broader than scope of conduct typically considered).

V. WHAT THE RELEVANT CONDUCT RULES DETERMINE

- A. The Base Offense Level. Where the guideline for the offense of conviction contains more than one base offense level, the relevant conduct rules are used to set the appropriate base level. *See, e.g.*, U.S.S.G. § 2A1.4 (involuntary manslaughter); § 2A2.3 (minor assault); § 2K1.2 (firearms). In the case of the RICO guidelines, U.S.S.G. §§ 2E1.1-.4, the Second Circuit has limited the determination of the appropriate base offense level to conduct contained in the offenses of conviction. *United States v. McCall*, 915 F.2d 811 (2d Cir. 1990). *But see United States v. Carrozza*, 4 F.3d 70 (1st Cir. 1993) (applying relevant conduct rules to determination of base offense level for RICO guideline).
- B. Specific Offense Characteristics. The relevant conduct rules are used to determine if a specific offense characteristic applies. *E.g.*, *United States v. Breedlove*, 197 F.3d 524 (D.C. Cir. 1999) (in fraud case, where dollar amounts from uncharged transactions counted as loss, proper to assess points for more than minimal planning); *United States v. Shumard*, 120 F.3d 339 (2d Cir. 1997) (where count of conviction charged fraud against only one bank victim, proper to enhance sentence for number of victims under § 2F1.1(b)(2) based on relevant conduct); *United States v. Thomas*, 120 F.3d 564 (5th Cir. 1997) (gun enhancement under § 2D1.1(b)(2) properly applied based on coconspirator's firearm); *United States v. Santoro*, 159 F.3d 318 (7th Cir. 1998) (applying enhancement for number of weapons based on defendant's possession of third gun 6-9 months prior to offense of conviction); *United States v. Parker*, 989 F.2d 948 (8th Cir. 1993) (defendant who arguably did not participate himself in more than minimal planning nonetheless received upward adjustment because planning undertaken by his coconspirators was reasonably foreseeable).
- C. Cross References. Relevant conduct can determine the application of cross references. *See, e.g.*, *United States v. Jones*, 994 F.2d 456 (8th Cir. 1993) (defendant properly sentenced under guideline applicable to producing child pornography despite dismissal of that count under plea bargain, because guideline for receiving child pornography contained cross reference to guideline for producing it).
- D. Chapter Three Adjustments.
1. Role in Offense.
 - a. Generally. *United States v. Cyphers*, 130 F.3d 1361 (9th Cir. 1997) (in environmental crimes case, defendant properly given enhancement for supervisory role where, although he was convicted only of submitting false statements, he directed others to drain contaminated water into storm drains); *United States v. Holland*, 22 F.3d 1040 (11th Cir. 1994) (defendant, who committed offense of conviction—perjury by lying about his assets—alone, but who was aided in hiding the assets, was eligible for leadership role enhancement because he was a leader in the relevant conduct of asset concealment).

- b. Conflict among circuits over basis for minor role adjustment. Compare United States v. Olibrices, 979 F.2d 1557 (D.C. Cir. 1992) (adjustment for mitigating role not available where the more serious conduct not used to set offense level); United States v. Goodman, 165 F.3d 169 (2d Cir. 1999); United States v. Richardson, 130 F.3d 765 (7th Cir. 1997); United States v. Marsalla, 164 F.3d 1178 (8th Cir. 1999); United States v. James, 157 F.3d 1218 (10th Cir. 1998) and United States v. Holley, 82 F.3d 1010 (11th Cir. 1996) with United States v. Isaza-Zapata, 148 F.3d 236 (3d Cir. 1998) (holding that fact that defendant was not charged with conspiracy or was charged only with drugs in possession does not preclude consideration of mitigating role adjustment) and United States v. Ruelas, 106 F.3d 1416 (9th Cir. 1997) (adjustment for mitigating role still available even where full relevant conduct not used to set offense level). The Sentencing Commission has proposed an amendment that would resolve the split in favor of not precluding the adjustment in courier cases. U.S. Sentencing Comm’n, Proposed Amendments to the Sentencing Guidelines, vol. 1, no. 7 (Jan. 24, 2001) (“reader-friendly” version). If the amendment is promulgated, it would take effect Nov. 1, 2001.
2. Abuse of Position of Trust. Compare United States v. Duran, 15 F.3d 131 (9th Cir. 1994) (under 1990 amendment to commentary to U.S.S.G. § 3B1.3, court may look beyond conduct constituting offense of conviction to determine whether adjustment is appropriate) with United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (limiting consideration of enhancement to offense of conviction). Note that this guideline was amended significantly effective November 1993.
3. Obstruction of Justice. The Sentencing Commission has limited the application of this adjustment to a defendant’s own conduct. U.S.S.G. § 3C1.1, comment. (n.9). Further, the obstruction must relate to the offense of conviction or to relevant conduct (note that this guideline was amended in both 1997 and 1998 to clarify this point; be aware of the date of the offense for possible ex post facto arguments), as well as occur during the investigation, prosecution or sentencing of the offense. United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1998) (reversing application of enhancement based on defendant’s failure to appear for proceeding connected to conduct relevant to offense of conviction where defendant did not fail to appear at any proceeding directly related to offense of conviction); United States v. Ramunno, 133 F.3d 476 (7th Cir. 1998) (obstruction must relate to offenses charged); United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998) (false statement to probation officer during sentencing investigation warranted enhancement, even though statement related to conduct outside of offense of conviction).
4. Acceptance of Responsibility.
 - a. The Sentencing Commission’s policy is that failure to discuss relevant conduct cannot be used to deprive a defendant of an adjustment for acceptance of responsibility, i.e., acceptance cannot be conditioned upon a defendant’s admission of relevant conduct. U.S.S.G. § 3E1.1, comment. (n.1(a)); United States v. Salinas, 122 F.3d 5 (5th Cir. 1997); United States v. Piper, 918 F.2d 839 (9th Cir. 1990).

- b. If a defendant does discuss relevant conduct, however, and the court determines that he falsely denies or frivolously contest it, the adjustment can be denied. United States v. Cruz-Camacho, 137 F.3d 1220 (10th Cir. 1998); United States v. Coe, 79 F.3d 126 (11th Cir. 1996); cf. United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (although reduction properly denied for falsely denying relevant conduct, remanding case for determination as to whether uncharged conduct met relevant conduct definition).

E. Criminal History.

1. In general. U.S.S.G. § 4A1.2(a)(1) and application note 1 define the term “prior sentence” as being a sentence previously imposed for conduct that is not part of the instant offense, i.e., that is not relevant conduct. See, e.g., United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998); United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998); United States v. Flores, 149 F.3d 1272 (10th Cir. 1998). However, if the prior sentence is imposed prior to the acts or omissions constituting the offense of conviction, the sentence counts as criminal history, not relevant conduct, even if the conduct that is the subject of the sentence otherwise meets the definition of “same course of conduct or common scheme or plan.” U.S.S.G. § 1B1.3, comment. (n.8). Note 8 gives examples of the operation of this provision.
2. Time periods. Prior sentences count only if they fall within the time frames specified in § 4A1.2(d) or (e). These periods run backward from the defendant’s commencement of the instance offense, which includes relevant conduct. U.S.S.G. § 4A1.2 comment. (n.8); see, e.g., United States v. Peck, 161 F.3d 1171 (8th Cir. 1998).
3. “Recency” points. Relevant conduct also comes into play in determining whether a defendant committed the instant offense while under another sentence or within two years of release on a prior conviction, for which additional criminal history points are assigned. U.S.S.G. § 4A1.1(d)-(e) & comment. (nn.4-5); see, e.g., United States v. Sherwood, 156 F.3d 219 (1st Cir. 1998); United States v. Harris, 932 F.2d 1529 (5th Cir. 1991); United States v. Wilson, 168 F.3d 916 (6th Cir. 1999); United States v. Smith, 991 F.2d 1468 (9th Cir. 1993).

- F. Concurrent and Consecutive Sentences. If the defendant is serving a sentence at the time of sentencing on the instance offense, and the prior sentence is for conduct that is fully taken into account in determining the sentence for the instant offense, i.e., the prior sentence is for relevant conduct, then the sentence for the instant offense must run concurrently with the prior sentence. U.S.S.G. § 5G1.3(b) & comment. (n.2); United States v. Blanc, 146 F.3d 847 (11th Cir. 1998).

G. Safety Valve.

1. Firearm possession. U.S.S.G. § 5C1.2(2) and application note 4 limit a defendant’s accountability for firearm possession to his own conduct; thus, the fact that a coconspirator possessed a weapon during the offense of conviction does not preclude safety valve relief. In re Sealed Case (Sentencing Guidelines’ Safety Valve), 105 F.3d 1460 (D.C. Cir. 1997); United States v. Wilson, 114 F.3d 429 (4th Cir. 1997); United States v. Wilson, 105 F.3d 219 (5th Cir. 1997). Contra United States v. Hallum, 103 F.3d 87 (10th Cir. 1996) (finding two defendants

responsible for third defendant's gun on basis of "jointly undertaken criminal activity"). However, a defendant's possession of a firearm in connection with drug dealing that is relevant conduct outside the offense of conviction renders him ineligible for safety valve relief. United States v. Plunkett, 125 F.3d 873 (D.C. Cir. 1997); United States v. Chen, 127 F.3d 286 (2d Cir. 1997).

2. Fifth prong. To meet § 5C1.2(5), the defendant must provide "all information and evidence [he] has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." E.g., United States v. Miller, 151 F.3d 957 (9th Cir. 1998).

H. Upward Departures. The Fifth Circuit has stated that a district court is not limited to consideration only of acts that are relevant conduct or criminal. United States v. Arce, 118 F.3d 335 (5th Cir. 1997). The Sixth Circuit, while agreeing that a district court may consider more than "relevant conduct," found that it cannot base an upward departure on conduct completely unrelated to the offense of conviction. United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (affirming upward departure based on torture for defendant convicted of drug conspiracy, but rejecting departure for defendant who pled only to one count of distribution occurring several weeks before torture). The Ninth Circuit has said that uncharged or dismissed conduct, in the context of a plea agreement, cannot be the basis for an upward departure. United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999).

VI. WHAT CONDUCT CAN BE CONSIDERED

- A. Must Conduct Be Criminal to Be Considered? Neither the relevant conduct guideline nor its commentary expressly state that, to qualify as relevant conduct, the conduct must be unlawful. By the same token, neither one expressly states that lawful conduct is excluded. Several circuits have found that conduct must be illegal before it can be considered as relevant conduct. See United States v. Dickler, 64 F.3d 818 (3d Cir. 1995); United States v. Peterson, 101 F.3d 375 (5th Cir. 1996); United States v. Shafer, 199 F.3d 826 (6th Cir. 1999); United States v. Sheahan, 31 F.3d 595 (8th Cir. 1994); United States v. Standard, 207 F.3d 1136 (9th Cir. 2000); United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999); see also United States v. Ahmad, 202 F.3d 588 (2d Cir. 2000) (under § 2K2.1, in determining number of guns involved, finding error in inclusion of guns whose possession by defendant violated no federal law; rejecting government's argument that guns should count because their possession violated state and local law). But see United States v. Smallwood, 920 F.2d 1231 (5th Cir. 1991) (approving use in methamphetamine trafficking case of yield from phenylacetic acid possessed by defendant, even though at the time possession of that substance was not illegal and substance was not listed as a precursor); United States v. Otero, 868 F.2d 1412 (5th Cir. 1989) (sustaining application of gun enhancement in drug-trafficking case even though defendant's possession not unlawful; gun enhancement not dependent on whether weapon carried illegally).
- B. Uncharged Conduct Can Be Considered. U.S.S.G. §1B1.3, comment. (backg'd); e.g., United States v. Bennett, 37 F.3d 687 (1st Cir. 1994) (district court erred in finding that it was inappropriate to consider uncharged fraudulent conduct to determine loss amount in a fraudulent loan scheme); United States v. Bove, 155 F.3d 44 (2d Cir. 1998) (proper to include uncharged conduct in determining loss under tax guideline); United States v. Miller, 910 F.2d 1321 (6th Cir. 1990)

(additional sales of cocaine revealed to probation officer were part of relevant conduct); United States v. Newbert, 952 F.2d 291 (9th Cir. 1991). But see United States v. Mezas de Jesus, 217 F.3d 638 (9th Cir. 2000) (requiring “clear and convincing” evidence before nine-level increase for uncharged kidnapping could be applied); United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999) (under Ninth Circuit precedent, uncharged or dismissed conduct in context of plea agreement cannot be used as basis for upward departure).

C. Conduct in Dismissed Counts Can Be Considered. E.g., United States v. Streich, 987 F.2d 104 (2d Cir. 1993); United States v. Gibson, 985 F.2d 860 (6th Cir. 1993); United States v. Redlin, 983 F.2d 893 (8th Cir. 1993); United States v. Fine, 975 F.2d 596 (9th Cir. 1992); cf. United States v. Williams, 10 F.3d 910 (1st Cir. 1993) (consideration of conduct in dismissed counts proper where nexus shown to count of conviction, even if dismissal of counts did not result in lower sentence); United States v. McGee, 7 F.3d 1496 (10th Cir. 1993) (where more serious counts dismissed, failure of defendant to stipulate to conduct in them pursuant to § 1B1.2 did not preclude consideration of that conduct pursuant to relevant conduct rules); United States v. Velez, 1 F.3d 386 (6th Cir. 1993) (court would not give effect to provision in plea agreement that relevant conduct would be limited to that which occurred in the Iowa count to which defendant pled, where defendant had committed a multi-state fraud with activities in other states as part of the same course of conduct). But see United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999) (under Ninth Circuit precedent, uncharged or dismissed conduct in context of plea agreement cannot be used as basis for upward departure).

D. Acquitted Conduct.

1. The Supreme Court has ruled that conduct underlying charges of which a defendant has been acquitted can nonetheless be used as relevant conduct. United States v. Watts, 519 U.S. 148 (1997). This decision resolves a conflict among the circuits, *id.* at 149 & n.1, in favor of the majority position. Cases applying Watts include United States v. Conley, 156 F.3d 78 (1st Cir. 1998), and United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997).
2. Where the use of acquitted conduct changes the offense level, a higher standard of proof may be required. Compare United States v. Hopper, 177 F.3d 824 (9th Cir. 1999) (upholding increase based on violent activity of which defendants were acquitted, but requiring use of “clear and convincing” standard for increase that more than doubled one defendant’s sentence) with United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000) (use of acquitted conduct of arson as relevant conduct did not require use of higher standard of proof where sentences were roughly half of what they would have been had defendants actually been convicted of arson).
3. Where the consideration of acquitted conduct results in an astronomical increase in a sentence, there is precedent for a downward departure. United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) (where consideration of acquitted conduct under § 2K2.1 resulted in increase from 30 years to mandatory life, district court has authority to depart); United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992) (where acquitted conduct considered under U.S.S.G. § 2K2.1 resulted in an increase of defendant’s sentencing range from 12-18 months to 210-262 months, district court had power to depart downward on the basis that Sentencing Commission did not consider adequately this drastic consequence of considering acquitted conduct).

- E. Conduct in Counts on Which Jury Deadlocked May Be Used. United States v. Duran, 15 F.3d 131 (9th Cir. 1994) (in making determination whether adjustment for abuse of trust was appropriate, embezzlement crimes on which jury failed to reach verdict could be used as relevant conduct).
- F. Post-Arrest Conduct Can Be Considered. Conduct occurring after a defendant's arrest can meet the "same course of conduct" test. E.g., United States v. Kidd, 12 F.3d 30 (4th Cir. 1993) (defendant, who was arrested and charged with sales to undercover informant and then, after his release, sold an additional amount, could be held accountable for quantity involved in post-arrest conduct despite having pled guilty only to earlier sale).
- G. Pre-Guideline Conduct Can Be Considered. Conduct occurring before the Sentencing Guidelines went into effect can be considered if it is otherwise relevant, i.e., part of the same course of conduct or common scheme or plan. E.g., United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994) (joining other circuits in holding that conduct occurring before effective date of Guidelines may be taken into consideration to determine relevant conduct for sentencing purposes).
- H. Conduct Outside Statute of Limitations Can Be Considered. Conduct occurring outside the time frame established by a statute of limitations may be considered. E.g., United States v. Wishnefsky, 7 F.3d 254 (D.C. Cir. 1993) (funds embezzled outside statute of limitations period could be added to those embezzled within statutory period to determine loss amount); accord United States v. Silkowski, 32 F.3d 682 (2d Cir. 1994); United States v. Stephens, 198 F.3d 389 (3d Cir. 1999); United States v. Lokey, 945 F.2d 825 (5th Cir. 1991); United States v. Pierce, 17 F.3d 146 (6th Cir. 1994); United States v. Matthews, 116 F.3d 305 (7th Cir. 1997); United States v. Williams, 217 F.3d 751 (9th Cir. 2000); United States v. Neighbors, 23 F.3d 306 (10th Cir. 1994); United States v. Behr, 93 F.3d 764 (11th Cir. 1996).
- I. Conduct Occurring Outside United States. Such conduct may be considered if it otherwise meets the definition of relevant conduct. E.g., United States v. Hughes, 211 F.3d 676 (1st Cir. 2000) (cross reference in § 2B3.2 applied on basis of defendant's commission of murder in Mexico); United States v. Greer, 223 F.3d 41 (2d Cir. 2000) (counting drugs intended for distribution in Canada where defendant convicted of importing and exporting); United States v. Levorio-Quiroz, 161 F.3d 903 (5th Cir. 1998) (finding defendant's use of gun in battle with Mexican police not part of relevant conduct where defendant convicted of importing firearm and cross reference in § 2K2.1(c) refers only to "another federal, state, or local offense"); United States v. Dawn, 129 F.3d 878 (7th Cir. 1997) (rejecting defendant's argument that conduct occurring in foreign country was not relevant conduct where defendant, convicted of receiving and possessing child pornography, had made in Honduras the very films he received in the United States); United States v. Farouil, 124 F.3d 838 (7th Cir. 1997) (including drugs seized in Belgium from defendant's accomplice because they were destined for distribution in United States); United States v. Wilkinson, 169 F.3d 1236 (10th Cir. 1999) (upholding consideration of child pornography produced by defendant in Thailand in applying cross reference from § 2G2.4 to § 2G2.1); United States v. Brown, 164 F.3d 518 (10th Cir. 1998) (losses from coconspirator's activities in Germany not relevant conduct for defendant because not reasonably foreseeable to him).

- J. Conduct Committed While Defendant a Juvenile. United States v. Thomas, 114 F.3d 228, 267 (D.C. Cir. 1997) (where defendant was properly convicted as an adult for conspiracy he joined as juvenile but continued after he turned eighteen, district court properly considered defendant's and coconspirators' conduct going back to when defendant joined conspiracy at age eleven); United States v. Gibbs, 174 F.3d 762 (6th Cir. 1999) (although vacating conspiracy conviction, holding that district court, on remand, may take into account quantities of crack cocaine defendant sold before he reached age eighteen as relevant conduct to his substantive drug trafficking convictions); United States v. Jarrett, 135 F.3d 519 (7th Cir. 1998) (although defendant could not be convicted of conspiracy because of juvenile status, once he was properly transferred to adult status and convicted of substantive offenses, conduct of other participants could be attributed to defendant).
- K. Double Jeopardy.
1. Double jeopardy does not bar use of conduct to enhance a sentence where the defendant was previously convicted of an offense constituting the relevant conduct. Witte v. United States, 515 U.S. 389 (1995); Williams v. Oklahoma, 358 U.S. 576 (1959).
 2. Double jeopardy does not bar prosecution for crimes previously used as relevant conduct to enhance a sentence. Witte v. United States, 515 U.S. 389 (1995); United States v. Rohde, 159 F.3d 1298 (10th Cir. 1998).

VII. WHAT EVIDENCE CAN BE CONSIDERED

- A. In General. The Federal Rules of Evidence do not apply at sentencing. Fed. R. Evid. 1101(d)(3); see U.S.S.G. § 6A1.3, p.s., comment. However, to satisfy due process concerns, evidence must have "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a), p.s.
- B. Testimony. United States v. Owusu, 199 F.3d 329 (6th Cir. 2000) (upholding use of coconspirator's testimony regarding drug quantity estimates where testimony consistent with other testimony and witness had no reason to single out defendant); United States v. Robbins, 197 F.3d 829 (7th Cir. 1999) (upholding use of alcoholic witness's testimony where three defense attorneys cross-examined witness and testimony was not inconsistent with other testimony); United States v. Griffin, 194 F.3d 808 (7th Cir. 1999) (upholding use of testimony of other drug dealers to determine quantity; defendant must do more to challenge reliability than simply asserting evidence is unreliable and uncorroborated); United States v. Pigeon, 197 F.3d 879 (7th Cir. 1999) (upholding estimate of drug quantity based on testimony of witness who made hundreds of buys from defendants).
- C. Hearsay.
1. Confrontation Clause. The Confrontation Clause does not apply at sentencing, so hearsay can be used. However, the hearsay must be reliable. See, e.g., United States v. Bird, 989 F.2d 450 (5th Cir. 1990); United States v. Wise, 976 F.2d 393 (8th Cir. 1992); United States v. Petty, 982 F.2d 1365 (9th Cir. 1993). Statements by unidentified sources may be used only if there is good

cause for non-disclosure of the source and there is sufficient corroboration by other means. U.S.S.G. § 6A1.3 p.s., comment.

2. Recent cases. United States v. Randall, 171 F.3d 195 (4th Cir. 1999) (upholding district court's reliance on coconspirator's statements, as related by police detective, to attribute nearly 1,900 grams of crack to defendant); United States v. Gibbs, 174 F.3d 762 (6th Cir. 1999) (vacating sentences where drug quantities based solely on statements made at post-trial private interview between probation officer and cooperating witness or on statements provided by other probation officers to testifying probation officer; witness's interview statements were at times contradictory to his trial testimony and some information was a "guess;" requiring on remand more specific evidence of source and reliability of witness's information); United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (upholding use of coconspirator's pretrial statements to officer contained in PSR where officer testified at sentencing about statements and defendant cross-examined officer); United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999) (codefendant's statements to agent sufficiently reliable where agent's testimony corroborated by codefendant's statements to other officers and defendant declined to call codefendant to challenge statements); United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (finding clear error in district court's reliance on agent's estimates of conspiracy's sales where agent had no firsthand knowledge of sales, did not reveal hearsay, did not provide FBI 302 reports, and was not cross-examined).
- D. Suppressed Evidence. Nearly every federal appellate court has ruled that the exclusionary rule does not apply at sentencing; therefore, evidence suppressed for trial purposes can be considered against a defendant at sentencing in determining relevant conduct. United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991); United States v. Tejada, 956 F.2d 1256 (2d Cir. 1992); United States v. Torres, 926 F.2d 321 (3rd Cir. 1991); United States v. Montez, 952 F.2d 854 (5th Cir. 1992); United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993); United States v. Brimah, 214 F.3d 854 (7th Cir. 2000); United States v. Taul-Hernandez, 88 F.3d 576 (8th Cir. 1996); United States v. Kim, 25 F.3d 1426 (9th Cir. 1994); United States v. Jessup, 966 F.2d 1354 (10th Cir. 1992); United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991); cf. United States v. Raposa, 84 F.3d 502 (1st Cir. 1996) (without deciding if exclusionary rule applies at sentencing, finding that even if it did, defendant's own statements to probation officer provide independent and sufficient basis for including drug quantities).

REVOCATION OF PROBATION AND SUPERVISED RELEASE

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INTRODUCTION

This outline addresses revocation of probation and supervised release. Revocation of probation and revocation of supervised release are, in many ways, treated identically. See, e.g., Fed. R. Crim. P. 32.1 (entitled “Revocation or Modification of Probation or Supervised Release”); U.S.S.G. Ch. 7, Pt. B (entitled “Probation and Supervised Release Violations”); id. intro. comment. (“Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.”). However, the statutory provisions concerning sentencing for each differ in some significant ways.

Consequently, this outline is organized as follows: Part I addresses the issues common to both revocation of probation and revocation of supervised release. Part II focuses on those issues peculiar to probation revocation, and Part III on those issues peculiar to supervised release revocation. (For another take on many of the same issues, see U.S. Sentencing Commission, Office of General Counsel, Probation and Supervised Release Violations (July 2000), available at <http://www.ussc.gov/training.htm>; for an article written for probation officers, see David N. Adair, Jr., Revocation Sentences: A Practical Guide, Fed. Probation, Dec. 2000, at 67.)

I. REVOCATION OF PROBATION AND OF SUPERVISED RELEASE: CONSIDERATIONS COMMON TO BOTH

A. Jurisdiction of the District Court

1. To have jurisdiction to revoke probation or supervised release, a district court must issue a warrant or summons that is based on an alleged violation of a condition of probation or supervised release prior to the expiration of the period of supervision. United States v. Morales, 45 F.3d 693 (2d Cir. 1995) (supervised release); United States v. Barton, 26 F.3d 490 (4th Cir. 1994) (supervised release); United States v. Neville, 985 F.2d 992 (9th Cir. 1993) (supervised release); United States v. Schmidt, 99 F.3d 315 (9th Cir. 1996) (probation).

2. On September 13, 1994, Congress amended the statutory revocation provisions to permit courts to exercise their power to revoke probation or supervised release even after the expiration of the supervision period as long as the warrant or summons was issued before the expiration of the supervision period. 18 U.S.C. § 3565(c) (probation); 18 U.S.C. § 3583(i) (supervised release); United States v. Lominac, 144 F.3d 308 (4th Cir. 1998) (supervised release). However, any delay must be “reasonably necessary;” a two-year delay caused by the government was not reasonably necessary, so the court did not have jurisdiction to revoke probation. United States v. Dworkin, 70 F. Supp. 2d 214 (E.D.N.Y. 1999).
3. Jurisdiction and tolling of supervised release: Supervised release is tolled when a defendant is on fugitive status, United States v. Crane, 979 F.3d 687 (9th Cir. 1992), or when a defendant is incarcerated in connection with a conviction, 18 U.S.C. § 3624(e). However, pre-trial detention does not qualify as imprisonment for purposes of § 3624(e). United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999).

B. Use of a Magistrate Judge

1. Where the original offense is a misdemeanor for which the defendant consented to trial, judgment, and sentencing by a magistrate judge, the magistrate judge has authority to revoke probation or supervised release. 18 U.S.C. § 3401(b), (d) (probation), (h) (supervised release); United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996) (probation; noting that 18 U.S.C. § 3401(h) was implemented to overrule United States v. Williams, 919 F.2d 266 (5th Cir. 1990)); United States v. Raynor, 764 F. Supp. 1067 (D. Md. 1991) (supervised release); United States v. Crane, 979 F.2d 687 (9th Cir. 1992) (supervised release).
2. In other cases, the district court may refer revocation proceedings to a magistrate judge, who must file proposed findings and recommendations. 18 U.S.C. § 3401(i) (added 1992); United States v. Rodriguez, 23 F.3d 919 (5th Cir. 1994); see United States v. Waters, 158 F.3d 933 (6th Cir. 1998). However, the language of section 3401(i) appears to be limited to supervised release cases.

- C. Probation Officers May File Petition**: Three appellate courts have held that the filing of petitions seeking warrants and revocation proceedings by probation officers does not exceed the probation officers’ statutory authority under 18 U.S.C. § 3603, was not an improper delegation of a judicial function, and was not the unauthorized practice of law. United States v. Cofield, 233 F.3d 405 (6th Cir. 2000); United States v. Mejia-Sanchez, 172 F.3d 1172 (9th Cir. 1999); United States v. Davis, 151 F.3d 1304 (10th Cir. 1998); see also United States v. Burnette, 980 F. Supp. 1429 (M.D. Ala. 1997). Contra United States v. Jones, 957 F. Supp. 1088 (E.D. Ark. 1997) (invalidating practice); see also United States v. Waters, 158 F.3d 933 (6th Cir. 1998) (noting district court criticism of Jones, but finding claim waived).

- D. Contents of Warrant: Rule 32.1(a)(2)(A); 18 U.S.C. § 3565(c); United States v. Gordon, 961 F.2d 426 (3rd Cir. 1992); United States v. Kirtley, 5 F.3d 1110 (7th Cir. 1993); United States v. Tham, 884 F.2d 1262 (9th Cir. 1989); United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); see also Section I(H)(1).
- E. The Probable Cause Hearing: Fed. R. Crim. P. 32.1(a)(1) provides that if a defendant is held in custody on the basis of a violation of probation or supervised release, he must be given a prompt hearing to determine if there is probable cause to hold him. The defendant must be given notice of the hearing, an opportunity to appear and present evidence, an opportunity to question opposing witnesses (if requested), and notice of the right to counsel. However, where a defendant has a hearing limited to the issue of detention in the course of which the alleged violation is described, the defendant waives his right to a probable cause hearing unless he specifically requests one. United States v. Whalen, 82 F.3d 528 (1st Cir. 1996).
1. Disclosure of evidence required: United States v. Ramos-Santiago, 925 F.2d 15 (1st Cir. 1991); United States v. Ayers, 946 F.2d 1127 (5th Cir. 1991); United States v. Donaghe, 924 F.2d 940 (9th Cir. 1991); United States v. Tham, 884 F.2d 1262 (9th Cir. 1989). Be wary of probation officers testifying to information received but not disclosed.
- F. The Revocation Hearing: Rule 32.1(a)(2) requires that a revocation hearing be held within a reasonable time in the district of jurisdiction. The defendant must be accorded various rights and opportunities: written notice of the alleged violation; disclosure of evidence; the opportunity to appear and present evidence; the opportunity to question opposing witnesses; and notice of the right to counsel. See Section I(H) for cases addressing the constitutional dimensions of these rights.
- G. Evidentiary Issues
1. Discovery: Rule 16 (discovery) applies by virtue of the fact that it is not excluded by Rule 54. See generally Bobbi J. Anello, Annotation, Availability of Discovery at Probation Revocation Proceedings, 52 A.L.R.5th 559 (1997).
 2. Applicability of Jencks Act: Rule 32.1(c) provides for the application of Fed. R. Crim. P. 26.2, concerning witness statements, to revocation proceedings.
 3. Applicability of evidentiary rules
 - a. Federal Rules of Evidence: Rule 1101(d)(3) provides specifically that the Rules of Evidence do not apply to sentencing or to the granting or revoking of probation. See also United States v. McCallum, 677 F.2d 1024 (4th Cir. 1982). Rule 1101, however, does not mention revocation of supervised release. In United States v. Frazier, 26 F.3d 110 (11th Cir. 1994), aff'g 807 F. Supp. 119 (N.D. Ga. 1992), the Eleventh Circuit held that the Rules of Evidence do not apply to supervised release revocations, because supervised release is comparable

to probation and parole. See also United States v. Portalla, 985 F.2d 621 (1st Cir. 1993); United States v. Walker, 117 F.3d 417 (9th Cir. 1997).

- b. Exclusionary rule: The Supreme Court has held that the exclusionary rule does not apply to state parole revocation proceedings. Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998) (5-4 decision); see United States v. Armstrong, 187 F.3d 392 (4th Cir. 1999); United States v. Hebert, 201 F.3d 1103 (9th Cir. 2000). Prior to this decision, the majority of courts addressing the issue had held that the exclusionary rule does not apply to federal revocation proceedings unless there is police harassment of the defendant. E.g., United States v. Montez, 952 F.2d 854 (5th Cir. 1992); United States v. Finney, 897 F.2d 1047 (10th Cir. 1990).
4. Use of hearsay: Hearsay testimony is admissible as long as it is reliable. United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991); United States v. Pratt, 52 F.3d 671 (7th Cir. 1995); United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978); United States v. Miller, 514 F.2d 41 (9th Cir. 1975); cf. U.S.S.G. § 6A1.3, comment. (court may consider any information “so long as it has ‘sufficient indicia of reliability to support its probable accuracy,’” and specifically permitting consideration of reliable hearsay). If the hearsay is reliable, the court must weigh the need for it against the defendant’s right to confront and examine adverse witnesses. United States v. Waters, 158 F.3d 933 (6th Cir. 1998) (use of reliable hearsay not barred by Rule 32.1(a)(2)(D)); United States v. O’Meara, 33 F.3d 20 (8th Cir. 1994); United States v. Reynolds, 49 F.3d 423 (8th Cir. 1995); United States v. Walker, 117 F.3d 417 (9th Cir. 1997); United States v. Frazier, 26 F.3d 110 (11th Cir. 1994); see Section I(H)(4).
5. Standard of proof
 - a. To revoke a defendant’s supervised release, the court must find by a preponderance of the evidence that the defendant violated a condition of supervised release. 18 U.S.C. § 3583(e)(3); see also United States v. Whalen, 82 F.3d 528 (1st Cir. 1996); United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994); United States v. Goad, 44 F.3d 580 (7th Cir. 1995); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994).
 - b. Preponderance of the evidence is also the standard applied to probation revocation. United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993).
6. Evidence of drug possession: Most circuits have held that drug use (typically proven by a defendant’s admission or by urinalysis test results) can constitute evidence of drug possession. United States v. Dow, 990 F.2d 22 (1st Cir. 1993); United States v. Blackston, 940 F.2d 877 (3d Cir. 1991); United States v. Clark, 30 F.3d 23 (4th Cir. 1994); United States v. Courtney, 979 F.2d 45 (5th Cir. 1992); United States v. Hancox, 49 F.3d 223 (6th Cir. 1995); United States v. Young, 41 F.3d 1184 (7th Cir. 1994); United States v. Oliver, 931 F.2d 463 (8th Cir. 1991); United States v. Baclaen, 948 F.2d 628 (9th Cir. 1991); United States v. Rockwell, 984

F.2d 1112 (10th Cir. 1993); United States v. Granderson, 969 F.2d 980 (11th Cir. 1992), aff'd on other grounds, 511 U.S. 39 (1994).

7. Sufficiency of evidence: United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994) (testimony of single witness sufficient); United States v. Levine, 983 F.2d 785 (7th Cir. 1993) (evidence sufficient to establish defendant's commission of theft by deception); United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996) (evidence sufficient where defendant admitted to two violations and store security officer testified in detail about defendant's shoplifting); United States v. Hall, 984 F.2d 387 (10th Cir. 1993) (evidence sufficient to establish defendant's involvement in cocaine distribution); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994) (police officer's testimony sufficient to establish that person selling cocaine to officer was defendant; although defendant presented evidence to contrary, court entitled to find officer's testimony more credible).
- H. Constitutional Concerns: In Morrissey v. Brewer, 408 U.S. 471 (1972), and by extension in Gagnon v. Scarpelli, 411 U.S. 788 (1973), the Supreme Court held that a defendant must be accorded a minimum of due process before his parole or probation can be revoked. Fed. R. Crim. P. 32.1, added in 1979, incorporates the Court's requirements. This section covers the most frequently litigated of those due process requirements, as well as some arising under other parts of the Constitution.
 1. Notice: Rule 32.1(a)(1)(A) requires that a defendant be given notice of the probable cause hearing and of the alleged violation. Rule 32.1(a)(2)(A) requires that a defendant be given written notice of the alleged violation. A petition alleging a defendant's use of drugs in violation of a condition of supervised release instructing the defendant not to purchase, possess, use, distribute, or administer any drug was found to give sufficient notice of an allegation of possession of drugs to trigger mandatory revocation. United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); see also Section I(G)(5) (evidence of drug use as evidence of drug possession).

Where the violation consists of committing "another federal, state, or local crime," the petition for revocation must clearly specify a statutory provision that the defendant's conduct is alleged to violate. United States v. Havier, 155 F.3d 1090 (9th Cir. 1998).
 2. Delay: Rule 32.1(a)(1) requires the preliminary hearing to be held promptly. Rule 32.1(a)(2) requires the revocation hearing to be held "within a reasonable time." United States v. Sanchez, 225 F.3d 172 (2d Cir. 2000) (four-year delay between occurrence of violation and issuance of summons did not violate due process where summons and revocation hearing took place before term of supervised release ended); United States v. Tippens, 39 F.3d 88 (5th Cir. 1994) (30-month delay); United States v. Throneburg, 87 F.3d 851 (6th Cir. 1996) (holding revocation hearing nearly two years after issuance of violation warrant neither violation of due process nor abuse of discretion where warrant issued eight months into term of supervised release and hearing held before expiration of term of supervision; due process concerns implicated only where delay prejudices defendant's ability to challenge validity of revocation, not where delay affects

defendant's ability to have revocation sentence run concurrently with state sentence); United States v. Shampang, 987 F.2d 1439 (9th Cir. 1993) (although unreasonable delay between time of violation and revocation proceeding may violate due process, five-month delay in this case was acceptable).

3. Presence

- a. Revocation hearing: Rule 32.1(a)(2)(C) requires that the defendant be given the opportunity to appear at the revocation hearing. If the defendant chooses, however, to waive a revocation hearing, that waiver must be knowing and voluntary. United States v. Pelensky, 129 F.3d 63 (2d Cir. 1997); United States v. LeBlanc, 175 F.3d 511 (7th Cir. 1999); United States v. Stocks, 104 F.3d 308 (9th Cir. 1997).
- b. Sentencing: The Fifth Circuit vacated a revocation sentence where the district court sentenced the defendant in absentia. The appellate court found that the lower court's adoption of the magistrate judge's proposed findings and recommendations violated the defendant's right to be present and to have allocution pursuant to Fed. Crim. R. 43(a) and 32(a)(1)(C). United States v. Rodriguez, 23 F.3d 919 (5th Cir. 1994); see also United States v. Waters, 158 F.3d 933 (6th Cir. 1998).

- 4. Confrontation: Rule 32.1(a)(2)(D) gives the defendant the opportunity to question adverse witnesses. The confrontation issue arises most frequently in the context of the use of positive drug tests as evidence of drug possession without presenting the person who processed the urine or blood sample used for testing. The right includes the ability to impeach the accuracy of test results. The court must balance the defendant's right to confrontation against the government's "good cause" to deny the right. The court must also consider the reliability of the evidence. Good cause for the government is typically the difficulty and expense of procuring witnesses. See, e.g., United States v. McCormick, 54 F.3d 214 (5th Cir. 1995) (no violation where testimony of lab technician would be of limited value and where defendant failed to pursue even one of various alternative means of challenging test results); United States v. Kindred, 918 F.2d 485 (5th Cir. 1990) (defendant's confrontation rights were not violated by admission of urinalysis test through testimony of probation officer); United States v. Bell, 785 F.2d 640 (8th Cir. 1986); United States v. Comito, 177 F.3d 1166 (9th Cir. 1999) (use of witness's testimony regarding defendant's girlfriend's unsworn verbal statements without performing balancing test violated confrontation clause); United States v. Martin, 984 F.2d 308 (9th Cir. 1993) (although right to confrontation not as strong in revocation proceeding as in trial setting, defendant's right violated in this case where district court refused to allow defendant to retest urine samples that were the only evidence of drug possession); United States v. Penn, 721 F.2d 762 (11th Cir. 1983).

5. Defendant's right to speak

- a. At the revocation hearing: The Sixth Circuit found that a defendant was denied due process when the district court prohibited the defendant from testifying as a witness at the final probation revocation hearing and allowed the defendant only to make unsworn oral statements unassisted by counsel. United States v. Dodson, 25 F.3d 385 (6th Cir. 1994).
 - b. At the sentencing: Among the circuits addressing the issue, there is a split as to whether Rule 32 applies to sentencing in revocation cases.
 - i. Probation: Because section 3565(a) requires the court to “resentence the defendant under subchapter A,” the better view is that Rule 32 does apply to sentencing hearings held after revocation of probation. However, only the Fifth Circuit applies Rule 32. United States v. Anderson, 987 F.2d 251 (5th Cir. 1993). The Sixth Circuit does not apply Rule 32. United States v. Coffey, 871 F.2d 39 (6th Cir. 1989) (but see United States v. Waters, 158 F.3d 933 (6th Cir. 1998)). The Eighth Circuit addressed, but did not decide, the issue. United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996).
 - ii. Supervised release: The Fifth, Eighth, and Ninth Circuits apply Rule 32 to sentencing hearings held after revocation of supervised release. United States v. Rodriguez, 23 F.3d 919 (5th Cir. 1994); United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997); United States v. Carper, 24 F.3d 1157 (9th Cir. 1994). The Sixth Circuit, while not applying Rule 32, invoked its supervisory powers to require district courts to provide defendants with an opportunity to allocute before imposing sentence for a violation of supervised release. United States v. Waters, 158 F.3d 933 (6th Cir. 1998).
6. Double jeopardy: Using the same conduct as the basis for a probation or supervised release violation and as the basis for criminal prosecution does not violate double jeopardy principles. United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996); United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995). Similarly, because the punishment for violating a condition of probation or supervised release by committing a criminal offense is punishment for the offense for which probation or supervised release was imposed, the Double Jeopardy Clause does not preclude punishment for the new criminal conduct. United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996).
7. Miranda warnings: Where the defendant appeared voluntarily at the probation office for an appointment, she was not “in custody” for purposes of Miranda; consequently, the failure to give warnings against self-incrimination did not preclude use of her statements against her in revocation proceedings. United States v. Nieblas, 115 F.3d 703 (9th Cir. 1997).

8. Ex Post Facto Clause

a. Mandatory revocation for drug possession

- i. On November 18, 1988, Congress added the provisions for mandatory revocation based on drug possession found in 18 U.S.C. § 3565(a) (subsection (b) after September 13, 1994) and 18 U.S.C. § 3583(g). Section 7303(d) of Public Law 100-690, 102 Stat. 4464, provided that the provisions applied “with respect to persons whose probation, supervised release, or parole begins after December 31, 1988.” In keeping with that provision, the Sixth Circuit uses the date of the violation leading to revocation as the critical date for ex post facto purposes. United States v. Reese, 71 F.3d 582 (6th Cir. 1995). In contrast, the Second, Fourth, and Ninth Circuit use the date of the original offense as the critical date. United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Parriett, 974 F.2d 523 (4th Cir. 1992); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993).
- ii. On September 13, 1994, Congress amended the mandatory revocation provisions in two ways. First, for supervised release, it expanded the possible bases for mandatory revocation to include firearm possession and refusal to submit to drug testing. Pub. L. 103-322, § 110505, 108 Stat. 2016-17. For probation, where firearm possession was already a basis for revocation, see 18 U.S.C. § 3565(b) (1993), Congress added the drug testing provision as an additional basis for revocation. Pub. L. 103-322, § 110506, 108 Stat. 2017-18. Second, Congress removed the “one-third” sentence requirement from both the supervised release and probation provisions. See Sections II(A)(3)(a) and III(A)(3)(a) for text comparisons. In United States v. McGee, 60 F.3d 1266 (7th Cir. 1995), the court found on plain error review that there was no ex post facto violation because the defendant was not subjected to any increase in punishment from the application of the amendments.

- b. Imposition of additional supervised release following revocation of supervised release: On September 13, 1994, Congress amended 18 U.S.C. § 3583 by adding section (h), which specifically permits the imposition of additional supervised following imprisonment for a violation of supervised release. (For cases addressing this issue prior to the amendment, see Section III(B)(2)(a).) The circuits addressing whether § 3583(h) can be applied retroactively to defendants whose offenses took place prior to the amendment had split on the issue. In Johnson v. United States, 529 U.S. 694 (2000), the Supreme Court resolved this split when it ruled that § 3583(h) did not apply to revocations for offenses occurring prior to the section’s enactment. However, the Court also ruled that under § 3583(e)(3) as it stood prior to Sept. 13, 1994, district courts had authority to impose additional supervised release following a term of imprisonment punishing a revocation violation.

- c. Sentencing Guidelines: Courts have found that using the amended Chapter 7 policy statements does not create an ex post facto violation on two bases. United States v. Levi, 2 F.3d 842 (8th Cir. 1993) (Chapter 7 not subject to ex post facto analysis because it does not have the force of law); United States v. Schram, 9 F.3d 741 (9th Cir. 1993) (the offense for Chapter 7 purposes is the violation of probation or supervised release, not the original offense).

I. Defenses

1. Insanity: The federal insanity defense is not available in revocation proceedings because revocation is not a “prosecution under any Federal statute” within the meaning of 18 U.S.C. § 17. United States v. Brown, 899 F.2d 189 (2d Cir. 1990). Moreover, there is no minimum standard of criminal responsibility required for revocation. Id.
2. Indigency: Where a condition of probation is that a defendant pay a fine or restitution, probation cannot be automatically revoked for inability to make payments. Bearden v. Georgia, 461 U.S. 660 (1983); see 18 U.S.C. § 3614.
3. Underlying conduct: Where the conduct underlying the revocation proceedings also results in a conviction in state court, the defendant cannot use the revocation proceedings to collaterally challenge the state conviction. United States v. Brown, 656 F.2d 1204 (5th Cir. 1981). However, where the appeal of the revocation is consolidated with the appeal of the federal conviction for the conduct giving rise to the revocation, the vacation of the latter also results in vacation of the former. United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981). The fact that a defendant has been acquitted of the conduct giving rise to the revocation proceeding does not preclude revocation. Morishita v. Morris, 702 F.2d 207 (10th Cir. 1983).

J. Findings

1. Revocation: The Supreme Court held in Morrissey v. Brewer, 408 U.S. 471 (1972), and by extension in Gagnon v. Scarpelli, 411 U.S. 788 (1973), that in revoking parole or probation, a court must issue a written statement specifying the evidence it relied upon and its reasons for its decision to revoke. The appellate courts have developed an exception to this rule: written findings are not required, and due process is satisfied, where oral findings, if recorded or transcribed, create a record sufficient to advise the parties of the reasons for revocation and to permit appellate review. United States v. Barth, 899 F.2d 199 (2d Cir. 1990); United States v. Barnhart, 980 F.2d 219 (3d Cir. 1992); United States v. Copley, 978 F.2d 829 (4th Cir. 1992); United States v. Gilbert, 990 F.2d 916 (6th Cir. 1993); United States v. Yancey, 827 F.2d 83 (7th Cir. 1987); United States v. Daniel, 209 F.3d 1091 (9th Cir. 2000); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994); see also United States v. Whalen, 82 F.3d 528 (1st Cir. 1996) (on plain error review, no due process violation in court’s failure to make written findings when defendant failed to request court to do so and court stated on record that it

concluded defendant committed offense leading to revocation and adopted presentence report); cf. United States v. Kindred, 918 F.2d 485 (5th Cir. 1990) (remand for written findings not necessary when evidence at hearing was overwhelming that defendant possessed drugs, thus mandating revocation).

2. Sentencing: United States v. Blackston, 940 F.2d 877 (3d Cir. 1991) (court's statement of reasons for decision to sentence defendant above minimum required for revocation based on drug possession was sufficiently detailed); United States v. McClelland, 164 F.3d 308 (6th Cir. 1999) (reversing because district court's articulation of reasons insufficient to justify sentence); United States v. McClanahan, 136 F.3d 1146 (7th Cir. 1998) (district court made sufficient findings to justify sentence at statutory maximum); United States v. Lockard, 910 F.2d 542 (9th Cir. 1990) (18 U.S.C. § 3553(c) requires judge to state in open court the general reasons for imposing particular sentence); United States v. Rose, 185 F.3d 1108 (10th Cir. 1999) (district court must state reasons for sentence, even when range does not exceed 24 months).

K. Sentencing

1. Application of the U.S. Sentencing Guidelines

- a. Chapter 7 of the U.S. Sentencing Guidelines addresses revocation of probation and supervised release. Every circuit has held that because the Sentencing Commission intended the policy statements of Chapter 7 to be recommendations, those policy statements are not binding on the courts. However, the courts must consider them. United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993); United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993); United States v. Anderson, 15 F.3d 278 (2d Cir. 1994); United States v. Blackston, 940 F.2d 877 (3d Cir. 1991); United States v. Davis, 53 F.3d 638 (4th Cir. 1995) (supervised release); United States v. Denard, 24 F.3d 599 (4th Cir. 1994) (probation); United States v. Mathena, 23 F.3d 87 (5th Cir. 1994); United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994); United States v. Washington, 147 F.3d 490 (6th Cir. 1998) (district court adequately considered policy statements even though court did not refer to them by name); United States v. Hill, 48 F.3d 228 (7th Cir. 1995); United States v. Levi, 2 F.3d 842 (8th Cir. 1993); United States v. Forrester, 19 F.3d 482 (9th Cir. 1994) (probation); United States v. Hurst, 78 F.3d 482 (10th Cir. 1996); United States v. Thompson, 976 F.2d 1380 (11th Cir. 1992) (supervised release); United States v. Milano, 32 F.3d 1499 (11th Cir. 1994) (probation). Cf. United States v. Wright, 92 F.3d 502 (7th Cir. 1996) (although not binding, it would be abuse of discretion for district court to ignore Ch. 7); United States v. Montez, 952 F.2d 854 (5th Cir. 1992) (no plain error in failing to consider guidelines).
- b. On September 13, 1994, Congress amended 18 U.S.C. § 3553(a)(4) to require courts to consider "the kinds of sentence and the sentencing range established for . . . in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission" 18 U.S.C. § 3553(a)(4)(B). Several courts

have found that the inclusion of this language in section 3553 still does not make application of the Chapter 7 policy statements mandatory. See United States v. Cohen, 99 F.3d 69 (2d Cir. 1996); United States v. Schwegel, 126 F.3d 551 (3d Cir. 1997); United States v. Escamilla, 70 F.3d 835 (5th Cir. 1995); United States v. West, 59 F.3d 32 (6th Cir. 1995); United States v. Brown, 203 F.3d 557 (8th Cir. 2000); United States v. George, 184 F.3d 1119 (9th Cir. 1999); United States v. Hofierka, 83 F.3d 357 (11th Cir. 1996).

c. Although the policy statements are not binding, district courts are required to interpret them correctly. United States v. Kingdom (U.S.A.), Inc., 157 F.3d 133 (2d Cir. 1998).

d. Determining a revocation sentence under the Guidelines

i. Begin by determining what grade the violation is under U.S.S.G. § 7B1.1. United States v. Kingdom (U.S.A.), Inc., 157 F.3d 133 (2d Cir. 1998) (where defendant has committed multiple violations, sentence to be based on most serious violation); United States v. Lindo, 52 F.3d 106 (6th Cir. 1995) (multiple Grade C violations do not aggregate into a Grade B violation); United States v. Schwab, 85 F.3d 326 (8th Cir. 1996) (look to defendant's actual conduct, not offense of which he was convicted, to determine grade); United States v. Bonner, 85 F.3d 522 (11th Cir. 1996) (making a threatening phone call is "crime of violence" that is grade A violation); United States v. Cawley, 48 F.3d 90 (2d Cir. 1995) (witness intimidation is crime of violence that is grade A violation); United States v. Boisjolie, 74 F.3d 1115 (11th Cir. 1996) (where defendant sentenced in state court under habitual offender provision for offense that was basis for revocation, proper to use maximum sentence under recidivist provision to determine grade of violation); contra United States v. Lee, 78 F.3d 1236 (7th Cir. 1996) (do not use sentence enhancements in determination based on actual conduct).

ii. Determine the guideline range of imprisonment contained in § 7B1.4.

iii. For information related to departures, see sections II(B)(1)(a), III(B)(3).

iv. Apply § 7B1.3(c) for sentencing options relating to Grade B and C violations. If imprisonment is imposed, adjust for time spent in official detention. U.S.S.G. § 7B1.3(e); United States v. Whaley, 148 F.3d 205 (2d Cir. 1998).

2. Concurrent v. consecutive sentences

a. Revocation after sentencing for new offense: The statutes governing revocation are silent on this subject. U.S.S.G. § 7B1.3(f) and application note 4 require a sentence imposed upon revocation to run consecutively to any other sentence a defendant is serving. However, several courts have ruled that because Chapter 7 is advisory only, district courts can use their discretion in deciding whether to run a sentence consecutively or concurrently. United States

v. Sparks, 19 F.3d 1099 (6th Cir. 1994); United States v. Hill, 48 F.3d 228 (7th Cir. 1995); United States v. Caves, 73 F.3d 823 (8th Cir. 1995); United States v. Rose, 185 F.3d 1108 (10th Cir. 1999). Approaching the issue from the perspective of § 5G1.3, the Second Circuit has ruled that the directive in that provision’s application note 6 is not mandatory. United States v. Maria, 186 F.3d 65 (2d Cir. 1999).

- b. Revocation before sentencing for new offense: Where a defendant is sentenced federally for a new offense after having been sentenced on a federal or state revocation violation, the Sentencing Guidelines require that the sentence for the instant conviction run consecutively to the revocation sentence. U.S.S.G. § 5G1.3, comment. (n.6) (added Nov. 1, 1993 as note 4); United States v. Gondek, 65 F.3d 1 (1st Cir. 1995); United States v. Alexander, 100 F.3d 24 (5th Cir. 1996); United States v. Goldman, 228 F.3d 942 (8th Cir. 2000); United States v. Bernard, 48 F.3d 427 (9th Cir. 1995); United States v. Flowers, 13 F.3d 395 (11th Cir. 1994). But see United States v. Maria, 186 F.3d 65 (2d Cir. 1999) (directive in § 5G1.3 that district court “should” impose consecutive sentence when new offense represents violation of parole, probation, or supervised release, is not mandatory).
- c. Revocation before imposition of state sentence: The Guidelines do not address this issue directly. U.S.S.G. § 7B1.3(f) refers only to running a revocation sentence consecutive to a sentence the defendant “is serving;” similarly, § 5G1.3 addresses situations where the defendant is already serving another sentence. The circuits are split as to whether a court may order a federal revocation sentence to run consecutively to a state sentence that has not yet been imposed. In the only case to address the issue directly, the Sixth Circuit held that 18 U.S.C. § 3584(a) does not give the district courts such authority. United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998). The Ninth Circuit, in a non-revocation case, has also reached this conclusion. United States v. Clayton, 927 F.2d 491 (9th Cir. 1991). The Fifth, Tenth, and Eleventh Circuits have reached the opposite conclusion in non-revocation cases. United States v. Brown, 920 F.2d 1212 (5th Cir. 1991); United States v. Williams, 46 F.3d 57 (10th Cir. 1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993). The Second Circuit has held that a district court may impose a consecutive sentence to an as-yet-to-be-imposed state sentence under the statutory scheme that predated § 3584(a), Salley v. United States, 786 F.2d 546 (2d Cir. 1986); in a recent case, however, that court expressly reserved the question as to whether Salley would still apply under the new statute. McCarthy v. Doe, 146 F.3d 118 (2d Cir. 1998).
- d. Multiple terms of imprisonment for revocation violation: Several circuits have held that when concurrent terms of supervised release are revoked, the district court may impose consecutive terms of imprisonment as punishment. United States v. Johnson, 138 F.3d 115 (4th Cir. 1998); United States v. Cotroneo, 89 F.3d 510 (8th Cir. 1996); United States v. Jackson, 176 F.3d 1175 (9th Cir. 1999); United States v. Quinones, 136 F.3d 1293 (11th Cir. 1998).

L. Appeals

1. Jurisdiction of appellate court: Following Spencer v. Kemna, 523 U.S. 1 (1998), two courts of appeals have ruled that they do not have jurisdiction to hear an appeal where the defendant has completed the term of imprisonment imposed upon revocation. United States v. Probbler, 170 F.3d 345 (2d Cir. 1999); United States v. Meyers, 200 F.3d 715 (10th Cir. 2000). In these cases, however, the district court imposed only a term of imprisonment. Therefore, if a defendant's revocation sentence included a term of supervised release that he is serving at the time of appeal, the appeal should be ripe, and the defendant should have standing, because he is still under sentence. Cf. United States v. Palomba, 182 F.3d 1121 (9th Cir. 1999) (defendant lacked standing to appeal sentence where he had completed supervised release term).
2. Standard of review
 - a. Unless a violation is based upon drug or firearm possession, which requires revocation, a district court's decision to revoke probation or supervised release will be reviewed for abuse of discretion. United States v. Morin, 889 F.2d 328 (1st Cir. 1989); United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991); United States v. Levine, 983 F.2d 785 (7th Cir. 1993); United States v. Schmidt, 99 F.3d 315 (9th Cir. 1996); United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994).
 - b. The factfinding underlying a decision to revoke will be reviewed for clear error. United States v. Whalen, 82 F.3d 528 (1st Cir. 1996); United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994); United States v. Hall, 984 F.2d 387 (10th Cir. 1993).
 - c. Questions of law will be reviewed de novo. See, e.g., United States v. Morales, 45 F.3d 693 (2d Cir. 1995) (jurisdiction of district court); United States v. Barton, 26 F.3d 490 (4th Cir. 1994) (jurisdiction of district court); United States v. Truss, 4 F.3d 437 (6th Cir. 1993) (whether district court exceeded authority under 18 U.S.C. § 3583); United States v. McClanahan, 136 F.3d 1146 (7th Cir. 1998); United States v. Shampang, 987 F.2d 1439 (9th Cir. 1993) (interpretation of 18 U.S.C. § 3565); United States v. Neville, 985 F.2d 992 (9th Cir. 1993) (jurisdiction of district court); United States v. Boisjolie, 74 F.3d 1115 (11th Cir. 1996) (interpretation of Guidelines).
 - d. The sentence imposed upon revocation will be reviewed for reasonableness. United States v. Sweeney, 90 F.3d 55 (2d Cir. 1996); United States v. Mathena, 23 F.3d 87 (5th Cir. 1994); United States v. McClanahan, 136 F.3d 1146 (7th Cir. 1998); United States v. Oliver, 931 F.2d 463 (8th Cir. 1991).

II. REVOCATION OF PROBATION: SPECIAL CONSIDERATIONS

A. The Relevant Statutory Provisions

1. In general, the imposition of probation is governed by 18 U.S.C. §§ 3561-3566. Revocation, in particular, is governed by 18 U.S.C. § 3565. The text of the current version of section 3565, last amended substantively as of September 13, 1994, is reproduced in Appendix A.
2. Discretionary revocation: Under subsection (a), revocation of probation is within the discretion of the court.
3. Mandatory revocation: If a defendant violates certain conditions of probation, the court is required to revoke probation.
 - a. Drug possession
 - i. Prior to September 13, 1994: Effective December 31, 1988, Congress added a provision to section 3565(a) requiring that “if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence.” Pub. L. 100-690, § 7303(a)(2), (d), 102 Stat. 4464. The split that developed among the circuit courts as to the meaning of “one-third of the original sentence” was resolved by the Supreme Court in favor of the majority position, that “original sentence” means the original Guidelines sentence, not the term of probation. United States v. Granderson, 511 U.S. 39 (1994).
 - ii. After September 13, 1994: On September 13, 1994, Congress added section 3565(b)(1) to require a court to “revoke the sentence of probation and resentence the defendant under subchapter A [18 U.S.C. §§ 3551-3559] to a sentence that includes a term of imprisonment.” Pub. L. 103-322, § 110506, 108 Stat. 2017.
 - iii. Drug use can constitute evidence of possession. See Section I(G)(5).
 - iv. In the case of a defendant who fails a drug test, the court must consider whether the availability of drug treatment programs, or the defendant’s past or present participation in such programs, warrants an exception to the mandatory revocation and imprisonment requirements. 18 U.S.C. § 3563(a); U.S.S.G. § 7B1.4 comment. (n.6).
 - v. In at least one case, a court held that it must revoke probation if it finds that defendant possessed drugs, even where the drug possession is not the event triggering the revocation proceeding. United States v. Shampang, 987 F.2d 1439 (9th Cir. 1993). In

contrast, another court found that it was not required to revoke probation where the drug possession was not the triggering event for revocation. United States v. White, 770 F. Supp. 503 (W.D. Mo. 1991).

b. Drug testing

- i. Prior to September 13, 1994, section 3565 contained no provision mandating revocation for a defendant's refusal to comply with drug testing requirements.
- ii. On September 13, 1994, Congress added section 3565(b)(3), which requires revocation and a sentence of imprisonment. Pub. L. 103-322, § 110506, 108 Stat. 2017.

c. Firearm possession

- i. Prior to September 13, 1994: On November 18, 1988, Congress enacted section 3565(b), requiring revocation “[i]f the defendant is in actual possession of a firearm, as that term is defined in section 921 of [Title 18]” and the imposition of “any other sentence that was available under subchapter A at the time of the initial sentencing.” Pub. L. 100-690, § 6214, 102 Stat. 4361.
- ii. On September 13, 1994, Congress amended section 3565(b)(2) to require revocation “[i]f a defendant . . . possesses a firearm.” The court “shall . . . resentence the defendant under subchapter A to a sentence that includes a term of imprisonment.” Pub. L. 103-322, § 110506, 108 Stat. 2017.

B. Sentencing

1. The language of subsection 3565(a)(2)

- a. Prior to September 13, 1994, the language of subsection (a)(2) read “revoke the sentence of probation and impose any other sentence that was available under subchapter A [18 U.S.C. §§ 3553-3559] at the time of the initial sentencing.”
 - i. The revocation sentence could not exceed the guideline range that was calculated for the underlying offense at the original sentencing. United States v. Boyd, 961 F.2d 434 (3d Cir. 1992); United States v. Alli, 929 F.2d 995 (4th Cir. 1991); United States v. Von Washington, 915 F.2d 390 (8th Cir. 1990); United States v. Dixon, 952 F.2d 260 (9th Cir. 1991); United States v. Smith, 907 F.2d 133 (11th Cir. 1990).
 - ii. Departures from the guideline range calculated for the underlying offense were possible, but could be based only on factors that were present at the time of the original sentencing; the court could not use post-sentence conduct as a basis for departure.

United States v. Williams, 961 F.2d 1185 (5th Cir. 1992); United States v. Von Washington, 915 F.2d 390 (8th Cir. 1990); United States v. White, 925 F.2d 284 (9th Cir. 1991); United States v. Smith, 907 F.2d 133 (11th Cir. 1990); see United States v. Alli, 929 F.2d 995 (4th Cir. 1991).

- iii. Conversely, where the original sentence was the result of a downward departure, the court was not required to depart down again, but could sentence the defendant within the guideline range originally calculated. United States v. Forrester, 19 F.3d 482 (9th Cir. 1994); United States v. Redmond, 69 F.3d 979 (9th Cir. 1995). In the case of a departure for substantial assistance, the government must renew its 5K1.1 motion. United States v. Schaefer, 120 F.3d 505 (4th Cir. 1997).
 - b. On September 13, 1994, Congress amended section 3565(a)(2) to read “revoke the sentence of probation and resentence the defendant under subchapter A [sections 3551-3559].” The effect of this amendment is to subject a defendant to a full resentencing, including a recalculation of his sentence under the Guidelines that takes into account changes in the defendant’s circumstances occurring after the original sentencing (e.g., an increase in criminal history score due to additional convictions sustained after the original sentencing). United States v. Schaefer, 120 F.3d 505 (4th Cir. 1997); United States v. Hudson, 207 F.3d 852 (6th Cir. 2000); see United States v. Byrd, 116 F.3d 770 (5th Cir. 1997) (comparing language of former and current statutes and impact of change).
2. Interplay of section 3565 and Chapter 7 policy statements: Keeping in mind that Chapter 7 of the Sentencing Guidelines is not binding, see Section I(K)(1), the examples that follow illustrate the interplay between section 3565 and Chapter 7.
- a. Defendant A’s original guideline range is 4-10 months. His revocation range, according to U.S.S.G. § 7B1.4, is 12-18 months. Under the old version of section 3565(a), Defendant A could not be sentenced to more than 10 months in prison, absent an upward departure based on factors present at the time of the original sentencing. United States v. Dixon, 952 F.2d 260 (9th Cir. 1991). Under the current version of section 3565(a), the court could sentence Defendant A to as much as 18 months, or more if the guideline range for the original offense, as recalculated, is higher, or there is an upward departure based on factors present at the new sentencing.
 - b. Defendant B’s original guideline range is 0-6 months, and his revocation range is 3-9 months. Under the old version of section 3565(a), Defendant B could be sentenced to no more than 6 months in prison absent an upward departure (and no less than 3 months, if the court chooses to follow section 7B1.4). United States v. Boyd, 961 F.2d 434 (3d Cir. 1992). Under the current version of section 3565(a), Defendant B could be sentenced to as much as 9 months, or more if the guideline range for the original offense, as recalculated, is higher, or there is an upward departure based on factors present at the new sentencing.

- c. Defendant C has an original guideline range of 33-41 months, but, thanks to a downward departure, received 5 years probation. His revocation range is 3-9 months. Under the old version of section 3565(a), Defendant C could be properly given a sentence of 33 months. United States v. Forrester, 19 F.3d 482 (9th Cir. 1994). He could also be given a sentence as high as 41 months, or more if the court departs upward. Under the current version of section 3565(a), Defendant C could also be sentenced to as much as 41 months, or more if the guideline range for the original offense, as recalculated, is higher, or there is an upward departure.
3. Supervised release: Upon revoking probation, a court may impose supervised release to follow a sentence of imprisonment. United States v. Wesley, 81 F.3d 482 (4th Cir. 1996); United States v. McCullough, 46 F.3d 400 (5th Cir. 1995); United States v. Vasquez, 160 F.3d 1237 (9th Cir. 1998); United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994); United States v. Hobbs, 981 F.2d 1198 (11th Cir. 1993); see United States v. Gallo, 20 F.3d 7 (1st Cir. 1994). However, where a defendant was sentenced originally to probation under the Federal Juvenile Delinquency Act, the court cannot impose supervised release as part of a sentence upon revocation of probation. United States v. Sealed Appellant, 123 F.3d 232 (5th Cir. 1997).
4. Credit for time spent previously in detention. The district court, in imposing a maximum sentence for a probation violation, should not reduce the term by the amount of time spent in community confinement or home detention. United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996); United States v. Horek, 137 F.3d 1226 (10th Cir. 1998). Moreover, where a defendant has spent time in pretrial detention for which he would receive credit pursuant to 18 U.S.C. § 3585(b), the court must increase the term of imprisonment imposed for the revocation violation. U.S.S.G. § 7B1.3(e).

III. REVOCATION OF SUPERVISED RELEASE: SPECIAL CONSIDERATIONS

A. The Relevant Statutory Provisions

1. In general, the imposition of supervised release is governed by 18 U.S.C. § 3583. Revocation, in particular, is governed by 18 U.S.C. § 3583(e), (g), (h), and (i). The current version of these provisions, last amended substantively as of September 13, 1994, are reproduced in Appendix B.
2. Discretionary revocation: Under subsection (e), revocation of supervised release is within the discretion of the court.
3. Mandatory revocation: If a defendant violates certain conditions of supervised release, the court is required to revoke the supervised release.

a. Drug possession

- i. Prior to September 13, 1994: Effective December 31, 1988, Congress enacted section 3583(g), which provided that the court must sentence a defendant found to have possessed a controlled substance to a term of imprisonment “not less than one-third the term of supervised release” in length. Pub. L. 100-690, § 7303(b)(2), (d), 102 Stat. 4464.
- ii. After September 13, 1994: On September 13, 1994, Congress amended section 3583(g) to require the court to sentence a defendant to a term of imprisonment “not to exceed the maximum term of imprisonment authorized under subsection (e)(3).” Pub. L. 103-322 § 110505, 108 Stat. 2016.
- iii. Evidence of drug use can equal possession. See Section I(G)(5).
- iv. In the case of a defendant who fails a drug test, the court must consider whether the availability of drug treatment programs, or the defendant’s past or present participation in such programs, warrants an exception to the mandatory revocation and imprisonment requirements. 18 U.S.C. § 3583(d); U.S.S.G. § 7B1.4 comment. (n.6); United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997).

b. Drug testing

- i. Prior to September 13, 1994, section 3583 did not contain any provision mandating revocation for a defendant’s refusal to comply with drug testing requirements.
- ii. On September 13, 1994, Congress added section 3583(g)(3) to require revocation and a sentence of imprisonment. Pub. L. 103-322, § 110505, 108 Stat. 2016.

c. Firearm possession

- i. Prior to September 13, 1994, section 3583 did not contain a provision mandating revocation for a defendant’s possession of a firearm.
- ii. On September 13, 1994, Congress added section 3583(g)(2) to require revocation and a sentence of imprisonment. Pub. L. 103-322, § 110505, 108 Stat. 2016.

B. Sentencing

1. Additional imprisonment

- a. Statutory limits: Section 3583(e)(3) permits a court to “require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release [section 3583(b)] without credit for time previously served on postrelease supervision.”
 - i. Determine the maximum imprisonment possible for the violation by (1) determining the class of the original offense under 18 U.S.C. § 3559(a); (2) determining the authorized term of supervised release for the original offense under section 3583(b); and (3) determining the limits set forth in section 3583(e). Note that for Class B, C, and D felonies, the maximum term of imprisonment authorized under section 3583(e) is shorter than the term of supervised release authorized under section 3583(b). However, where the original offense is a drug offense punishable pursuant to 21 U.S.C. § 841(b)(1)-(2), there is no maximum term of supervised release. United States v. Page, 131 F.3d 1173 (6th Cir. 1997).
 - ii. Credit for time served: As provided in section 3583(e), a defendant does not have the sentence imposed following revocation of supervised release reduced by the amount of time he spent on supervised release before it was revoked. United States v. Bewley, 27 F.3d 343 (8th Cir. 1994) (maximum length of total revocation sentence possible is three years, the amount of supervised release originally imposed, not 27 months (three years minus nine months already served on supervised release) as defendant argued). Thus, as an extreme example, a defendant whose supervised release is revoked based on a violation occurring just before the end of a five-year term of supervision could be sentenced to five years in prison for the violation.
- b. Imprisonment in excess of statutory maximum for original offense: The courts addressing the issue have found that it is acceptable for a court to order imprisonment for a revocation violation even where that imprisonment, when combined with the prior term of imprisonment for the original offense, exceeds the statutory maximum for the original offense. United States v. Celestine, 905 F.2d 266 (5th Cir. 1991); United States v. Wright, 2 F.3d 175 (6th Cir. 1993); United States v. Colt, 126 F.3d 981 (7th Cir. 1997); United States v. Purvis, 940 F.2d 1276 (9th Cir. 1991); United States v. Robinson, 62 F.3d 1282 (10th Cir. 1995); United States v. Proctor, 127 F.3d 1311 (11th Cir. 1997).
- c. Imprisonment in excess of guideline maximum for original offense: Similarly, courts have found it permissible to order imprisonment for a revocation violation even where that imprisonment, when combined with the prior term of imprisonment for the original offense, exceeds the original guideline range. United States v. Mandarelli, 982 F.2d 11 (1st Cir.

1992); United States v. Dillard, 910 F.2d 461 (7th Cir. 1990); United States v. Smeathers, 930 F.2d 18 (8th Cir. 1991).

- d. Factors in determining length of sentence: United States v. Ramirez-Rivera, ___ F.3d ___, 2001 WL 194843 (1st Cir. Feb. 23, 2001) (No. 99-2168) (court did not abuse discretion when it considered defendant's drug rehabilitation needs in imposing sentence beyond recommended range); United States v. Anderson, 15 F.3d 278 (2d Cir. 1994) (under section 3583(e), it was proper for district court to consider defendant's correctional and medical needs in determining length of imprisonment); United States v. Giddings, 37 F.3d 1091 (5th Cir. 1994) (proper for court to consider need for rehabilitation following mandatory revocation under section 3583(g)); United States v. Jackson, 70 F.3d 874 (6th Cir. 1995) (court can consider rehabilitation in setting sentence following mandatory revocation under section 3583(g)); United States v. Kaniss, 150 F.3d 967 (8th Cir. 1998) (appropriate for court to consider defendant's repeated violations of supervised release by using marijuana, his failure to participate in drug abuse treatment programs, and leniency of his original sentence); United States v. Aguiard, 217 F.3d 1319 (11th Cir. 2000) (district court may consider availability of rehabilitation programs in determining length of sentence imposed).

2. Additional supervised release

- a. Until September 13, 1994, section 3583 had no provision addressing the imposition of additional supervised release to follow imprisonment for a revocation violation.
 - i. The First and Eighth Circuits found it permissible for a court to order additional supervised release as long as the combined length of the imprisonment for the revocation and the new term of supervised release did not exceed the length of the original term of supervised release. United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993); United States v. Stewart, 7 F.3d 1350 (8th Cir. 1993).
 - ii. Every other circuit addressing the issue held that a court cannot order additional supervised release to follow a term of imprisonment. United States v. Koehler, 973 F.2d 132 (2d Cir. 1992); United States v. Malesic, 18 F.3d 205 (3d Cir. 1994); United States v. Cooper, 962 F.2d 339 (4th Cir. 1992); United States v. Holmes, 954 F.2d 270 (5th Cir. 1992); United States v. Truss, 4 F.3d 437 (6th Cir. 1993); United States v. McGee, 981 F.2d 271 (7th Cir. 1992); United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990); United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993); United States v. Williams, 2 F.3d 363 (11th Cir. 1993).
 - iii. The Supreme Court has resolved this split in favor of the minority position. Johnson v. United States, 529 U.S. 694 (2000).

- b. On September 13, 1994, Congress enacted section 3583(h), Pub. L. 103-322, § 110505, 108 Stat. 2016, in response to urging from the judiciary and the Sentencing Commission. See Malesic, 18 F.3d at 205-06 & n.2. This section authorizes a court to impose an additional term of supervised release as long as that term does not exceed the amount of supervised release authorized by statute for the original offense minus the amount of imprisonment imposed as punishment for revocation. For a discussion and example of the operation of section 3583(h), see United States v. Brings Plenty, 188 F.3d 1051 (8th Cir. 1999). See also United States v. Beals, 87 F.3d 854 (7th Cir. 1996), overruled in part on other grounds by United States v. Withers, 128 F.3d 1167 (7th Cir. 1997).
3. Departures: A number of courts have held that, because the Chapter 7 policy statements are not binding, a sentence greater than that suggested by the Chapter 7 sentencing table is not a departure such that the sentencing court must give notice or make detailed findings. United States v. Pelensky, 129 F.3d 63 (2d Cir. 1997); United States v. Blackston, 940 F.2d 877 (3d Cir. 1991); United States v. Davis, 53 F.3d 638 (4th Cir. 1995); United States v. Mathena, 23 F.3d 87 (5th Cir. 1994); United States v. Marvin, 135 F.3d 1129 (7th Cir. 1998); United States v. Shaw, 180 F.3d 920 (8th Cir. 1999); United States v. Burdex, 100 F.3d 882 (10th Cir. 1996); United States v. Hofierko, 83 F.3d 357 (11th Cir. 1996).
4. Deportation: Once a court has revoked an alien defendant's supervised release and sentenced him to imprisonment, the court lacks authority to order the defendant to be deported. United States v. Aimufa, 122 F.3d 1376 (11th Cir. 1997).

APPENDIX A

§ 3565. Revocation of probation

(a) Continuation or revocation.--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and resentence the defendant under subchapter A [18 U.S.C. §§ 3551-3559].

(b) Mandatory revocation for possession of controlled substance or firearm or refusal to comply with drug testing.--If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in section 3563(a)(3);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of probation prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing, thereby violating the condition imposed by section 3563(a)(4),

the court shall revoke the sentence of probation and resentence the defendant under subchapter A [18 U.S.C. §§ 3551-3559] to a sentence that includes a term of imprisonment.

(c) Delayed revocation.--The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

APPENDIX B

§ 3583. Inclusion of a term of supervised release after imprisonment

....

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)-

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....

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release [Rule 32.1], finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; . . .

. . . .

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.--If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.--When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release [section 3583(b)], less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation.--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

“THE PRISONERS WE HAVE TAKEN”
A Defense Lawyer’s Perspective on Policies and Programs
Of the United States Bureau of Prisons

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Johnny Clegg and Savuka of South Africa sang that “we are the prisoners of the prisoners we have taken”¹ describing the loss of freedom in a society that relies too heavily upon incarceration to deal with unrest and discord. The United States Bureau of Prisons now houses approximately 150,000 inmates in more than 100 facilities across the country, from the new state of the art maximum security prison at Florence, Colorado, to the “country club” federal prison camps at Allenwood, Pennsylvania, Maxwell Air Force Base, in contract facilities and in community corrections centers and under home confinement on any given day. Roughly thirty percent of the inmates have a drug abuse problem; 40% are serving sentences of more than ten years; 30 % are aliens; 42% are non-white. This paper will not address the larger moral questions raised by these numbers, but rather will address the more mundane topics of how inmates are designated to a federal prison institution, BOP programs beneficial to your clients, and pertinent aspects of inmate life.

To understand how the BOP deals with your client during the course of his confinement, it is helpful to first know a little about the bureau’s organization. Directed by Kathleen Hawk Sawyer from the central office in Washington, the BOP is divided into six geographic regions. Each region has a regional director and staff, including regional counsel. The country is further divided geographically by the responsibilities of the Community Corrections Manager (CCM) offices. If you do not know the location of the Community Corrections Office for your district, or the geographic Regional Office to which it reports, you can get that information from your local U.S. Probation office, U.S. Marshal’s office, or someone in the federal defender office. This is important information to have. The staff of the CCM plays an integral role in the inmate designation process and is the most accessible source of information on BOP policies and procedures. A good working relationship with the staff of the CCM office for your district is probably the most effective way to stay current on BOP matters and to have a positive impact on issues relating to how and where your clients are housed during the service of their sentences.

The BOP is accessible on the Internet. A bureau “home page” is located at <http://www.bop.gov>. Many of the policy statements and operating memoranda referred to in this paper are available from the BOP Internet site.

CLIENT CONTACT

The Bureau recognizes the right to confidential and private communication between attorney and client, but such communications are not automatically afforded protected status. Telephone calls between attorney and client are only assured confidentiality if the call originates from the institution and is placed by institution staff on secured lines at the inmates request. Unless you know that your client has requested and been granted a private attorney call, do not assume that the phone call is protected. If confidentiality is needed ask your client to make the request of his/her counselor, or if you initiate the call, ask that your client be advised to request an attorney call during whatever time period you will be available. Written communications between attorney and client are afforded the protection of being opened only in the presence of the inmate to insure the absence of contraband - the contents are not read. However, this protection is offered only when the outside of the envelope is marked "SPECIAL MAIL - OPEN ONLY IN THE PRESENCE OF THE INMATE" *and* the name and status of the responsible attorney appears on the outside of the envelope. (28 C.F.R. §540.19(b)) Thus, a return address showing the name and address of the office or law firm is not sufficient. The name of the individual attorney must appear. If you do not know where your client is incarcerated, you may get the information from the BOP Inmate Locator Service (202-307-3126). You will need your client's full name, inmate number, if possible, birth date and/or social security number. While your client is in transit to an institution, the locator service will not be able to give you a current location.

FUNERAL, DEATH-BED VISITS.

You may be asked to help your client attend the bedside or grave side of a family member during the course of incarceration. The BOP policy (Policy Statement 5280.07 Furloughs) is to allow furloughs (for inmates with community custody classification) or escorted trips (for inmates with other custody classifications) to the funeral of a deceased member of the inmate's immediate family (child, spouse, sibling or parent, or functional substitute - client raised by grandmother who is now deceased). The inmate may be allowed to make a hospital visit to an immediate family member upon medical certification of the impending death of that person. Most of the costs of such a trip must be borne by the inmate or his family. While the institution staff and local probation officers are expected to facilitate such trips, the intervention and assistance of the attorney can often make the difference in raising funds or producing the necessary proof of medical condition, relationship, etc. to make the trip possible on short notice. Once again, the CCM staff can answer your questions about what information you will need and what to do with it.

INMATE RIGHTS

While an inmate may be bereft of hope upon entry into custody of the Bureau of Prisons, she is not bereft of rights, at least not all. Many of them are described at 28 C.F.R. §541.12 ("Inmate Right and Responsibilities"). Bureau policies regarding the exercise of many of these rights are spelled out in other C.F.R. sections. The Bureau has a statutory obligation to provide for the "safekeeping, care and subsistence" of the persons in its charge. 18 U.S.C. § 4042(a)(2). See also 18 U.S.C. § 4001(b)(2).

The Eighth Amendment to the Constitution requires that the custodian of a convicted inmate not be deliberately indifferent to threats to the inmates health and safety. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 291 (1976).² A violation of this right may be asserted under the Federal Tort Claims Act or directly under the Constitution as a *Bivens* action (*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388) and survives the death of the inmate. Carlson v. Green, 446 U.S. 14 100 S.Ct. 1468 (1980)(death following inappropriate medical response to asthma attack). The court is not required to await actual physical injury from the deliberate indifference before acting. Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475, 2480 (1993)(alleged health risk in exposure to environmental tobacco smoke). Nor, however, should it speculate that currently appropriate health care will reach a level of deliberate indifference. Clark v. Hedrick, 233 F.3d 1093 (8th Cir. 2000)(condition not yet at acute stage where bone-marrow transplant might be required). However, a blanket policy against organ transplants, except at inmate's expense in outside hospital, could raise constitutional questions. Barron v. Keohane, 216 F.3d 692 (8th Cir. 2000).

DESIGNATION

The Bureau of Prisons is given authority to select the place of confinement of a sentenced inmate and some direction as to how to make the decision by statute, 18 U.S.C. § 3621(b). Shortly after the imposition of sentence, upon the request of the U.S. Marshal's office the staff of the CCM office will initiate the designation process. The CCM will get a copy of the Judgment in a Criminal Case (or Judgment and Commitment Order), the report of the Pre- Sentence Investigation³ and the marshal's intake form. From the information then available to it, the CCM will determine whether the inmate will serve the sentence in a local facility, including a community corrections center. If the inmate is to serve the sentence in a BOP institution, the information from the Judgment and the PSIR and other sources is submitted to the Regional Office for designation. The designation will usually be made within three days. Where the designation will be determined by medical or psychiatric needs, BOP staff in the central offices in Washington will make the designation.

The designation decision is in large part a product of the security classification of the inmate.⁴ Inmates will be classified throughout the term of incarceration as either high, medium, low, or minimum security. *The practice of the BOP is to place an inmate in an institution appropriate for the security classification that is reasonably close to the inmate's release point (home).*⁵

An inmate's security classification is determined by the completion of an Inmate Load and Security Designation form. A copy of the form is attached. The manual for use of the form, Program Statement 5100.07, is maintained in each CCM office. The manual is available under the Freedom of Information Act and on the Bureau's web site, "www.bop.gov." However, interpretations in complex factual situations may be most easily researched in conjunction with the staff of the CCM. Many of the items on the form are scored items. The total score (the higher the score, the higher the security classification) together with the presence or absence of certain Public Safety Factors will indicate the appropriate security classification for each inmate.

The recent adoption of a new designation manual is described as Phase I of the work of an internal Classification Workgroup. It made “the most extensive modifications affecting male classification since the inception of the Bureau’s system in the 1970s.” There are now separate, but similar classification schemes for male and female inmates. Phase II of the revision process may result in similarly “extensive modifications” for female inmates and other changes, but none have been published to date. As with all BOP policy materials, it is important to be sure that any policy statement you are dealing with is the most current, or otherwise applicable, policy or program statement.

Some of the scored items on the designation form are easily determined and not likely to be disputed. For instance, the expected length of incarceration (applies to females only) is simply the sentence imposed less time served and less anticipated good time equals a certain number of points. However, whether your client’s arson offense involved a “substantial risk of death or bodily injury” or not will mean the difference between “high” and “greatest” severity of offense (5 or 7 points). Other scored items include: detainers against the inmate for unserved sentences or unresolved criminal charges (up to 7 points); the type of prior commitments (up to 3 points); history of escapes (up to 3 points for males, 7 points for females) and acts of violence (up to 7 points); and the inmate’s pre-commitment status. The last item is the only one that will reduce the person’s point total. If the person complies fully with the conditions of a release order that has no financial obligation, the score is reduced by three points. Or if the person is allowed to surrender directly to the designated institution, the score is reduced by six points for females and three points for males. Voluntary surrender to the U.S. Marshal qualifies for the point reduction so long as the surrender is not on the same day as imposition of sentence. A total score of five points or less (ten for females) with no Public Safety Factors will result in a minimum security classification. In the absence of Public Safety Factors, 6-8 points for males or 11-21 for females results in a low security classification; 9-14 points results in a medium security classification for males and more than 14 points for males or more than 21 points for females results in a high security classification.

Public Safety Factors (“PSF”), while not “scored” factors, often make the difference between a minimum security classification (eligible for prison camp) and low security classification (will be housed in a federal correctional institution.) For instance, an inmate whose current offense or criminal history warrant application of the Sex Offender PSF will never be a minimum security classification - thus no prison camp, no community corrections and no home detention. If reliable information causes the application of the Disruptive Group PSF (membership in groups such as the Jamaican Mafia, the Crips and Bloods, etc.) A male inmate will be given a high security classification and serve his time in a federal prison. Other PSFs include Greatest Severity Offense (male only), Threat to a Government Official (male or female), Deportable Alien (male or female - no minimum security unless INS certifies it will not deport, or long standing ties to the community, etc. are shown); Sentence Length (males w/ 25 + years remaining = high security; 18 + years = medium and 10+ years = low security); Violent Behavior (female only) and Escape Risk (female only). The impact of any PSF may be waived by the Regional Designator. A waiver would most likely be granted to satisfy a judicial recommendation and where the specific facts of the case indicate that the purpose(s) underlying the PSF are not really met by application of the factor in this case. This point should be first addressed to the staff of the CCM in an effort to enlist their support for a waiver.

The new designation manual outlines the required contents of a request for a waiver. P.S. 5100.07 (9/99) Ch. 7, p.6.

Any of the scored items or the PSFs could result in an inappropriate classification and designation of your client if based upon erroneous facts or a faulty interpretation of those facts. There are several opportunities to influence the outcome of the determination. First, contested facts may be litigated to successful resolution during the sentencing hearing. If the court orders changes in the PSI report, make sure that the changes are in fact made before the report is sent to the BOP. Second, by presenting additional, or more accurate facts, or persuasive arguments, to the CCM (or beyond that, to the Regional Office staff) a more appropriate classification may result. Third, the inmate can seek correction of an erroneous classification through administrative remedies in the institution. Fourth, the inmate has a Privacy Act right to insist that BOP fact-bound determinations not be based upon erroneous facts that are subject to verification. See *Sellers v. Bureau of Prisons*, 959 F.2d 307 (D.C. Cir. 1992). Obviously, the earlier in the process that erroneous facts can be corrected, missing information supplied, or faulty interpretations addressed, the more likely a more appropriate designation will be made.

The BOP has recognized that there are certain regularly occurring situations that will warrant a discretionary variance from the designation indicated by the security score and PSFs. These are called Management Variables. They include such things as medical or psychiatric concerns, program participation, Central Inmate Monitoring Assignment (snitch protection monitoring) and judicial recommendation. The last of these is the most frequently encountered by defense counsel. *BOP policy is to try to accommodate a judicial recommendation and to advise the sentencing court of its response to the recommendation.* See P.S. 5100.07 (9/99) Chap. 7, page 11. See also 18 U.S.C. § 3621(b)(4). The recommendation can be for a particular institution, or class of institution; for program participation; for pre-release (less restrictive) status while in community corrections centers; for waiver of subsistence payments while in community corrections centers or for any other consideration the facts indicate would be appropriate. Although many district judges feel their recommendations have been disregarded in recent years, the Bureau reports that it continues to honor approximately 80% of judicial recommendations. For participation in an Intensive Confinement Center, a judicial recommendation was essential, and would certainly be helpful, but is now not absolutely required. **But note:** if there is to be a direct commitment to the boot camp, the sentencing judge should be strongly urged to allow the defendant to self surrender to the institution at a date provided by the CCM, to avoid the possibility that the defendant will go to another institution first and placed on a waiting list for admission to the program until too late in the term of his sentence to afford time for the program.

Timing is critical should you try to influence the classification or designation of your client. The BOP policy is to try to make a designation within three days of receipt of the request. However, reports of much longer delays have been heard. Therefore, if you need to challenge, or supplement information provided to the CCM, you should be prepared to do so by the time of the imposition of sentence. If that is not possible, a phone call to the CCM might buy necessary time to gather and submit the information. Once the designation is made, the marshal's office will be notified, as will the designated institution.

BOOTCAMPS

Designation to an Intensive Confinement Center (bootcamp) may be beneficial to your client. If your client is so designated, he/she will be moved to one of the ICCs (now at Lewisburg, PA, and Lompoc, CA for males and Bryan, TX for females) sometime between 12 and 30 months before termination of the sentence. If the six month program is successfully completed, the inmate will not return to a prison or prison camp for the rest of the sentence. The time remaining on the sentence will be served at a community corrections center or in home detention. Thus bootcamp graduates may spend a far greater portion of their sentence in a halfway house or in home detention than any other inmate. In addition, the BOP has a policy that will allow boot camp graduates who had sentences of 12 - 30 months an early release from custody of from three to six months. See 18 U.S.C. § 4046(c). Thus a person who completes the bootcamp and has 24 months left to serve would now be released after 18 months halfway house/home detention time rather than 24 months. There may as well be benefits to the inmate from the self-discipline, improved stamina and life skills programs of the ICCs, and presumably lower recidivism rates that are the primary purpose of the centers.

In order to be designated to an ICC, a person must:

- * have 12-30 months remaining on the sentence and a total sentence not exceeding 60 months;⁶
- * be serving the first period of incarceration or has a minor history of prior incarcerations;
- * not be serving a term of imprisonment for a crime of violence (this is critical - see the discussion on crimes of violence that follows)⁷;
- * have a minimum security classification;
- * be physically and mentally able to complete the program; and
- * volunteer.

(See Program Statement 5390.07, eff. 5/28/96 superseding Operations Memorandum 249-93)

A recent policy change may exclude persons whose history demonstrates a stable employment, educational or military background, in that such persons do not “require the intensive specialized programs” of an ICC. Program Statement 5390.08(11/04/99) Intensive Confinement Center Program, page 6. The key for the advocate may be to show that the stable history masked significant problems that ultimately led the client to the current conviction and that the client would benefit from the intensive specialized programs. A specific and strongly worded judicial recommendation in such cases may be essential.

A judicial recommendation, while certainly increasing the likelihood of a boot camp designation, particularly in close cases, is no longer required. However, the BOP will notify the sentencing judge (and now the AUSA) that it plans to designate a person to an ICC and allow an opportunity for a response. Further, *non-citizens are no longer ineligible*, however, where a deportation detainer exists or is likely non-citizens will generally not be eligible for minimum security classification and therefore not designated to an ICC. The ICC program is modeled on military boot camps and is similar to such programs now found in many states. The inmate is exposed to a rigorous program of long hours, physical exercise, self

control, stress management, nutrition and other life skills training. The intent is to give the person a better chance of avoiding further criminal conduct by raising their self-respect and improving their coping skills.

EARLY RELEASE FOR DRUG TREATMENT

The 1994 Crime Bill provided that the BOP may release up to one year prior to the expiration of sentence those non-violent offenders who complete an intensive residential drug treatment program while incarcerated. 18 U.S.C. § 3621(e). The BOP has adopted procedures for the implementation of that authority.⁸

Program Statement 5330.10, Drug Abuse Programs Manual, sets out the requirements for participation and completion of drug programs, and the benefits to the inmate. See also, 28 C.F.R. §§ 550.50 et seq. It should be noted that some form of drug treatment is *mandatory* where drug abuse contributed to the commission of the offense; drug use was the basis for revocation of supervised release or community placement; or if recommended by the sentencing judge. Sanctions for failure to participate or to complete include pay reduction and ineligibility to participate in community programs. The residential drug abuse program is the one that can result in a reduction of sentence. It consists of 500 hours of treatment/education over six to twelve months. There are such programs in five or six institutions in each of the geographic regions of BOP.⁹

In order to be eligible to participate in a residential drug treatment program, the inmate:

- 1.) must have a verifiable documented drug abuse problem, including a drug use disorder defined by DSM-IV;
- 2.) must have no serious mental impairment;
- 3.) must sign a participation agreement;
- 4.) must ordinarily be within 36 months of release; and
- 5.) must have an appropriate security classification for the institution offering the program.

Incentives for successful completion include modest cash awards, consideration for maximum period of time (currently 180 days) in a community corrections center; local institution privileges and early release. *Inmates who are INS detainees, pretrial inmates, contractual boarders, parole eligible inmates and those who have committed a crime of violence (discussed below) or who have a prior conviction for homicide, forcible rape, robbery or aggravated assault are not eligible for early release.* Persons serving non-violent minimum mandatory sentences may be considered for drug treatment programs and are *not ineligible* for a reduction in time in custody. There is a retroactivity provision that will extend the early release to inmates who otherwise qualify, but completed their program prior to the effective date of the 1994 crime bill. Parole eligible inmates can get a recommendation for early parole release.

In order to complete the residential drug treatment and receive the benefits, including reduced time in custody, the inmate will have to meet both attendance and testing standards. Following completion of the residential program, the inmate will be required to participate in transitional services.¹⁰ This will usually

be out-patient counseling while the inmate is in a camp, community corrections center or home detention. Failure to participate, or the commission of rules or legal infractions, including drug use or possession can result in a re-designation to a BOP institution and a loss of the early release date. The community corrections administrator has the authority to retard an early release date by the minimum time necessary for the inmate to complete transitional treatment. 28 C.F.R. § 550.58 (c)(3). The inmate who goes from BOP custody to supervised release can expect to have continued drug treatment be a condition of supervision.

CRIMES OF VIOLENCE

The determination as to whether an inmate is ineligible for program participation (boot camp) or benefits (early release for drug treatment) due to the commission of a crime of violence has been controversial. BOP first adopted guidelines defining the term “crime of violence” (P.S. 5162.02, 7/24/95, amended 4/23/96). This definition applied to eligibility determinations for admission to Intensive Confinement Centers and for early release consideration for ICC and drug treatment program graduates. As defined in P.S. 5162.02, the term is very broad, arguably broader than intended by Congress. The guideline first adopts the “crime of violence” definition of 18 U.S.C. § 924 (c)(3) as the primary determination. An offense may be a “crime of violence” for purposes of BOP policies and programs if it:

a.) is always a crime of violence by the nature of the statutory definition. A list of such statutes is included in the guideline;

b.) has a sentencing guidelines base offense level chosen because of some element of violence or the threat of, or substantial risk of violence;

c.) resulted in a finding of a specific offense characteristic indicating violence or threat of, or substantial risk of violence;

d.) was committed under circumstances that involved violence, the threat of violence, or the substantial risk of violence, relying on the language of § 924(c)(3). The guideline does not deal with any of the case law interpreting § 924(c)(3). There has developed a fertile field of challenge on behalf of an inmate client who is denied participation in a BOP program as a violent offender, or who has been denied early release upon completion. Most, but not all courts have found the BOP definition defective. See for example, *Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Davis v. Crabtree*, 109 F.3d 566 (9th Cir. 1997); *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir. 1997); *Jacks v. Crabtree*, 114 F.3d 983 (9th Cir. 1997); *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997); *Venegas v. Henman*, 126 F.3d 760 (5th Cir. 1997); *Wiggins v. Wise*, 951 F. Supp. 614 (S.D.W.Va. 1996); *Fonner v. Thompson*, 955 F. Supp. 638 (N.D.W.Va. 1997); *Piccolo v. Lansing*, 939 F. Supp. 319 (D.N.J. 1996). As a result of the litigation, the Bureau modified its criteria for eligibility for participation in Intensive Confinement Centers, 28 CFR § 524.31, and for early release from a sentence for successful completion of a drug treatment program, 28 C.F.R. § 550.58. This change is intended to exclude violent offenders by the exercise of the implicit discretion placed in BOP by the statute, 18 U.S.C. § 3621(e)(2)(B), rather than by definition of the statutory language “nonviolent offense”. The new criteria will deny ICC participation and early release to persons who have been convicted of a crime of violence or a felony offense:

1. that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
2. that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
3. that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
4. that by its nature or conduct involves sexual abuse offenses committed upon children.

The new criteria came in an interim rule with a stated effective date of October 9, 1997, that did not discuss retroactivity¹¹, i.e. whether it will be applied to persons already in the programs. Assuming BOP or the courts preclude its application to persons already in the programs, the definitions in P.S. 5162.02 (as interpreted by applicable circuit and district opinions) would apply.

The intent of the Bureau is to avoid different courts of appeal from construing an administrative definition to be consistent or inconsistent with statutory language and thus have a uniform national policy: one which excludes persons whose offense or history carries one of the factors indicating a proclivity to violence. . Whether courts would allow BOP to exclude inmates in the exercise of its discretionary authority that it could not exclude by its administrative interpretation of statutory terms became the question. Some courts were open to arguments that while limited in its interpretation of who is statutorily eligible, the BOP is free to exercise its discretion as to who among eligible inmates is deserving of benefits, and that there is “nothing unreasonable in the Bureau’s making the common-sense decision that there is a significant potential for violence from criminals who carry, possess or use firearms while engaged in their felonious employment, even if they have wound up committing a nonviolent offense this time.” *Bowen v. Hood*, 202 F.3d 1211,1219 (9th Cir. 2000); *Bellis v. Davis*, 186 F.3d 1092 (8th Cir. 1999); *Pelissero v. Thompson*, 155 F.3d 470 (4th Cir. 1998) and see *Bush v. Pitzer*, 133 F.3d 455, 458 (7th Cir., 1998); *Wottlin v. Fleming*, 136 F.3d 1032 (5th Cir. 1998); *Stiver v. Meko*, 130 F.3d 574 (3rd Cir. 1997), *Sesler v. Pitzer*, *supra* and *Jacks v. Crabtree*, *supra*. However, two circuits held that the new regulation is but a “distinction without a difference” and concluded that the Bureau may not categorically exclude early release benefits from persons convicted of nonviolent offenses. *Kilpatrick v. Houston*, 36 F. Supp.2d 1328 (N.D. Fla.), *aff’d*. 197 F.3d 1134 (11th Cir. 1999) and *Ward v. Booker*, 202 F.3d 1249 (10th Cir. 2000). The Supreme Court granted certiorari in the *Bellis* case from the Eighth Circuit, *sub nom. Lopez v. Davis* and found for the BOP, — U.S. —, 121 S.Ct. 714 (2001) thus ending five years of litigation. While the creativity of lawyers litigating these issues gives hope for further resistance to the Bureau’s efforts to limit availability of early release, for the time being, conservative advice to a client would be that the existence of a prior record within the confines of the Bureau’s policy statement will preclude the client from entry to boot camp or from receiving early release for completing intensive drug treatment¹².

CONCLUSION

The Bureau of Prisons has grown dramatically in the last several years. Many of the programs and policies described in this paper were developed, or modified, in reaction to the increased demand on BOP resources. It is reasonable to expect these trends to continue. While major changes in Bureau policies and programs may be reported in law journals, and are often available in the Congressional Report and C.F.R. and on the Bureau homepage, the single most accessible and current source of information and assistance will be the staff of the Community Corrections Manager for your district. CCM staff will either have the information you need, or can tell you how to obtain the information. The author has consistently found BOP personnel to be cooperative and helpful. Good luck.

For Further Reading

*A Judicial Guide to the Bureau of Prisons;
Federal Prisons Journal;
Facilities*

From: Federal Bureau of Prisons
Office of Public Affairs
320 First Street, NW
Washington, D.C. 20534

NOTE: BOP Homepage makes many publications of the bureau available on line:
<http://www.bop.gov>

Federal Probation
Administrative Office of the U.S. Courts
Washington, D.C. 20544

The National Prison Project JOURNAL
1875 Connecticut Avenue, NW #410
Washington, D.C. 20009

Community Corrections Report
Civic Research Institute, Inc.
4490 U.S. Route 27
P.O. Box 585
Kingston, NJ 08528

Corrections Alert
Corrections 2000
#7 Chelsea House
2411 Crofton Lane
Crofton, MD 21114

Endnotes

1. From "Jericho" by Johnny Clegg.

2. Similar protection is afforded pre-trial detainees, although founded on the Fifth Amendment Due Process clause instead of the Eighth Amendment. Cuoco v. Moritsugu, 222 F.3d 99, 106 (2nd Cir. 2000)(denial of estrogen treatment regimen to pre-operative transsexual).
3. There are persistent rumors that inmates in some institutions coerce new inmates to secure a copy of their PSIR from their attorney so that the inmates can see whether the new inmate has cooperated with the government. Apparently because of this, or related problems, it has been reported that inmates will not be allowed to keep a copy of the PSIR in their personal belongings, but will have access to it through their case manager.
4. With an effective date of September 3, 1999, a new designation manual was adopted recently. Program Statement 5100.07. It replaced P.S. 5100.06 which had an effective date of June 7, 1996 with a revision of May 12, 1997. P.S. 5100.07 is available on the BOP web site, "www.bop.gov."
5. Placement within 500 miles is ordinarily deemed reasonable, even if a closer institution is available. P.S. 5100.07 (9/99), Ch.7, p.11.
6. Those inmates whose sentences exceed 30 months will not be eligible for the "time cut" and will not go to the ICC until 24 months remain on their sentence.
7. If your client is convicted of an offense that is considered a crime of violence, e.z. any bank robbery, but in fact was not armed, or the way in which the offense was committed did not pose any realistic threat of harm to others, a "strong" recommendation by the judge for participation in boot camp might persuade the BOP to waive the exclusion of this factor.
8. A bill almost passed in Congress in 1996 that would withdraw the authority for early release of residential drug treatment program graduates on the theory that the policy provides preferential treatment for drug abusers. The Bureau supports repeal. The passage of such an act would raise interesting retroactivity questions for those who participate in the program prior to repeal.
9. Due to demand, there may be a waiting list for the intensive program at an institution where your client might otherwise be sent. If participation in the program is more important than geographic location and if your client has a sentence short enough that would make him eligible for entry into treatment (36 months or less) a request for a judicial recommendation for placement at an institution where intensive residential drug treatment is immediately available might make a difference.
10. An argument that requiring transitional services following the residential program, and denying early release eligibility to those inmates whose custody level prevents community placement exceeds the statutory authority of the Bureau has been rejected. McLean v. Crabtree, 173 F.3d 1176 (9th Cir. 1999). Given the diversity of circuit opinions on other BOP/DAP issues, the argument should not be abandoned.
11. The BOP has asserted in litigation that it will apply the new rule prospectively only.
12. This and related issues have been a particularly fluid area of the law in recent years. You should update the research before giving advice or taking action based upon the discussion in this paper. Steve Sady, Assistant Federal Public Defender for the District of Oregon, (503) 326-2123, has been at the forefront of the litigation to secure inmates' benefits of early release for participation in drug treatment programs and is happy to share his expertise (and briefs!).

INMATE LOAD AND SECURITY DESIGNATION FORM - MALE (BP-337)					
INMATE LOAD DATA		1. REG NO		2. LAST NAME	
3. FIRST NAME		4. MIDDLE		5. SUFFIX	
6. RACE	7. SEX	8. ETHNIC ORIGIN	9. DATE OF BIRTH		
10. OFFENSE/SENTENCE					
11. FBI NUMBER		12. SOCIAL SECURITY NUMBER			
13. STATE OF BIRTH		14. OR COUNTRY OF BIRTH		15. CITIZENSHIP	
16. ADDRESS - STREET			17. CITY		
18. STATE		19. ZIP CODE		20. OR FOREIGN COUNTRY	
21. HEIGHT - FT: IN:		22. WEIGHT		23. HAIR	24. EYES
25. ARS ASSIGNMENT					
SECURITY DESIGNATION DATA //////////////////////////////////////					
1. PUBLIC A - NONE F - SEX OFFENDER I - SENTENCE LENGTH SAFETY B - DISRUPTIVE GROUP G - THREAT GOVT OFFICIAL L - SERIOUS ESCAPE FACTORS C - GREATEST H - DEPORTABLE ALIEN M - PRISON DISTURBANCE SEVERITY OFFENSE					
2. USM OFFICE		3. JUDGE		4. REC FACILITY	
				5. REC PROGRAM	
6. TYPE OF DETAINER 0 - NONE 3 - MODERATE 7 - GREATEST 1 - LOWEST/LOW MODERATE 5 - HIGH					
7. SEVERITY OF CURRENT OFFENSE 0 - LOWEST 3 - MODERATE 7 - GREATEST 1 - LOW MODERATE 5 - HIGH					
8. MONTHS TO RELEASE _____					
9. TYPE OF PRIOR COMMITMENT 0 = NONE 1 = MINOR 3 = SERIOUS					
10. HISTORY OF ESCAPE OR ATTEMPTS NONE >15 YEARS 10-15 YEARS 5-10 YEARS <5 YEARS MINOR 0 1 1 2 3 SERIOUS 0 3 3 3 3					
11. HISTORY OF VIOLENCE NONE >15 YEARS 10-15 YEARS 5-10 YEARS <5 YEARS MINOR 0 1 1 3 5 SERIOUS 0 2 4 6 7					
12. PRECOMMITMENT STATUS 0 = NOT APPLICABLE -3 = OWN RECOGNIZANCE OR VOLUNTARY SURRENDER					
13. VOLUNTARY SURRENDER DATE			14. VOLUNTARY SURRENDER LOCATION		
15. CRIM HX PTS _____			16. SECURITY POINT TOTAL		
17. OMDT REFER (Y/N) _____					
18. REMARKS					

INMATE LOAD AND SECURITY DESIGNATION FORM - FEMALE (BP-337)				
INMATE LOAD DATA		1. REG NO		2. LAST NAME
3. FIRST NAME		4. MIDDLE		5. SUFFIX
6. RACE	7. SEX	8. ETHNIC ORIGIN	9. DATE OF BIRTH	
10. OFFENSE/SENTENCE				
11. FBI NUMBER		12. SOCIAL SECURITY NUMBER		
13. STATE OF BIRTH		14. OR COUNTRY OF BIRTH		15. CITIZENSHIP
16. ADDRESS - STREET			17. CITY	
18. STATE		19. ZIP CODE	20. OR FOREIGN COUNTRY	
21. HEIGHT - FT: IN:		22. WEIGHT	23. HAIR	24. EYES
25. ARS ASSIGNMENT				
SECURITY DESIGNATION DATA //////////////////////////////////////				
1. PUBLIC A - NONE H - DEPORTABLE ALIEN M - PRISON DISTURBANCE SAFETY F - SEX OFFENDER K - VIOLENT BEHAVIOR FACTORS G - THREAT GOVT OFFICIAL L - SERIOUS ESCAPE				
2. USM OFFICE		3. JUDGE	4. REC FACILITY	5. REC PROGRAM
6. TYPE OF DETAINER 0 - NONE 3 - MODERATE 7 - GREATEST 1 - LOWEST/LOW MODERATE 5 - HIGH				
7. SEVERITY OF CURRENT OFFENSE 0 - LOWEST 3 - MODERATE 7 - GREATEST 1 - LOW MODERATE 5 - HIGH				
8. MONTHS TO RELEASE		8A. EXPECTED LENGTH 0- 0-12 MONTHS 3 - 60-83 MONTHS OF INCARCERATION 1 - 13-59 MONTHS 5- 84 + MONTHS		
9. TYPE OF PRIOR COMMITMENT 0 = NONE 1 = MINOR 3 = SERIOUS				
10. HISTORY OF ESCAPE OR ATTEMPTS NONE >15 YEARS 10-15 YEARS 5-10 YEARS <5 YEARS MINOR 0 1 1 2 3 SERIOUS 0 4 5 6 7				
11. HISTORY OF VIOLENCE NONE >15 YEARS 10-15 YEARS 5-10 YEARS <5 YEARS MINOR 0 1 1 2 3 SERIOUS 0 4 5 6 7				
12. PRECOMMITMENT STATUS 0= N/A -3= OWN RECOGNIZANCE -6= VOLUNTARY SURRENDER				
13. VOLUNTARY SURRENDER DATE			14. VOLUNTARY SURRENDER LOCATION	
15. CRIM HX PTS			16. SECURITY POINT TOTAL	
17. OMDT REFER (Y/N)				
18. REMARKS				

Table 7-1

SECURITY DESIGNATION TABLE (MALES)		
INMATE SECURITY LEVEL ASSIGNMENTS BASED ON CLASSIFICATION SCORE AND PUBLIC SAFETY FACTORS		
Classification Score	Public Safety Factors	Inmate Security Level
0 - 5	No Public Safety Factors Deportable Alien Greatest Severity Offense Sex Offender Threat to Government Officials Sentence Length Time remaining > 10 Yrs Time remaining > 20 Yrs Time remaining > 30 Yrs Includes non-parolable LIFE/ Death penalty cases Serious Escape Disruptive Group Prison Disturbance	Minimum Low Low Low Low Low Low Medium High Medium High High
6 - 8	No Public Safety Factors Serious Escape Sentence Length Time remaining > 20 Yrs Time remaining > 30 Yrs Includes non-parolable LIFE/ Death penalty cases Disruptive Group Prison Disturbance	Low Medium Medium High High High
9 - 14	No Public Safety Factors Disruptive Group Prison Disturbance Sentence Length Time remaining > 30 Yrs Includes non-parolable LIFE/ Death penalty cases	Medium High High High
15 +		High

Table 7-2

SECURITY DESIGNATION TABLE (FEMALES)		
INMATE SECURITY LEVEL ASSIGNMENTS BASED ON CLASSIFICATION SCORE AND PUBLIC SAFETY FACTORS		
Classification Score	Public Safety Factors	Inmate Security Level
0 - 10	No Public Safety Factors Deportable Alien Sex Offender Threat to Government Officials Violent Behavior Prison Disturbance Serious Escape	Minimum Low Low Low High High High
11 - 21	No Public Safety Factors Violent Behavior Prison Disturbance Serious Escape	Low High High High
22 +		High

OFFENSE SEVERITY SCALE

9/3/99

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GREATEST SEVERITY**Aircraft Piracy** - placing plane or passengers in danger**Arson** - substantial risk of death or bodily injury**Assault** - serious bodily injury intended or permanent or
life threatening bodily injury resulting)**Car Jacking** - any**Drug Offense** - see criteria below***Escape** - closed institution, secure custody, force or
weapons used**Espionage** - treason, sabotage, or related offenses**Explosives** - risk of death or bodily injury**Extortion** - weapon or threat of violence**Homicide or Voluntary Manslaughter** - any**Kidnaping** - abduction, unlawful restraint, demanding or
receiving ransom money

Robbery - any

Sexual offenses - rape, sodomy, incest, carnal knowledge,
transportation with coercion or force for commercial
purposes

Toxic Substances/Chemicals: - weapon to endanger human life

Weapons - distribution of automatic weapons, exporting
sophisticated weaponry, brandishing or threatening use of
a weapon

* Any **drug offender** whose current offense includes the following criteria shall be scored in the
Greatest severity category:

The offender was part of an organizational network and he or she organized or maintained
ownership interest/profits from **large-scale** drug activity,

*****AND*****

the drug amount equals or exceeds the amount below:

Cocaine - greater than or equal to 10,000 gm, 10 K, or 22 lb

Cocaine Base "Crack" - greater than or equal to 31 gm

Hashish - greater than or equal to 250,000 gm, 250 K, or 551 lb

Marijuana - greater than or equal to 620,000 gm, 620 K, or 1,367 lb

PCP - greater than or equal to 100,000 mg, 100 gm, or 20,000 dosage units

Heroin or Opiates - greater than or equal to 2,000 gm, 2 K, or 4.4 lb

Methamphetamine - greater than or equal to 16,000 gm, 17 K, or 35 lbs

Other illicit drugs: - Amphetamine, Barbiturates, LSD, etc. greater than or equal to 250,000
dosage units

HIGH SEVERITY

PS 5100.07

9/3/99

Arson - other

Appendix B, Page 2

Cruelty to Children - any

Drugs (For Females only)

Cocaine - greater than or equal to 10,000 gm, 10 K,
Or 22 lb

Cocaine Base "Crack" - greater than or equal to 31 gm

Hashish - greater than or equal to 250,000 gm, 250 K,
Or 551 lb

Marijuana - greater than or equal to 620,000 gm, 620 K,
Or 1,367 lb

PCP - greater than or equal to 100,000 mg, 100 gm, or
20,000 dosage units

Heroin or Opiates - greater than or equal to 2,000 gm,
2 K, or 4.4 lb

Methamphetamine - greater than or equal to 16,000 gm,
17 K, or 35 lb

Other illicit drugs - Amphetamine, Barbiturates, LSD
etc. - greater than or equal to 250,000 dosage units

Explosives - other

Extortion - other

Involuntary manslaughter - includes vehicular homicide

Residential Burglary - with evidence that occupants were in dwelling during the commission of the offense

Rioting - any

Sexual Offenses - sexual exploitation of children, unlawful sexual conduct with a minor, pornography

Stalking - any

Threatening Communications - with conduct evidencing intent to carry out such threat

Toxic Substances/Chemicals - other

PS 5100.07

9/3/99

Appendix B, Page 3

MODERATE SEVERITY

Assault - other

Auto Theft - any

Breaking and Entering - any

Burglary - other

Child Abandonment - any

Contempt of Court - criminal contempt

Drugs Cocaine - greater than or equal to 400 gm, .4 K, or .88 lb

Cocaine Base "Crack" - greater than or equal to 1 gm

Hashish - greater than or equal to 11,000 gm, 11 K,
or 24 lb

Marijuana - greater than or equal to 25,000 gm, 25 K,
or 55 lb

PCP - greater than or equal to 4,000 mg, 4 gm, or .14 oz

Heroin or Opiates - greater than or equal to 80 gm, .08 K, or .18 lb

Methamphetamine - greater than or equal to 667 gm, .67 K, or 1.47 lb

Other illicit drugs - Amphetamine, Barbiturates, LSD, etc. greater than or equal to 10,000 dosage
units, .05 K, or .11 lb

Escape - walkaway from open institution, failure to appear/bail
reform act, no threat of violence involved

Immigration Offenses - transportation of unlawful aliens

Obstruction of Justice - any

Property Offenses - over \$250,000, includes theft, fraud, tax evasion, forgery, currency offenses

Sexual Offenses - other

Weapons - other

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm	1 gm = 1 ml (liquid)
1 lb = 453.6 gm	1 liter = 1,000 ml
1 lb = 0.4536 kg	1 kg = 1,000 gm
1 gal = 3.785 liters	1 gm = 1,000 mg
1 qt = 0.946 liters	1 grain = 64.8 mg

PS 5100.07

9/3/99

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LOW-MODERATE

Bigamy - Polygamy

Drugs Cocaine - less than 400 gm, .4 K, or .88 lb

Cocaine Base "Crack" - less than 1 gm

Hashish - less than 11,000 gm, 11 K, or 24 lb

Marijuana - less than 25,000 gm, 25 K, or 55 lb

PCP - less than 4,000 mg, 4 gm, or .14 oz

Heroin or Opiates - less than 80 gm, .08 K, or .18 lb

Methamphetamine - less than 667 gm, .67 K, or 1.47 lb

Other illicit drugs - Amphetamine, Barbiturates, LSD, etc., less than 10,000 dosage units, .05 K, or .11 lb

Indecent Exposure - indecent acts, lewd behavior

Immigration Offenses - other

Post-release Supervision Violation - technical, administrative

Property Offenses - valued between \$2,000 and \$250,000)

LOWEST SEVERITY

Drugs - personal use

Gambling Law Violation - any

Liquor Law Violation - any

Property Offenses - less than \$2,000

Suspicion - any

Traffic Laws - any

Vagrancy - any

Vandalism - any

MARIJUANA EQUIVALENT CHART

DRUG	MARIJUANA EQUIVALENT
1 gm of Heroin	1,000 gm
1 gm of Cocaine Powder	200 gm
1 gm of Methamphetamine	2,000 gm
1 gm of LSD	100,000 gm
1 gm of "crack" cocaine	20,000 gm
1 gm of Hashish Oil	50 gm

For other drug equivalents, please refer to the U.S. Sentencing Commission Guidelines Manual.

PUBLIC SAFETY FACTORS

There are certain factors which require increased security measures to ensure the protection of society. Staff shall apply any of the following Public Safety Factors (PSF) that are appropriate. Up to three PSFs may be entered on the Update Security Designation (BP-337). If more than three applicable Public Safety Factors are identified, use those which would most appropriately control the inmate's placement.

<u>CODE</u>	<u>DESCRIPTION - PSF</u>

A	<u>NONE.</u> No Public Safety Factors apply.

B	<u>DISRUPTIVE GROUP.</u> A male inmate who is a validated member of a Disruptive Group identified in the Central Inmate Monitoring System shall be housed in a High security level institution, unless the PSF has been waived.

Note: At the time of initial designation, if the PSI or other documentation identifies the inmate as a possible member of one of the Central Inmate Monitoring Disruptive Groups, Community Corrections (CC) staff shall indicate a PSF on the BP-337. However, CC staff shall not enter the CIM assignment "Disruptive Group." Upon loading this PSF on a not-yet-validated member, CC staff shall 1) make a notation in the remarks section to indicate the need for validation upon arrival at the institution, and 2) notify the Central Office Intelligence Section, via GroupWise, to advise them of the inmate's status. Upon the inmate's arrival at the designated institution, the intake screener shall notify the institution's Special Investigation Supervisor (SIS) of the inmate's PSF, in order to begin the validation process.

C	<u>GREATEST SEVERITY OFFENSE.</u> A male inmate whose current term of confinement falls into the "Greatest Severity" range according to the Offense Severity Scale (Appendix B) shall be housed in at least a Low security level institution, unless the PSF has been waived.

<u>CODE</u>	<u>DESCRIPTION - PSF</u>

F	<u>SEX OFFENDER.</u> A male or female inmate whose behavior in the current term of confinement or prior history includes one or more of the following elements shall be housed

in at least a Low security level institution, unless the PSF has been waived. A conviction is not required for application of this PSF if the PSI, or other official documentation, clearly indicates the following behavior occurred in the current term of confinement or prior criminal history. If the case was dismissed or nolle prosequi, application of this PSF cannot be entered. However, in the case where an inmate was charged with an offense that included one of the following elements, but as a result of a plea bargain was not convicted, application of this PSF should be entered.

Example: According to the PSI, the inmate was specifically described as being involved in a Sexual Assault but pled guilty to Simple Assault. Based on the documented behavior, application of this PSF should be entered.

- (1) Engaging in sexual contact with another person without obtaining permission to do so (forcible rape, sexual assault or sexual battery);
- (2) Possession, distribution or mailing of child pornography or related paraphernalia;
- (3) Any sexual contact with a minor or other person physically or mentally incapable of granting consent (indecent liberties with a minor, statutory rape, sexual abuse of the mentally ill, rape by administering a drug or substance);
- (4) Any sexual act or contact not identified above that is aggressive or abusive in nature (rape by instrument, encouraging use of a minor for prostitution purposes, incest). Examples may be documented by state or Bureau of Prisons' incident reports, clear NCIC entries, or other official documentation;
- (5) Attempts are to be treated as if the sexual act or contact was completed; and/or,
- (6) Any offense referenced in the Sex Offender Notification and Registration Program Statement.

CODE

DESCRIPTION - PSF

- G** **THREAT TO GOVERNMENT OFFICIALS.** A **male** or **female** inmate classified with a Central Inmate Monitoring assignment of Threat to Government Official shall be housed in at least a Low security level institution, unless the PSF has been waived.
- H** **DEPORTABLE ALIEN.** A "Deportable Alien" is a **male** or **female** inmate who is a citizen of a foreign country, rather than the United States. In addition, the inmate shall be housed in at least a Low security level institution, unless the PSF has been waived. This PSF also prevents placement in a CCC. Unless an inmate meets all of the below criteria, the PSF shall be applied:
- (1) **Documented and/or independently verified history of stable employment in the**

U.S. for at least three years immediately prior to incarceration. Stable or regular employment is generally defined as full-time (40 hours a week) work. Part-time or seasonal work prior to incarceration does not meet the definition of stable employment;

(2) **Verified history of domicile in the U.S.** (five or more consecutive years immediately preceding the inmate's incarceration for the current term of confinement). For example, if an inmate was arrested and detained in March 1993 on his or her current conviction and was in the U.S. between 1980 and 1984, and again between 1992 and 1993, a PSF for Deportable Alien shall be applied since the five years were not consecutive and did not immediately precede his or her incarceration; and,

(3) **Verified strong family ties in the U.S.** Strong family ties include **only** the immediate family. Members of immediate family include: mother, father, step-parents, foster parents, brothers and sisters, spouse, and children. The word "spouse" includes a common-law relationship which has previously been established in a state which recognizes such a status. In states which do not, a common-law relationship is not considered "immediate family." For determination of applicable state laws, Regional Counsel should be consulted.

CODE

DESCRIPTION - PSF

The defendant or the family member's statement to the USPO preparing the PSI is not considered adequate verification for criteria (1) and (2) above.

The PSF shall not be applied when the Immigration and Naturalization Service (INS) or the Immigration Judge has determined that deportation proceedings are unwarranted and the Institution Hearing Program (IHP)

Case Management Activity (CMA) assignment of NO IHP or IHP CMP ND is assigned. Conversely, if the inmate is ordered deported (CMA of IHP CMP WD), the Deportable Alien PSF shall be applied regardless of the above criteria. The Deportable Alien PSF shall also be applied when FCI Oakdale institution staff assign the inmate a CMA assignment of "OAK INS," regardless of the above criteria. Cases with detainers for deportation investigations or other unusual situations will be evaluated individually.

I

SENTENCE LENGTH. A **male** inmate with more than ten years remaining to serve shall be housed in at least a Low security level institution unless the PSF has been waived.

A **male** inmate with more than 20 years remaining to serve shall be housed in at least a Medium security level institution, unless the PSF has been waived.

A **male** inmate with more than 30 years remaining to serve (including non-parolable LIFE sentences) shall be housed in a High security level institution unless the PSF has been waived.

K **VIOLENT BEHAVIOR.** A **female** inmate whose current term of confinement or history involves two convictions (or findings of commission of a prohibited act by the DHO) for serious incidents of violence within the last five years shall be assigned to the Carswell Administrative Unit, FMC Carswell, Texas, unless the PSF has been waived.

L **SERIOUS ESCAPE.** A **female** inmate who has been involved in a serious escape within the last ten years, including the current term of confinement, shall be

CODE **DESCRIPTION - PSF**

assigned to the Carswell Administrative Unit, unless the PSF has been waived.

A **male** inmate who has escaped from a secure facility (prior or instant offense) with or without the threat of violence or who escapes from an open institution or program with a threat of violence shall be housed in at least a Medium security level institution, unless the PSF has been waived.

M **PRISON DISTURBANCE.** A **male** or **female** inmate who was involved in a serious incident of violence within the institution and was found guilty of the prohibited act(s) of Engaging, Encouraging a Riot, or acting in furtherance of such as described in, but not limited to institution disciplinary codes such as 103, 105, 106, 107, 212, 213 or 218. Such a finding must be in conjunction with a period of multiple institution disruptions. Males will be housed in at least a HIGH security level institution and females shall be assigned to the Carswell Administrative Unit, unless the PSF has been waived.

DISCONTINUED PUBLIC SAFETY FACTORS

D Firearms
E High Drug
J Designation Assessment

IV. MISCELLANEOUS

2001 NEW APPROACHES

GROUND S OF DEPORTABILITY AND INADMISSIBILITY RELATED TO CRIMES¹

Katherine Brady² and Dan Kesselbrenner³

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I. Overview of Immigration Proceedings

A. Civil Nature

Immigration proceedings are civil in nature. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). Although the consequences of deportation may be “drastic,” deportation is not punishment. *Galvan v. Press*, 347 U.S.522, 530 (1954). Consequently, the Supreme Court has repeatedly held that the prohibition against *ex post facto* laws does not apply to deportation proceedings. See, e.g., *Lehmann v. Carson*, 353 U.S. 685, 690 (1957); *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). There is a statutory right to counsel, but not at government expense. 8 U.S.C. § 1362, INA § 292.

B. Deportation and Exclusion Proceedings

Before April 1, 1997, there were two types of immigration proceedings: exclusion and deportation. Exclusion proceedings were for people who were seeking to enter the United States. Deportation proceedings were for people who had already entered the United States.

¹ Revised April 1 2001.

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C. Removal Proceedings

All immigration proceedings that began on or after April 1, 1997 are called “removal” proceedings. In “removal” proceedings, an immigration judge decides whether a noncitizen is inadmissible or deportable from the United States. 8 U.S.C. § 1229(a), INA § 240. The grounds of inadmissibility apply if a person is seeking admission to the United States. The grounds of deportability apply to a person that the United States has admitted as either an immigrant or a non-immigrant.

D. Burden of Proof for Inadmissibility

A first time applicant for admission must establish that he or she is “clearly and beyond doubt entitled to be admitted.” 8 U.S.C. § 1229a(c)(2)(A), INA § 240(c)(2)(A). A person returning to a status must establish by “clear and convincing evidence” that he or she is “lawfully present pursuant to a prior admission.” 8 U.S.C. § 1229a(c)(3)(B), INA § 240(c)(3)(B). In the case of a returning permanent resident, the INS has the burden of establishing inadmissibility. *Matter of Kane*, 15 I&N Dec. 258 (BIA 1975).

E. Burden of Proof for Deportability

The burden is on the INS to establish a ground of deportability by “clear and convincing evidence” in the case of a noncitizen that has been admitted to the United States. 8 U.S.C. § 1229a(c)(3)(A), INA § 240(c)(3)(A).

II. Definition of Conviction

A. Statutory Definition

Congress defines “conviction” at 8 U.S.C. § 1101(a)(48)(A), INA § 101(a)(48) as follows:

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or a jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

B. Specific Dispositions

1. A juvenile court disposition is not a conviction for immigration purposes. *Matter of Devison*, Int. Dec. #3435 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

2. A disposition under a pre-plea diversion statute is not a conviction. *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989).

C. Vacated Convictions

1. A conviction that a trial or appeals court vacates because it was legally defective is not a conviction for immigration purposes. *Matter of Rodriguez-Ruiz*, Int. Dec. #3436 (BIA 2000); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970).

2. A conviction that a trial court vacates for equitable reasons remains a conviction for immigration purposes. *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998).

III. Sentence for Immigration Purposes

A. Statutory Definition

In 1996, Congress established a statutory definition for what is a sentence for immigration purposes. 8 U.S.C. § 1101(a)(48)(B), INA § 101(a)(48)(B). The provision treats as a sentence “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution” of all or part of the sentence.

B. Implications for Aggravated Felony Definition

This definition has important consequences for the aggravated felony ground of deportability because the INA defines certain offenses as aggravated felonies only if the defendant receives a sentence to imprisonment or confinement of a year or more. See Section V below.

IV. Controlled Substance Offenses

A. Deportability for Controlled Substance Offenses

A noncitizen convicted of an offense relating to a controlled substance is deportable and subject to removal from the United States. 8 U.S.C. § 1227(a)(2)(B), INA 237(a)(2)(B).

B. Specific Controlled Substance Offenses and Deportability

1. A conviction for a conspiracy or an attempt to possess, distribute, or manufacture a controlled substance is a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i).

2. A conviction for solicitation to possess a controlled substance is not a deportable offense under the controlled substance ground of deportability. *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (drawing negative implication from the statutory language that includes “attempts or conspiracies”).

3. A conviction for accessory after the fact or misprision of felony is not a controlled substance offense even if principal offense involved possession, distribution, or manufacture of a controlled substance. *Matter of Batista-Hernandez*, Int. Dec. #3321 (BIA 1997).

4. Any record of conviction that does not identify the drug cannot support an order of deportability. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).

5. A conviction for a single offense for simple possession of 30 grams or less of marijuana is not a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i).

6. Drug trafficking and offenses punishable as felonies under certain federal drug laws are also deportable offenses as aggravated felonies. See Section V below.

C. Effect of Rehabilitative Disposition

1. A dismissal or expungement under the Federal First Offender Act (18 U.S.C. § 3607) is not a conviction for immigration purposes.

2. The BIA considers state counterparts to the Federal First Offender Act to be convictions for immigration purposes. *Matter of Roldan*, Int. Dec. #3377 (BIA 1999).⁴

D. Inadmissibility for Controlled Substance Offenses

1. A single conviction for any controlled substance triggers inadmissibility under 8 U.S.C. § 11182(a)(2)(A)(i)(II), INA § 212(a)(2)(A)(i)(II).

⁴ The Ninth Circuit reversed the Board in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

2. A noncitizen is inadmissible if he or she makes a formal, knowing admission of a drug offense to a Department of State or an INS official. 8 U.S.C. § 11182(a)(2)(A)(i)(II), INA § 212(a)(2)(A)(i)(II). To constitute a valid admission, a noncitizen must voluntarily admit the elements of the offense after the official explains the offense in plain terms. *See, e.g., Matter of G.M.*, 7 I&N Dec. 40 (A.G. 1956). No conviction is necessary to trigger inadmissibility under this section.

3. A noncitizen is inadmissible if a Department of State or INS official has a “reason to believe” that he or she is or was a drug trafficker. No conviction is necessary to trigger inadmissibility under this section. 8 U.S.C. § 1182(a)(2)(C), INA § 212(a)(2)(C).

4. A noncitizen that is a “drug addict” or “drug abuser” is inadmissible. 8 U.S.C. § 11182(a)(1)(A)(iv), INA § 212(a)(1)(A)(iv).

V. Aggravated Felonies

A. Overview

Conviction of an aggravated felony is a ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(iii), INA § 237(a)(2)(A). The INA defines the term at 8 U.S.C. § 1101(a)(43), INA § 101(a)(43).

Congress imposes severe immigration penalties for conviction of an aggravated felony. A noncitizen with an aggravated felony conviction is ineligible for most forms of relief from deportation. Congress also provides severe federal criminal penalties for noncitizens who unlawfully re-enter the United States after having been deported or removed and convicted of an aggravated felony. Under 8 U.S.C. § 1326(b)(2) the offense is punishable by 20 years in prison.

B. Specific Offenses Defined as Aggravated Felonies

1. A conviction for sexual abuse of a minor, rape or murder is an aggravated felony. 8 U.S.C. § 1101(a)(43)(A), INA § 101(a)(43)(A). The BIA held that a noncitizen with a conviction for indecency with a child had a conviction for “sexual abuse of a minor.” *Matter of Rodriguez-Rodriguez*, Int. Dec. #3411 (BIA 2000).

2. A conviction must be for a felony offense to satisfy the aggravated felony under 8 U.S.C. § 1101(a)(43)(A), INA § 101(a)(43)(A). *Matter of Crammond*, Int. Dec. #3443 (BIA 2001). The BIA uses the definition at 18 U.S.C. § 3559(a) to determine whether an offense is a felony. *Matter of Crammond*, Int. Dec. #3443 (BIA 2001). Section 3559(a) of Title 18 defines a “felony” as an offense punishable by more than one year.

3. Offenses punishable as felonies under federal controlled substances acts and drug trafficking as commonly understood are aggravated felonies. This definition is in two parts.

Under the first part, a “felony punishable under 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 the Maritime Drug Law Enforcement Act (46 U.S.C. App. §§ 1901 *et seq.*)” is an aggravated felony. 8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B) incorporating definition under 18 U.S.C. § 924(c)(2). This part also applies to a state offense that is punishable as a felony under federal law. *Matter of K-V-D*, Int. Dec. #3422 (BIA 1999); *Matter of L.-G.*, 20 I&N Dec. 905 (1995).

Under the second part of the definition, a conviction for any offense that fits the common meaning of “drug trafficking” is an aggravated felony. 8 U.S.C. § 1101(a)(43)(B), INA § 101(a)(43)(B); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). Even if an offense is not punishable as a felony under the first part of the definition, it could still be an aggravated felony under the second part.

a. In general, first offense, simple possession drug offenses under federal law are not aggravated felonies. *Matter of L.G.*, 20 I&N Dec. 905 (1995). This is because they are misdemeanors (except possession of “cocaine base” or “flunitrazepam,” which are felonies) 21 U.S.C. § 844(a), and they do not fit the common meaning of drug trafficking.

b. A second conviction for possession of a controlled substance may or may not be an aggravated felony. *Compare Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001) (holding that a second state offense was not an aggravated conviction because it did not contain a notice requirement comparable to 21 U.S.C. § 851) *with U.S. v. Garcia-Olmedo*, 112 F.3d 399 (9th Cir. 1997) (treating a second offense as an aggravated felony for sentencing enhancement purposes).

c. The BIA does not treat federal circuit court decisions interpreting the federal sentencing guidelines as controlling for civil immigration cases because the term “aggravated felony” means different things in the civil and criminal context. *Matter of K-V-D*, Int. Dec. #3422 (BIA 1999). The Second and Fifth Circuits share this view. *U.S. v. Porges-Garcia*, 171 F.3d 142 (2d Cir. 1999); *Ruiz-Romero v. Reno*, 205 F.3d 837 (5th Cir. 2000).

4. A conviction for trafficking in firearms or federal crimes relating to firearms or destructive devices (bombs, grenades) is an aggravated felony. 8 U.S.C. § 1101(a)(43) (C), (E), INA § 101(a)(43) (C), (E). A federal conviction for being a felon in possession of a firearm satisfies the definition of aggravated felony because it is an offense described in 18 U.S.C. § 922(g)(1). 8 U.S.C. § 1101(a)(43)(E)(ii), INA § 101(a)(43)(E)(ii). The BIA has held, however, that a state conviction for felon in possession of a firearm is not an aggravated felony since a state

offense lacks the “interstate commerce” element described in 18 U.S.C. 922(g)(1) . *Matter of Vasquez-Muniz*, Int. Dec. #3440 (BIA 2000).

5. A conviction for money laundering and monetary transactions from illegally derived funds is an aggravated felony. 8 U.S.C. § 1101(a)(43)(D), INA § 101(a)(43)(D).

6. A conviction for fraud, deceit, or tax evasion if the loss to the victim or government exceeds \$10,000 is an aggravated felony. 8 U.S.C. § 1101(a)(43)(M), INA § 101(a)(43) (M).⁵

7. A conviction for a crime of violence is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F). A crime of violence includes an offense that has the use of force as an element of the offense. 18 U.S.C. § 16(a). It also includes any felony that by its nature presents a substantial risk that force will be used against a person or property in the commission of the offense. 18 U.S.C. § 16(b). The BIA held that this definition includes involuntary manslaughter. *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994). It does not, however, apply to negligent manslaughter where there is no connection between the use of force and the commission of the crime. *Matter of Sweetser*, Int. Dec. #3390 (BIA 1999). It does include drunk driving as a felony. *Matter of Magallanes-Garcia*, Int. Dec. #3341 (BIA 1998) *but see United States v. Chapa-Garza*, __ F.3d __, 2001 U.S. App. LEXIS 2975 (5th Cir 2001) (rejecting view that drunk driving is an aggravated felony because there is no use of actual force in the commission of the crime).

8. A conviction for theft, receipt of stolen property, or burglary is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(G), INA § 101(a)(43)(G). The BIA interpreted this provision several times in 2000. A conviction for a “burglary” offense is not necessarily a conviction for an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(G), INA § 101(a)(43)(G) unless it comports with the federal definition of burglary established in *Taylor v. United States*, 495 U.S. 575 (1990)⁶. According to the BIA, a taking of property constitutes a theft offense for purposes of the aggravated felony definition regardless of whether a permanent taking of the property is an element of the offense. *Matter of V-Z-S*, Int. Dec. #3434 (BIA 2000). The BIA has also held that a conviction for attempted possession of stolen property constitutes an aggravated felony. *Matter of Bahta*, Int. Dec. #3437 (BIA 2000). In so doing, the BIA equated “possession of stolen property” and “receipt of stolen property.” *Id.*

⁵ The victim does not need to suffer an actual loss. *See Matter of Onyido*, Int. Dec. #3379 (BIA 1999) (holding that a failed insurance fraud in which the claim exceeded \$10,000 was an aggravated felony even though there was no actual loss).

⁶ For purposes of the Career Criminal Offender Act, the Supreme Court defined burglary as an unlawful or unprivileged entry in a building or other structure with the intent to commit a crime. *See Taylor v. United States*, 495 U.S. 575, 598 (1990).

9. A conviction for commercial bribery, forgery, or trafficking in vehicles with altered numbers is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(R), INA § 101(a)(43)(R).

10. A conviction for obstruction of justice, bribery of a witness, or perjury is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(S), INA § 101(a)(43)(S). A federal conviction for accessory after the fact comes within the aggravated felony definition for obstruction of justice. *Matter of Batista-Hernandez*, Int. Dec. #3321 (BIA 1997). A federal conviction for misprision of felony is not obstruction of justice as defined in 8 U.S.C. § 1101(a)(43)(S), INA § 101(a)(43)(S). *Matter of Espinosa*, Int. Dec. #3402 (BIA 1999).

11. A conviction for using or creating false documents is an aggravated felony if the term of imprisonment is at least one year. There is an exception for a first offense that the defendant committed to aid his or her spouse, child, or parent. 8 U.S.C. § 1101(a)(43)(P), INA § 101(a)(43)(P).

12. A conviction for smuggling is an aggravated felony. There is an exception for a first offense in which only the smuggler's parent, spouse, or child is involved. 8 U.S.C. § 1101(a)(43)(N), INA § 101(a)(43)(N). The BIA considers harboring or transporting offenses also to be aggravated felonies. *Matter of Ruiz-Romero*, Int. Dec. #3376 (BIA 1999), *aff'd Ruiz-Romero v. Reno*, 205 F.3d 837 (5th Cir. 2000).

13. A conviction for failure to appear to serve a sentence if the underlying offense is punishable by a term of five years, or to face charges of an offense for which a sentence of two years may be imposed, is an aggravated felony. 8 U.S.C. § 1101(a)(43)(Q), (T), INA § 101(a)(43) (Q), (T).

14. Various offenses such as demand for ransom, child pornography, RICO offenses punishable by a one-year sentence, running a prostitution business, slavery, offenses relating to national defense, sabotage, treason, or revealing the identity of a foreign or domestic undercover agent are aggravated felonies. 8 U.S.C. § 1101(a)(43)(H), (I), (J), (K), (L), INA § 101(a)(43) (H), (I), (J), (K), (L).

15. A conviction for illegal re-entry after conviction of an aggravated felony followed by deportation is an aggravated felony. 8 U.S.C. § 1101(a)(43)(O), INA § 101(a)(43) (O).

16. A conviction for conspiracy or attempt to commit any offense listed in the aggravated felony definition is an aggravated felony. 8 U.S.C. § 1101(a)(43)(U), INA § 101(a)(43)(U).

VI. Crimes Involving Moral Turpitude

A. Deportability

Since 1917, there has been a ground of deportability for noncitizens convicted of “crimes involving moral turpitude.” 8 U.S.C. § 1227(a)(2)(A), INA § 237(a)(2)(A). Although there is no statutory definition of the phrase, the Supreme Court has held that it is not void for vagueness. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

B. One Crime Involving Moral Turpitude

A noncitizen is deportable for a crime of moral turpitude if he or she:

- Is convicted;
- Of a crime involving moral turpitude;
- Committed within five years of admission;⁷ and
- For which he or she could receive a sentence of one year or more.⁸

8 U.S.C. § 1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i).

C. Two or More Crimes Involving Moral Turpitude

A noncitizen is also deportable if he or she:

- Is convicted;
- Of two or more crimes involving moral turpitude;
- That did not arise out of “a single scheme of criminal misconduct.”

8 U.S.C. § 1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i).

D. Definition of Crime Involving Moral Turpitude

1. In determining whether an offense involves moral turpitude, a fact finder examines the crime as defined by the elements in the criminal statute, not the defendant's actual conduct. *Goldesthtein v. INS*, 8 F.3d 645 (9th Cir. 1993); *Matter of Short*, 20 I&N Dec.136 (BIA 1989).

⁷ The period is ten years for those noncitizens that obtained an immigrant visa because they provided significant assistance in a state or federal prosecution. 8 U.S.C. § 1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i).

⁸ Before the Anti-Terrorism and Effective Death Penalty Act of 1996, the statute required that the defendant receive a sentence of a year or more. The change applies to proceedings initiated after April 24, 1996.

2. A conviction under a statute in which theft, fraud, or intent to commit bodily harm is an essential element of an offense involving moral turpitude.

3. It is the elements of the offense that determine whether a conviction is for a crime involving moral turpitude, not the name or designation of the offense. *See, e.g., Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (conviction for Louisiana kidnapping offense does not involve moral turpitude).

E. Divisible Statutes

The Board has created a special rule to interpret whether a conviction under a broad or multi-sectioned statute is a conviction for a crime involving moral turpitude. It refers to these as “divisible statutes.”

1. The first type of divisible statute involves multi-sectioned statutes. If a multi-sectioned statute includes certain subsections that necessarily involve moral turpitude and other subsections that do not, then the fact-finder will examine the “record of conviction” to determine for which offense the defendant was convicted. If the “record of conviction” does not establish the defendant has a conviction under a subsection that necessarily involves moral turpitude, then the noncitizen is not deportable for that offense. The record of conviction includes the charge, plea, verdict (including defender's admissions made while entering plea), and judgment. *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964); *Matter of Mena*, 7 I&N Dec. 30 (BIA 1979).

2. The second type of divisible statute involves broadly worded offenses. If a broadly worded statute defines certain offenses that involve moral turpitude and others that do not, then the fact-finder will examine the “record of conviction” to determine for what offense the defendant was convicted. The BIA will not examine evidence of the defendant's actual conduct that is outside the “record of conviction.” Where the defendant had a conviction for “intent to commit a felony upon a minor,” the BIA held that the offense did not involve moral turpitude even though the INS offered other evidence that the felony involved a sexual assault. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

F. Specific Offenses

Whether a crime involves moral turpitude depends on the elements of the offense, not the name of the offense. *Compare Matter of Balao*, 20 I&N Dec. 440 (BIA 1992) (holding that offense of passing bad checks involves moral turpitude because fraud was an element of offense) *with Matter of Bart*, 20 I&N Dec. 436 (BIA 1992) (holding that offense of passing bad checks does not involve moral turpitude because fraud was not an element of the offense).

1. Assault

A conviction for simple assault does not involve moral turpitude. *Matter of Short*, 20 I&N Dec.136 (BIA 1989. *Matter of S*, 9 I&N 688 (BIA 1962). An assault offense that requires a mental state of criminal recklessness does not involve moral turpitude unless the statute also requires that the assault result in serious bodily injury. *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). Nevertheless, a conviction for an assault offense where injury to a spouse or child is an element of the offense involves moral turpitude. *INS v. Grageda*, 12 F.3d 919 (9th Cir. 1993); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). A conviction for assault with a deadly weapon is also a conviction for a crime involving moral turpitude. *Matter of Logan*, 17 I&N Dec.367 (BIA 1980).

2. Fraud Offenses

A conviction for an offense in which fraud is an essential element of the crime always involves moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

3. Structuring Transactions

A conviction for structuring transactions to avoid a reporting requirement in violation of 31 U.S.C. § 5324 does not involve moral turpitude. *Matter of L-V-C*, Int Dec. #3382 (BIA 1999).

4. Theft Offenses

A conviction for an offense that includes as an element the intent to deprive the rightful owner of his or her property permanently involves moral turpitude. Compare *Matter of De La Nues*, 18 I&N Dec.140 (BIA 1981) (holding that theft constitutes a conviction for a crime involving moral turpitude) with *Matter of M*, 2 I&N Dec. 686 (BIA 1946) (holding that joyriding does not involve moral turpitude because statute included temporary taking of a motor vehicle). A conviction for possessing stolen property involves moral turpitude without regard to the triviality of the offense. *Michel v. INS*, 206 F.3d 253 (2d Cir.2000).

G. Inadmissibility Issues for Moral Turpitude Offenses

A noncitizen is inadmissible for a single conviction for a crime involving moral turpitude unless the person qualifies for the petty offense exception or youthful offender exception. 8 U.S.C. § 1182(a)(2)(A)(ii), INA § 212(a)(2)(A)(ii).

1. The statute provides exceptions to inadmissibility for a “petty offense” and for a “youthful offense.” 8 U.S.C. § 1182(a)(2)(A)(ii), INA § 212(a)(2)(A)(ii).

a. The petty offense exception applies when:

- A noncitizen has committed a single offense that involves moral turpitude;
- The maximum possible punishment is a year or less; and
- The noncitizen received a sentence of six months or less.

b. The youthful offender exception applies when:

- A noncitizen has committed a crime involving moral turpitude while under the age of 18; and
- Any imprisonment for the offense ended more than 5 years before the current visa application.

2. The moral turpitude ground of inadmissibility may apply even if a noncitizen does not have a conviction. A noncitizen is inadmissible if he or she voluntarily admits the essential elements of a crime involving moral turpitude to an INS or Department of State Official. To constitute a valid admission, the INS or Department of State official must explain the offense in plain terms. *See, e.g., Matter of G.M.*, 7 I&N Dec. 40 (A.G. 1956).

VII. Firearms and Explosive Devices

A. Deportability

A noncitizen faces removal from the United States if he or she has a single conviction for purchasing, selling, using, owning, or possessing a firearm in violation of law. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

B. Definition of Firearm Offense

1. A sentencing enhancement for using a firearm is not a conviction for a firearm offense.⁹ *Matter of Rodriguez-Cortez*, 20 I&N Dec. 587 (BIA 1992).

2. A conviction under a “divisible statute” is not a firearm offense unless the record of conviction establishes that the offense committed involved firearms. *See, e.g., Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996). A police report is not part of the record of conviction. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996).

3. If the statutory definition of the offense does not involve a weapon, then a conviction

⁹ *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (treating as a separate element of an offense any fact that increases punishment beyond the statutory maximum other than the fact of the existence of a prior offense).

is not a firearm offense even if the record of conviction shows that the defendant actually used a firearm. *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992).

VIII. Domestic Violence Deportability

A. Deportability

In 1996, Congress added a ground of deportability for domestic violence convictions and for violations of civil protection orders. 8 U.S.C. § 1227(a)(2)(E), INA § 237(a)(2)(E).

B. Domestic Violence Conviction

A person is deportable for a conviction for a domestic violence offense if on or after September 30, 1996, he or she “is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.”

The statute defines domestic violence as a “crime of violence as defined in Section 16 of Title 18” directed against a current or former spouse, co-parent of a child, co-habitator, or other similarly situated under domestic violence laws. A crime of violence under 18 U.S.C. § 16 includes an offense that “has as an element threatened, attempted, use of physical force against person or property of another or a felony that by its nature involves significant risk of use of such force.” Thus, simple assault may come within this ground of deportability under this section if the victim was, for example, a former cohabiting girlfriend.

C. Violation of a Protective Order

The ground of deportability also applies when a noncitizen is enjoined by a protective order and is found by a criminal or civil court to have violated the portion of the order that protects “against credible threats of violence, repeated harassment, or bodily injury.”

HOW TO GET PAID: VOUCHERS FOR CJA ATTORNEYS, EXPERTS AND TRANSCRIPTS

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I. Introduction

Panel attorneys are the only members of the Federal Court criminal system who are not on salary. Prosecutors, judges, probation officers, and agents, all get a weekly paycheck rain or shine. Direct deposit no less. And health insurance. And a retirement plan. And federal benefits. And salaried staff. They have unlimited Westlaw usage, government cars, government computers and government phones, badges, ID cards and special parking spaces. Thank you Uncle Sam.

CJA attorneys have vouchers.

That's it. Oh, we have clients, ethical obligations and bills. But money – no; file a voucher. So, like it or not, unless you are independently wealthy and want to further subsidize the Federal Government's constitutional obligations, you must master the Art of the Voucher.

There are currently three primary vouchers you need to understand.

CJA 20	Appointment and Payment of CJA Attorneys
CJA 21	Authorization for Experts and Other Services
CJA 24	Authorization for Transcripts

The new vouchers are printed by the computer system in the clerk's office and replace the older multi-part NCR forms. Find out who is the CJA clerk at your district court. Charm this person. They are your inside source. They can give you the inside scoop on how to satisfy the various and individualized requirements of each magistrate and judge. **Never alienate the voucher clerk.** These are your contact people. Some district courts have written handouts or memos on CJA billing. Some have areas on a web site which provide details and local requirements. Inhale this information.

II. Attorney Fees

A. This is Not Philanthropy

If you want to get paid you need to give the judge the tools he or she needs to pay you. Too many judges take the attitude published by the 5th circuit:

Philosophy of the Act. The hourly rates of compensation fixed by the Criminal Justice Act are designated and intended to be the maximum rates and should be so treated. The underlying philosophy of the Act that the Bar of the Nation owes a responsibility to

represent persons financially unable to retain counsel and that the compensation provided is not intended to equate to private counsel fees.

Where did they come up with this ? The true philosophy of the Act is to make the conviction and sentence constitutionally valid so the government does not have to try cases twice. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Some judges seem to think we are part of this process for public service extra credit. Some people coach little league, I defend poor people, that sort of thing. I don't see it. Heck, it probably would not be enough to get you a downward departure. No, we defend because we are the true believers. We are not closet prosecutors. We are not FBI wanna be's. We are defense counsel, all that stands between freedom and life in a cage. This is hard work and serious stuff. We have not merely a desire to be paid, but a statutory right. So tell your judges not to be cheap. You can't put a price on justice, but you can fairly compensate CJA counsel who are in the trenches daily making the system work. Without us, everything stops. The government can always find more defendants, but there are a limited number of us, and if we go broke the Judge is in real trouble. So feed us. Treat us fairly. Give us a little room to breathe. In return, we will give the Courts the paperwork they need. Remember, beyond marble, paper is the foundation of federal practice. Fire up that computer and start printing.

The purpose of law school (ostensibly) was to teach us to think and act like lawyers, the "herd mentality". We were taught to read the rules and play by the rules. Law is rules driven. So too with vouchers. I am giving you the needed rules. Next you need to make the argument. What you should know is that every argument must be tailored to its specific target audience. Here the audience is the voucher approver, first the clerk (or in some districts the FPD) and second the judge. Tell them what they want to hear in the language of the rules. Pretty much the same strategy as a pleading.

B. Understanding the Voucher

Thoughtfully, each voucher comes with a full set of instructions attached. Remember the first rule of statutory construction; **read the whole thing first**, then start.¹ Most of the entry blocks are very clear. If you have a question and can't figure out what goes in what block, ask the Clerk, or send me an e-mail. It really is not that hard. Keep a notebook with an example of a completed voucher and related forms so you can refer back to it the next time.

What is missing from the voucher forms is room to explain. A cover letter or supporting memo is the missing link. Stop whining and start typing. You need to give the judge what he or she needs to help you get paid. This starts with proper record keeping. A few other buzzwords like avoiding reversible error, 2255, change of counsel, and ineffective assistance can also grab the court's attention. Equally important is substance. What you really did to earn your fee.

C. Codes for Federal Court CJA Billing Codes

The current voucher system, like its predecessor divides all billing into 15 predefined areas. To be paid your time records must be broken down by these areas. This can be done on support sheets which the clerk provides, but I suggest using off the shelf billing software (particularly if you already have it for other aspects of your practice. I use Timeslips which not only keeps all the time and a narrative of the work done, but also does all the math! Timeslips has a feature called "references". These are codes which allow bills to be sorted (filtered in database jargon) by the code. The Chart below shows the codes I assign which logically match the voucher categories. In Timeslips each slip input box has a spot for "reference" and you

type the code if you remember it or there is a drop down menu to click on. We make these references “global” meaning they are available for any case and I don’t need anything special when I open a new client in billing.

Codes or Reference Numbers for Timeslips

Code	Description of Voucher category
	Out of Court @ \$50 per hour
1	Interviews & Conferences
2	Obtaining & Reviewing Records
3	Legal Research & Brief Writing
4	Travel Time
5	Investigative & Other Work
	In Court @ \$70 per hour
6	Arraignment and or Plea
7	Bail & Detention Hearings
8	Motions Hearings
9	Trial
10	Sentence Hearings
11	Revocation Hearings

Code	Description of Voucher category
12	Appeals Court
13	Other Court Proceedings
	Costs The voucher just has travel and other for costs but I have given codes to my most frequent other costs)
14	Mileage/Travel
15	Copies
16	Postage
17	CALR/Lexis/Westlaw
18	Toll Calls
19	Trial Exhibits
20	Medical Records
21	Other

On your worksheets or time entries, when indicating telephone calls or conferences, there needs to be some explanatory materials such as whom the call or conference was with, and the general subject discussed. Good narratives have the collateral benefit of serving as mini file notes showing the day a certain person was interviewed or outlining a case read or argument considered.

D. Costs

For out of pocket costs over \$50, I like to get advanced approval so I don’t ever get stuck with a bill personally. I have used this for rental equipment such as an overhead projector before the court had one, for a technical publication I needed to purchase, for copying costs when they were going to be very large (several hundred dollars), and for the cost of trial exhibits like blow ups and enlarged photos.

For travel costs, you can get the government rate on travel by booking through **National Travel Services, 1-800-445-0668**. If you need to fly somewhere for investigation, get a price quote from NTS and then go on the Internet and print out a price off **www.travelocity.com** or other web travel pricer. Show the judge how much you “saved” the government because you knew CJA counsel could go through NTS. Show the number of hours to drive times \$50 an hour, the mileage cost and/or a bus ticket. Call a PI in another state and get a price quote. We got quotes over \$100 an hour in California. Contrast that rate with the \$380 plane

ticket we lined up. It was not only better, but cheaper for the lawyer to go to California rather than hiring a PI to do interviews.(The lawyer did not bill for his travel time, but he also had some friends in CA and offered to “save” even more money by including a Saturday night stay.)

E. Case Maximums and Payments above the Statutory Cap

Payment for appointed counsel is authorized under 18 U.S.C. § 3006A, *Adequate Representation of Defendants*, also known as the *Criminal Justice Act* (CJA). The Act establishes both the hourly rates and the case maximums. Current case maximums remain:²

Felonies	\$3,500	Appeals	\$2,500
Misdemeanors	\$1,000	Other	\$750

Fortunately, the maximums can be exceeded for “extended or complex representation” when the judge certifies that “the amount of the excess payment is necessary to provide fair compensation,” and the application is approved by the circuit court. 18 U.S.C. § 3006A(d)(3).

In dealing with voucher issues, the Administrative Office of the Courts puts out a book, *Guide to Judiciary Policies and Procedures, Vol. VII, “Appointment of Counsel in Criminal Cases.”*(CJA Guidelines). This is a useful reference source as you can cite to the Court its own guide. There should be a copy available at the clerk’s office of from your Federal Defender.

In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel shall submit with the voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. CJA Guidelines, Paragraph 2.22 C(2).

A case is **complex** if the "legal or factual issues are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case," and that a case is **extended** if "more time is reasonably required for total processing than the average case." *Id.* Paragraph 2.22 B(3). The following criteria as useful in determining fair compensation in extended or complex cases:

- " Responsibilities involved measured by the magnitude and importance of the case;
- " Manner in which duties were performed;
- " Knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel;
- " Nature of counsel's practice and injury thereto;
- " Any extraordinary pressure of time or other factors under which services were rendered; and
- " Any other circumstances relevant and material to a determination of a fair and reasonable fee. *Id.* Paragraph 2.22 B(3) .

The following areas help to show that a case qualifies for payment over the statutory maximum. All items will not apply in every case and the list is not exhaustive.

1. Length of appointment to case; total number of in-court hours, specifying pretrial hearings, trial, sentencing hearings, and other; and total number of out-of-court hours.
2. Offenses charged; number of counts charged; and other pending cases of defendant during the representation.
3. Number of co-defendants.
4. The Sentencing Guideline range found by the Court and whether a mandatory minimum was found or at issue at sentencing.
5. Discovery materials (nature and volume) and/or discovery practices.
6. Motions, legal memoranda, jury instructions, and sentencing documents, or legal research not resulting in such, which were drafted originally for this case (do not include standardized motions, etc., unless content was modified significantly).
7. Investigation and case preparation (e.g., number and accessibility of witnesses interviewed, record collection, document organization). Use of investigative, expert, or other services.
8. The following client considerations: communication with client/family, language difference, accessibility of client, other.
9. Any other noteworthy circumstances regarding the case and the representation provided to support the compensation request. Include, if applicable: negotiations with the U.S. Attorney's office or law enforcement agency; complexity or novelty of legal issues and factual complexity; responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed and knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and hardship or injury resulting from the representation; any extraordinary pressure of time or other factors under which services were rendered.

Being the advocates we are, we now know both the applicable standard and who we need to convince. As is always the case in criminal work, the burden rests on us, if not beyond a reasonable doubt, then by a fair preponderance (whatever that means). In some instances just a paragraph like the one above along with the completed voucher and supporting time sheets will be enough. Other times a longer explanation is needed. With these materials is a copy of a full and detailed motion which was used and granted resulting in full payment. Payment over the cap must first be approved by the district court, and then approved at the circuit level. The quality of your memo to the district court will be a decisive factor at the circuit level as well. Your judge may well just staple your memo to the circuit form and send it in. How much time do you think the judge will spend drafting a special memo to the circuit just to get you paid ? So make your memo good.

If you are just a few hundred dollars over the cap a short explanation like this **may** be enough to satisfy most judges. If in doubt go with the full memo.

This was a hard-fought case in which the defendant faced serious Career Offender penalties. The first two attorneys appointed to represent the defendant withdrew due to the difficult nature of representing this particular defendant. Upon taking over representation, counsel began a significant investigation which stretched from Maine to Texas with stops along the way. Witnesses were located and interviewed (by telephone) in Texas, South Carolina and Maine. Counsel personally examined the physical evidence, went to the scene of the crime, took photographs, interviewed witnesses and developed the defense theory. Counsel prepared for trial including submission of a trial brief and proposed jury instructions. Upon receipt of Jencks material 7 days before scheduled trial, the defendant decided to change his plea. Sentencing took on a life of its own with the career offender issue and the

viability of the disputed out of state predicate convictions. This required counsel to investigate and research the state law of Massachusetts and to obtain old records and interview lawyers “from away”. Counsel spent 80 hours of billable defense time on the case. An unmeasurable amount of attorney thought time goes into such a case for which counsel receives no compensation. Counsel requests payment for the full 80 hours spent as supported by the attached itemized time records. This results in a request of \$4,000 for attorney time which exceeds the cap by \$500. In light of the complexity and career offender aspect of the case counsel asks that this request be granted.

F. Traps for the Unwary

1. Be sure to use the correct voucher category for tracking time.
2. Be sure to use the correct hourly rate
3. Time must be kept in tenth of an hour intervals, i.e., .1, .2, etc.
4. Many judges resent the legal research area. Counsel are presumed to have a strong working knowledge of general federal defense and many judges will not pay for what they see as “remedial studies.” One way to address this is to provide a detailed and active explanation of why the time was spent. Here’s an example of a narrative supporting the need for computer assisted legal research (CALR).

Total time 4.5 hours:

Computer assisted legal research on issue of constructive possession using CD’s, the Internet and Westlaw. Starting with the Supreme Court cases of *Bass* and *Scarborough*, Counsel compared the facts as contained in the grand jury testimony of Smith and agent Jones to the requirements set forth in this circuit’s decision of *Gillies* and the second circuit case of *Buck*. With these cases as a guide, counsel worked on a proposed jury instruction consistent with the anticipated testimony on this crucial issue. By using the Westlaw keycite service, counsel located an unreported case, *Adams*, and was able to update the law in this area quickly, saving over two hours of what would have been tedious Shepardizing.

This may seem like a lot of work, but if you make these kinds of time notations as you go, it really is not that much harder, and your time records serve as an outline of the work you did and proof that you were not ineffective.

5. Travel time must be kept separately from the actual meeting or reason for the travel.
6. You need receipts for all expenses over \$50. For travel expenses, you are supposed to try to retain receipts for everything, including tolls and parking. I try to keep all receipts as some clerks/judges require them for even small items. Create a costs folder in each case.
7. For CALR including Westlaw or Lexis you must explain how much manual time was saved by using the computer service. Yes, it is subjective, but do the math. If it had been cheaper by hand then you did not save enough time to justify being online.
8. You must itemize your time according to the categories available on the voucher. The “new” vouchers have arrived. While these have little change for attorneys, the underlying computer system in the clerk’s office has been totally revamped. For “statistical analysis,” the Administrative Office requires that all time fit into the categories they have chosen. If you use Timeslips or a similar billing program, set up reference codes. Use the number of each area as an automatic code. Then you can print time bills which are chronological by category with full subtotals of your hours. Once you set this up and start using this system it will make

your vouchers go much faster. Your voucher can not be paid if you do not separate time by categories.

9. In-Court waiting time can be billed at the in court rate. Chambers conferences are billable at the in court rate.
10. The court will pay reasonable mileage at 32.5 cents per mile as of 1/14/2000. My District considers trips under 5 miles, as *de minimis* and I don't get paid. Oh well.
11. Toll telephone charges are paid at the actual cost. I save the phone bills in case there is any question (especially those collect calls from jail).

III. Experts and Investigators

A. The Request.

These requests are made using form CJA 21. The Act specifically authorizes these requests as *ex parte*. 18 U.S.C. § 3006A(e)(1). The exact procedure varies with differing Magistrates and Judges. The Act says "may request" so frequently a request can be accomplished by letter request as opposed to a motion. Note; if a request is captioned as a motion it tolls the speedy time clock. Generally the following information is essential.

- " Expert's name and address
- " Qualifications, (attaching a CV or resume is preferable)
- " Hourly rate and estimated total cost
- " The reason for the request, and
- " Maximum amount available is \$1,000 without Circuit court approval.

Here is an example of a reason for the request:

1. The Defendant is currently facing a nine count indictment, including four counts of mail fraud. Defendant has been found indigent and counsel appointed. Pursuant to a Grand Jury subpoena prior to indictment, the Postal Inspector's office took handwriting exemplars from the Defendant. The Government has informed counsel that they have submitted those handwriting exemplars to a government employed document examiner. Assistant United States Attorney Smith has represented to counsel that the results of that examination are "inconclusive." The government is of the opinion that the inconclusivity is the result of the deliberate efforts of deceptive acts by the defendant during his providing of the exemplars. The government intends to try and use this alleged "expert opinion" opinion against the defendant as evidence of deception, obstruction and guilt. AUSA Smith claims he will be requesting a jury instruction, similar to the flight instruction, suggesting that concealment or deception is evidence of guilt.
2. The defense believes that the exemplars provided were adequate, and that the inability of a government examiner to reach a conclusion between the provided exemplars and the question documents constitutes important exculpatory information in support of the defense. Specifically, the defendants handwriting on the exemplars, given to the postal inspector, do not match the handwriting on the checks and records obtained from the defendant's employer, the alleged victim of the claimed fraud.

3. Counsel has contacted E.F.A., a diplomat of the American Board of Forensic Document Examiners, whose curriculum vitae is attached. Counsel has utilized Mr. A's services in the past and found Mr. A. to be professional and extremely helpful in dealing with document related issues including handwriting. Mr. A. has indicated that he would be in a position to examine the questioned exemplars and documents, provide a written report if requested, consult with counsel by telephone, mail and e-mail, and assist counsel in the preparation of the defense. The initial cost would be in the area of \$950.00 based on 9.5 hours of work billed at \$100 per hour. Mr. A. recognizes the budget constraints in an appointed case and is graciously offering this rate which is greatly reduced from his normal fee structure which requires a \$500 minimum retainer and an hourly rate of \$150.00 per hour. If trial testimony were needed there would be an additional cost which counsel would seek only if needed and at a later date.

For these reasons, the Defendant requests authorization of funds up to the sum of \$950.00 for the retention of E. F. A.

An explanation such as this can be included in a letter along with a copy of the expert's CV or if needed as part of a motion with incorporated memorandum. Some judges have a preference so check with the clerk. Be careful on the *ex parte* aspect. In many courts, whether filed as a letter request or a motion, so long as it is clearly marked "*ex parte*" the request is kept at the clerk's office under seal. Other clerks put your filing directly in the case file for all the world to see unless you make a specific request to seal. Check with the clerk on your districts local practice **Be careful**. A word of caution – if you (or your staff) carbon the prosecutor on your filing that obviates the *ex parte* aspect. In this day of word processors and recycle electronic forms, be sure you do not inadvertently include a certificate of service or have "CC: AUSA" on your letter as the clerk's office will then assume it is not an *ex-parte* request. They may even set the matter for a hearing or conference.

Remember, your time in searching for an expert is compensable so include it on your voucher. Give a narrative time entry which shows how tough and time consuming finding an expert is.

<i>Compare:</i> Search for and locate potential blood stain expert,	5 hours
to	
Recognize potential need for bloodstain expert due to governments reliance on carpet stains.	
Search NACDL directory for experts.	.5
Internet computer search for experts.	.5
Go to forensics website and locate a number of potential experts.	.3
Attempt to find person in close geographical proximity to save time and costs. Follow up on three leads, Drs. X, Y, and Z. Check web sites of Drs. X and Y. Interview both doctors by telephone with follow up e-mails.	2.5
Send Dr. X copy of police report and letter outlining what I am seeking. Receive e-mail response along with CV, price structure and suggestions. Follow up telephone discussion on fees and time frame for Dr. X's work.	1.3
Prepare and file request for funds to retain Dr. X.	.5
Total	5.6 hours.

B. Case Law

Some judges love case citation. For the citers among us I have a few (not many, but a few) useful cases or at least positive language from losing cases.

- My best new case, *U.S. v. Joseph Abreu*, 202 F.3d 386 (1st Cir. 2000) Reversible error when sentencing judge refused consider *ex parte* defendant's request for expert funds.

Although the statute expressly provides that the proceeding be *ex parte*, the district court found the statute's language to be "very ambiguous." The judge did not explain why he viewed this language as ambiguous. At the adversary hearing, the court simply said that "it just didn't seem to make sense" to hear the application *ex parte* where "the Defendant had already pled guilty, and what we were dealing with was a sentencing issue."

202 F.3d at 389. Wrong. "Nothing in the statute limits its applicability to pre-sentencing proceedings." *Id.*

Given the extent to which sentencing determines a defendant's liberty, it is just as crucial that the defendant have a fair opportunity to marshal a defense at the sentencing phase as at any other phase of the criminal proceedings. In fact, the Supreme Court, in a capital case, has said that due process requires that, where "the defendant's mental condition [is] relevant to his criminal culpability and to the punishment he might suffer," the government provide to indigent defendants expert psychiatric testimony at "the sentencing phase." *Ake v. Oklahoma*, 470 U.S. 68, 80, 83-84 (1985)."

There is another principle at stake: fair treatment of indigents. Defendants who are able to fund their own defenses need not reveal to the government the grounds for seeking a psychiatrist who might potentially testify at sentencing. To require indigent defendants to do so would penalize them for their poverty. The words of Judge Aldrich in an opinion of this court more than thirty years ago still hold true: "[W]e would regard the purpose of the . . . rule as apparent on its face to be in recognition of the principle that defendants are not to be avoidably discriminated against because of their indigency." *Holden v. United States*, 393 F.2d 276, 278 (1st Cir. 1968).

Abreu, 202 F.3d at 391. Nice language. You might just want to stick that in your next funds request.

- In order to obtain Government appointed services under the CJA., a defendant must first establish that he or she is "financially unable" to obtain the services without Government appointment and that the services are "necessary" for an adequate defense.(internal citations omitted). *U.S. v. Bissell*, 954 F.Supp. 903, 922 (D.N.J. 1997).
- Services are "necessary for an adequate defense" when "a reasonable attorney would engage such services were client having the independent financial means to pay for them."(internal citations omitted). *U.S. v. Bissell*, 954 F.Supp. 903, 922 (D.N.J. 1997).

Bissell instructs you to argue that you (being a reasonable attorney) would engage such services (what ever you are seeking, be it your time, an expert, etc.) if you were retained. I have used affidavits or letters from other defense attorneys to bolster my position as needed. Generally the federal defender (if you have one) will give you a letter saying that if the client were represented by the federal defender's office, they would do that which you are seeking.

- The court must be concerned with the protection of the rights of the accused. The public interest as well as the interest of the accused require prompt criminal proceedings. In complex multi-defendant cases, speedy trial rights are "stretched about as far as can be without making a mockery of that constitutional protection." (internal citations omitted) *U.S. v. Mosquera*, 813 F.Supp. 962, 964 (E.D.N.Y. 1993).
- This court has long been mindful of enormous burdens posed on the courts and lawyers by complex criminal cases. Large multi-defendant cases such as the instant one creates severe disadvantages to defendants because many attorneys, particularly sole practitioners, can ill afford the substantial outlay of time and expense associated with the case. While attorneys sit for countless hours in a courtroom to hear their clients name mentioned only occasionally, their private practices stagnate. Coordination of the work of defense counsel becomes almost impossible, to the disadvantage not only of defendants, but of the prosecutor and the court. Trial judges are faced with enormous problems of trial of *U.S. v. Mosquera*, 813 F.Supp. 962, 965 (E.D. N.Y. 1993) (Judge Weinstein ultimately rules that in this 18 defendant case under the CJA he can assign an overall coordinating lawyer to the case itself, in addition to each individual defendant's lawyer, *Id.* 966).
- Sure it was a high profile capital case, but the opinion in *U.S. v. McVeigh*, 954 F. Supp. 1441 (D.Colo. 1997) is very helpful in obtaining needed funds. Judge Matsch approved a broad motion filed by CJA counsel requesting the appointment of additional counsel, investigators, consultants and forensic specialists "together with attendant costs and expenses." The scope of the ruling and phraseology used in the opinion are worth quoting here:

[T]he court has made no effort to evaluate the credibility or determine the significance of these submissions, and has consistently relied on the experience and integrity of defense counsel, accepting their representations that such resources are reasonably necessary in preparing for the trial defense of Mr. McVeigh. There is no requirement that defense counsel show that admissible evidence will result from these investigatory efforts."

McVeigh at 1445.

- The case of *United States v. Kennedy*, 64 F.3d 1465 (10th Cir. 08/30/1995) provides some useful insight into how an appellate court, looking backwards addresses expert and funding issues.

Kennedy received appointed counsel one year before his August, 1993 trial. During pretrial discovery, the government provided the defense access to 800 bankers' boxes of documents it had amassed during its investigation. The boxes were placed in a repository in two rooms of a government building in Denver, Colorado, and were available for viewing as of August 14, 1992. During the pretrial period, Kennedy's counsel

made numerous requests for additional support services to supplement the services of his one paralegal assistant. The court granted Kennedy funds for an investigator, and funds to retain Philip Bolles ("Bolles"), who had served as the "victim corporation's" chief financial officer from 1989 to 1992 and was an expert on the companies inner workings. Nice idea, have the court appoint a former employee of the fraud victim to work for the defense. I like it. The court also authorized funds for Kennedy to hire an expert witness on the metal industry, and an expert witness on Ponzi schemes. On December 15, 1992, the court appointed co-counsel to work on Kennedy's case. Not bad. Here is precedent from the notoriously cheap 10th circuit supporting funds for three experts, co-counsel and a paralegal.

The court denied Kennedy's request for additional paralegals to help review and index the 800 boxes of documents. The court also denied Kennedy's request for airfare to fly himself and an expert from California to Denver to prepare for trial. The court denied Kennedy's request to hire an accounting firm to audit the victim's financial records and to review the conclusions and analysis of one of the government's key expert witnesses.

The CJA creates a plan for furnishing representation to those who lack the financial ability to obtain it on their own. In relevant part, it provides that "[c]ounsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services." 18 U.S.C. Section(s) 3006A(e)(1) (emphasis added). In order to obtain services under this provision, the defendant must do more than allege that the services would be helpful. *United States v. Ready*, 574 F.2d 1009, 1015 (10th Cir. 1978). The defendant bears the burden of showing that the requested services are "necessary" to present an adequate defense. *United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987). The denial of such a request is reviewed only for an abuse of discretion. *United States v. Nichols*, 21 F.3d 1016, 1017 (10th Cir.), *cert. denied*, 115 S. Ct. 523 (1994)."

An indigent defendant is not entitled to all the assistance that a wealthier counterpart might buy, but rather only to the basic and integral tools. To determine what basic tools are required, we consider three factors: (1) the effect on Kennedy's private interest in the accuracy of the trial if the requested service is not provided; (2) the burden on the government's interest if the service is provided; and (3) the probable value of the additional service and the risk of error in the proceeding if such assistance is not offered. *See id.* at 78-79. In this case, the third factor is dispositive, because Kennedy has not shown the value of the requested services or how their denial caused him any substantial prejudice at trial. *See Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986), *cert. denied*, 482 U.S. 909 (1987); *see also Greschner*, 802 F.2d at 377 (requiring deprivation of a substantial benefit at trial)."

Kennedy, 64 F.3d 1465 (10th Cir. 1995)

III. Witness Subpoenas

Do not pay to have witness subpoenas served because you will not be reimbursed. This is done at government expense by the U.S. Marshals. See F.R.Cr.P. 17(b). It is important to get the motions for witness subpoenas filed as early as possible so they can be delivered to the Marshals for service. You will not be reimbursed for the cost of having subpoenas served, since this can be done by the Marshals at no cost. If you are seeking a witness who is in custody, you must include with your witness subpoena, the witness's name, or location and a writ explaining why the witness is needed. Sample forms are attached.

IV Transcripts

The Court Reporters Act, 28 U.S.C. § 753(f), permits payment for transcripts in criminal proceedings for persons proceeding under the Criminal Justice Act. Transcripts are arranged with the court reporter using a CJA 24 along with a transcript order form. Most judges will allow you to get copies of anything the government gets. The original of all court transcripts go to the court so if the government orders a transcript the clerk will get a copy. Talk to your court reporter and ask that they let you know if the government orders any transcripts.

Some judges seem to routinely deny request for transcripts from pre-trial hearings even when it is obvious the transcript will be helpful at trial. If you suggest that the testimony be transcribed and then you provide the court with a post-hearing factual memo, some magistrates jump on that. If the magistrate refuses your early request for a hearing transcript, ask again as trial gets closer making it clear the case is going to trial and you need the witnesses statements from the suppression hearing. If again denied, go to the trial judge and explain that not having the transcript is likely to slow down the trial if you go to sidebar saying you can impeach with what was said at the suppression hearing but need to adjourn until tomorrow as the magistrate denied your advance transcript request. Reversible error and 2255 are both terms judges do not like to hear. I try to hint at those obliquely, "if I were retained your honor I would certainly be buying that transcript, it is awfully important." See *U.S. v. Scarpa*, 691 F.Supp. 635 (E.D.N.Y. 1988) allowing daily transcripts for CJA defendant.

V. Appeals

Appointed counsel is obligated to explain to the client his or her appellate rights and perfect an appeal if requested by the client. Once a notice of appeal is filed, jurisdiction on the case goes to the appellate court. Any motion to withdraw must be filed with the appeals court. Not every trial court abides by this rule, but the bulk will not entertain a motion to withdraw post-sentencing. This means you must have the necessary paperwork done to begin the appeal process, even if you hope to withdraw and have someone new handle the appeal. Circuits vary, but in the First Circuit the appeals court clerk keeps a separate list of attorneys who are willing to accept appointments on appeal. Trial counsel normally files the notice of appeal, puts in the transcript request, then moves to withdraw. I have been paid at the district court level for the notice of appeal, transcript request and explanatory letters to the client. I have never been paid for the withdraw process and related calls, letters and forwarding of the file. (I also have never put in a voucher with the appellate court for that work, so it might be possible to be paid for it). By having a set of appeal forms and explanatory letters, this process does not take very long. I send the client a letter explaining appellate rights and potential issues (if any) at least a week before sentencing so they can think about the matter. I have with me either at the last meeting before sentencing or the day of sentencing the necessary forms so the client can sign everything while they are still available. Once sentenced they may ship out that day, I never know in

advance. If the judge allows self reporting it is usually 21 or 30 days from the date of sentencing. **You must be sure and have the client sign the form either agreeing they want you to continue on appeal, or indicating they want new counsel.** If you were retained in district court and wish to be appointed or have someone else appointed on appeal the process is more lengthy, see FRAP 24(a). Be sure to check any applicable local rule, in **both** the district and appellate court. In the First Circuit we have local rule 46.4 on withdraws.

To be paid following an appeal you must certify to the circuit that you have either explained the *certiorari* rights and the client does not want to pursue cert, that you have petitioned for *certiorari*, or certify to the circuit that you have explained the process to the client, they wish to file for *certiorari* and you feel such a petition would be frivolous. See, First Circuit Local Rule 46.5(c). If you file for *certiorari* the cost and time is included within the appeals court voucher and may for the basis for compensation above the statutory limit. Note, a copy of any petition for *certiorari* must be served on the Solicitor General of the United States, Department of Justice, Washington, DC 20530.

VI. Final Thoughts

Judges worry that if they pay you fairly they may have to pay everyone the same way. This is not about everyone, it is about your getting paid. I had the clerk call me in after a lengthy insanity defense trial. I was told my full voucher had been approved, but please keep the amount to myself. I did and so I can't tell you how much I was paid, but it was the amount I requested. Be humble. Document your time. Be polite to the clerks. File your vouchers promptly. My final test, read your request and time sheets. Would you pay the bill if someone sent it to you ?

ENDNOTES

1. Defending A Federal Criminal Case, 1998 ed. Chapter 19 is an excellent resource for all CJA related areas. Some clerks provide a detailed memo on vouchers which should be consulted.
2. Case maximums have been the same since 1986 despite persistent efforts to have them raised. As of April 1, 2000 House Resolution 1752 which would raise the case caps is languishing in Congress. The resolution seeks a raise to \$5,400 for felonies, \$1,600 for misdemeanors, \$3,900 for appeals, and \$1,200 for other.

INVESTIGATING & UNDERSTANDING MENTAL HEALTH ISSUES

Mark E. Olive

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Tallahassee, FL 32301

5 STEP PROCESS FOR COMPETENT PSYCHIATRIC EVALUATION

- Accurate Medical and Social History
- Historical Data from Patient and Independent Sources
- Thorough Physical Examination
- Appropriate Diagnostic Studies
- MSE Alone Insufficient for Diagnosis

BUILDING BLOCKS FOR MENTAL HEALTH

- Heredity
- Early Nurturance
- Summation of Traumatic Life Experiences
(Including in Utero Injury and Physical and Psychological Assaults)
- Quality of Individual's Support System

WHAT TO LOOK FOR

A. Genetic Heritage

Epilepsy
Diabetes
Brain Tumors
Liver, Pancreas Disease
Mental Illness
Depression
Alcoholism
Drug Addiction

Mental Retardation
Neuro Disease
Senility
Strokes
Endocrinology

B. Fetal Development

Father's Alcoholism
In Utero Toxins
Prescribed Drugs
Home Remedies
Mother's Alcoholism
Organic Solvents
Industrial Toxins
Clay Eating
Illegal Drugs
OTC Drugs
Cigarettes
Pregnancy Edema
Pregnancy Nutrition
Maternal Illness

C. BIRTH TRAUMA

Length of Labor
Interruption of Labor
Alcohol During Labor
Use of Forceps
Bleeding
Infant Skin Color
Hypoxia
Apgar Score
Birth Weight
Body Measurements
Body Formation
Drugs at Birth

D. INFANT DEVELOPMENT

Breast Milk
Collick/fussiness
Nutrition
Developmental Milestones
Environmental Toxins
Home Remedies
Physical Size

Head Injuries
Fevers
Physical Injuries
Illnesses
Listlessness
Hyper/nervousness
Perseveration
Rashes
Vermin
Family Dynamics
Mother's Mental Health
Caretakers

E. CHILDHOOD DEVELOPMENT

Nutrition
Physical Illness
Physical Injury
School Performance
Toxins
Perseveration
Hearing Difficulty
Speech Difficulty
Alcohol
Drugs
Physical Environment
Family Dynamics
Child Labor
Caretakers

F. DEVELOPMENTAL TRAUMA

Loss of Significant Others
Death
Abandonment
Forced Removal
Parental Hospitalization
Parental Incarceration
Chaos, Dysfunction in Home
Sexual Assault
Witnessing Sexual Assault
Physical Assault
Witnessing Physical Assault
Psychological Trauma
Degradation
Humiliation
Witnessing Psychological Trauma

Hunger
Failure in School
Racism
Community Rejection

G. HEAD INJURIES

In Utero Beatings
In Utero Accidents
Physical Assaults
Car Accidents
Falls
Explosions
Fevers
Shaking
Fights
Work Accidents
Near Drowning
Boxing
Sports

H. PHYSICAL MANIFESTATIONS

Headaches
Dizziness
Numbness
Appetite Loss
Weight Changes
Lumps/bumps
Appearance
Physical Asymmetry
Sexual Drive Changes
One-sided Weaknesses
Hearing Difficulty
Visual Disturbances

FORENSIC ISSUES:

MENTAL HEALTH CHECKLIST

A. Before the Crime

Prior Offenses and Convictions

B. Crime Itself

Specific Intent for Murder & Underlying Felonies (Voluntary Intoxication)
Premeditation

Malice, Malice Aforethought
Insanity
Diminished Capacity
Duress
Accident
Domination by Other
Non-accomplice Status

C. Arrest and Aftermath

Consent to Search
Confessions: Miranda Waiver
Voluntariness of Confessions
Reliability of Confessions
Other Waivers
 Of Counsel
 Of Specific Defenses
 Of Jury
Waiver Mitigating Circumstances

D. Competency at Critical Stages

Preliminary Hearing
Guilty Plea
Competency to Effectuate Right to Be Present
Competency for Direct Appeal
Competency to Waive Further
Review of Proceedings
Ford Incompetency

EFFECTIVE USE OF AN INVESTIGATOR

Jan Erickson

Investigator, Federal Public Defender's Office
District of Arizona
222 North Central, Suite 810
Phoenix, Arizona 85004
602.379.3290

BENEFITS TO UTILIZING AN INVESTIGATOR

- C Saves You Time During Crucial Pretrial Stages
- C Prevents You from Becoming a Witness
- C Investigator is Trained in Fact Gathering & Aware of Resources
- C Provides an Essential Element to the Defense Team for Developing Theories & Leads

INVESTIGATIVE NEEDS AT ALL STAGES OF REPRESENTATION

- C** Initial Client Meetings
- C Fact Gathering for Detention and Bail Hearings
- C Fact Gathering for Preparing Pretrial Motions
- C Discovery Review
- C Crime Scene Review
- C Agent Interview
- C Assist During trial
- C Mitigation & Fact Investigation for Sentencing and Post-Trial Motions

DETERMINE GOALS OF THE INVESTIGATOR

- C** Locate & Interview Defense Witnesses
- C Locate & Interview Government witnesses
- C Locate, Review and Analyze Evidence
- C Locate Mitigating Facts for Plea and/or Sentencing
- C Review the Elements of the Offense with the Investigator
- C Set Up a Communication System for Keeping Each other Informed of the Case Status

BRING INVESTIGATOR INTO THE CASE EARLY

- C Builds Rapport with the Client
- C Investigator has Early Access to Client, Family and Friends to Quickly Identify and Locate Key Witnesses Before Too Much Time Has Passed and Memories Fade
- C Provides a Team Approach Where Investigator Can Provide Non-legal Approach to Developing Theories and Leads

INITIAL & PRETRIAL STAGES

- C Family History from Client, Family & Friends
- C Determine Possible Alibi or Mental Health Issues at an Early Stage
- C Begin to Track Down Necessary Records Or Provide leads for a Legal Assistant to Pursue
 - C Employment
 - C Medical
 - C Educational
 - C Criminal History
- C Review of Search Warrant Applications or Complaint Affidavits for Determining Leads and Recommending Theories of Defense
- C Obtaining Facts and Providing Leads for Pretrial Motions

REVIEW OF THE SCENE

- C Whether a Violent Crime or Business Fraud
 - C Digital Photographs
 - C Videotape Area and from Points of Eyewitness Observation Based on Reports
- C Initial Review and With the Attorney Prior to Trial
- C Measurements and Photos to Contradict Agent Reports and Eyewitness Testimony and for Use in Interviewing Witnesses and Experts
- C Prepare Simple Computerized Graphic of Crime Scene for Use at Pretrial Hearings and Trial

DISCOVERY REVIEW

- C** Digital Photographs at Close Range of Physical Evidence Maintained By Agent (Weapons, Impounded Vehicle or Vehicle Parts, Drugs & Containers Found In, Clothing, etc.)
 - C Do Not Rely Solely On Government's Low Quality Photos
 - C Close-Up Photos necessary to determine unusual markings, Discrepancies in Reports, etc.
 - C For Use in Developing Leads, Defense Theories, Interviewing Witnesses, Client & Experts
 - C For Later Use In Preparing For Trial and Cross-Examinations
- C Analysis by Investigator to Summarize Findings in Evidence Review
 - C Business Records
 - C Summary of Witness Reports
 - C Charts of Testimony for Each Witness
 - C Assist with Trial Notebook & Rough Draft of Direct/Cross Outline for Witnesses
- C** Provide the Investigator with Everything You Receive, Regardless of Whether it Seems Relevant or Important at the Time

LOCATING A PRIVATE INVESTIGATOR

- C Begin with Referrals From Local Federal Public Defender Office Investigators
- C County and State Public Defender Investigators Are Often Allowed to Take Private Cases Or May Have Connections To Others Who Can Assist
- C Area Colleges and Universities With Criminal Justice Programs
 - C Interns/Externs to Assist in Areas Where Less Experience Required
 - C Many Students Required to Work as Intern for Credit
 - C Can Provide Assistance With Conducting Record Retrieval and Review

SUGGESTED REFERENCE BOOKS

- C Medicolegal Investigation of Death - Spitz and Fischer
- C The Pathology of A Homicide
- C Gunshot Wounds - Practical Aspects of Firearms, Ballistics & Forensic Techniques - Vincent DiMaio
- C Tabor's Medical Dictionary
- C Practical Homicide Investigation - Geberth
- C The Guide To Background Investigations
 - C Invaluable Resource Every Attorney and Investigator Should Have
 - C Provides Up-To-Date Information For All States and All Counties Within Those States for Criminal and Civil Record Requests, Vital Records and Often Motor Vehicle Records; Government Agencies and Universities Are Also Included
- C Gray's Anatomy
- C Shooter's Bible
- C Ask Area Public Defender Investigators for Access to their Reference Books or Recommendations for Purchase

COMPUTER SOFTWARE

- C A Variety of Inexpensive Graphic Programs
 - C Visio Is One Example
 - C Basic Drawings of Crime Scene as It Was At Time of Event when Pictures Don't Show All
 - C Examples:
 - C Sketch of Residential Sub-Division for Location of Homes
 - C Drawing of Interior of Home for Felon in Possession Case
 - C Drawing of Office or Warehouse in Business Fraud
 - C Organization and Event Flow Charts to Show Relationship or Lack of Relationship between Individuals or Organizations; Also can Show Transaction Flow in Drug or Money Laundering Cases, If Helpful
- C Microsoft PowerPoint or Corel Presentations
 - C Extremely Easy for a Basic Computer User to Put Together a Presentation
 - C Jurors Have Come to Expect Some Technology During Trial
 - C Incorporate Evidence or Crime Scene Photos that have been Scanned or Are

- From a Digital Camera for use at Hearings and During Trial
- C Opening Statement and Closing Argument
 - C Keeps the Jury's Attention
 - C Emphasizes Defense Theory
 - C Points Out Discrepancies in Government's Evidence & Witness Testimony
 - C Can Incorporate Digital Photos or Defense Evidence Obtained During the Investigation to Emphasize Key Facts & Evidence

ON-LINE RESOURCES

- C Jeff Flax's Home Page: www.jflax.com
 - C Most Comprehensive Legal Site With The Links You'll Need
 - C Jeff Flax is the National Systems Support Analyst for the Defender Services Division of the Administrative Office of the U.S. Courts
 - C Links to Investigative Resources
 - C Links to Government Statistics & Agency Sites
 - C Sentencing Statistics
 - C Prosecution Statistics for Race & Offense, etc.
 - C Links to Medical Resources, Including Mental Health Resources and On-line Reference Books
 - C Links to Expert Witnesses
 - C Links to Death Penalty Resources
 - C Links to Articles and Publications on a Variety of Medical & Mental Health Topics
- C AutoTrak
 - C On-Line Investigation Database to Locate Background Information on Individuals
 - C A subsidiary of ChoicePoint, a Database Used By Many Government Agencies
 - C Charges Per Search
- C Federal, State and County Records On-Line
 - C Many Clerk's Offices have Civil and Criminal Record Information Online and Available through their Internet Web Site
 - C Invaluable Information on Witnesses and Snitches Through Court Files, Including Divorce Records, Pre-sentence Reports, Civil Interrogatories and Bankruptcy Schedules; The On-Line Information Can Tell You Whether There are Files to Request
 - C Only as Accurate and Inclusive as that Agency has Maintained On-line
 - C Can be Used as a Starting Point for Requesting Hard Copies When Necessary
 - C Helpful in Obtaining Information on Attorneys Representing Client in Prior Out-of-State Cases when Client Does Not Recall Attorney's Name

V. ETHICS

THE ACCIDENTAL ETHICAL CRIMINAL LAWYER

(*Criminal Law Ethics Goes to the Movies*)¹

Christopher Johns

Maricopa County Public Defender's Office
Phoenix, Arizona

“Virtue down the middle,” said the Devil as he sat down between two lawyers.

Danish Proverb

H.L. Mencken, *A New Dictionary of Quotations*, 1946

There are . . . many forms of professional misconduct that do not amount to crimes.

Benjamin N. Cardozo

***People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470 (1928)**

WHAT IS ETHICS?

There is a scene in the 1996 movie *Primal Fear* where the high-priced criminal defense lawyer, Martin Vail, is feeling sorry for himself. He's sitting at the local court watering hole. An inquisitive reporter is perched next to Vail on a barstool hoping to get a scoop on the melancholy barrister's latest high-profile case.

The story-line is that Vail has snared the sensational case of an altar boy accused of a ritualistic murder of a respected local archbishop.

Vail is in media hog-heaven, but the case is going badly. He senses that the reporter wants to know why he would represent a client that looks as guilty as sin. Vail admits to liking the media attention. In fact, he says, “I love that shit.”

Then Vail asks the reporter, “Have you ever been to Vegas?”

“Yeah,” the reporter responds.

“Why gamble with money, when you can gamble with people's lives,” says Vail. “That's a joke,” he adds.

“Alright I'll tell you,” Vail says [why he does what he does].

“I believe in the notion that people are presumed innocent until they are found guilty. I believe in that notion because I choose to believe in the basic goodness of people. I choose to believe that not all crime is committed by bad people. I try to understand that some good people do some bad things.”

That soliloquy encapsualizes the role of the defense. Lawyering is about more than right and wrong. It is about understanding. In a sense, criminal defense lawyers are the ultimate insiders. We choose, to fight within the system to defend our clients.

Lawyers are as much students of the human soul as of the Constitution, statutes and ethical rules. Every courtroom is a lesson in complex quirks of race, class, human nature and ethics. The courtroom is a crucible of good and evil---and ethics.

The right to a jury trial, which has been around at least since about 1220², derived from “battle” or “combat.” Sometimes also referred to as “judicial duel.” Ethics, in trial practice, is not much more than the rules of the game. Ethics is the sum of the rules and standards by which disputes are resolved in the courtroom. As one judge told the lawyers, “Okay, I want a clean fight. No kicking, biting or name-calling.”

What follows are some basic guideposts for the rules of the game in trial:

THE ETHICS OF OPENING STATEMENT: Close Encounters of Some Kind.

Keep thee far from a false matter.

Ex. 23:7

Opening statement is supposed to be confined to the issues in the case and the evidence that the lawyers intend to offer. Before either can be mentioned there should be a good faith belief that the issues or evidence is available and admissible. There must be a reasonable basis for stating the “alleged facts.” And a lawyer cannot allude to personal knowledge of the facts or state a personal opinion.³

A shorthand list prepared by Gary Stuart, author of *The Ethical Trial Lawyer* (State Bar of Arizona 1994), emphasizes the following problem areas:

- C *Appealing to the passion and prejudice of the jury*
- C *Disparaging a party or opposing counsel*
- C *Expressing a personal opinion⁴ as to:*
 - The justness of your cause*
 - The credibility of witnesses*
 - The guilt or innocence of the accused*
- C *Asserting personal knowledge⁵ of a fact*
- C *Alluding to any matter trial counsel does not reasonably believe is relevant.*

That’s the easy stuff. The hard stuff is the biggest problem in opening statement: when does opening statement become argument? Most commentators agree that it is improper to argue in opening statement.⁶

The simple test: does counsel’s presentation *inform* the jury as to the nature and extent of evidence or does it attempt to *persuade* the jury to accept or reject the evidence? Another author notes that as a rule of thumb, ask yourself: do I have a witness that can state on the stand the facts I’m telling the jury in opening statement? If the answer is yes, the opening is proper.⁷

Some commentators also think it is objectionable to discuss or explain the law during opening statements.⁸ As a practical matter some argument or brief mention of the applicable law is almost

inevitable. Extended argument or a lengthy legal harangue, especially a misstatement of the law, is likely to draw an objection and a possible trip to the judge's woodshed.

DIRECT EXAMINATION ETHICS: Every Which Way But Loose.

How forcible are right words!
Job 6:25

Criminal defense lawyers generally do not get an opportunity to practice direct examination much.. But you have to know the rules. A few words up front. Direct examination is not only bound by ethical considerations, but by the rules of evidence. Testimony offered on direct examination must be relevant, authentic, not hearsay, and otherwise admissible.

Trial lawyer Gary Stuart lists six basic goals in the ethical presentation of direct testimony⁹:

1. Establish the foundation for pivotal exhibits.
2. Establish the credibility of the direct witness.
3. Introduce undisputed facts.
4. Enhance the likelihood of disputed facts.
5. Establish final argument points.
6. Attract and hold the jury's attention.

Again, Rule 3.4 is the touchstone. It is unethical to "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence" Note also that Rule 3.5 prevents a lawyer from seeking "to influence . . . [a] juror . . . by any means prohibited by law." False evidence is, of course, prohibited by law. Rule 4.1 is also applicable to jury trials. It proscribes the making of a "false statement of material fact or law to a third person." Jurors are "third persons."¹⁰

Actually, most ethical issues in direct examination happen outside the courtroom. They deal with preparing the witness to testify. It is axiomatic that lawyers cannot have witnesses manufacture testimony. On the other hand, it is an accepted practice of American trial lawyering to "coach" witnesses.¹¹ "Dressing the witness" up is also a common practice. Suggesting, however, that a witness wear a wedding band when she is not married or six inch crucifix around her neck when she is not a Christian "may verge on fraud."¹²

The most common problem for the criminal defense lawyer is the presentation of perjured testimony. As the issue relates to witnesses, it is settled. A lawyer shall not "falsify evidence [or] counsel assist a witness to testify falsely." Rule 3.4(b). And, if a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. Rule 3.3, Model Rules of Professional Conduct.

As for client perjury, that's beyond the scope of this brief overview. Many practicing criminal lawyers think it is an accused's Constitutional right to take the stand. Whether his lawyer believes it should not be the end-all-be-all (since if the client represented herself she could take the stand). Monroe Freedman's, *Understanding Lawyer's Ethics* (1990) is a good initial reference source.

CROSS EXAMINATION ETHICS: *The Empire Strikes Back*

How are the mighty fallen!

E.g., 2 Sam. 1:19

More cross-examinations are suicidal than homicidal.

Emory R. Bucknes

Francis Lewis Wellman, *Art of Cross-Examination*, 1936

Never, never, never, on cross-examination ask a witness a question you don't already know the answer to was a tenet I absorbed with my baby-food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case.

Harper Lee

To Kill a Mockingbird, 1960

Cross examination. Just saying it, if you are a criminal defense lawyer usually gives you a warm fuzzy the way an “E-Ticket”¹³ at Disneyland did when you were a kid. Cross examination is also hard. At least, to do it well and ethically.

Ethically? Yes, ethically. Superior advocacy does not have to be unethical or dishonest. Abraham Lincoln was no slouch when it came to lawyering. In fact, while practicing in Illinois before his presidency, many considered Lincoln one of the top lawyers in the state. His reputation as a lawyer, including a skilled courtroom advocate, rested in large part on the belief in his absolute honesty.

“Honest Abe” or “Honest Old Abe” held himself to the highest standards of truthfulness. In notes for a lecture written around 1850, Lincoln referred to the “vague popular belief that lawyers are necessarily dishonest” and warned: “Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation.”¹⁴

To give it another spin, cross-examination can take many forms. But generally, unfair or abusive behavior only loses points with a jury. Cicero’s quote that “When you have no basis for argument, abuse the plaintiff,”¹⁵ isn’t the best advice.

Jurors in a jury trial are judges and are entitled to respect. In Arizona, Rule 41 of the Rules of the Supreme Court provides that among the duties of members of the bar are:

- C To employ for purposes of maintaining causes confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law.
- C To abstain from all offensive personalty and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged.

Again, Rule 3.4(e), Model Rules of Professional Conduct, limits cross-examination. There must be a good faith basis for a cross-examination question supported by admissible evidence. Good faith cannot be supported by rumors, uncorroborated hearsay or pure speculation.

Criminal defense lawyers probably take it for granted, but the public and others in our profession sometimes don't get it. A criminal defense lawyer is entitled to insist that the government prove its case. The proof must be through evidence that is persuasive beyond a reasonable doubt.

That means that witnesses not only need to be truthful but convincing. A criminal defense lawyer may try to discredit a witness she knows to be truthful (that it is wise to always do so is, of course, another matter).

Justice White¹⁶ in *United States v. Wade*¹⁷ writes a pretty good guide:

[A]bsent a voluntary plea of guilty, we . . . insist that [defense counsel] defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness whom he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.¹⁸

On the other hand, a prosecutor has a public duty to avoid convicting the innocent. Consequently, truthful witnesses should not be discredited by the prosecution.¹⁹

CLOSING ETHICS? Who Framed Roger Rabbit?

If you are at all like me, the words "To begin with, this case should never have come to trial . . . [it] . . . is as simple as black and white,"²⁰ is burned into your brain. Atticus goes on to argue that:

The state has not produced one iota of medical evidence to the effect that the crime Tom Robinson is charged with ever took place. It has relied instead upon the testimony of two witnesses whose evidence has not only been called into serious question on cross-examination, but has been flatly contradicted by the defendant. The defendant is not guilty, but someone in this courtroom is.²¹

You won't find much, if anything, improper in Atticus Finch's closing argument. The last sentence above is about as close as he gets to saying anything improper, but the statement is phrased in such a way as not to express a personal opinion. A lawyer in closing is entitled to argue *all reasonable* inferences from

the evidence *in the record*. Conversely, it is improper for a lawyer to intentionally misstate the evidence or to mislead the jury as to the inferences it may draw.²²

Rule 3.4(e) also makes it unethical to “assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”

Likewise appeals to race, religion, ethnicity and gender are fraught with peril. A lawyer should not make arguments calculated to inflame the passions or prejudices of juries.²³ It is generally argued that prosecutors must adhere to a higher standard than defense lawyers in closing.

A shorthand list for closing includes:

- C *Avoid statements of personal belief*
- C *No appeals to prejudice or bigotry*
- C *Cannot misstate the evidence*
- C *Cannot misstate the law*
- C *No appeals to jurors’ personal interests*
- C *Avoid appeals to emotion, sympathy and passion*
- C *Cannot comment on the exercise of privilege*

Finally, there are some ethics that aren’t in the books. A few I try to keep in mind are:

- ” Reputation is everything as a lawyer and probably as a person
- ” Never do anything that will not benefit your client
- ” Unless you are comfortable with it on tomorrow’s front page, don’t put it in writing, especially if you are angry
- ” Never bid against yourself
- ” If you don’t have a reason to trust someone . . .

It is not hard to be an ethical lawyer. It is much harder to give every case the best you’ve got --- but it’s our job.

Good luck.

Endnotes

1. Film clips are used for educational purposes of continuing legal education under the “fair use” exception and not for any other purpose.
2. An easy read book on the development of the jury trial is Charles Rembar’s *Law of the Law, The Evolution of Our Legal System* (1980).
3. John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, 2d ed. (1996).

4. In fact, it is unethical for counsel to express a personal opinion or assert personal knowledge of the facts at any point during the trial. *See* Rule 3.4(e), Model Rules of Professional Conduct.
5. *Id.*
6. *See, e.g.,* Steven Lubet, *Modern Trial Advocacy* (1993); Gary Stuart, author of *The Ethical Trial Lawyer*, notes that it is not unethical to argue in the opening statement unless the argument violates a standing order of the tribunal. Rule 3.4(c), Model Rules of Professional Conduct. In Arizona, for example, the Criminal Rules of Procedure do not specifically prohibit “argument” (Rule 19.1), while the civil rules note that opening statement shall “be confined to a concise and brief statement of the facts.” Rule 39(b)(1) and (2).
7. Thomas A. Mauet, *Fundamentals of Trial Techniques* (1980).
8. Steven Lubet, *Modern Trial Advocacy* (1993).
9. From materials by Gary Stuart presented at The Tenth Annual Arizona College of Trial Advocacy (1995).
10. *Id.*
11. Steven Lubet, *Modern Trial Advocacy* (1993).
12. *Id.*
13. An “E-Ticket” was for the Matterhorn and the other most exciting rides.
14. Recounted in *Lincoln* by David Herbert Donald (1995).
15. Louis Levinson, *Barlett’s Unfamiliar Quotations*, 1971.
16. Concurring and dissenting.
17. 388 U.S. 218, 257-58, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967).
18. *Id.* at 388 U.S. 257-58.
19. *See also* Rule 3.8 of the Model Rules of Professional Conduct.
20. Harper Lee, *To Kill A Mockingbird* (1960).
21. *Id.*
22. John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, §19:13, 2d ed. (1996).
23. ABA Stds, *The Defense Function*, Std 4-7.7, Commentary; *The Prosecution Function*, Std 3-5.8(c) and Commentary.

2001 New Approaches For The Millennium

Supplemental Materials

Williamsburg, VA
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DEPARTMENT OF JUSTICE GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS

SHIFTING FOCUS TO WIN

by Anne T. Berton and Robert F. Castañeda

TRIAL TIPS (Part Two)

Initial Interview of Client

1. Use interview primarily for preparing for preliminary hearing.
2. Obtain all possible information from client regarding the client's statement to the agent who interviewed him.
 - a. What client said
 - b. What agent said to him
 1. Examples: "we don't believe you" "you're a liar" "everyone says they are innocent – we are tired of hearing the same old story" "you'd better cooperate – you're facing lots of years in jail" "you think we're stupid" "you'll get less time if you cooperate" "by the time you get out of prison, your wife will fall in love with someone else"
 2. Other threats
 - c. Agent's tone of voice
 - d. Agent's threatening body language (getting in client's face)(pointing finger in his face)
3. How many times did client have to deny his guilt? What was agent telling him upon hearing each denial?
4. How many different times was client interviewed? (length of interview(s))
5. Did any other agent(s) harass client verbally, etc.?
6. Was client asked questions by agent en route to the jail or to initial appearance?
7. If possible, have client write out his version of the interview with the agent. Retrieve this from the client prior to the preliminary hearing. Use the version to prepare for the hearing.

Preliminary Hearing

This hearing takes place a day or two after you meet the client, so you normally don't have a lot of time to prepare for it. Hence, it is best to use it to set up impeachments for trial. Impeach: the testifying agent, who is usually the agent who took the client's statement; and, any government agents this agent spoke to. The following are some points that may be of use in a particular case.

1. Find out how long the statement took. Perhaps it was hurried. Other tasks were consuming the case agent.
2. Was the client cooperative? Did client offer to help? (this will impeach trial efforts by agent where he claims client wasn't and didn't)
3. Who was in charge of the interview? Client or agent? Who chose the questions?
4. Did client answer all questions?
5. Did client refuse to answer any questions?
6. At end of interview, was agent satisfied that he had conducted a complete interview?
7. Did he ask client if client had anything to add?
(3-7 will help rebut agent's trial claims that client failed to state some fact)
8. Ask about threats client told you about in initial interview
9. Did client tell agent he was innocent? Repeatedly? How many times? Agent wanted a confession, didn't he? (Agent will always state that he wants the truth) – agent wasn't there, so he doesn't know the truth himself / later can argue that government was lazy, didn't investigate to ascertain the truth – i.e., investigation ended when they were unable to obtain a confession.
10. Did agent talk to other law enforcement personnel? Did he ask them if they were aware of any incriminating information? i.e., did he ask them if client was nervous? (Point: to impeach these other agents at trial when they come up with newly-recalled incriminating information – Be sure to ask about each cop they talked to individually, so that impeachment is set up fully.
11. Next day, on way to Magistrate, did agent ask client anything? Since client had not invoked his rights, agent had every opportunity to ask if he wanted anything clarified?

12. Did agent take rough notes? Has he destroyed them? (at trial, can use answers either way)
13. Did agent tell client why he was under arrest?
14. When did agent first tell client drugs had been found? (sometimes, this information can be used to refute agent's trial testimony)
15. Why didn't the agent video or cassette-record the statement
16. After the preliminary hearing, tell client to write out his version of what took place in case. Make sure he covers all phases. Have him write it and rewrite it as many times as necessary. He will remember more details at different times, e.g., after the preliminary hearing, and after you tell them what other witnesses have told you. From the client's enhanced recollection, you will be able to obtain the names of all the witnesses you need to talk to in order to develop your defense. All other investigative pursuits stem from this process.

Working With Client

1. Conduct exhaustive interview(s) with client to develop all information you need for your investigation. Have client make diagrams regarding the offense, the interview, etc.
2. Do a mock direct-examination
3. Cross-examine client
4. Get co-counsel to cross-examine client
5. Get investigator to cross-examine client
6. All three of you cross-examine client together
7. Walk through the various phases of the case (in your own mind) – what would an ordinary human being have thought, felt, done – ask client about all these questions
8. Advise client of talks with other witnesses (to enhance recollection and eliminate unnecessary conflict)
9. Client's exhaustive narrations to you will allow you to conduct a full investigation to include witnesses, corroborative physical/documentary evidence. It will also assist you in preparing the trial cross-examinations of the government witnesses.

Investigation

1. Get your investigator involved. Have him read discovery. Number your discovery pages so that you all can communicate more readily regarding discovery. Get all possible ideas from co-counsel, investigator, regarding investigative possibilities.
2. Give client a copy of numbered discovery also. Client will recall more, and can also provide you with ideas.
3. Give client a copy of all pictures and exhibits as they are developed. This prevents emergencies the day of or the day before the trial.
4. Visit crime scene. Drive through it or walk through it as client did. Examine the vehicle involved. Look for corroborative details. Look for details to refute government claims.
5. Study pretrial services report carefully for possible problems.
6. Obtain copy of financial affidavit client signed to avert impeachment problems.
7. Talk to all witnesses. If they turn out to be trial witnesses, talk to them as often as necessary, and put them through mock direct and cross runs.
8. Have one session where you and investigator read discovery together. You will come up with additional ideas and insights.
9. Turn over copy of preliminary report to investigator and client. Have their input on this as well.
10. Talk to a non-lawyer, non-investigator, individual, perhaps a family member. Have them review discovery. See how case affects them. Preferably, more than one individual. This will be like a mock jury. Implement their feedback.

Working with Witnesses

1. Make sure you talk to them exhaustively, so that you can eliminate the harmful ones.
2. Look for corroborating details from them by way of documents/physical evidence, etc.
3. Do directs & crosses with them.

4. If family, give them a copy of discovery also to see what they can come up with.
5. Look for a good reputation witness(es).
6. The two questions couched in legally sufficient language:
 - a. Are you familiar with the Defendant's reputation for 1) truth and veracity, 2) being peaceful and law abiding (or do you have an opinion as to the Defendant's character for)
 - b. Is that reputation/opinion good or bad?

Use of Expert

Oftentimes, the government will make no effort to gather hard evidence, e.g., fingerprints. They will rarely record the client's statement by way of audio or video, or even by the client's own handwriting. They will testify that they cannot go to a foreign country to investigate.

As justification, they will testify that: 1) fingerprints are very difficult to lift, 2) they don't video or audio client statements, 3) they are prohibited from doing so by such and such a regulation.

If you have a qualified investigator or expert available with law enforcement experience, you can get him to refute these claims. For example, in our office we have an investigator who is an ex-cop. He can testify truthfully that:

1. Fingerprints can indeed be lifted off the surface at issue. He can give examples. He will testify that one can never know unless the effort is made. That is why we have labs and fingerprint experts.
2. Videos and audios of client statements can in fact be made. Their purpose is to preserve the entire statement (both for content and accuracy) so that the jury can know exactly what was said by whom and that no unnecessary controversies are created for the jury.
3. Law enforcement (federal and state) have developed a network that assists each other in investigating matters in another country. These are liaison offices, officers in other countries who are willing to help, etc. Oftentimes, the only effort that is needed is a phone call. He himself (our expert) has availed himself of this network in the past, and he knows that it is available right now.
4. He himself went to Mexico in this case to investigate. It wasn't that difficult.

Jury Selection

Only one of our judges allows us to ask questions. These are questions we ask:

1. Does everyone here understand that the government has the burden of proof in this case?
2. Will everyone here require government to prove its case BRD before they can convict my client?
3. Mr. So & So, if the government does not prove its case BRD, will you find my client not guilty?
4. Does everyone understand that the client does not have to prove his innocence or produce any evidence at all?
5. Can everyone follow this instruction?
6. Is there anyone here who will require us to prove that we are not guilty?

Of course, ask any other questions you feel are necessary, e.g., prejudice in drug cases, individual questions, etc.

By above questions, try to ensure that jury members understand that 100% of the burden is on the government. Get them to commit to this understanding and promise you that they will follow it. Later on in final argument, remind them of this promise, tell them that if they have any questions, they are to look to government for answers. Why? Because they, and only they, have the burden of proof.

Opening Statement

Contrary to all the advice we have received, we do not usually make full and complete opening statements right after the government's opening statement. Our reasons are as follows:

1. Our experience is that when we are overly-precise, AUSA will meet with witnesses and discuss all the details with them. They will contradict our client in areas where the credibility contest cannot be won directly by our client. Guess who loses?
2. If you have a solid impeachment of government witnesses, any telegraphing of it will allow him to explain or minimize. Who wants that?
3. Sometimes our own witnesses are weak, non-professional, etc., and they might make mistakes on the stand. Who wants his or her opening statement held against him?

4. Obviously, nature and content of opening statement depends on facts of each particular case. We have found that a thorough but general opening statement, with precise specifics in unrefutable areas, has worked best for us.
5. Contrary to the general practice, we reserve our opening statement for a number of reasons. We do so in cases where it appears that the government is not aware of some key information benefitting our defense. Other tactical reasons apply on a case-by-case basis.

Government's Case During Trial

1. Listen carefully. All of your careful study of case will come to naught if you miss something because you weren't paying attention. Opportunities may come up that you will not be able to take advantage of if you are not listening carefully.
2. If you get hit, don't bleed in front of jury – smile, maintain a poker face – BRD should get you over any non-fatal hits.
3. There are certain facts that you need to develop, and certain facts that you may need to minimize – success in these two areas may be crucial to winning the case. Look in chapter 24 of the Pozner/Dodd Cross-Examination book for techniques on how to do this.
4. Develop a series of questions that will result in “I don't now or I don't remember” answers from the case agent. Ask them at key moments of examination (when jury is shaking their heads in disgust at the agent). The level of disgust will intensify if these questions are asked at the right psychological moment. The jury will look down on the investigation if you are successful in this regard.

Defendant's Case During Trial

1. If possible put your reputation witness on so that you can obtain the instruction and argue it to jury.
2. Put client on last.
3. Get as much detail as you can from your client and your witnesses during their direct examinations. Disarm the cross-examiner as much as possible.
4. Defendant, when he testifies, should face nothing new from prosecutor. He will have been cross-examined by various individuals from all possible angles already. When he sits down, after his

testimony, his testimony by itself should raise serious questions about his innocence, i.e., reasonable doubt.

Government's Rebuttal

File a motion in limine requiring government to make offer of proof to ensure that it is truly rebuttal. Have court instruct government to limit evidence to rebuttal.

Government's Argument

Listen and be ready to object to improper argument. Ask for curative instruction, mistrial, etc, as need arises. The following are most frequent areas of objection.

1. Attacking defense counsel
2. Intentionally inflaming the jury
3. Commenting on silence at arrest/refusal to testify
4. Attacking defendant's character
5. Expressing personal belief
6. Bolstering government witnesses
7. Mischaracterizing the defense
8. Shifting the burden of proof
9. Arguing facts outside the record
10. Misstating the law

(These objections were provided to us by the office of the Federal Public Defender for the Western District of Texas)

Practical Considerations

1. Try to get a fresh jury (don't get one that's been convicting all month long).
2. Watch your mouth outside the courtroom – many a defense counsel has stated something in front of jury members that he has regretted eternally.

**CHALLENGING THE TESTIMONY OF FORENSIC IDENTIFICATION
EXPERTS IN A POST-DAUBERT WORLD: THE NEW RULES OF THE GAME**
by Robert Epstein*

A. INTRODUCTION

For the past 100 years forensic identification “experts,” such as latent fingerprint examiners, hair analysts and forensic document examiners, have been providing devastating testimony against criminal defendants, typically receiving little in the way of challenge from defense counsel. Over the past several years, however, the Supreme Court has unintentionally provided the criminal defense bar with substantial ammunition for attacking the testimony of such experts, both as a matter of admissibility and on cross-examination as well. That ammunition has come in the unlikely form of two civil cases: Daubert v. Merrell Dow Pharmaceuticals¹ and Kumho Tire v. Carmichael.² Daubert requires prosecutors (as well as defense attorneys for that matter) to establish the “reliability” of the expert testimony that they are proffering.³ In addition, Daubert provides that courts, when assessing reliability, may properly consider such factors as whether the particular technique or methodology in question has been tested, whether an error rate for it has been established, and whether there are objective standards to govern the technique’s operation.⁴

Kumho, in turn, makes clear that prosecutors cannot avoid this reliability requirement simply by offering expert testimony as “technical” or “specialized” knowledge, rather than as “scientific.”⁵ The trial court must consider the reliability, or lack thereof, of all expert testimony, and in so doing a district court may properly consider, to the extent warranted, the factors enumerated in Daubert.⁶ Moreover, as the Third Circuit recognized in United States v. Velasquez,⁷ these same factors are appropriate

grounds for cross-examination because they may properly influence the jury's determination as to what weight such evidence, once admitted, should receive.⁸

Forensic identification witnesses are especially vulnerable to attack under Daubert and Kumho, because while these witnesses have long claimed the mantle of science to bolster their opinions, there has in fact been little or no testing done to validate the fundamental premises upon which their fields are based.⁹ Nor have error rates or objective identification standards for these various disciplines ever been established.¹⁰ Accordingly, the few courts that have thus far had the occasion to reassess these fields, pursuant to the requirements of Daubert and Kumho, have found them to be critically lacking. Daubert and Kumho thus provide the defense bar with a unique opportunity to challenge areas of expertise that prosecutors have long been able to rely upon to obtain convictions. This paper will first examine the Daubert and Kumho decisions in detail and will then discuss how those cases have been applied, or can be applied, to two of the mainstays of forensic identification science: handwriting and fingerprints.

B. THE LEGAL STANDARD

1. Daubert v. Merrell Dow Pharmaceuticals

The Supreme Court in Daubert addressed the issue of what the standard should be for admitting expert scientific testimony in a federal trial.¹¹ The Ninth Circuit in Daubert had affirmed the district court's decision to exclude the plaintiff's proffered expert because the expert's methodology for concluding that benedictin can cause human birth defects did not meet the "general acceptance" test of Frye v. United States.¹² In reversing the Ninth Circuit, the Supreme Court held as an initial matter that

the Frye standard had effectively been displaced by the Federal Rules of Evidence, a fact which a majority of the federal circuits had failed to recognize.¹³

The Daubert Court additionally held that under Federal Rule of Evidence 702,¹⁴ a federal trial court faced with a proffer of expert testimony must act as a gatekeeper so as to exclude expert opinions lacking sufficient reliability.¹⁵ Specifically addressing the issue of “scientific” experts, the Court held that trial judges must determine at the outset whether the “reasoning or methodology underlying the [expert] testimony is scientifically valid”¹⁶ As the Court recognized, in a case involving scientific evidence, evidentiary reliability will be based upon “scientific validity.”¹⁷ Significantly for criminal defense practitioners, the Court stated that this standard applies not only to “novel scientific techniques,” but also to “well established propositions.”¹⁸

The Daubert Court suggested five factors that trial courts may consider in determining whether proffered expert testimony is scientifically valid. The first and most essential factor is whether the “theory or technique . . . can be (and has been) tested.”¹⁹ As the Court recognized, empirical testing is the primary criterion of science:

Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry. The statements constituting a scientific explanation must be capable of empirical test. The criterion of the scientific status of a theory is its falsifiability, or testability.²⁰

A second closely related factor that the Daubert Court suggested should “ordinarily” be considered is the “known or potential rate of error” of the particular technique.²¹ In this regard, the

Court cited United States v. Smith,²² in which the Seventh Circuit surveyed studies concerning the error rate of spectrographic voice identification techniques.²³

A third factor pointed to by the Court is the “existence and maintenance of standards controlling the technique’s operation.”²⁴ As an example, the Supreme Court cited the Second Circuit’s opinion in United States v. Williams²⁵ in which the Second Circuit observed that the “International Association of Voice Identification . . . requires that ten matches be found before a positive identification can be made.”²⁶

Fourth, the Daubert Court held that “general acceptance can . . . have a bearing on the inquiry.”²⁷ “A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.”²⁸ As the Court recognized, “widespread acceptance can be an important factor in ruling particular evidence admissible and a ‘known technique which has been able to attract only minimal support within the community’ . . . may properly be viewed with skepticism.”²⁹

Finally, the Daubert Court recognized that an additional factor which may be considered “is whether the theory or technique has been subjected to peer review and publication.”³⁰ As the Court recognized, “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.”³¹ Accordingly, “[t]he fact of publication (or lack thereof) in a peer reviewed journal . . . [is] a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.”³²

In providing the above factors, the Supreme Court emphasized that the inquiry under Federal Rule of Evidence 702 is a “flexible one” and that, as such, additional factors may be considered.³³

Several such additional factors have been suggested by the Third Circuit:

- (1) the relationship of the technique to methods which have been established to be reliable;
- (2) the qualifications of the expert witness testifying based on the methodology;
- (3) the non judicial uses to which the method has been put ³⁴

2. Kumho Tire v. Carmichael

In the aftermath of Daubert, the federal courts were divided over the question of whether the Daubert criteria, as set forth above, should be applied to expert testimony of a non-scientific nature.³⁵

As noted above, Federal Rule of Evidence 702 also allows for expert testimony that is based upon “technical or other specialized knowledge.”³⁶ The Supreme Court in Kumho held, as an initial matter, that a district court’s “gatekeeping” obligation to assure that expert testimony is sufficiently “reliable” applies to all experts, not just scientists.³⁷ Moreover, the Court held that the Daubert factors may properly be considered by a trial court in assessing non-scientific expert testimony to the extent that any or all of those factors are pertinent to the particular case.³⁸

The Court provided some guidance in this regard by considering the particular facts of the case before it. At issue in Kumho was the proffered testimony of the plaintiff’s expert in tire failure analysis.³⁹ The expert opined that the right rear tire of the plaintiff’s minivan had blown out because of a defect in its design or manufacture.⁴⁰ The expert reached this conclusion on the basis of a visual inspection of the tire in which he looked for the presence of four physical signs that would indicate that the blow out was caused by “overdeflection,” i.e., underinflating the tire or causing it to carry too much

weight.⁴¹ He testified that unless he saw two of the four signs he was looking for, he would conclude that overdeflection did not occur and that a manufacturing defect or design had instead caused the blow-out.⁴² As both the trial court and the Supreme Court recognized, however, neither the plaintiff nor his expert provided any indication that other experts in the industry use this two-factor test.⁴³ Nor could they point to any articles or papers that validate such an approach.⁴⁴ Moreover, the plaintiff was unable to identify any criteria, beyond those that the Supreme Court pointed to in Daubert, that would militate in favor of admissibility.⁴⁵ The Supreme Court thus found that the district court did not abuse its discretion in excluding the expert's testimony.⁴⁶

Kumho is critical for criminal defense attorneys because it means that prosecutors cannot avoid the burden of establishing the reliability of their expert witnesses merely by characterizing those witnesses as being "technical" or "specialized" rather than "scientific." Prosecutors must be able to demonstrate the reliability of the particular expert methodology or technique involved, either by way of the Daubert factors or by some alternative criteria. When it comes to forensic identification witnesses, the prosecution is going to be hard pressed to make the necessary showing. Although these witnesses have been long been claiming that their respective fields are scientifically based, there has never been any real science conducted in any of the forensic identification disciplines. The premises which underlie these fields have not been tested, error rates have never been established and objective identification standards never developed. The primary explanation for this is that these fields were created by and for law enforcement.⁴⁷ Once law enforcement was able to gain judicial acceptance for the initial forensic identification fields in the early 1900's, at a time when courts were not applying anywhere near the kind of scrutiny that Daubert now requires, there was certainly no motivation on the part of law

enforcement to conduct testing to try to falsify the premises upon which these fields are based, or to establish error rates for the fields' practitioners.⁴⁸ To the contrary, law enforcement was content to leave well enough alone. As the recent handwriting cases make clear, however, the practitioners of these various fields may now be in for a rude awakening.

C. THE LEGAL STANDARD APPLIED

1. Handwriting

Since the early 1900s, forensic document examiners have routinely been allowed to testify as expert witnesses in this country. However, since the Supreme Court's decision in Daubert, the dubious underpinnings of the field have become widely recognized.⁴⁹ In United States v. Velasquez,⁵⁰ the Third Circuit held that it was reversible error for the district court not to allow the defense to call an expert "critic" of handwriting analysis to apprise the jury of the field's limitations.⁵¹ In addition, at least four federal trial courts have found that the field does not satisfy the Daubert criteria and that forensic document examiners do not possess "scientific knowledge."⁵² Although none of these courts took the ultimate step of precluding the handwriting testimony altogether, each adopted particular measures that substantially diminished its impact.

In the Third Circuit case, Velasquez, the defendant was convicted on drug charges after a forensic document examiner testified that the defendant and his girlfriend had written a mailing label which had been used to ship drugs.⁵³ On appeal, the defendant did not challenge the district court's decision to admit the testimony of the government's handwriting expert, but rather only the court's preclusion of the expert handwriting "critic" that the defense had proffered.⁵⁴ The defense expert was not a trained handwriting analyst.⁵⁵ Rather, he was a law school professor who had conducted eight

years of self-directed research on handwriting analysis, culminating in a lengthy law review article harshly criticizing the field.⁵⁶ The professor's criticisms related, among other things, to the lack of empirical testing that had been done to validate handwriting analysis and to the failure of the handwriting community to develop objective standards.⁵⁷ In reversing the defendant's conviction, the Third Circuit recognized, as an initial matter, that the professor had "sufficient specialized knowledge of the limitations of handwriting analysis to be considered an expert in that regard."⁵⁸ The court further found that "the mere fact that the professor is not an expert in conducting handwriting analysis to identify particular scribes of specified documents does not mean that he is not qualified to offer expert testimony criticizing the standards in the field."⁵⁹ In addition, the court found that the professor had "good grounds" for his rejection of handwriting analysis and that his criticisms had been published and subjected to peer review.⁶⁰ Finally, the court held that the professor's criticisms of the field of handwriting generally, and of the analysis performed by the government's expert, would have assisted the jury in determining the proper weight to accord the testimony of the government expert.⁶¹ In this connection, the court noted that the "same considerations that inform the [trial] court's legal decision to admit evidence under Rule 702 [i.e., the Daubert factors] may also influence the factfinder's determination as to what weight such evidence, once admitted, should receive."⁶²

In United States v. Starzecpyzel,⁶³ the issue before the district court was not whether a defense expert should be permitted to counter the government's expert, but whether the government should even be permitted to call a handwriting analyst in the first place.⁶⁴ After conducting a three day Daubert hearing, the court found that "forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after Daubert, be regarded as

‘scientific ... knowledge.’”⁶⁵ However, without the benefit of the Supreme Court’s subsequent decision in Kumho, the district court ultimately determined that because forensic document examiners provide “technical,” rather than scientific knowledge, they are beyond the scope of Daubert.⁶⁶ Luckily for the defendant, though, the court’s analysis did not end there. Appropriately considering the issue under Federal Rule of Evidence 403, the court recognized the danger of unfair prejudice to the defendant given that jurors “might well view FDE’s as experimental scientists, placing more weight on their testimony than was justified by the government’s showing at the Daubert hearing.”⁶⁷ Accordingly, the court held that it would advise the jury, prior to the document examiner’s testimony, that a forensic document examiner is not a scientist and that the opinion of such a witness does not have the same degree of demonstrable certainty as that of a chemist who is reporting on a standard blood test.⁶⁸ The court further held that the defense would be permitted at trial to attack the reliability of forensic document examination, as they did at the Daubert hearing.⁶⁹

The next two handwriting cases, United States v. Hines⁷⁰ and United States v. Santillan,⁷¹ effectively demonstrate the difference that Kumho can make. In both of these cases the district courts, like the court in Starzecpyzel, found that handwriting analysis does not satisfy the Daubert criteria.⁷² In contrast to Starzecpyzel, however, both courts found, pursuant to Kumho, that the Daubert criteria may properly be applied in assessing the reliability of a forensic document examiner’s testimony.⁷³ Applying that criteria, the courts precluded the government’s experts from stating their opinions that the defendants in the respective cases had authored the documents that were at issue.⁷⁴ The courts held that the experts could only testify to the similarities that they found between the documents and the defendants’ known writing exemplars, without providing their ultimate opinions of authorship.⁷⁵ The

courts reasoned that, while forensic document examiners possess an acquired skill of spotting similarities in different pieces of writing, there is no data to suggest that they can reliably conclude from those similarities that the writings under consideration were authored by the same individual.⁷⁶ This exact same approach was also recently taken by the Federal District Court of Colorado in the case of United States v. McVeigh.⁷⁷

Thus, in the seven years since Daubert was decided, there has been a significant transformation in the judicial treatment of forensic document examiners. A trend has developed in which forensic document examiners are being permitted to testify only to the similarities that they can spot, without being allowed to provide any ultimate opinion as to authorship. This development in the case law has, in turn, been recognized by the Department of Justice, which has effectively conceded the scientific bankruptcy of the field. In a 1998 report entitled Forensic Sciences: Review of Status and Needs, the Department states that “document examination, . . . is currently in a state of upheaval[;] [c]ourts in several jurisdictions recently questioned the scientific basis of handwriting identifications.”⁷⁸ The report then goes on to state, under a heading entitled “Needs,” that validation studies must be done to establish a “scientific basis” for handwriting identifications.⁷⁹ To date, however, such studies have not been conducted.

2. Latent fingerprints

Like forensic document examiners, latent fingerprint examiners have been testifying as experts in this country since the beginning of the 20th Century. But, as with forensic document examiners, the trial court judges that initially permitted latent fingerprint examiners to testify did not act as the “gatekeepers” envisioned by Daubert.⁸⁰ Rather, they admitted the fingerprint testimony without any real scrutiny

whatsoever.⁸¹ Forensic science commentators, writing in the wake of Daubert, have recognized that latent fingerprint examiners are, in fact, susceptible to a Daubert challenge on the grounds of reliability.⁸² As one writer has put it, “when and if a court agrees to revisit the admissibility of fingerprint identification evidence under Daubert, the Daubert approach – that courts may admit scientific evidence only if it meets contemporary standards of what meets science – is likely to meet its most demanding test: A vote to admit fingerprint evidence is a rejection of conventional science as the criterion for admission[;] [a] vote for science is a vote to exclude fingerprint expert opinions.”⁸³

To date there has not yet been any reported decisions in which fingerprint analysis has been put to the test of Daubert. That day, however, is soon coming.⁸⁴ A close examination of the fingerprint profession reveals precisely the same deficiencies that have plagued forensic document examiners. Latent fingerprint examiners cannot satisfy any of the Daubert criteria.

a. There has been no testing of the field’s fundamental premises

First and foremost there has been a complete absence of scientific testing in the fingerprint profession. In sharp contrast to the relatively new field of DNA, no testing has been conducted to determine what the probability is of two different people having a number of fingerprint ridge characteristics in common.⁸⁵ Even more fundamentally, there have been no studies performed to assess just how reliable it actually is for an examiner to make an identification on the basis of a latent fingerprint fragment which oftentimes is very small⁸⁶ and very distorted.⁸⁷ Commentators have recently recognized that the lack of such testing is a critical problem for the fingerprint profession. David Stoney, for example, a leading forensic science scholar, and a trained fingerprint analyst, has written:

[T]here is no justification [for fingerprint identifications] based on conventional science: no theoretical model, statistics or an empirical validation process.

Efforts to assess the individuality of DNA blood typing make an excellent contrast. There has been intense debate over which statistical models are to be applied, and how one should quantify increasingly rare events. To many, the absence of adequate statistical modeling, or the controversy regarding calculations brings the admissibility of the evidence into question. Woe to fingerprint practice were such criteria applied!

* * *

Much of the discussion of fingerprint practice in this and preceding sections may lead the critical reader to the question “Is there any scientific basis for an absolute identification?” It is important to realize that an absolute identification is an opinion, rather than a conclusion based on scientific research. The functionally equivalent scientific conclusion (as seen in some DNA evidence) would be based on calculations showing that the probability of two different patterns being indistinguishably alike is so small that it asymptotes with zero The scientific conclusion, however, must be based on tested probability models. These simply do not exist for fingerprint pattern comparisons.⁸⁸

The Department of Justice, in a stunning admission, has recently conceded that this type of testing has not been done, and even more importantly, that it needs to be done. The Department, just this past March, issued a formal “Solicitation” for “Forensic Friction Ridge (Fingerprint) Examination Validation Studies.”⁸⁹ The Department’s Solicitation, which specifically cites to the Supreme Court’s decision in Daubert, calls for testing in two fundamental areas. First, “[b]asic research to determine the scientific validity of individuality in friction ridge examination based on measurement of features, quantification and statistical analysis.”⁹⁰ As the Department admits in this regard, “the theoretical basis for ... individuality has had limited study and needs additional work to demonstrate the statistical basis for identifications.”⁹¹ Second, the Department has also called for testing of the procedures that

examiners use for making fingerprint comparisons.⁹² In regards to this latter testing, the Solicitation provides that “[p]rocedures must be tested statistically in order to demonstrate that following the stated procedures allows analysts to produce correct results with acceptable error rates.”⁹³ As the Department concedes, such testing “has not yet been done.”⁹⁴ The ramifications of this Solicitation are thus enormous. The Department has effectively admitted that latent fingerprint analysis fails the primary criteria of science and, by extension, the primary criteria for admissibility under Daubert; there has been no testing of the field’s fundamental underlying premises.

b. There is also no error rate.

Latent fingerprint examiners plainly fail a second fundamental Daubert factor as well. Because of the lack of testing, there are no established error rates for latent fingerprint examiners, a fact that the Department of Justice, as set forth above, has also explicitly conceded. There can be no dispute, moreover, that latent fingerprint examiners do make mistakes. There have been a number of documented cases in which latent fingerprint examiners have made erroneous identifications which have led to the imprisonment of innocent people.⁹⁵ What remains unknown, however, is the rate at which misidentifications take place. As commentators have recognized, “it is difficult to glean information about cases of error because they rarely produce a public record, and the relevant organizations and agencies tend not to discuss them publicly.”⁹⁶

Just how prevalent the problem of false identifications may actually be, however, can be seen, at least to some extent, from the astonishingly poor performance of latent print examiners on crime lab accreditation proficiency exams. While these exams do not constitute controlled scientific studies, they nevertheless do provide some indication of the proficiency, or lack thereof, of examiners throughout the

United States. On these exams, latent fingerprint examiners are typically provided with several latent prints along with a number of “ten print” inked impressions to compare them with. Commencing in 1995, the provider of the test, Collaborative Testing Service, began to include one or two “elimination” latent prints made by an individual whose inked impressions were not furnished.

The results of the 1995 exam were, in the words of a leading fingerprint authority, both “alarming” and “chilling.”⁹⁷ Of the 156 examiners who participated, only sixty-eight (44%) were able to both correctly identify the five latent print impressions that were supposed to be identified, and correctly note the two elimination latent prints that were not to be identified.⁹⁸ Even more significantly, thirty-four of these examiners (22%) made erroneous identifications on one or more of the questioned prints for a total of forty-eight misidentifications.⁹⁹ Erroneous identifications occurred on all seven latent prints that were provided, including thirteen errors made on the five latent prints that could be correctly identified to the supplied suspects.¹⁰⁰ In addition, one of the two elimination latents was misidentified twenty-nine times.¹⁰¹

These shockingly poor results, moreover, could not be blamed on the test. The 1995 proficiency exam was recognized as being “a more than satisfactory representation of real casework conditions.”¹⁰² The test was designed, assembled and reviewed by representatives of the International Association of Identification, the leading professional association for latent fingerprint examiners.¹⁰³ A “proficiency test composed of seven latents and four suspects was considered neither overly demanding or unrealistic.”¹⁰⁴ Accordingly, the fingerprint profession’s dreadful performance on this test has been, and continues to be, a matter of significant concern. As David Grieve, the head of Forensic Sciences for the Illinois State Police, has written:

Reaction to the results of the CTS 1995 Latent Print Proficiency Test within the forensic science community has ranged from shock to disbelief. Errors of this magnitude within a discipline singularly admired and respected for its touted absolute certainty as an identification process have produced chilling and mind-numbing realities. Thirty-four participants, an incredible 22% of those involved, substituted presumed but false certainty for truth. By any measure, this represents a profile of practice that is unacceptable and thus demands positive action by the entire community.¹⁰⁵

Despite Mr. Grieve's call for "positive action," the poor results have continued unabated on the more recent proficiency exams. On the 1998 test, for example, only 58% of the participants were able to correctly identify all of the latents and to recognize the two elimination latents as being unidentifiable.¹⁰⁶ Even more disturbing was the fact that 21 erroneous identifications were made by 14 different participants.¹⁰⁷

The proficiency testing thus suggests that there may be a substantial rate of error for latent fingerprint examiners. Since the prosecutor bears the burden of establishing the reliability of the expert evidence that he or she is seeking to admit,¹⁰⁸ when it comes to the Daubert factor of error rate, the prosecution will not be able to meet its burden. As the district court stated in United States v. Starzecpyzel, "certainly an unknown error rate does not necessarily imply a large error rate[;] [h]owever, if testing is possible, it must be conducted if forensic document examination is to carry the imprimatur of science."¹⁰⁹

c. The lack of objective standards

Latent fingerprint examiners in the United States currently operate in the absence of any uniform objective standards. The absence of standards is most glaring with respect to the ultimate question of all fingerprint comparisons: What constitutes a sufficient basis to make a positive identification? The

position of the FBI, as well as the International Association of Identification, is that no minimum number of corresponding points of identification is necessary for an identification.¹¹⁰ Instead, the determination of whether there is a sufficient basis for an identification is left entirely to the subjective judgment of the particular examiner. As one of the world's leading fingerprint practitioners, David Ashbaugh, has candidly acknowledged, a fingerprint examiner's opinion of identification is "very subjective."¹¹¹

While the official position of the FBI is that there is no basis for a minimum point requirement, many fingerprint examiners in the United States continue to employ either their own informal point standards or standards that have been set by the agencies that they work for.¹¹² In addition, while there is no uniform identification standard in the United States, many other countries have set such standards.¹¹³ England, for example, has a minimum standard of sixteen matching ridge characteristics, Italy, seventeen, and France and Australia, twelve.¹¹⁴ The obvious purpose of establishing such standards is to try to insure against erroneous identifications.¹¹⁵

As commentators have recognized, the question of whether there should be a minimum point standard for latent print identifications has bitterly divided the fingerprint community.¹¹⁶ While latent print examiners have somehow managed to maintain a united front in the courtroom, they have been at odds in the technical literature.¹¹⁷ Mr. Ashbaugh, for example, has written that "it is unacceptable to use the simplistic point philosophy in modern day forensic science."¹¹⁸ As Mr. Ashbaugh has correctly recognized, the selection of any particular point standard is based, not on scientifically conducted probability studies, but "through what can best be described as an 'educated conjecture.'"¹¹⁹

The problem, however, is that while Mr. Ashbaugh is correct that all of the various point standards employed by fingerprint examiners over the past hundred years are scientifically invalid,

neither Mr. Ashbaugh, nor any other member of the fingerprinting community, has advanced a scientifically sound alternative. Here, for example, is Mr. Ashbaugh's explanation as to how a latent print examiner, in the absence of a minimum point standard, is supposed to know when a sufficient basis exists to make an identification:

A frequently asked question is how much is enough? The opinion of individualization or identification is subjective. It is an opinion formed by the friction ridge identification specialist based on the friction ridge formations found in agreement during comparison. The validity of the opinion is coupled with an ability to defend that position, and both are founded in one's personal knowledge ability and experience

* * *

How much is enough? Finding adequate friction ridge formations in sequence, that one knows are specific details of the friction skin, and in the opinion of the friction ridge identification specialist there are sufficient uniqueness within those details to eliminate all other possible donors in the world, is considered enough. At that point individualization has occurred and the print has been identified. The identification was established by the agreement of friction ridge formations, in sequence, having sufficient uniqueness to individualize.¹²⁰

The utter meaninglessness of this explanation speaks for itself. Mr. Ashbaugh's prior writings on this subject provide little in the way of additional insight. He has stated, for example, that while "in some instances we may form an opinion on eight ridge characteristics [,] [i]n other instances we may require twelve or more to form the same opinion."¹²¹ Mr. Ashbaugh's explanation for this sliding scale is that some ridge characteristics are more unique than others.¹²² But, no weighted measures of the different characteristics have ever been adopted by the fingerprint community, and different examiners vary considerably in terms of their subjective beliefs as to the relative frequencies with which different characteristics appear.¹²³ Accordingly, as Mr. Ashbaugh has ultimately recognized, a particular

examiner's determination of whether eight or twelve matching characteristics is sufficient in a particular case is entirely "subjective."¹²⁴

The lack of uniform standards for latent print comparisons extends well beyond the question of what ultimate standard should apply for a positive identification. Objective standards are lacking throughout the entire comparison process. Take for example, the so called "one dissimilarity rule."¹²⁵ Pursuant to this rule, if two fingerprints contain a single genuine dissimilarity then the prints cannot be attributed to the same finger or individual.¹²⁶ This doctrine is well recognized in the fingerprint community.¹²⁷ But, it is effectively ignored in practice. As Dr. John Thornton, a leading forensic science commentator and trained fingerprint analyst has recognized, once a fingerprint examiner finds what he or she believes is a sufficient number of matching characteristics to make an identification, the examiner will then explain away any observed dissimilarity as being a product of distortion or artifact:

Faced with an instance of many matching characteristics and one point of disagreement, the tendency on the part of the examiner is to rationalize away the dissimilarity on the basis of improper inking, uneven pressure resulting in the compression of a ridge, a dirty finger, a disease state, scarring, or super-imposition of the impression. How can he do otherwise? If he admits that he does not know the cause of the disagreement then he must immediately conclude that the impressions are not of the same digit in order to accommodate the one-dissimilarity doctrine. The fault here is that the nature of the impression may not suggest which of these factors, if any, is at play. The expert is then in an embarrassing position of having to speculate as to what caused the dissimilarity, and often the speculation is without any particular foundation.

The practical implication of this is that the one-dissimilarity doctrine will have to be ignored. It is, in fact, ignored anyway by virtue of the fact that fingerprint examiners will not refrain from effecting an identification when numerous matching characteristics are observed despite a point of disagreement. Actually, the one-dissimilarity doctrine has been

treated rather shabbily. The fingerprint examiner adheres to it only until faced with an aberration, then discards it and conjures up some fanciful explanation for the dissimilarity.¹²⁸

The absence of real standards in the fingerprint field also can be seen with respect to the issue of verification. Independent verification by another fingerprint examiner is considered an essential part of the identification process.¹²⁹ However, again, in real practice, fingerprint agencies sometimes “waive the verification requirement.”¹³⁰ Moreover, as one noted fingerprint practitioner has candidly revealed, some examiners will simply go shopping from one supervisor to another until a desired verification is obtained.¹³¹

Finally, the lack of standards in the fingerprint community extends to the training and experience requirements for latent print examiners. To put it simply, no such requirements currently exist.¹³² As one leading fingerprint commentator has recognized, “people are being hired directly into latent print units without so much as having looked at a single fingerprint image.”¹³³ Once hired, the training that examiners receive is typically minimal. Consider what another leading fingerprint practitioner has stated on the subject of training:

The harsh reality is that latent print training as a structured, organized course of study is scarce. Traditionally, fingerprint training has centered around a type of apprenticeship, tutelage, or on-the-job training, in its best form, and essentially a type of self study, in its worst. Many training programs are the “look and learn” variety, and aside from some basic classroom instruction in pattern interpretation and classification methods, are often impromptu sessions dictated more by the schedule and duties of the trainer than the needs of the student. Such apprenticeship is most often expressed in terms of duration, not in specific goals and objectives, and often end with a subjective assessment that the trainer is ready.¹³⁴

The direct result of this poor training, of course, is deficient examiners. As stated by a leading law enforcement fingerprint examiner, “The quality of work produced is directly proportional to the quality of training received.”¹³⁵ That examiner further acknowledges that “it is all too well established” that there are “examiners performing identification functions who are not qualified and proficient.”¹³⁶ Moreover, the lack of training and standards has not only resulted in a plethora of deficient examiners, but dishonest ones as well. Pat Wertheim, a fingerprint examiner with more than 25 years of law enforcement experience, estimates that there have been “hundreds or even thousands” of cases of forged and fabricated latent prints.¹³⁷

In sum, latent print examiners operate without the benefit of any objective standards to guide them in their comparisons. There also are no objective standards or minimum qualifications with respect to their hiring and training. Accordingly, another critical Daubert factor is unsatisfied.

d. The fingerprint literature confirms the scientific bankruptcy of the field.

The technical literature that exists in the fingerprint field has failed to meaningfully address any of the fundamental premises that underlie fingerprint identification. As one leading fingerprint commentator has stated, “it is difficult to comprehend that a complete scientific review of friction ridge identification has not taken place at sometime during the last one hundred years[;] a situation seems to have developed where this science grew through default.”¹³⁸

Even when the premises of latent print identifications have been considered in the technical literature, they have not been critically examined. A perfect example is the editorial Nature Never Repeats Itself, written by Alan McRoberts.¹³⁹ In this editorial, Mr. McRoberts cites with approval the

following statement which was originally made by Harris Wilder and Bert Wentworth in their 1916 text,

Personal Identification:

Finally, there is never the slightest doubt of the impossibility of the duplication of a fingerprint, or even of the small part of one, on the part of anyone who has carefully studied the subject at first hand, whether finger-print expert or anatomist: the only doubters are those who have never taken the trouble to look for themselves, and who argue from the basis of their own prejudices and preconceived opinions.¹⁴⁰

It is probably statements such as these that have led Mr. Ashbaugh to bemoan the “failure of the identification community to challenge or hold meaningful debate.”¹⁴¹ As Mr. Ashbaugh has acknowledged, the fingerprint community has been more akin to a religion than to a science:

In the past the friction ridge identifications science has been akin to a divine following. Challenges were considered heresy and challengers frequently were accused of chipping at the foundation of the science unnecessarily. This cultish demeanor was fostered by a general deficiency of scientific knowledge, understanding and self confidence within the ranks of identification specialists. A pervading fear developed in which any negative aspect voiced, which did not support the concept of an exact and infallible science, could lead to its destruction and the credibility of those supporting it.¹⁴²

In sum, as the district court in Starzecpyzel found with respect to handwriting, the literature of latent fingerprint examiners “fails to meet the expectations of the Daubert Court -- that a competitive, unbiased community of practitioners and academics would generate increasingly valid science.”¹⁴³

e. General consensus.

It can hardly be disputed, of course, that a consensus exists amongst the general public, as well as the judiciary, that latent fingerprint identifications are perfectly reliable. But the pertinent inquiry, for purposes of Daubert, is whether a general consensus has been reached by a “relevant scientific

community.”¹⁴⁴ And, as has been recognized in several post-Daubert cases, in defining a relevant scientific community, it is necessary to look beyond the practitioners of the technique that is under assessment.¹⁴⁵

There has never been a scientific community, beyond fingerprint examiners themselves, that has expressed a general acceptance of latent fingerprint identifications. To the contrary, mainstream scientists, by and large, have ignored the question of whether individuals can be reliably identified through latent fingerprint impressions.¹⁴⁶ And the leading forensic science commentators that have examined the issue have found that the fingerprint field is scientifically deficient. Michael Saks, for example, an editor of the leading treatise, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West 1997), has written that “A vote to admit fingerprints is a rejection of conventional science as a criterion for admission.”¹⁴⁷ Likewise, David Stoney, another leading forensic science commentator, has stated that “[t]here is no justification [for fingerprint identifications] based on conventional science: no theoretical model, statistics or an empirical validation process.”¹⁴⁸ Accordingly, fingerprint examiners cannot even properly satisfy the general acceptance prong of Daubert.

- f. The Prosecution cannot point to any non-Daubert factors to establish the reliability of latent fingerprint identifications.

As discussed above, the Supreme Court in Kumho made clear that, while a court may apply the Daubert factors in making its reliability determination, it is not required to do so.¹⁴⁹ A court may utilize whatever factors are pertinent in the particular case to assess the reliability of the proffered expert testimony. Accordingly, the government can properly argue for the admissibility of latent fingerprint

evidence on the basis of factors that were not identified in Daubert. But, as in the recent handwriting cases, the government will be hard pressed to come up with any convincing alternative criteria. How after all can a court reasonably have confidence in a fingerprint examiner's identification which is based on certain points of similarity when there has been no probability testing conducted so as to demonstrate that these same points of similarity could not also be found in any number of other fingerprints?¹⁵⁰ Likewise, how can a judge believe in the reliability of an identification that is being made from a small distorted latent fingerprint fragment, when there has been no testing done to establish the error rate for such identifications, especially given the dreadful performance of fingerprint examiners on crime lab accreditation proficiency exams?

Perhaps the best argument a prosecutor can make in this regard is that fingerprint identifications have been the subject of court testimony since the early 1900s and there are only a few cases of documented error. But the obvious reply to this argument is that there is simply no way of telling how many cases of error might have gone undetected. It certainly cannot be presumed that defense attorneys were regularly retaining fingerprint experts over the past 100 years as a check upon the prosecution's experts.¹⁵¹ Moreover, to the extent that there are reliability problems inherent to the fingerprint field itself, the retention of a defense expert would probably not do any good. Just as all polygraph examiners might reach the wrong conclusion about whether someone is telling the truth, because of deficiencies in the polygraph, so too all fingerprint examiners might make a false identification with respect to a particular fingerprint because of deficiencies in the standards and procedures of the fingerprint profession. Indeed, in one of the most famous cases of fingerprint error, the misidentification was made not only by the prosecution's expert, but by a defense-retained expert

as well.¹⁵² The erroneous identification was only discovered upon the subsequent trial of the defendant's wife.¹⁵³

- g. A federal court judge has already excluded fingerprint evidence because of its questionable reliability.

Readers of the foregoing sections might reasonably be thinking to themselves: “this is all very interesting, but is a trial court judge really going to preclude the prosecution from presenting fingerprint evidence?” The answer, however, is that it has already happened. In 1992, one year before Daubert was even decided, a federal trial court judge in Los Angeles barred the government from calling a latent fingerprint examiner who would have identified several latent prints found at a crime scene as having been left by the defendant.¹⁵⁴ The judge reached this decision after holding the functional equivalent of a Daubert hearing. The court, outside the presence of the jury, heard testimony from three fingerprint experts that the government produced in an effort to have the evidence admitted.¹⁵⁵ The judge had first become concerned about the reliability of the fingerprint evidence after the initial government expert testified that her personal identification standard is 8 points of similarity.¹⁵⁶ The fingerprint examiners who had testified before the judge had in prior cases had always claimed to be using higher minimum point thresholds.¹⁵⁷ The court in Parks questioned the government's three experts as to whether any scientific studies had been done so as to establish a reliable minimum identification standard.¹⁵⁸ The court was shocked to learn that no such studies had ever been conducted and that different fingerprint examiners employ different standards and that some examiners employ no standard at all.¹⁵⁹ As the court correctly recognized, if there are no studies “then this is not a science and there are no experts in it.”¹⁶⁰ The judge also was extremely disturbed to learn from one of the government's experts that

fingerprints from different people may have a number of points of similarity.¹⁶¹ That expert further conceded, in response to one of the judge's follow-up questions, that fingerprint examiners are in "dangerous territory" when making identifications on only eight points of similarity.¹⁶² Here is some of what the judge had to say regarding the scientific bankruptcy of the fingerprint profession:

You don't have any standards. As far as I can tell, you have no standard. It's just an ipse dixit. "This is unique, this is very unusual?" "How do you know it's unusual?" Because I never saw it before." Where is the standard, where is the study, where is the statistical base that been studied?

* * *

I have discovered . . . that there are very limited objective standards, and that the training in this area, if it exists, other than "I've done this for a long time and I'm teaching you what I know," is almost nonexistent.

People that have done it teach each other. So far as I've heard from you, and so far I've heard from anybody, those kinds of studies that would turn this into a bona fide science simply haven't been done.

The information is there, it could be done, but it hasn't been done. There has been no study about how far qualified experts with existing prints could look at them and make a mistake on which kinds of things. That's something that can be done. Those prints exist. It wouldn't be hard for those studies to be made.

This thing could be turned into a science, but it isn't now, not from what you've said, and not from what she said, and not from what her supervisor said.

* * *

Now I have heard a lot of conversation about what it takes to become an expert in this field, and I will say, based on what I've heard today, the expertise is as fragile as any group that I've ever heard hold themselves out as experts.

The basis for calling themselves experts seems to me to be very fragile. The basic premise that they don't need expertise, that fingerprints don't change, doctors told them that.

The other premise that they are unique is, I think, a matter of genetics, and also a matter not of fingerprint specialists. Those are givens in the expertise.

The expertise that they have said that they possess, to say this is unique, I can't find, as I said, a common thread of analysis. It may be there, but I haven't heard it.¹⁶³

United States v. Parks thus effectively demonstrates that it is not, in fact, impossible for fingerprint evidence to be excluded from a trial. A judge, moreover, might be convinced to adopt the approach taken in the recent handwriting cases, i.e., to allow the fingerprint examiner to testify as to the similarities that he was able to find between the two prints under comparison, but to preclude the examiner from providing his ultimate opinion as to identity.¹⁶⁴ Finally, it must again be stressed that all of the major deficiencies in the fingerprint profession set forth above are appropriate grounds for cross-examination, should the prosecution's examiner be permitted to testify.¹⁶⁵

CONCLUSION

Thus, the rules of the game have truly changed over the past seven years. Daubert and Kumho have provided the criminal defense practitioner with significant opportunities to challenge expert witnesses whose expertise have long gone unquestioned.

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- 1. 509 U.S. 579 (1993).
- 2. 119 S.Ct. 1167 (1999).
- 3. 509 U.S. at 590.
- 4. Id. at 593 - 594.
- 5. 119 S.Ct. at 1174.
- 6. Id. at 1176.
- 7. 64 F.3d 844 (3d Cir. 1995).
- 8. Id. at 848.
- 9. Michael J. Saks, Merlin and Solomon: Lessons From the Law's Formative Encounters With Forensic Identification Science, 49 Hastings L.J. 1069, 1080 - 1090 (1998).
- 10. Id.
- 11. 509 U.S. at 582.
- 12. 293 F. 1013, 1014 (D.C. Cir. 1923).
- 13. 509 U.S. at 588 - 589.

14. Fed. R. Evid. 702 provides
“If scientific, technical, or other specialized knowledge will assist the
trier of fact to understand the evidence or to determine a fact in issue, a
witness qualified as an expert by knowledge, skill, experience, training,
or education, may testify thereto in the form of an opinion or
otherwise.”
15. 509 U.S. at 592 - 593.
16. Id.
17. Id. at 590 n.9.
18. Id. at 592 n.11.
19. Id. at 593.
20. Id. at 593 (internal quotations and citations omitted).
21. Id. at 594.
22. 869 F.2d 348, 353-354 (7th Cir. 1989).
23. 509 U.S. at 594.
24. Id.
25. 583 F.2d 1194, 1198 (2d Cir. 1978).
26. 509 U.S. at 594. While the Supreme Court did not address the issue, there would, of course,
seem to be a critical distinction between an objective standard that has been derived from
scientific testing, designed to establish a safe and reliable standard, and an objective standard
that is nothing more than an educated guess as to what a safe standard might be. As discussed,
infra, the point standards that have been employed by some latent fingerprint examiners have
recently been recognized by a noted fingerprint practitioner to be based on nothing more than
“educated conjecture.” See infra p. 16.
27. Id.
28. Id. (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).
29. Id. (quoting Downing, 753 F.2d at 1238).
30. Id. at 593.
31. Id.
32. Id. at 594.
33. Id.
34. United States v. Downing, 753 F.2d 1224, 1238-39 (3d Cir. 1985); see also In re Paoli R.R.
Yard PCB Litig., 35 F.3d 717, 742 n.8 (3d Cir. 1994).
35. Kumho, 119 S.Ct. at 1173 - 1174.
36. Fed. R. Evid. 702.
37. 119 S.Ct. at 1174.
38. Id. at 1176 (emphasis added).
39. Id. at 1171.
40. Id. at 1172.
41. Id.
42. Id.

43. Id. at 1178.
44. Id.
45. Id. at 1179.
46. Id.
47. Saks, supra n.9, at 1090-1094 (discussing the law enforcement origins of the forensic identification sciences).
48. Saks, supra n.9, at 1100-1101 (discussing the minimal scrutiny that was rendered by the trial judges in the initial fingerprint cases).
49. See Saks, supra note 9, at 1094 - 1100. The scientific bankruptcy of the handwriting field was first recognized in a seminal law review article. D. Michael Risinger, Mark P. Denbeaux and Michael J. Saks, Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification “Expertise,” 137 Pa. L. Rev. 731 (1989). Subsequent articles on the subject include - D. Michael Risinger, Michael J. Saks, Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise, 82 Iowa L. Rev. 21 (1996); Andre A. Moenssens, Handwriting Identification Evidence in the Post-Daubert World, 66 UMKC L. Rev. 251 (1997); D. Michael Risinger, Mark P. Denbeaux and Michael J. Saks, Brave New “Post-Daubert World” - A Reply to Professor Moenssens, 29 Seton Hall. L. Rev. 405 (1998).
50. 64 F.3d 844 (3d Cir. 1995).
51. Id. at 852; but see United States v. Paul, 175 F.3d 906 (11th Cir. 1999) (holding that it was not an abuse of discretion for the district court to preclude the defense from calling the same handwriting “critic” who was at issue in Velasquez).
52. United States v. Starzecpyzel, 880 F. Supp. 1027 (S.D.N.Y. 1995); United States v. Hines, 55 F. Supp. 2d 62 (D. Mass. 1999); United States v. Santillian, No. 96-CR-40169, 1999 WL 1201765 (N.D. Cal. Dec. 3, 1999); United States v. McVeigh, No. 96-CR-68, 1997 WL 47724 (Colo. Trans. Feb. 5, 1997).
53. 64 F.3d at 846.
54. Id. at 847. Nevertheless, the court stated in extended dicta that the government’s handwriting expert satisfied the criteria of Daubert. Id. at 850, 851.
55. Id. at 847.
56. Id. at 851.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id. at 851.
62. Id. at 848.
63. 880 F. Supp. 1027 (S.D.N.Y. 1995).
64. Id. at 1028.
65. Id. at 1038 (quoting Fed. R. Evid. 702).
66. Id. at 1034 - 1041.

67. Id. at 1048. The court stated that jurors might get this impression because forensic document examiners have historically attempted to give the impression that they are scientists and because they state their conclusions in terms of a nine level scale which suggests a level of precision that is entirely unwarranted. Id.
68. Id. at 1050. The court’s instruction also analogized a forensic document examiner to a “harbor pilot” who in an admiralty case might have useful knowledge to provide because of his or her experience in piloting boats in and out of harbors. Id. This is an analogy that Forensic Document Examiners, many of whom believe themselves to be scientists, have not taken kindly to. It has also been criticized by forensic science commentators as being unfair to harbor pilots. Whereas, harbor pilots “learn from the instant feedback they receive if they ground a ship or deliver it to the wrong wharf,” forensic document examiners can never actually tell whether their identifications are correct or not. Saks, supra note 9, at 1098, n.141.
69. Id. at 1049.
70. 55 F. Supp. 2d 62 (D. Mass. 1999). The defendant in Hines was charged with bank robbery. Id. at 63. The opinion of the government’s handwriting expert was that the defendant wrote the demand note. Id.
71. 1999 WL 1201765 (N.D. Cal. 1999). The defendant in Santillan was charged with conspiracy to distribute false immigration documents. Id. at *1. The government’s handwriting expert was prepared to testify that the defendant’s handwriting was on numerous “questioned documents.” Id.
72. 55 F. Supp. at 69; 1999 WL 1201765 at *5. The court in Hines, for example, stated:
There is no data that suggests that handwriting analysts can say, like DNA experts, that this person is “the” author of the document. There are no meaningful, and accepted validity studies in the field. No one has shown me Harrison’s error rate, the times she has been right, and the times she has been wrong. There is no academic field known as handwriting analysis. This is a “field” that has little efficacy outside of a courtroom. There are no peer reviews of it. Nor can one compare the opinion reached by an examiner with a standard protocol subject to validity testing, since there are no recognized standards. There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out.
- 55 F. Supp. at 69.
73. 55 F. Supp. at 67 (“Kumho extended Daubert to non-scientific fields”); 1999 WL 1201765 at *3 - *5.
74. 55 F. Supp. at 70 - 71; 1999 WL 1201765 at *5.
75. 55 F. Supp. at 70-71; 1999 WL 1201765 at *5.
76. 55 F. Supp. at 69; 1999 WL 1201765 at *5.
77. 1997 WL 47724 at *10-*11. (D. Colo. Trans. February 5, 1997).
78. U.S. Department of Justice, Forensic Sciences: Review of Status and Needs (1999) 31.

79. Id. at 32.
80. Saks, supra note 9, at 1103 (“What is disappointing about the fingerprint admissibility cases is that these courts made virtually no serious substantive inquiry into the body of knowledge on which they had the responsibility to pass judgment.”)
81. Saks, supra note 9, at 1103.
82. Saks, supra note 9, at 1106; A. Moenssens, J. Starrs & C. Henderson, Scientific Evidence in Civil and Criminal Cases § 809 at 519 (4th ed. 1995).
83. Saks, supra note 9, at 1106.
84. A Daubert challenge to fingerprint evidence was recently denied without opinion in United States v. Mitchell, Cr. No. 96-407 (E.D. Pa. 1999). An appeal of the district court’s ruling will be taken after the defendant is sentenced. The author of this paper is co-counsel to Mr. Mitchell.
85. Fingerprint examiners typically make identifications by finding a number of matching ridge characteristics, both in terms of type and location, between the latent print found at a crime scene and a rolled print taken directly from a suspect’s finger. Analysis of Standards in Fingerprint Identification, FBI L. Enforcement Bull. 1 (June 1972). While there is no agreement among fingerprint examiners as to either the precise number or nomenclature of the ridge characteristics, it is commonly understood that there are only a few basic types. Id. at 2; James F. Cowger, Friction Ridge Skin: Comparison and Identification of Fingerprints 143 (1983) (“The terms used to define and describe these characteristics vary markedly among writers in the field and differ even among examiners depending upon the organization in which they were trained.”) Additionally, it is well documented that two different people may have fingerprints that display a number of corresponding ridge characteristics See Y. Mark & D. Atlas, What is the Minimum Standard of Characteristics for Fingerprint Identification, 22 Fingerprint Whorld 148 (Oct 1996) (discussing fingerprints from two people that have seven points of similarity); James W. Osterburg, The Crime Laboratory: Case Studies of Scientific Investigation 132 (1967) (charting fingerprints from two different people that have 10 points of comparison).
86. A fingerprint expert who appeared for the government in United States v. Mitchell, see supra note 82, testified that the average size of a latent fingerprint is only 1/5th the size of a full rolled print.
87. See David Ashbaugh, Quantitative-Qualitative Friction Ridge Analysis: An Introduction to Basic and Advanced Ridgeology 115-127 (CRC Press 1999) (discussing the various causes of distortion that all fingerprints are susceptible to and explaining how distortion can sometimes cause a ridge characteristic to appear as something other than what it really is. See also David A. Stoney & John I. Thornton, A Critical Analysis of Quantitative Fingerprint Individuality Models, 31 J. Forensic Sci., 1187, 1193 (1986) (ridge characteristics on a fingerprint may appear different than the way those characteristics really are constituted on a person’s finger because of the various effects of distortion).
88. David Stoney, Fingerprint Identification, in Modern Scientific Evidence: The Law and Science of Expert Testimony § 21-2.3.1, at 72 (David L. Faigman et al. eds., West 1997). Dr.

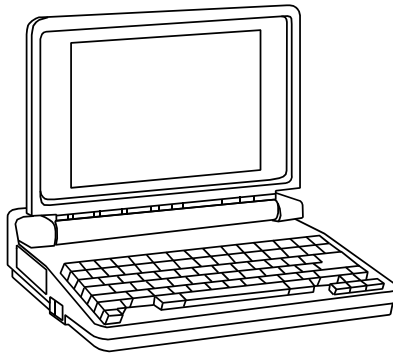
- Stoney, who holds a Ph.D. in forensic Science from the University of California at Berkeley, did his doctoral dissertation on the subject of fingerprint individuality. That effort culminated in a published article in the Journal of Forensic Science. See supra note 87. Dr. Stoney is currently the Executive Director of the McCrone Research Institute, a not for profit teaching and research institution located in Chicago, Illinois. He was called as an expert witness for the defense in United States v. Mitchell. See supra note 84.
89. National Institute of Justice, Solicitation; Forensic Friction Ridge (Fingerprint) Examination Validation Studies (March 2000). The National Institute of Justice is a division of the Department of Justice.
90. Id. at 4.
91. Id.
92. Id. The Department also admits that standard procedures for fingerprint comparisons have not yet been adopted. Id.
93. Id.
94. Id.
95. See State v. Caldwell, 322 N.W.2d 574 (Minn. 1982) (conviction reversed because of erroneous identification made not only by prosecution's fingerprint expert, but by the defense retained expert as well); James E. Starrs, More Salimbarcos on the Loose? -- Fingerprint Experts Caught in a Whorl of Error, 12 Sci. Sleuthing News. 1 (Winter 1998) (detailing several erroneous identifications discovered in North Carolina and Arizona); Stephen Gray, Yard in Fingerprint Blunder, Times (London), April 6, 1997, at 6 (discussing erroneous fingerprint identification which had been triple checked pursuant to standard Scotland Yard procedures); Anne Barnard, Convicted in Slaying, Man Wins Freedom, Philadelphia Inquirer, December 24, 1999, at B1 (defendant set free after it was determined that three prosecution fingerprint experts had erred).
96. Simon A. Cole, Witnessing Identification: Latent Fingerprinting Evidence and Expert Knowledge, 28 Social Studies in Sci. 687, 701 (Oct-Dec. 1998).
97. David L. Grieve, Possession of Truth, 46 J. Forensic Identification 521, 524 (1996).
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 524-25.
106. Collaborative Testing Services, Inc., Report No. 9808, Forensic Testing Program: Latent Prints Examination 2 (1998).
107. See supra note 106. On the 1997 exam, 16 false identifications were made by 13 participants. Collaborative Testing Services, Inc., Report No. 9708, Forensic Testing Program: Latent Prints Examination 2 (1997). Six misidentifications were made on the 1996 exam.

- Collaborative Testing Services, Inc., Report No. 9608, Forensic Testing Program: Latent Prints Examination 2 (1996).
108. Kannankeril v. Terminex, Intl., Inc., 128 F.2d 802, 806 (3d Cir. 1997) (proponent of expert testimony required to demonstrate by preponderance of the evidence that expert's opinion was based on methods and procedures of science).
109. 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995).
110. F.B.I. L. Enforcement Bull., supra 85, at 2; International Association for Identification, IAI Standard Committee Report 1 (1973).
111. David Ashbaugh, The Premises of Friction Ridge Identification, Clarity and the Identification Process, 44 J. Forensic Identification 499, 511 (1994). Mr. Ashbaugh is a staff Sergeant with the Royal Canadian Mounted Police. He has more than twenty-five years of experience as a fingerprint examiner and he was called by the government as an expert witness in connection with a Daubert challenge in United States v. Mitchell, see supra note 84.
112. Simon Cole, What Counts For Identity? The Historical Origins Of The Methodology Of Latent Fingerprint Identification, 12 Sci. In Context 1, 3-4 (Spring 1999).
113. Ashbaugh, supra note 87, at 98.
114. Christopher Champod, Numerical Standards and "Probable" Identifications, 45 J. Forensic Identification 136, 138 (1995). England, however, is apparently scheduled to abolish the 16 point standard in April 2000.
115. K. Luff, The 16-Point Standard, 16 Fingerprint Whorld 73 (Jan. 1990).
116. Cole, What Counts For Identity, supra note 112 at 1.
117. Cole, What Counts For Identity, supra note 112, at 6.
118. Ashbaugh, supra note 111 at 513.
119. Ashbaugh, supra note 87, at 2; see also Ashbaugh, supra note 111 at 512 (stating that "superficial and unsubstantiated quips became the methodology of the point system").
120. Ashbaugh, supra note 87 at 103 (emphasis in the original).
121. David Ashbaugh, The Key to Fingerprint Identification, 10 Fingerprint Whorld 93, 93 (April 1985).
122. Id. at 94, 95.
123. James W. Osterburg, An Inquiry Into the Nature of Proof, 9 J. Forensic Sci. 413, 425 (1964) ("Clearly subjective evaluation of the significance to be attached to a fingerprint characteristic is suspect.").
124. Ashbaugh, supra note 87, at 146.
125. See John I. Thornton, The One-Dissimilarity Doctrine in Fingerprint Identification, 306 Int'l Crim. Police Rev. 89 (March 1977).
126. Id. at 89.
127. David Ashbaugh, Defined Pattern, Overall Pattern and Unique Pattern, 42 J. Forensic Identification 505, 510 (1992).
128. Thornton, supra note 125, at 91.
129. Ashbaugh, supra note 87 at 148.

130. William Leo, Identification Standards - The Quest for Excellence, Cal. Identification Dig. (December 1995).
131. Pat Wertheim, The Ability Equation, 46 J. Forensic Identification 149, 153 (1996).
132. Leo, supra note 130 (recognizing need for “minimum training and experience standards” for latent print examiners).
133. Wertheim, supra note 131, at 152.
134. David L. Grieve, The Identification Process: The Quest For Quality, 40 J. Forensic Identification 109, 110 (1990).
135. Id. at 111.
136. David L. Grieve, The Identification Process: Traditions in Training, 40 J. of Forensic Identification 195, 196 (1990); see also Robert D. Olsen, Cult of the Mediocre, 8 Fingerprint Whorld 48, 51 (Oct. 1982) (“There is a definite need for us to strengthen our professional standards and rise above the cult of the mediocre.”)
137. Pat Wertheim, Detection of Forged and Fabricated Latent Prints, 44 J. Forensic Identification 653, 675 (1994) (“A disturbing percentage of experienced examiners polled by the author described personal exposure to at least one of these cases during their careers.”).
138. Ashbaugh, supra note 87, at 4.
139. Alan McRoberts, Nature Never Repeats Itself, 12 The Print 1 (1996).
140. Id.
141. Ashbaugh, supra note 87, at 4.
142. Ashbaugh, supra note 87, at 4.
143. 880 F. Supp. 1027, 1037 (S.D.N.Y. 1995).
144. Daubert, 500 U.S. at 593.
145. Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okla. 1995) (“Not even the ‘general acceptance’ standard is met, since any ‘general acceptance’ seems to be among hair experts who are generally technicians testifying for the prosecution, not scientists who can objectively evaluate such evidence.” Habeas petition granted based, in part, on the erroneous admission of expert hair analyst); United States v. Starzecpyzel, 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995) (“[Forensic Document Examiners] certainly find general acceptance within their own community, but this community is devoid of financially disinterested parties, such as academics.”).
146. Saks, supra note 9, at 1081.
147. Saks, supra note 9, at 1106.
148. Stoney & Thornton, supra note 87, at § 21-2.3, at 72.
149. See discussion supra part B.2.
150. Making this problem all the worse is that fingerprint examiners, lacking any probability studies, express their opinions in terms of absolute certainty, that is, they identify a particular finger to the exclusion of all other fingerprints in the world. Grieve, supra note 97, at 527-28. As one particularly candid fingerprint practitioner has recognized, such claims of absolute certainty are inherently unscientific. Grieve, supra note 97, at 527-28.

151. It must be recognized in this respect that there are virtually no academic training grounds for fingerprint examiners. The vast majority of fingerprint examiners are trained by, and work for, law enforcement.
152. State v. Caldwell, 322 N. W. 2d 574 (Minn. 1982).
153. Id.
154. United States v. Parks, No. CR-91-358-JSL (C.D. Cal. 1991).
155. Id., Tr., 12/10/91.
156. Id. at 538.
157. Id. at 551 - 553.
158. Id. at 555.
159. Id. at 559-561.
160. Id. at 556.
161. Id. at 599, 600.
162. Id. at 602.
163. Id. at 587, 591-92, 606-607.
164. A judge should also be willing to give the type of instruction that was provided in United States v. Starzecpyzel with respect to forensic document examiners, advising the jurors that fingerprint evidence is not “scientific” in nature. See supra p. 12. Such an instruction is critical because the vast majority of jurors do assume that fingerprint evidence is scientific, and it has been widely recognized that jurors give undue weight to evidence that they believe to be scientifically derived. See Charles Illsley, Juries, Fingerprints and the Expert Fingerprint Witness 16, presented at the International Symposium on Latent Prints (FBI Academy, Quantico, VA, July, 1987) (93% of 978 jurors polled expressed the view that fingerprint identification is a science); John W. Strong, Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form, 71 Or. L. Rev. 349, 361 (1992) (“there is virtual unanimity among courts and commentators that evidence perceived by jurors to be ‘scientific’ in nature will have particularly persuasive effect.”).
165. United States v. Velasquez, 64 F.3d 844, 848 (3d Cir. 1995).

The Internet: An Introduction & How to Use it for Legal Research and Investigations



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The Internet:

An Introduction & How to Use it for Legal Research and Investigations

I. What we are going to cover

- A. Benefits and pitfalls of legal information on the 'Net
- B. What you will need to go on-line
- C. What's out there to help you in your research
- D. Where our clients are getting in trouble
- E. Where legal information on the 'Net is headed

II. Background

- A. How the 'Net differs from traditional services, such as Westlaw/InfoAmerica and Lexis-Nexis
- B. Flat rather than hierarchical (menu-based) structure
- C. Quick review of:
 - 1. URL - Uniform Resource Locator
 - 2. WWW - World Wide Web
 - a. Hypertext links
 - b. Domains
 - (1) .com - commercial or private
 - (2) .net - major Internet Service Provider
 - (3) .gov - U.S. Government
 - (4) .us - State Government
 - (5) .org - nonprofit
 - (6) .mil - military
 - (7) .edu - educational institution
 - (8) country codes (e.g., UK, CA - Canada)
 - (9) new domains
 - 3. Browsers - Netscape and Internet Explorer
 - 4. Newsgroups
 - 5. Listservs
 - 6. IRC - Internet Relay Chat (Chat Rooms)
 - 7. FTP - File Transfer Protocol

III. Benefits

- A. Huge amount of information available on the 'Net
- B. Generally at no cost
- C. Quick access
- D. Ability to personalize how you access information (shape your information neighborhood)

IV. Dangers

- A. Reliance on third parties (e.g., bankrupt provider)
- B. Authenticity and reliability of data
 - 1. Consider source
 - a. Primary
 - b. Secondary
 - c. Tertiary
 - 2. Timeliness - information may not be current
 - 3. Will it be there tomorrow?
- C. Security, Confidentiality and Privacy

V. Getting on-line

- A. Need PC, Modem and available telephone line
- B. Cable and DSL
- C. Internet providers
 - 1. Independent Service Providers (ISPs)
 - 2. National service providers such as Earthlink, AT&T, Sprint, MCI, CompuServe, AOL and MSN
- C. Other issues
 - 1. Cost
 - 2. Technical support
 - 3. Time demands

VI. Where to start

- A. *The Complete Internet Handbook of Lawyers*, by Jerry Lawson (ABA - 800-285-2221) 1999
- B. *Lawyer's Guide to the Internet*, by Burgess Allison (ABA) (800-285-2221) 1995

- C. *Internet Fact Finder for Lawyer - How to Find Anything on the Net*, by Josh Blackman (ABA) (800-285-2221)
- D. *Protect Your Privacy on the Internet* (J. Wiley Publishing), by Bryan Pfaffenberger
- E. Lists and books available on-line
- F. Experiment and play

VII. E-Mail

- A. Electronic messaging
- B. Format similar to traditional mail - to, from, cc:, etc.
- C. Can attach files
- D. Can send to multiple recipients
- E. Very fast - usually received by recipient's ISP within seconds
- F. Confidentiality - local ethics rules and practice on sending unencrypted e-mail or attachments
- G. Communicating with other lawyers, clients, and witnesses

VIII. Listservs

- A. Electronic discussion groups usually by e-mail
- B. Topic specific
- C. Messages sent by e-mail to a group of users subscribing to the list
- D. Posting of questions and ideas
- E. May be open or closed (restricted or unrestricted membership)
- F. May be moderated or unmoderated (which messages get posted may be controlled by a moderator)
- G. Dissemination of materials (such as the distribution of synopses of U.S. Supreme Court opinions by Cornell Law's Legal Information Institute - L.I.I.)
- H. Practical:
 - 1. NET-LAWYERS
 - 2. GOVDOC-L
 - 3. Specific topic areas - see
<http://www.lib.uchicago.edu/~llou/lawlists/info.html>

IX. World Wide Web (WWW)

- A. Browsers
 - 1. Netscape (Netscape Corp.) - <http://www.netscape.com>
 - 2. Internet Explorer (Microsoft) - <http://www.microsoft.com/ie>
- B. Home Pages
 - 1. Meta pages
 - 2. Search engines
 - 3. Starting page
 - 4. Pointers
- C. Favorites/Bookmarks - keep track of useful sites
 - 1. How to create your own
 - 2. Organize
 - 3. Favorites in Internet Explorer
 - 4. Bookmarks in Netscape
- D. Starting points
 - 1. **Jeff Flax's Home Page** – <http://www.jflax.com>
 - 2. Search Engines:
 - a. AltaVista - <http://altavista.com>
 - b. Askjeeves - <http://www.askjeeves.com>
 - c. Beaucoup Search Engines - <http://www.beaucoup.com/engines.html>
 - d. GOOGLE - <http://www.google.com>
 - e. GOTO - <http://goto.com>
 - f. Lycos - <http://www.lycos.com>
 - g. Yahoo - <http://yahoo.com>
 - 3. 555-1212 Yellow, White and Blue Pages (Incl. Reverse Phone #'s) - <http://www.555-1212.com/>
 - 4. Adobe Acrobat - <http://www.adobe.com/>
 - 5. Alcoholics Anonymous - <http://www.alcoholics-anonymous.org>
 - 6. AIDS, National Clearinghouse - <http://www.cdcnpin.org/>
 - 7. All-in-One Search Page - <http://www.allonesearch.com/>
 - 8. American Bar Association - <http://www.abanet.org/>
 - 9. American Bar Association, Criminal Justice Section - <http://www.abanet.org/crimjust>

10. American Bar Association, Law Practice Management -
<http://www.abanet.org/lpm>
11. AMERICA LAW SOURCES ON LINE -
<http://www.lawsources.com>
12. Anonymizer - <http://www.anonymizer.com>
13. Attorney directory from MARTINDALE-HUBBLE -
<http://www.martindale.com>
14. Capital Defense Network -
<http://www.capdefnet.org>
15. CIS - Extensive Searchable Investigative Databases -
<http://home.hiwaay.net/~pvtteye/source.html>
16. Computer Search and Seizure (from DOJ) -
<http://www.cybercrime.gov>
17. CRIMINAL JUSTICE ACT (18 USC §3006A) -
<http://www.law.cornell.edu/uscode/18/3006A.html>
18. Criminal Justice Page by Cecil Greek -
<http://www.criminology.fsu.edu/cj.html>
19. Criminal Law Index from Findlaw -
<http://www.findlaw.com/01topics/09criminal/index.html>
20. CyberPsychLink - <http://cctr.umkc.edu/user/dmartin/psych2.html>
21. Death Penalty Information Center -
<http://www.deathpenaltyinfo.org/>
22. DejaNews/Google - <http://www.google.com/groups>
23. Diseases, Disorders and Related Topics -
<http://www.mic.ki.se/Diseases/index.html>
24. Drugs, Drug Testing, Narcotics - Detailed Info -
<http://www.mninter.net/~publish/>
25. FBI Lab Report -
<http://www.criminaljustice.org/MEDIA/fbilabreport/fbil1toc.htm>
26. Federal Bureau of Prisons - <http://www.bop.gov/>
27. Federal Judicial Center - <http://www.fjc.gov>
28. FindLaw - <http://www.findlaw.com>
29. FOIA Page from DOJ - <http://www.usdoj.gov/foia/>
30. Forensic Science Page (Zeno's) -
<http://forensic.to/forensic.html>

31. Government Printing Office (extensive materials) -
<http://www.access.gpo.gov/>
32. Immigration and Nationality Law - <http://www.visalaw.com>
33. IRS Tax Forms -
http://www.irs.ustreas.gov/prod/forms_pubs/index.html
34. L.I.I. - Cornell University - <http://www.law.cornell.edu/>
35. Lucien Campbell's Home Page - <http://lonestar.texas.net/~lbc>
36. MEDSCAPE - <http://www.medscape.com/default.mhtml>
37. Mental Health Index - <http://www.mentalhealth.com/>
38. Merck Manual of Diagnosis and Therapies -
<http://www.merck.com>
39. Municipal Codes Online -
<http://www.spl.org/govpubs/municode.html>
40. Municipal Codes (MCC) - <http://www.municode.com>
41. National Association of Criminal Defense Lawyers (NACDL) -
<http://www.criminaljustice.org>
42. National Institute on Alcohol Abuse and Alcoholism -
<http://www.niaaa.nih.gov/>
43. Prisons - US Bureau of - <http://www.bop.gov/>
44. PsychNet (American Psychological Association) -
<http://www.apa.org/>
45. Psych Web - <http://www.psychwww.com/>
46. Rap Dictionary - <http://www.rapdict.org/>
47. Thomas (House of Representatives) Home Page -
<http://thomas.loc.gov>
48. TRAC, Information on federal law enforcement -
<http://trac.syr.edu>
49. TRACKEM, People Finder Search Site -
<http://www.toolcity.net/~richreen/trackem.html>
50. U.S. Attorneys' Bulletins -
<http://www.usdoj.gov/usao/eousa/foia.html>
51. U.S. Attorneys' Manual -
http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/
52. U.S. Courts Homepage - <http://www.uscourts.gov>
53. U.S. Sentencing Commission - <http://www.ussc.gov>

- 54. U.S. Supreme Court
<http://www.supremecourtus.gov/>
- 55. TUTORIALS
 - a. 2001 Guide To Internet Research (Glenn Bacal) -
<http://www.ali-aba.org/aliaba/search.htm>
 - b. Tennessee Criminal Defense Lawyers -
<http://www.tncrimlaw.com/primer.html>
 - c. Mississippi Lawyers and Judiciary Guide to the Internet -
<http://www.mslawyer.com/guide.html>

X. Newsgroups (formerly called Usenet Groups)

- A. Similar to listservs except messages stay on special servers (newsgroup servers) rather than being sent via e-mail
- B. Messages may be a file (such as a graphic image) or combination of a message and a file
- C. Groups are established topically
 - 1. Major groupings listed on left, then separated by “.”
 - 2. e.g., “alt.”, “misc”., “comp.”

XI. Chat Rooms - IRC (Internet Relay Chat)

- A. Real-time (live), on-screen discussions with other Internet users
- B. Generally by topic
- C. Requires special software such as mIRC or Pirch
- D. AOL chat rooms restricted to AOL customers (closely monitored)
- E. Log files may be recorded locally, or by others recording all conversations and file transfers
- F. New ICQ software program allows users to page each other, and communicate, on-line (similar to IRC)

XII. What's out there and what's not

- A. Increasing amounts of materials by the day
- B. Can't compete with many commercial services
 - 1. Not a substitute for Westlaw or Lexis
 - 2. Good supplement for traditional on-line, legal services, news services
 - 3. Types of data
 - 4. Search engines
 - 5. Commercial, Internet legal services emerging
- C. Investigative information
 - 1. Not much about individuals unless public figures or active on the 'Net
 - 2. Check publications (magazines, newspapers, etc.)
 - 3. Dejanews.com for newgroup listings
 - 4. Commercial information brokers
- D. Government information
- E. Case law and statutes
- F. Scientific and medical information
- G. International law, treaties, etc.
- H. Academic and scholarly works
- I. Network with millions around the world
- J. Software

XIII. The future of legal resources on the Net

- A. Where is the Internet going?
- B. Commercialization
 - 1. Charge for access to materials
 - 2. Cost
 - 3. Government role
- C. Technofixes
 - 1. Document signatures - authentication
 - 2. Encryption
 - 3. Other secure services
- D. Privacy concerns
- E. Bandwidth requirements



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Methamphetamine, Clandestine Labs and Other Interesting Information

In recent years the emphasis in law enforcement has been the eradication of the “Meth” problem in this country. A great deal of federal and state funds have been spent in equipping and training police officers in this area.

The Methamphetamine problem is certainly not new. What has changed is the synthesis methods that make the production of this drug easier, quicker and less noticeable. Today’s Meth Labs are not as sophisticated, require much less specialized equipment and can manufacture the drug in a matter of hours not days. Most of the methods used today were found in a wide variety of academic sources and journals and have been altered to meet the needs of the home cooker.

This document will explore many of the facets involved in Meth Lab cases. Most of the information presented has been found in forensic journals, internet web sites and from counter culture books specializing in the topics of clandestine drugs. This document should not be considered the “all inclusive treatise” on the subject, rather a means to familiarize the attorneys with the various facets of Meth cases derived from the above sources in addition to the findings of case reviews by Forensic Consulting.

Finally it is important to understand that no two clandestine lab cases are alike. While it may be possible to make certain “generalities” about these cases, very often the evidence seized will vary significantly. It is important to obtain “outside” assistance on cases like this to ensure the case the state is presenting is accurate.

Methamphetamine

Methamphetamine is not a recent addition our “better living through chemistry” society. It has been only in the past 30 - 40 years, or so, it has been scientifically studied and its effects and potentials determined.

The use of central nervous stimulants, such as Methamphetamine, reached epidemic proportions during the late 1940's and early 1950's, especially during WW II. At one time the Department of Defense placed methamphetamine pills into what they referred to as “Go/No Go” packs. These pills were used by the military as a countermeasure to fatigue induced by circadian desynchronization (disruption of the natural day/night circadian rhythms).

In the 1960's the use of this drug became a social problem. Methamphetamine was, and still is, pharmaceutically prepared by Abbott Laboratories and is sold under the names of “Desoxyn” or “Methedrine.” Today it is used as a treatment for Attention Deficit Disorder and narcolepsy..

Methamphetamine is classified as a central nervous stimulant. Because of its abuse potential it was placed as a Schedule II Drug in the Controlled Substances Act noting its potential for severe psychic or physical dependency.

The effects of Methamphetamine include:

1. Increased alertness	9. Anxiousness
2. Excitation	10. Paranoia
3. Euphoria	11. Hallucination
4. Increased pulse rate	12. Aggressive behavior
5. Increased blood pressure	13. Violent behavior
6. Insomnia	14. Twitching/jerkiness
7. Loss of appetite	15. Delusions of grandeur
8. Slurred speech	

It is common for hard core users of the drug to be on a multiple day high. During these times these individuals go without sleep and are subject to strong mood swings and violence. The physical dependencies are such individuals will do just about anything to obtain Meth

Methamphetamine in the base form exists as a yellow liquid. Because of this most Meth encountered will be in the salt form, generally as Methamphetamine Hydrochloride. In many instances, you will hear talk about d-Meth or l-Meth. D-Methamphetamine is the psychoactive drug and differs from the “l” version due to the placement of the methyl group (CH₃) on the molecule.

Common street names for the drug include “Speed”, “Crank”, “Go”, “Crystal” and “Meth.” These versions are generally snorted or injected. Another version of Meth is “Ice”. While it is the same drug as the above, it is generally smoked and due to the rapid absorption of the drug through the lungs, the effects are more pronounced and quicker.

The Analysis of Methamphetamine

Methamphetamine samples submitted to forensic labs can appear in a wide variety of forms. It can be in the form of a white, tan, off white, yellow or pinkish powder depending on the synthesis method and the cutting agent used.

It is also not uncommon to find Meth in the form of a slurry. Many “buys” were made of an off-white powder to find its consistency changed prior to testing. Very often this was entirely due to the synthesis methodology. In these instances, the Meth was in a form that was “hygroscopic” (moisture absorbing) and would liquify due to this reason.

The actual analysis of Meth is a straight forward procedure. Depending on the laboratory protocol, it can involve these steps:

Color tests

1. The first color test used is called the “**Marquis**” test. This test consists of a reagent made with Sulfuric Acid and Acetaldehyde. Adding a small amount of Meth sample to a spot plate will result in an “orange to brown” color.

This test is not specific for Meth as it will react with many other compounds, such as Amphetamine. This initial test is used as an indicator to the forensic analyst.

2. The second color test that can be used on Meth samples is called the “**Nitroprusside**” test. This reagent is made with Sodium Nitroprusside dissolved in distilled water. A blue color with this reagent is indicative of a “secondary amine”, such as Meth, and does differentiate Meth from Amphetamine.

A few words on color tests. 1) They are subjective in that the analyst must be able to distinguish colors. The concentration of Meth in the powder can affect the intensity of the color as well as the speed of its formation. 2) There is no color scale employed by the forensic analyst to determine if it is the correct orange. 3) Color tests are not sufficient to make a positive identification.

We will discuss the topic of “**Field Test Kits**” later in this article.

Thin Layer Chromatography

Thin Layer Chromatography is an old method which, before the advent of instrumentation, formed the crux of the analytical opinion. This method is still used in many labs. Thin Layer Chromatography is a separate technique in which the sample is spotted on a glass plate coated with a very thin layer of silica gel. The plates are placed in a chamber containing a solvent or combination of solvents. Through capillary action, the drug is carried up the plate and stops depending on its affinity for the solvent. After the solvent has been allowed to migrate almost to the top of the plate, it is dried and then visualized in a variety of manners.

This method generally employs the use of known standards spotted alongside the suspected drug. This provides a reference as if the known and unknown are the same or similar drugs, they will migrate about equal distance and form the same color upon visualization.

Some forensic laboratories will use only one solvent system while others will use a combination to demonstrate how the known and unknown reacted the same.

This method is not considered positive identification for any drug. It is considered another test available to the analyst to confirm the results of the color tests.

Infrared Spectroscopy

This method forms the first of the instrumental methods and is considered positive identification for a compound.

Most often the meth is extracted from its powder form via the use of various solvents. It is then placed on a surface, such as Potassium Bromide, and is subjected to an infrared radiation source covering the entire infrared region of light. The sample drug will absorb or transmit the various frequencies of the light and the result is a printout of this reaction.

This print out will consist of a pattern of peaks and valleys. Specific components of the Meth molecule can be seen in this pattern. By the use of this "infrared fingerprint" and comparing it with known Methamphetamine standards, a positive identification can be made.

This method is extremely useful in most cases, but the greatest draw back comes from Meth samples which may contain Ephedrine or other compounds. It is not always possible to completely remove these other constituents and the obtain infrared spectrum will be a composite of more than one drug.

Modern Infrared equipment is computer based and data manipulation is very easy to do. For example, the computers allow you to remove the spectrums of the other components and arrive at what is believed to be the spectrum of Meth. If an analyst chooses to do data manipulation, they better be prepared to explain the process in courts.

Gas Chromatography/Mass Spectroscopy

GC/MS is now the staple of the analytical process in the identification of Methamphetamine. In general terms the sample is injected into a gas chromatograph where it is separated in a similar way as TLC. As the sample exits the column inside the GC, it is ionized and selectively monitored by a mass analyzer. The ions exit the mass analyzer and enter a detector where the data is captured and produced in a meaningful manner.

In essence the sample is broken down into its component parts and the amount of these compound parts form the printout called the "total ion chromatogram." (TIC) Computer capabilities allow these to be analyzed and compared with known compounds.

GC/MS is a simple method. The purported meth is dissolved in a solvent and then injected. The TIC is characteristic of a given compound.

It is the ease of GC/MS which can create the potential for error. Many labs have what are called "auto-samplers" which allows the analyst to prepare 20 or so samples, place them in a tray, start the program and walk away. This is generally done overnight and the analyst then reviews the data and arrives at an opinion. Any error in the placing of the vial in the tray can cause the entire run to be in error.

Another concern in GC/MS involves the comparison of known to unknown. Most "canned" libraries are not produced at the same settings as the instruments in question. While there is generally little variance between the library and questioned sample, this is a source of defense questioning. Many labs have built their own library based upon the running of known drugs on their equipment. This makes the comparison and interpretation more accurate.

I would not suggest you attempt to interpret the data obtained from a GC/MS analysis unless you have the background. What is even worse is to question an analyst about this data without being totally versed in the process and interpretation. I guarantee you will lose control of that cross.

There are a couple other analytical methods available to the analyst, but are rarely encountered. They are “**microcrystalline tests**” and “**melting point determination.**” These are old methods and most of the time they are not taught to new forensic scientists.

The reason I placed this section in this publication is not only to make you aware of what should be done, but also to let you know the analysis via GC/MS can often be used as an indicator of the synthesis methodology used in the manufacturing of Meth. For example, finding a sample containing Meth and Ephedrine will lead one to conclude Ephedrine was the primary precursor. If N-formylmethamphetamine was found, this would indicate a P-2-P method.

GC/MS can also be used to compare samples for potential similarities. If there are additional compounds present in the sample, the chromatograms can be examined to determine if the same constituents are found in multiple samples. This could be important in those buy/bust lab situations where the buy Meth is not similar to the Meth taken from the suspects abode.

Finally, most of these analytical methods produce data that is available to the attorney. It should be evaluated by a competent person who can then provide you with the information obtained from this review. We will discuss this more in the Bench Notes section.

Methamphetamine Synthesis Methods

In this section we will brief touch on the variety of means by which Methamphetamine can be produced. Most of the methods presented here are rarely used and uncommon to most law enforcement officers.

Back in 1982 an article in the *Journal of Forensic Sciences* by R.S. Frank indicated the most popular method of synthesis in over 50% of the lab seizures involved the use of phenyl-2-propanone (P-2-P), methylamine, mercuric chloride and aluminum metal in alcohol.

Another method he lists comprising less than 10% of the seizures involve a "Leuckart reaction" where P-2-P was refluxed with either methylamine and formic acid or N-methylformamide to form an intermediate N-formylmethamphetamine with the conversion of this to Meth.

This is important information to understand the methods being used today. Let's look at some aspects of these older methods:

1. These methods required a great deal more knowledge on the part of the "cookers". Many of these individuals were hired out to set up and run labs. These people would come to a particular town and stay only long enough to create the product, collect their money and go onto the next lab.

Some of these individuals were degreed chemists who discovered a more profitable life in illegal drugs. There was a certain "expertise" involved in these methods that you do not find in today's cooks.

2. Most of the chemicals used in these methodologies are no longer easily available without raising a number of red flags. P-2-P is now a Controlled Substance and chemical companies will not sell any of these to individuals. This has created the formation of "dummy" lab names and shipped to "store fronts."
3. These methods were actual cooking methods. Refluxing is a term used in chemistry to denote a substance is boiled and over the reaction vessel is an apparatus containing running water. The mixture is never boiled out, rather the steam and condensate is cooled and returned to the reaction mixture. The give away on these older methods was utility bills. These clandestine labs used a great amount of electricity and water, hence providing law enforcement with the ability to track this usage.
4. The older methods required the use of specialized chemistry equipment. Three necked flasks, condensers and round bottom heaters are just a few. Again in today's world these types of purchases are monitored by both the chemical supply company and law enforcement.
5. These methods were also much more dangerous. We hear today about the hazardous nature of meth labs, but I believe these older methods were even more hazardous. There was a strong potential for fire as heating was involved. If the reaction was stopped prior to completion a definite explosive potential existed. Couple this with the use of the same solvents in place today and it is a wonder more individuals didn't lose their lives in clandestine lab related accidents.
6. Last, but not least, these methods took a great deal of time. Cooking times of multiple days were not uncommon. The longer it takes to achieve a product, the greater the potential for detection.

The final older method I wish to present is the extraction of Vick's Inhalers. Vick's inhalers contain the compound l-deoxyephedrine or l-methamphetamine.

The process was fairly simple in that you would go to the store, buy all the inhalers on the shelf and extract the l-meth. The problem with this particular method is the product is l-methamphetamine which is

not the active drug. These inhalers also contained menthol or camphor which is hard to remove from the product.

This particular method was the rage in the mid to late 80's and set the tone for devising newer, less expensive and cheaper methods that we enjoy today.

Ephedrine

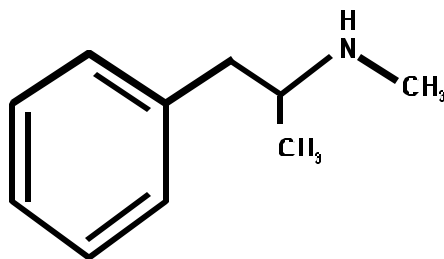
The most common precursor to the current clandestine manufacture of Methamphetamine is either Ephedrine or Pseudoephedrine. We will discuss the differences between these two shortly.

Ephedrine has its roots (no pun intended) in the Chinese herb Mahuang. This low growing, evergreen, almost leafless shrub has been used in Traditional Chinese Medicine for over 5,000 years. Mahuang treats such maladies as Cold & Flu, Fever, Chills, Headache and Nasal Decongestion.

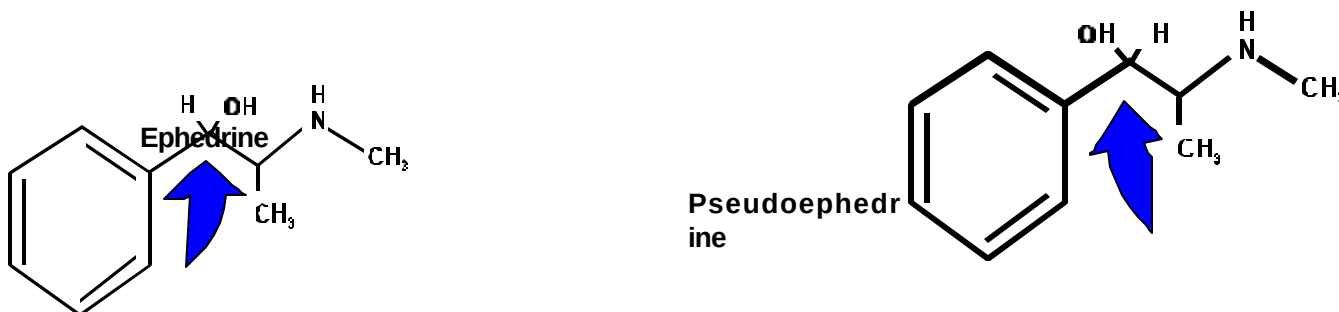
A specie of this herb, *Ephedra nevadensis* is found in the Southwest deserts. It was used as a tea by the early settlers and has gained the name of "Mormon Tea", "Brigham Tea" and "Desert Tea". The North American plant is generally believed to have no pharmacologically active alkaloids.

Today Ephedrine is found in many over the counter (OTC) cold and flu preparations. It is just this commonality that provides the precursors for Methamphetamine synthesis.

Now let's look at the chemical structures of these three and note the reason Ephedrine is so popular.



Methamphetamine



One can easily see, Ephedrine and Pseudoephedrine are almost identical to Methamphetamine. The sole difference is the presence of an OH or hydroxyl group indicated by the blue arrow.

The position of this hydroxyl group is the determining factor as to whether you have ephedrine or pseudoephedrine. The reason as to why both are precursors for Meth is because the chemical reaction removes the OH group and presto Methamphetamine.

In many Meth lab cases I have reviewed the presence of blister packs or empty boxes/bottles of OTC cold medications has been used as the evidence of this primary precursor in those cases where no actual ephedrine/pseudoephedrine was found. I have seen Federal cases where the "theoretical yield" has been calculated on the number of boxes, the number of bottles etc. We will discuss theoretical yields later in this document.

It is also well known stores that sell over the counter medications containing these two drugs will limit the number of boxes that can be purchased. Many business will notify law enforcement if an individual walks away with too many.

I have also noted a variety of "mini-thins" sold in the stores has the amount of ephedrine reduced to 20-25 milligrams and have added a drug named guaifenesin. This is an antitussive drug (stops cough) and the interesting thing about this additive is that it is soluble in the same solvents as ephedrine except one. This makes the separation of ephedrine more difficult in these products and the possibility exists the guaifenesin can be converted to 1-butoxy-4-methoxy benzene in the one method. Since there is a greater amount of guaifenesin present in the pill, it is possible it will compete with the ephedrine, thus yielding less Meth.

Extraction of Ephedrine

Over a period of the last few years, pharmaceutical companies have begun to place additives into over the counter ephedrine tablets. Some of these additives are waxes, solid fillers, sodium starch gluconate and other substances. Most of these substances do not lend well to the synthesis of Meth, by design some sources say. In most of these methods, the cooker will have to remove these additives prior to synthesis.

Look at a box of Sudafed 12 hour caplets. The active ingredient is 120 milligrams of Pseudoephedrine Hydrochloride. Now check out the inactive ingredients: Carnuba wax, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone and Titanium Dioxide.

The weight of a single Sudafed tablet is 0.6274 grams. If you remove the 0.120 grams of Pseudoephedrine, you find 0.5074 grams of filler etc. If you like percentages, 20% of the weight of the caplet is Pseudoephedrine, the remaining 80% is junk.

A general scheme for the extraction of Ephedrine goes like this:

1. The ephedrine pills are ground in a blender or similar device until they are now a fine powder.
2. The powder is soaked in denatured alcohol, methanol or water for at least 40 minutes, although the longer the better.
3. Filter this solution and retain the solvent
4. Re-add solvent to the sludge, stir one hour and then refilter
4. Evaporate the alcohol until a solid white powder is formed.
5. Dissolve this evaporate in distilled water, heating if necessary until it is all dissolved.
6. Place this solution in the freezer for about one half an hour.
7. Filter this solution cold.
8. Evaporate until dry.
9. Conduct a final wash with acetone or similar solvent, filter and evaporate.

If the ephedrine is not extracted and used directly from the bottles, emulsions and other unwanted items to the cooker is formed. All of this reduces the yield.

I have attempted a couple of the different extraction methods found. I found them to be difficult in the sense there are solids formed, emulsions and the extraction of the solvent is not 100%. The best I have achieved so far is a 30% ephedrine extraction by weight.

This extraction step, if conducted, adds another variable to estimating theoretical yields which will be discussed in greater detail later. Any time a substance is subjected to extraction processes rarely is all retrieved

We have now covered most of the preliminary information and it's time to move onto the most current synthesis methods encountered.

Lithium/Anhydrous Ammonia Method

This particular method is the one most recent and common. This method of making Meth is the result of the work of Gary Small and Alrene Minnola as published in the *Journal of Organic Chemistry*, Volume 40, pages 3151-3152 (1975). This reaction is also known as the "Birch Reaction." This method is known as a "cold cook" method as no heat source is required.

The most common ingredients are:

1. Ephedrine or Pseudoephedrine
2. Lithium batteries/metal
3. Anhydrous Ammonia
4. Hydrochloric Acid
 - A. Muriatic Acid
 - B. Liquid Fire and Rock salt
5. Ether (Starting Fluid)
6. Acetone, Toluol, or Coleman Fuel Oil
7. Filters, jars, bottles, etc.

The Ephedrine/Pseudoephedrine are **Required Precursors**. You can have everything else, but without these two, no reaction can occur.

The Lithium and Anhydrous Ammonia are considered **Essential Chemicals**, without both, the reaction will not occur.

The general scheme of this method is something like the following. Keep in mind there are as many variations to this as there are fish in the sea.

1. Reaction vessel is cooled in an ice bath or acetone bath
2. The anhydrous ammonia is condensed into and collected in the reaction vessel.
3. Small pieces of lithium metal, rinsed in ether, are added to the condensed ammonia. A deep royal blue color indicates the reaction is ready to proceed.
4. Ephedrine is added drop-wise into the reaction vessel. (More on this later)
5. After all the ephedrine is added, remove the reaction vessel from the bath.
6. The ammonia is allowed to come to room temperature and evaporate off.
7. When the ammonia is evaporated, water is added until the solution is clear.
8. The remaining lithium metal is discarded.
9. Solvent is added to the water and the water layer is discarded.
10. Hydrochloric acid gas is bubbled into the solvent forming Methamphetamine HCl.

In this reactions the lithium metal dissolves in the anhydrous ammonia to form what has been referred to as a "dissolved electron" solution. The solution is known to have powerful reducing properties, meaning it is capable of removing the OH group from the Ephedrine/Pseudoephedrine.

Some of the considerations to this method include the fact if water is added to the reaction vessel at the beginning of the reaction, the reaction may not go to completion. The water will quench the dissolved electrons which are necessary to remove the OH group from the ephedrine or pseudoephedrine.

It is also recommended the ephedrine be in the base form as the hydrochloride salt interferes with the reaction.

This method requires very little expense or complex lab equipment. It also provides the ability to "mass produce" products by allowing different batches to be evaporating at the same time.



(An example of the Anhydrous Ammonia/Lithium apparatus)

In relation to the discussion of this method, we should cover some facets of this synthesis. Let's first explore Anhydrous Ammonia.

Anhydrous Ammonia's main current use is a fertilizer. You can often see large tanks on wheels in farmers fields. These tanks are the primary source of the AA used in clandestine labs. Anhydrous ammonia is a colorless gas with a very characteristic pungent odor (similar to drying urine). Under favorable conditions, AA when mixed with air will explode when ignited.

The anhydrous ammonia found in these large tanks is in liquid form. This creates a problem in obtaining this substance and storage until use. I have read various methods by which this is accomplished. In several cases, the suspect's purportedly used 5 gallons buckets which they sealed and took back to the "lab." Probably the most common method is involves the transfer from the large container to an empty compressed gas cylinder like the ones used on barbeque carts.

There are means by which adapters can be connected to a hose and the transfer of AA goes relatively smoothly, going from an area of high pressure (the large tank) to an area of low pressure (the compressed cylinder tank). Other means involve using hoses without adapters which can be illustrated through the finding of larger diameter tubing at clandestine lab scenes.

Almost every case I have reviewed where compressed gas cylinders were found, the allegation is made it contains anhydrous ammonia. Very often, the investigators have not opened the valve to make this determination. Equally often this container is seized and destroyed as "hazardous material" leaving the attorney with only a picture.

Compressed gas cylinders are a surface conducive to fingerprinting, something I have never seen conducted. This can be an important point in those cases where multiple individuals are found.

Many investigators will point to a blue/green discoloration around the valve of these cylinders as indicative of the presence of anhydrous ammonia. While this can be true, these cylinders are made of brass, an alloy of copper and tin. The blue/green discoloration can also be indicative of the normal reaction with this metal to air, moisture and the normal oxidation processes.



Drager Tube Test for Ammonia

(Blue/Green discoloration around the valve)

A final point to be made regarding anhydrous ammonia comes in those cases where the state alleges subject stole the AA prior to the synthesis. Unless there is some mechanism of adapters and hoses, overexposure to anhydrous ammonia can lead to these potential symptoms:

1. Eye, nose and throat irritation
2. Dyspnea
3. Broncho spasm and chest pains
4. Pulmonary edema
5. Skin burns

Just about every mechanism I have reviewed does involve the potential exposure to anhydrous ammonia. Many reaction vessels are jars, tubs or 5 gallon buckets, so the vapors would be pronounced.

You will find many in law enforcement received training in these types of labs. Most of it will include training on disposal or precautions around these scenes. Police officers have been taught the ramifications from getting "up close and personal" with this stuff, but it has been my experience they will not testify or remember this if this fact benefits the defense.

Lithium batteries

The next of the essential chemicals for this method is lithium commonly found in batteries:

This is an area where a review of the evidence can be especially revealing. Most Lithium batteries are associated with photographic cameras but there are Everready Lithium batteries in AA size.

The item of interest in these batteries is the lithium metal. Lithium metal is silvery-white which becomes yellowish on exposure to moist air. Another interesting fact is that carries a fire and explosive risk when exposed to water. It is recommended lithium metal be kept in mineral oil or any other liquid free from oxygen and water. This metal also carries some potential symptoms of mild to severe over-exposure that can be gained through handling without proper protection:

1. Impaired concentration
2. Lethargy
3. Irritability
4. Muscle weakness
5. Confusion
6. Impaired consciousness

Most often batteries found at the scene are intact. Battery hulls or other evidence of altered battery casings supports the use of the lithium metal and could be subject to latent printing.

It is important for the attorney to view the evidence prior to court. In a Meth lab case I was involved in, when we viewed the evidence we found the batteries were alkaline and did not have anything to do with the conversion to Meth.



The lithium strip is approximately 10" long and is lighter than the aluminum foil below it. It will darken in light and burn with the same intensity as magnesium (very bright and hot). In a fire, it will leave very little evidence of its existence.

Lithium, like sodium metal will react with water. Lithium, unlike sodium, does not react in the same violent manner. Once lithium is placed in contact with water, it begins to effervesce much like an Alka Seltzer producing hydrogen gas. Ultimately the lithium metal will completely react leaving a solution of lithium hydroxide.

This is the main reason for the addition of the extracted ephedrine in a solvent. If the ephedrine is an aqueous solution, the lithium will be destroyed and the reaction will not occur.



In those cases where the investigators allege to have found lithium strip residues in burn piles etc., be very caution. Lithium burns with the same intensity as magnesium and the only residue left is a white residue.

Hydriodic Acid/Red Phosphorus Method

This method was very popular a couple of years ago and seems to have been replaced by the first method listed. In this method the hydriodic acid is the reducing agent forming iodine and hydrogen. The ephedrine or pseudoephedrine absorbs the hydrogen atom from the hydriodic acid and Meth is being formed.

The ingredients for this method include:

1. Ephedrine or Pseudoephedrine
2. Iodine Crystals
3. Red phosphorus
(Combination of these two in water can make the hydriodic acid)
4. Hydriodic acid
5. Solvents (Ether, acetone, toluol)
6. Lye
7. Reaction vessel with condenser
8. Filters, jars etc.

This method is more complicated than the Lithium/Anhydrous Ammonia method. It also requires red phosphorus, hydriodic acid and iodine crystals, items a little harder to come by. This method is a "hot cook" method as it does require a heat source.

The general scheme for this method is as follows:

1. The ephedrine hydrochloride is added to the reaction vessel
2. The Red Phosphorus is added followed by
3. The Hydriodic Acid is added to the reaction vessel.
4. A condenser is added to the top of the reaction vessel.
5. The reaction vessel is allowed to boil for one day.
6. After the day, the reaction vessel is allow to cool.
7. The red phosphorus is filtered out.
8. Lye is added to the filtrate to neutralize the acid and make the solution basic.
9. The meth free base is seen floating on the surface of the water.
10. Solvent is added to extract the meth base.
11. Hydrochloric Acid is bubbled through the meth base forming methamphetamine.

A condenser, for those unfamiliar with the term, is a column of water above the reaction vessel. As the mixture boils, the condenser causes the vapor to condense back to a liquid and return to the reaction vessel. The best simile would be to take two pots and boil water on a stove. Leave one pot uncovered and place a lid on the other. The water will boil into a vapor on the uncovered pot leaving an empty vessel, while the pot covered with a lid will still retain much of the liquid.

This method also requires the use of ephedrine or pseudoephedrine in the hydrochloride salt. If someone were to use ephedrine sulfate, the sulfate will interfere with the reaction.

The red phosphorus most common source is the striking pads of match books. These contain about 50% red phosphorus which must be purified from the other contaminants. It is possible to make red phosphorus, but these attempts often have explosive results.

Iodine crystals can often be found for sale at aquarium shops.

Many cooks have been found to save the red phosphorus filtrates for their next batch.

There is some information that states the hydriodic acid (iodine crystals, water and red phosphorus should be "cooked" prior to the addition of the ephedrine. This reduces the potential for intermediate formation.

The addition of water to red phosphorus and iodine crystals is heat producing. That is why you will hear or see evidence of ice or ice to cook the reaction mixture.

The Methamphetamine produced from this method often contains a reddish or pinkish coloration.

One of the interesting products of synthesis in this method is P-2-P, which was a primary precursor in the older methods. If noted upon analysis, the defendant could be charged with possession of P-2-P, a controlled substance.



(The type of equipment used in the HI/Red Phosphorus Method)

When the cook decides to manufacture his own red phosphorus, you should keep in mind this will probably not as good as the red phosphorus purchased through chemical supply companies. This and the home-made hydriodic acid can affect the synthesis and the yield produced.

As indicated above, this method is rarely encountered in recent submissions. Because of this you will want to be on guard should you receive one. Recent training in law enforcement does touch this particular method, but greater emphasis is being placed on the Lithium/Anhydrous Ammonia method.

Now that we have touched the basics of the different synthesis methods and discussed some factors involving each, we will discuss some concepts and ideas common to Meth Lab cases in general.

Substantial Step

This concept is one of interest to the trial attorney. Many state and federal laws describe a person must take a substantial step towards the commission of a crime. In Missouri the concept of substantial step has been the subject of several Court of Appeals decisions.

U.S. vs. Wagner, 884 F. 2nd 1090, 1095 defined substantial step as an "overt act towards the commission of a crime must be something more than mere preparation, yet may be less than the actual commission of the substantive crime."

Missouri vs. Shivelhood, 946 SW 2nd 363,266 defined substantial step as "conduct that is strongly corroborative of the firmness of the actors intent."

Missouri vs. Wurtzberger, Case Number WD56473, handed down 11/9/99, Missouri Court of Appeals Western District discusses this concept and currently is used as the "authority" on this issue.

I am sure this makes more sense to you than it does to me, but this concept can be important as you prepare your cases.

Is ephedrine or pseudoephedrine found in the blisters packs in a residence with other meth lab related items indicative of a substantial step towards the manufacture of meth?

Is white powder found in a coffee filter with no other chemicals related to the manufacture of meth a substantial step?

If mini thins are found in a residence along with drain cleaner, starter fluid, coffee filters and jars does this constitute a substantial step?

This argument holds mainly on those cases where there is significant evidence of a clandestine lab lacking. While I can certainly testify the absence of ephedrine is significant in the fact Meth cannot be produced without it, other items of evidence/paraphernalia can be deadly, such as compressed gas cylinders, coffee or food grinders, solvents, tubing etc. When looked at in the totality of the situation, is it reasonable for a jury to be expected to acquit based on what will be demonstrated to be a minor point?

Chemical Odors

The use of chemical odors by investigators have been the basis of many search warrants. Some investigators are quite descriptive in their recanting the odors they detected while others use the generic chemical odors.

The most common chemical odors encountered are ether and ammonia. The odor of ether was sufficient in one case to cause the investigators to claim exigent circumstances and enter the residence to check on the health and well being of the occupants.

Another investigator detected the odor of ammonia over 100 yards from a garage. This was used as evidence towards a search warrant.

Don't get me wrong, ether and ammonia do have strong odors. Here is some of the things I have read:

REPORT: An investigator noted a subject standing on the porch of a residence wearing a coat and smoking a cigarette. In his training and experience, Meth cooks often smoke outside. It was 41 degrees and he was able to detect the odor of ether inside his under cover car parked about 150 feet from the house.

FINDINGS: In checking the weather, we found the day in question was 41 degrees and raining, a fact omitted in the investigators report.

The wind direction was blowing from the area of the investigators car towards the house, thus any odor of ether would be blown away from him.

There were no windows or doors open in the house. If the investigator did, in fact, smell ether, the man smoking on the porch would be a new satellite along with the house.

REPORT: Investigators detected a strong ether odor coming from the door area of a barn. Two of the suspects were placed under arrest at the barn door while cooking on a barbeque. A bottle of powder and ether was found in a microwave oven in the garage.

FINDINGS: There were no cans of starting fluid found inside or around the garage.

The jar inside the microwave oven did contain a white powder, however, the solvent was found not to be ether.

The only chemicals of note was charcoal lighter fluid used to start the barbeque. The investigators would later say charcoal lighter fluid is often found at meth lab scenes.

As it relates to odors, one must remember odors are often perceived and some individuals sense of smell is better than others. If you don't believe me, make a comment among a group of people you smell natural gas when none is actually present. There is a high probability at least one in the group will smell it also.

Reported "chemical" smells are harder to nail down, especially when chemicals are found. In some instances where the actual product is found, there will be an odor that some perceive as ammonia, while most chemists may detect it as a "amine" smell.

The key to any reported chemical odors is to attempt to get the investigator to be as specific as possible. This would be best accomplished during deposition at time after the initial investigation.

It is also important to obtain the weather data for that date as well as a diagram of the scene.

If chemicals are found the investigators should be able to recite the condition of these chemicals referring to whether they found them sealed, open etc. I remember a case where an officer noted in his report he detected a chemical odor when he entered the residence. The only problem was he was not one of the first entry personnel. He actually got there a little late and the chemical odors he detected were caused by other law enforcement personnel opening and playing with such things as starter fluid etc.



Windows and doors are closed, yet chemical odor detected.

Photography

The particular topic ranges from very good documentation of the scene to no photographs at all. The best scenes are documented where the chemicals were found, noting their position, quantities, if possible, and their condition.

There is a general tendency in the cases I have reviewed to take a “group” photograph of the evidence. In these photographs, investigators will collect all chemicals, glassware, supplies etc and place them in one area to photograph.

This photograph may be a true and accurate depiction of what was found, but it certainly is not true and accurate of where it was found. These types of photographs can make a small operation look large and if presented in court to a jury, it may have greater misleading potential than evidential.

I would also suggest you examine all photographs taken at the scene and compare them to the inventory or evidence list. Hazardous items are generally disposed of and if they do not appear in the photographs, you might be able to suppress any mention of these items during trial.

I would encourage you to closely examine, or have the photographs closely examined for the purposes of explaining the evidence. For example, coffee filters were deemed to be part of the Meth lab paraphernalia. The photograph clearly depicted the filters sitting adjacent to a coffee maker.

If there are photographs taken of the evidence in the laboratory, again check them again any other photographs or the evidence itself.

In instances where the scene was video taped, some of the tapes will not have audio. The original copy of the tape should be examined to determine whether the audio portion was included. The following are examples of “group photographs.”



Gas Generators

These devices generate the hydrochloric acid needed to transform the Meth base into Meth salt. These have been noted as numerous sizes and configurations. Most often the evidence of gas generators includes the "Liquid Fire" and rock or table salt. Gas generators have been seen as nothing more than 2 liter bottles with tubing attached. Muriatic Acid is a substitute for the use of gas generators.

You should be aware that gas generators can be anything with a hose attached. In one case a plastic one gallon gas can with a hose in the spout was seized as evidence. The officer testified that it was a gas generator much like he has seen on other cases.

The only problem with this testimony which he did not have a quick response to was if this is, in fact, a gas generator where is the residue which should be present from the chemicals? When we reviewed the evidence the gas can was clean. This was told to us to be the means by which the client filled his car, by going to the "neighbors" gas station.

As we will discuss briefly, there is a tendency in law enforcement to make almost everything Meth Lab related and quite often they are right.

Solvents

This is a topic which is very broad. Some of the more common solvents found at Meth labs include:

1. Acetone A good general solvent readily available. It is recommended for the extraction of ephedrine/pseudoephedrine.
2. Toluol Another good general solvent. This is generally considered the solvent of choice in the extraction of the Meth from the reaction mixture.
3. Coleman Fuel Another common item. Some formulas indicate this is the second solvent of choice in extracting the Meth.
4. Heet This product removes water from gas tanks and contains methyl alcohol.
5. Ether Generally found in the form of starter fluid and is known as Petroleum ether. This is good solvent for the extraction of Meth. This is probably the most volatile solvent found at scenes. It is easily ignited and explosive in nature.

In those cases where only one solvent is found, the investigators generally make this the all inclusive and only solvent necessary. Most of these items will be deemed hazardous and destroyed.

If you look at the list, these are all items commonly found in many garages throughout the U.S. Keeping a close eye on where these items were found may be of great assistance in putting things in perspective.

Destroyed Evidence

As indicated previously anhydrous ammonia and many solvents are considered hazardous and are destroyed for safety purposes. In many cases involving what appears to be drugs in liquids, those solutions are sampled with the remaining portion destroyed. This is almost required for health and safety reasons.

The key issue is the opinion or inference the destroyed evidence brings. The compressed gas cylinders are the best example. If the only evidence to support the cylinder contained anhydrous ammonia is the blue/green color and no actual testing was conducted, this "opinion" can be challenged.

It is also important to ensure the destroyed items have been captured photographically. While their absence from photographs does not automatically guarantee they will be limited out or suppressed, it does provide for this argument.

The most important issue when dealing with destroyed evidence comes from the other evidence destroyed with it. For example, some agencies will destroy gallon cans of solvents, compressed gas cylinders and other glassware. These items could be processed for latent prints and potentially determine who actually handled them. This is important, as I previously mentioned, in those cases where multiple parties are charged with the same incident.

Fingerprints and Other Evidential Considerations

We have already discussed this in previous sections but as a former certified instructor, I would stress to law enforcement officers the need to conduct any examination, such as fingerprints, to attempt to show exclusive possession. In some instances the items are printed prior to destruction. In most no fingerprinting is conducted.

It can be difficult to bring this out during trial. In some states the defense cannot bring out these types of issues unless the door is opened. I was subpoenaed to a trial where my testimony was solely related to items of evidence, such as gas cylinders etc could be printed. The prosecution filed a motion in limine and was successful in keeping that testimony out. None of the investigators opened the door allowing this testimony in.

If there is evidence that has been collected which does render itself to fingerprinting which the law enforcement officers failed to do, you can file a motion with the court and have this done for you. In most instances, the seizing officers wear gloves and would not deposit new prints, but they could have destroyed existing prints. If there are plastic bags of Meth or other critical evidence which your client categorically denies he or she ever handled, I would recommend this process be undertaken.

If prints are developed and none are associated with your client, you now have something to talk about.



Latent print processing could be conducted on the jars and box

In some instances investigators will find various documents purported to show the drug activity/accounting of the defendant. This makes for some potentially strong evidence.

What generally does not occur is the state having the documents examined for **handwriting** comparisons. The prosecutor can talk all day long about these documents, but if they cannot be tied to your client via this method, is this evidence pertinent.

The other factor about handwriting you should be aware of involves those undated documents. In Missouri there is case law, State vs. George Revelle which addresses the admissibility of undated documents.

Another item of evidence which generally cannot be examined, but is often critical in these cases involves **knowledge necessary to manufacture Meth**. There have been many cases filed in which the state has no evidence the defendant had the knowledge or the means to manufacture the drug. This is a very important issue when there is not a great deal of Meth related paraphernalia present.

Since many charges bear the wording "with the intent to manufacture" the state should be required to demonstrate the knowledge, means or the ability for a person to consummate the synthesis process. I have heard of several frustrated investigators who attempted to get this information in through previous knowledge, prior CI information and other hearsay testimony. In those instances where the attorney was paying attention, this type of information did not come into evidence, especially those instances of uncharged criminal acts.

Estimated Yields

This is mainly a federal case issue. If there is sufficient evidence available, chemicals, ephedrine bottles/boxes or receipts, it is possible to determine the potential yield of the lab in question and is fairly straight forward in calculations. By comparing the molecular weight of Ephedrine to Methamphetamine the result is 1 gram of Ephedrine will produce 0.92 grams of Meth. This value assumes a 100% yield.

Thus the topic of many a court argument. Anyone who understands chemical synthesis realizes most reactions are not 100%. Clandestine labs where the cooker may not be able to spell chemistry has very little chance of obtaining this yield. The Government used to argue the 100% yield until an article published by a DEA Chemist came to light indicating clandestine Meth labs generally operate on a 50-75% yield.

With the advent of extracting the ephedrine/pseudoephedrine prior to synthesis another factor has been added to estimating theoretical yield. While some underground information indicates a 95% percent extraction of the ephedrine/pseudoephedrine, this number could relate to those who are willing to take the time, invest in better equipment (separatory funnel, vacuum filtrations systems etc).

The problem associated with this type of calculation seems to be the lack of literature, recognized sources or scientific studies indicating percentage of yield in the extraction of meth. As previously mentioned, my study showed a 30% yield by weight and this was using items commonly found at meth lab scenes and did not include the more elaborate items or items commonly found in chemistry labs.

Estimated yields can also be calculated on the more elaborate synthesis methods based on the various chemicals found, hence you will find such wording as primary or secondary precursors etc. In one case the DEA estimate included a method in which two of the three essential chemicals were found. Without all the chemicals or at least some indication all were present, part of the theoretical yield was not admitted.

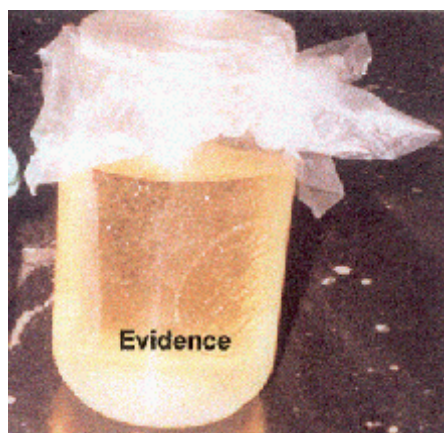
In most clandestine lab situations, the theoretical yield is based on the quantity of drug in the powder or liquid. Federal labs routinely quantitate all submission to them and report them.

I have been asked what the average percentage seem to be. I have no answer for that question, I have personally quanted cases as high as 90% plus. I have seen other cases in the 40 - 50% range. Recently I had a powder case in which the highest purity was 4%.

After the question on purities, comes the question why so low? This gets us in the gray area of conjecture and what if's. The range of reasons could be the cooker had no idea what he or she was doing, did not extract the ephedrine/pseudoephedrine, did not have the essential and required chemicals, "pushed processed" the synthesis, trying to get his or her yield in the shortest period of time and the list goes on.

The biggest issue facing the federal cases involves liquid samples in which only a portion was retained for analysis, the remaining amount was destroyed. The theoretical yield in these types of cases usually comes down to the investigators "estimation" of the amount in the quart jar, for example. I have seen reports where the investigator lists the jar as "full" and the theoretical yield calculated on this.

The picture below depict an actual case. The investigator described these as "full" quart mason jars. Using same or similar jars and scaling factors we were able to arrive at a more accurate estimation of volume. The photo on the right depicts a "full" quart jar containing 946 milliliters of liquid. This estimation of theoretical yield was adjusting accordingly and the assistant federal district attorney stipulated to the results. This is a strong reason to request photographs of the evidence on every federal case.



This quart jar, evidence in a case, was described as “full”



These quart jars represent 946 ml's of liquid or a “full” quart

The most recent document dealing with theoretical yields is entitled: ***The Yield of Methamphetamine, Unreacted Precursor and Birch By Product with the Lithium-Ammonia Reduction Method as Employed in Clandestine Laboratories*** by Nila Breemer, M.S. and Robin J. Woolery, M.S. from the Iowa Division of Criminal Investigation Laboratory, Des Moines, IA 50319.

This document is specific for the anhydrous cook method and provides information which can be of assistance in estimating theoretical yield. One of the conclusions of this document is as follows:

“In the average situation where the exact procedure followed at a site is not known, a range of 40 –50% yield of methamphetamine hydrochloride is a reasonable estimation.”
(page 16)

Bench Notes

These are the notes, charts, data etc. prepared by a forensic chemist and relate to the examination of the substances. They will record preliminary color tests and the equipment used to conduct the analysis. Most drugs are currently analyzed with the use of a Gas Chromatography/Mass Spectrometer providing positive identification for the substance. Infrared Spectroscopy is also used and it will again positively identify the drug in question.

The most beneficial of the notes are the charts from the instrumental analysis. Mass Spec charts will not only provide information on the controlled substance, but other compounds contained in the drug as well.

This type of information is not routinely part of discovery. To obtain this information requires a "duces tecum" subpoena. I would recommend on those cases where you anticipate deposing the analyst, you obtain these notes prior to the deposition. You can accomplish this by issuing the subpoena to the custodian of records of the lab. They will generally bring the case file or the items specified to the indicated location. You may have to be prepared to conduct a short deposition along the lines they are the custodian of records and the items they brought with them constitute the notes etc from the case. While the deposition is occurring, your copier can be busy.

In some instances the state can assist in obtaining these records, but most generally I find the tendency to argue they may not be discoverable. Any item, note, chart etc., used by the analyst in the formation of their opinion is discoverable.

You can have these items reviewed prior to the deposition and your expert can provide you with a list of suggested questions. These types of depositions are more focused than the ones I have been subjected to, the "what did you do then." style.

You can also consider obtaining the maintenance and run logs for the instrument used in the analysis. Part of the quality control programs in most labs includes these records. The reason I bring these up relates not to a meth lab case, but one in which Methamphetamine was identified via Mass Spectroscopy. Reviewing the run log found an entry labeled "blank". The adjoining column labeled result read "cholesterol." This indicated a problem with the instrument which the analyst did not investigate. The actual samples were analyzed right after this entry and were eventually suppressed.

Field Test Kits

You will frequently encounter these by law enforcement officials in cases where powders are found. Ephedrine/Pseudoephedrine do not give the same test result as Meth. There is a separate test available for Ephedrine called the "Chen's Test."

The key to this issue comes when you compare the results of the field test kits with the analytical results. If a sample is found to be Ephedrine/Pseudoephedrine and the investigator indicates a positive field test for Meth, there is something wrong as these two do not produce the same result.

This relative insignificant issue was the means by which a search warrant was obtained. The investigator received knowledge from a confidential information Meth was being cooked at a certain residence. The CI provided the investigator with a reported sample of that Meth and upon field testing the investigator reported it was positive for Meth. On to the judge for the search warrant which was served a short time later.

No active lab was found and, as a matter of fact, there were items which could be used in a Meth Lab, but no Meth powder was found. The defendant was charged on the basis of the CI information and the powder.

Lab results indicated the powder was ephedrine, not Meth. A motion to suppress hearing was held where the investigator testified to his training and experience with field test kits and a positive test for Meth was an orange to brown color. He was unable to testify as to the discrepancy between the field test kit and the lab analysis.

The defense attorney had the investigator conduct an in-court field test on the substance from the CI. It did not turn orange to brown and since the investigator used the field test result and "exigent circumstances" claim in obtaining the warrant, the judge threw the evidence out.

Field test kits have a use in law enforcement but again they can be misinterpreted. Some agencies log these test kits into evidence. I can guarantee by the time you look at the evidence, the solution will have turned black. This is normal, but does cause some investigators to get nervous.

Investigator Testimony

This is an area where the attorney must be on guard. To many investigators any item is related to a meth lab and the use of "literary licensing" can be pronounced.

The first issue relating to investigator testimony comes in the area of training in the area of clandestine labs. Many investigators will write the significance of evidence based on their education, training and experience. On this basis much of their testimony is allowed and I have reviewed Court of Appeals decisions which heavily relied on the information provided by police.

If you have an investigator who claims to have some form of training, dig into the issue a little deeper. Try to obtain course outlines, syllabuses, manuals etc to gauge the depth of the training. In a Southwest Missouri case a Sheriff's Deputy claimed to have a 40 hour programs offered at the Highway Patrol. A review of this course found very little dealing with the topic of Meth synthesis methods. More coverage was given to safety considerations, investigative techniques and use of informants. One part of the training specifically stated if there was some chemical or methodology questions a forensic chemist should be contacted.

Most investigators should not be allowed to testify as to the ability of a particular lab to produce Meth. There are cases where these investigators opined the lab could produce Meth even though the lithium and anhydrous ammonia were missing. This testimony went unchallenged! Once an investigator is allowed to testify as an "expert" in the area of clandestine labs, he or she is harder to challenge the next go 'round.

As I have previously indicated, it is important to understand the locations each item of evidence was seized. Most of the items associated with meth labs are found as common household items. Cold medications, coffee filters, Coleman Fuel Oil, funnels etc are found many houses including yours. If the items seized include drain cleaner from under the sink, coffee filters from the kitchen cabinet, ephedrine from the bathroom and Coleman Fuel from the garage is this a meth lab or anyhouse USA?

In one instance, an investigator testified as length of the finding of these items as indicative of meth labs. The attorney was very adept and the officer asleep while he admitted to having cold pills and other items in his own residence. This had a significant impact on the jury.

I recently reviewed the preliminary hearing of a Kansas investigator who claimed to have 40 hours in clandestine lab training. What I believe he had was the session mainly dealing with the "clean up" of these scenes and this was supported by his unfamiliarity of the Lithium/Anhydrous Ammonia method. A point to remember is if this goes unchallenged and the case is later reviewed by the Court of Appeals, the only information presented to them is from the officer.

Outside Testing

As a general rule I do not encourage the use of outside testing on drug samples. I have found this usually gives the State two expert witnesses. If there is some claim the substance was not the drug identified, or if there is some other need or compelling issue, such as quantitation, then outside testing should be considered. I will let you know this is not an inexpensive undertaking..

It is also hard to keep the State from knowing you are testing the samples. I like to require court orders for retests. Why? If I am stopped by law enforcement with drugs in my car on the way to conduct the analysis I have a document to show I am in possession of the substances on the order of a court. I did one case by agreement and developed an ulcer with over 25 grams of Meth in the car. The analysis was conducted over a weekend and I am sure both prosecutor and defense attorney were off somewhere and could not have been reached.

Another issue regarding outside testing, which really isn't an issue except for Springfield U.S. District Courts is whether your chemist is certified by the DEA to conduct the examination. All forensic labs have a DEA certification which allows them to purchase controlled substances as standards. The analysts themselves are not certified. In Springfield, the U.S. attorneys claim they cannot release any substance to someone without this certification.

I recently conducted a re-analysis out of the Kansas City Federal District Courts. The DEA agent met me at the KCPD evidence room, signed all the evidence out to me and off I went.

Another issue deals with the various law enforcement agencies reluctance to turn over drug evidence regardless of a court order. Some courts have taken the stance to order the retesting but allow the agency or analyst to be present during this testing.

My attitude towards this concept is not good. Twice I have been required to schedule my time, the lab time and the lab analyst's time. After two cancellations I was forced to go to the attorney and the courts as time was drawing near to the court date.

The other aspect to this process of including the analyst or officer at the time of retest is they are getting "privileged" information. You are allowed to prepare your case and not disclose the results of your case preparation. In this light, the re-analysis can be construed as part of your case preparation. If you can have the samples re-run by your analyst without the participation and presence of the state you can reach your decision about whether to use your expert or not without the knowledge of the prosecutor.

If there is some analysis which need to be conducted or your client requests they be done, you can feel free to contact me and I will be happy to assist in anyway I can. Forensic Consulting has the capabilities of conducting examinations on drug samples as it relates to both qualitative (drug identity) to quantitative results (purity). The examinations are conducted at Southwest Missouri State University and utilize the same or similar equipment to that found in forensic laboratories

Case Reviews

A case review is a process by which the discovery material is forward to me. Based on the information contained, including investigator reports, lab reports, evidence listings etc, I provide information on the case. These reviews are based on my education, training and experience as both a forensic analyst and a private consultant who has reviewed over twenty five Meth lab cases.

This review is objective meaning you will get unbiased information. If the evidence in your case strongly supports Meth synthesis, you will be told so. If there is evidence such as missing essential chemicals etc., you will also be informed of this. The examples listed in this document are based on review results.

The reviews form the basis of potential testimony or to act as your expert in a non-testimonial manner. This includes reviewing the documentation, creating an evidence listing with analytical results on larger cases and a work product memo (if desired) or telephonic conferences. If there is the need to view the evidence, this would be charged at the normal travel/hourly rate.

If called to testify, we will decide what, if any, demonstrative evidence is needed for the presentation in court and the approximate cost of this preparation. I am a firm believer in demonstrative evidence especially during jury trials. I have taken about 20+ college hours in education as well as 18 graduate level education courses. These have provided me with a background on the best means of presenting scientific evidence to jury panels.

You as the trial attorney must decide which of your cases merit reviews. There is no single or multiple issues which can be used to make this decision. If there is a question, I would encourage you to contact me. Many times we can discuss the case on the phone and give you an idea of how to proceed.

With the use of the internet I try to keep up with Court of Appeal decisions in the clandestine manufacture of Meth. Recently I visited the Kansas Court of Appeals page to familiarize myself with the format of the decisions. I do this to keep abreast of the findings of the court and how it can impact presentations in court.

Summary

The clandestine manufacture of Meth are not considered "simple" cases. Many of the cases I have reviewed contain some elements which require further examination.

The information provided should be considered an over-view on the topic. It is also an attempt to inform attorneys as they pursue their case preparation.

A great amount of information is available on the topic, however, you will not find this material from the local library. Some of the cites below can be purchased from Barnes and Noble, while others are found in academic libraries.

The interpretation of forensic data should be left to a qualified individual. I would also encourage attorneys to make every attempt to know the answers posed to scientific personnel prior to court. Many forensic chemists are laboratory bound and may have little information or experience in the preparation or synthesis of Meth. To wait until court may result in a technical person's inability to answer a question which aids your case.

I hope you find this information of use. I appreciate your organization allowing me to have this material available as a handout. I hope there will be a time in the future I can make a formal presentation on this topic and be present to answer any questions you may have.

Questions or comments on this document are requested and appreciated.

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<http://www.paranoia.com/~deadlock/meth-faq-old.html>



Theoretical Yields

Theoretical yield, by definition, is a calculation that attempts to identify the amount of drug which could have been produced from precursor material. These calculations are based on evidence obtained from the scene.

The evidence used in these calculations can come from a wide variety of sources:

1. Actual precursor material present
2. Receipts for precursor material
3. Testimony from witnesses regarding the amounts of precursor material.
4. Statements of defendants



Theoretical yields, or lab capacity, is often found in a separate report issued by the DEA, state or local laboratories.

In this document, I will attempt to familiarize you with the various concepts and means by which theoretical yields are accomplished and when they can be disputed. This discussion will be focused on the current synthesis methods using ephedrine and pseudoephedrine.

As defined in a previous document, theoretical yields can be calculated based upon:

1. Primary precursors
2. Secondary precursors

In the case of the Hydriodic Acid/Red Phosphorus and Anhydrous cook method, the primary precursor material will be the ephedrine/pseudoephedrine.

The Hydriodic Acid method would include red phosphorus and iodine as secondary precursors. The Anhydrous cook method would include lithium and anhydrous ammonia as secondary precursors.

1:1 Concept

Simply put, the 1:1 concept means for each amount of precursor material, the same amount of finished product will be produced. In other words, for each gram of Ephedrine/Pseudoephedrine, a gram of Methamphetamine will be produced.

This concept is incorrect. All estimations of yield are based upon conversion factors. These conversion factors are based upon the molecular weights of the precursor and finished product.

$$\frac{\text{Molecular Weight Methamphetamine (Hcl)}}{\text{Molecular Weight of Precursor}} = \text{Conversion Factor}$$

Example

$$\frac{\text{M.W. Methamphetamine} = 185}{\text{M.W. Ephedrine} = 201} = 0.92$$

Therefore 1 gram of Ephedrine will yield 0.92 grams of Meth

From this we can see 1 gram of Ephedrine will not produce 1 gram of Methamphetamine.

100% Yield Concept

This concept basically says if a person starts with a given amount of precursor, the reaction will produce a weight of final product consistent with its conversion factor. In the case of Ephedrine/Pseudoephedrine, for each 100 grams of precursor, 92 grams of Methamphetamine will be produced.

This 100% yield concept is taught in most high school and college chemistry courses and is the subject of many laboratory exercises. The best way to describe this concept is "ideal".

Fortunately, or unfortunately, depending on your view point, we don't live in an ideal world. Picture some chemistry you may have been in. Inside these labs are the necessary equipment, glassware etc, to conduct a wide variety of experiments or exercises. Now picture someone's garage or outbuilding. Dirt floors, little equipment and often poor lighting. Let's look at some other comparisons:

Academic Laboratories	Clandestine Labs
Funnels	Top of 2 liter plastic bottles
Separatory funnels	20 oz plastic soda bottles
Filter paper assortment	Coffee filters
Heating mantels with controlled heating	Electric or gas ranges, Coleman stoves
Reagent grade chemicals	Hardware of grocery store chemicals

It is not hard to see, clandestine labs are general not “ideal” situations. For anyone to suggest an individual with little, if any chemistry, can cookbook a synthesis procedure and arrive at 100 % yield is not a scientist. We must be mindful the individuals involved in the clandestine manufacture of Meth are frequently addicts or entrepreneurs desiring the product or the money. There is little attention paid to quality control and I have found no “American Association of Meth Cookers” society to establish manufacturing guidelines.

For many years, though, this concept has been promoted within the Federal Courts and defendants have been sentenced according to 100% yield.

In 1990, Harry F. Skinner of the DEA Southwest Lab wrote an article for Forensic Science International entitled: *Methamphetamine Synthesis via Hydriodic Acid/Red Phosphorus Reduction of Ephedrine* (Volume 48, pages 123-124, 1990). In this article he wrote:

“The theoretical yield is 92% by weight of the precursor ephedrine, whereas the clandestine yields range from 50 – 75% by weight of the precursor ephedrine.”

This article and a letter to the U.S. Sentencing Commission by the Drug Enforcement Administration indicated the use of 62.5% average yield in these calculations. (See Attachment A)

What should have been “problem solved” in 1990, is still being fought today. Within the last year, I have reviewed “theoretical yield” reports by the DEA which still cite the 100% conversion factors.

This report and letter served the basis of the defense challenge to theoretical yields on the Hydriodic Acid/Red P method well. When the Anhydrous cook method came to vogue, there was little, if any, literature produced regarding potential yields from this method.

This was somewhat resolved in 1999 with the appearance of *The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product with the Lithium-Ammonia Reduction Method as Employed in Clandestine Laboratories* in the Midwest Association of Forensic Sciences Fall Newsletter. The authors are Nila Breemer and Robin J. Woolery. (See Attachment B)

This comprehensive study looked at a wide variety of factors involved in this synthesis method and came to the conclusion:

“In the average situation where the exact procedure followed at a site is not known, a range of 40 – 50% yield of methamphetamine hydrochloride is a reasonable estimation.”

This now forms the basis of many defense related theoretical yield calculations and presentations. There are other factors which can affect the theoretical yield in Meth Lab cases.

Extraction of Meth

This was eluded to in the previous document. Let's take a look at the back of a Sudafed box:

ACTIVE INGREDIENT: Each coated extended-release tablet contains Pseudoephedrine Hydrochloride 120 mg.

INACTIVE INGREDIENTS: Carnauba Wax, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone, and Titanium Dioxide. Printed with edible blue ink.

Take a look at the inactive ingredients. From this you will see the drug manufacturers have made an attempt to diminish the ability to clandestine cooks to easily use their product.

These inactive ingredients must be removed from the Ephedrine/Pseudoephedrine before it can be used to create Meth. In both the Hydriodic Acid and Anhydrous methods, the presence of these ingredients affect the synthesis.

During my own experimentation in extracting the Pseudoephedrine from these tablets, the best I could achieve was 30%. This was using very much the same equipment, solvents and tools found at clandestine labs. Literature shows this can value can be significantly higher.

Hydriodic Acid/Red Phosphorus Method

In most instances, the cook is preparing their own Hydriodic Acid by combining the Red Phosphorus to Iodine crystals in water. This reaction is exothermic, meaning heat producing. There is reference in a great source of information *Secrets of Methamphetamine Manufacture* by Uncle Fester (5th Edition, Loompanics Unlimited, Port Townsend, Washington 1999)* regarding the need to allow the Red P and Iodine to react before adding precursor. If the precursor material is added too soon, the formation of intermediates will result.

*(The purchase of this book can be made off the internet and guaranteed to get the purchaser an FBI number.)

Intermediate products of synthesis can affect the overall yield.

Anhydrous Ammonia/Lithium Method

Possibly the greatest factor affecting this reaction is the introduction of water to the anhydrous and lithium. Lithium reacts with water forming lithium hydroxide and hydrogen gas. Anhydrous ammonia reacts with water to form ammonium hydroxide which will not support the reaction.

For those brain trusts who extract their ephedrine using the cold water method and introduce the precursor in a aqueous solution, the reaction is most definitely affected resulting in very poor yields.

The extraction of ephedrine and potential sources of problems with the two methods generally cannot be estimated into the theoretical yield. This are specific instances often which are unknown to the investigator, attorney and others involved in the case. This does make for some interesting testimony to the trier of fact in stating why the 100% yield estimation is probably inaccurate.

One would think with the above literature and documents, the issue of theoretical yield would be lessened in our “enlightened” society. A new wrinkle to the equation has come fairly recently when the Federal Probation and Parole people in certain parts of the Mid West have argued for the use of the 100% estimation. I have received three cases along this line and one of which caused me to appear in Federal Court until sanity ensued.

An Interesting Argument

I had the pleasure to participate in a Federal case in Federal Court in Wichita, KS. I refer to this as a pleasure for I was treated as a professional and expert by both Government and Defense. The Government’s expert and I were allowed to discuss the estimated yield and come up with an amount mutually agreeable to both of us.

This case involved a fairly large number of residues and powder materials some of which received quantitation and the remaining purities were estimated from the analytical data. When taken as a whole, the average purity was calculated at 70%, the theoretical yield promoted by the Government.

I cited the Iowa study in my estimation and promoted the use of 45%.

The crux of the Government’s argument, through it’s expert, was to use the average 70% as being indicative of the potential of the lab. On the surface this appeared to be a strong argument that could easily sway the sentencing judge. My estimation was not based on any case specific information, rather literature.

The flaw in this argument became apparent after a period of meditation and reflection. The flaw was the calculations did not work both directions. While it worked in determining the quantity of Methamphetamine which could be produced, it would not work within the realm of reversing the calculation and estimating the amount of precursor material.

The Government’s expert and myself discussed this and we finally reached a mutual agreement of a 60% conversion factor. This factor was close enough to what the defense hoped to achieve the net result favored the client.

Sentencing Guidelines

I think it is important to add this section to the discussion. As a forensic scientist I will state I know and understand very little of the Federal Sentencing Guidelines and I have no desire to education myself in this area.

In most cases, the defense wants the theoretical yield to bring the guidelines down to a point where the client has hopes of seeing the light of day. Defense experts who understand these guidelines and their implication to the length of the sentence open themselves up, in my opinion, to be viewed less than objective by the courts. I know of one private consultant who can magically and mystically make the number crunching always come below a certain guideline.

My role is to review the documentation and estimation and prepare what, in my education, training and experience, represents the theoretical yield of that particular case. If it assists the defense, I am rewarded with a subpoena. If it does not, I generally hope to get the bill paid.

Whomever you use as your expert in these cases, it is best to promote them as impartial and objective. I have been crossed about my knowledge of sentencing guidelines and it does make an impression on the court when I answered questions with “I don’t know” or “I haven’t a clue.” A good private forensic scientist maintains the role of objectivity as if his or her life depends on it, which is a true statement.

Theoretical Yield Estimations Involving Secondary Precursors

Every now and then I will hear of a theoretical yield in which the government's chemist based their opinion on the amount of secondary precursor. The courts have ruled this is permissible, but there is a stipulation you should be aware of.

The one instance I reviewed a theoretical yield report based upon the amount of iodine, I found error with this basis of this calculation. I found no evidence in the case where the specific formula or synthesis means was found. The chemist rendered their opinion based upon an average or collage of the various formulas they have knowledge of.

Using the "collage" theory allows for the theoretical yield based upon 10 lithium batteries or finding so much anhydrous ammonia at a scene. While this sounds logical and scientific, I believe the use of secondary precursors should be relegated only to those cases where a specific formula was found.

For example, the common means of preparing hydriodic acid includes adding 300 grams of iodine crystals to 50 grams of red phosphorus suspended in 300 ml of water. This is a general formula, but is it **the one** used at that particular scene? If not, the theoretical yield could be affected.

Theoretical Yield Involving Multiple Methods

The sign of a case that is not going well, is one where there is evidence from two different methods found at the scene. For example, evidence from a lab scene includes a propane tank with a bluish/green discoloration, blister packs of ephedrine/pseudoephedrine and a bag of red phosphorus or a bottle of iodine.

In most instances the theoretical yield report will include calculations for both the hydriodic acid and anhydrous cook method and I am willing to bet the government will opt for the one that is higher.

In an instance like this, your expert needs to take a close look at the evidence and the analytical data. This will involve obtaining the analytical charts, data, etc. from the chemist in the case or having the samples re-analyzed. What the expert will be looking for is evidence of which method was used.

If the expert finds iodoephedrine in the samples, this would be evidence of the Hydriodic Acid synthesis was used. If your expert finds the presence of "CMP" this would be evidence of the anhydrous cook method. It could be possible to eliminate a method through chemical analysis and/or review of past analyses. This, in turn, provides the testimony to the court as to why a method should be excluded from consideration.

Theoretical Yield Requirements For Second Opinions

If you have a case where theoretical yield estimation may be important, it is best to employ your expert in a timely manner. Calling someone Friday with the sentencing hearing Monday can be accomplished, but you would not want to hear what is being said after you hang up the phone.

The following are generally the documents and exhibits I require when I conduct this examination:

1. Scene Reports
2. Evidence Forms or Listing
3. Laboratory Reports
4. Theoretical Yield reports
5. Investigative reports where precursor materials are discussed or reported.
6. Statement of defendant/witnesses regarding precursor material
7. Photographs.

I ask for these because I feel I need as much information about the lab as possible. A Kansas City, MO Federal case involved a theoretical yield on an old P-2-P method. After I viewed the video tape of the lab, I quickly realized this was a lab many scientists would love to have. The presence and nature of the equipment was such, this person would be able to control many of the variables not routinely addressed in the clandestine arena.

The photographs can be important especially in those cases involving liquid sample. This deals with whether the jar is half full or half empty. In most cases the chemist for the government will use the description of the evidence in their calculations. By having any photographs of the evidence can allow for a more accurate estimation of quantity.



The use of a scaling analysis can allow for a more accurate determination of volume, hence theoretical yield.

Witness statements can be important if they bear evidence of the operation of the lab. There was a case submitted in which a co-defendant made a statement regarding the actual process involve in the synthesis that could affect the theoretical yield. Even though I was not able to place a percent on the statement, it was offered as reasons why the Government's estimate was inaccurate.

After the information has been removed, a theoretical yield can be completed, but there is a caveat. If the theoretical yield derived by Forensic Consulting Associates is intended to be used in court, I request I be allowed to write a "Report of Examination". The purpose of this is two fold.

1. It is consistent within the Forensic Sciences to document opinions.
2. It can form the basis of acceptance on the part of the government, negating the need for my testimony and associated costs.

As I have indicated previously, offering a witness on your client's behalf who "plays by the rules" like government experts carries a certain degree of credibility in the courts.

While on the subject of credibility I would like to suggest you not have your expert present in the court room during the government's testimony of their expert regarding theoretical yield unless there is a specific purpose in mind. You want the testimony of your expert to be his or hers based upon their examination and not a response to the testimony of an opposing expert.

Theoretical Yield Presentations in Court

Very often the only court presentation required is verbal. There are cases, however, where a more demonstrative presentation aids the case. For cases involving liquid samples and scaling examinations, photographs of the evidence and the scaled volumes can be very important in promoting the understanding of the opinion.

There are those cases where a more elaborate presentation on Methamphetamine Synthesis and theoretical yields is required. This may be to enhance your expert's standing, credibility or demonstration of knowledge in the subject.

In any case, a well thought out "Power Point" presentation can be prepared. These kinds of presentations where the government's own documents are used as your evidence can be especially powerful.

Obtaining Expert Services

As the trial attorney, you are most familiar with the case and case specifics. The decision to employ an outside expert rests on your shoulders. Here are a few things you might choose to look for when looking for or consulting with an expert.

1. **Background.** In this aspect I am not talking about education, rather familiarity with clandestine labs, the synthesis process and theoretical yields. I am aware of many attorneys who go to the academic world and employ college chemistry professors. Their knowledge of chemistry is by far greater than most, however, there are those Ph.D.'s that require an interpreter during their testimony.
2. **Number Of Past Court Appearances** This can be an important factor in credibility. If your expert testifies on a large number of submitted cases, he or she can be viewed in a different light as opposed to one who testifies in a smaller percentage of cases. A "Hired Gun" testifies with greater frequency than an objective private expert.
3. **Method of Synthesis Used.** The current methods using Ephedrine/Pseudoephedrine are generally straight forward. Older methods using P-2-P or more complicated synthesis afford more difficult calculations. A greater demand is placed in the area of knowledge and experience in these cases.
4. **Ability to Relate.** If you have a difficult time understanding what your expert is telling you, it probably will not get better in court. The "ideal expert" is one who relates to both prosecution and defense and offers their opinion as an objective scientist. Suggestions for and a willingness to prepare demonstrative aids for the case is a indicator of a good expert.

5. **Documentation.** An expert should be willing to share their documentation and methods freely. Those who recommend not writing a report or do not wish to reveal their notes can be problematic.
6. **Recommendations.** The best experts do not engage in any great deal of advertising for business, their participation is a result of recommendations of attorneys or from others in the criminal justice field.

Some Federal Cases Of Note

U.S. v. Eschman, 7th Circuit, 2000. Overturned the 1:1 ratio.

U.S. v. Harris, 10th Circuit (202 F.3^d 283) Estimation of quantity can be based upon defendant statements.

U.S. v. Wagner (994 F.2nd 1467). Reliance on estimated volume not an error.

U. S. v. Zachary, 4th Circuit, 1996. Under sentencing guidelines, unusable materials are excluded in determining the weight of a mixture of a substance containing a detectable amount of a controlled substance.

U.S. v. Levy, 5th Circuit, 1994. Eliminates from consideration any substance that must be separated from the controlled substance before the controlled substance can be used.

U.S. v. Coleman 8th Circuit, 1998. Upheld the District Court's use of iodine quantity to calculate methamphetamine quantity and computation.

Summary

This document, hopefully, addressed the common issues involved with theoretical yield determinations. I did not include any examples in this document, as often those examples are employed as the basis for other cases. Theoretical yields are a facet specific to a case and the case specifics.

This document is also not the all-inclusive treatise on the subject. Methamphetamine synthesis methods continual to evolve and so with it the factors that affect this type of examination.

I would encourage any attorney faced with the need for theoretical yield examinations to contact their expert. Forensic Consulting Associates would be happy to discuss your case over the phone regardless of whether you decide to employ or services. The first step to understanding is information and understanding.



U.S. Department of Justice
Drug Enforcement Administration

Washington, D.C. 20537

APR 24 1990

Rennie Scotkin
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Ms. Scotkin:

This is in response to your telephone inquiry to Frank Sapienza regarding the quantity of methamphetamine which could be synthesized from a given amount of ephedrine.

Methamphetamine may be synthesized by the reduction of ephedrine using a number of reagents and methods. The method most commonly used in clandestine laboratories in the United States involves the reduction of ephedrine with excess hydriodic acid in the presence of red phosphorus. The theoretical yield factor for synthesizing methamphetamine HCl from ephedrine HCl using the above method is 0.92 (molecular weight of methamphetamine HCl = 185 / molecular weight of ephedrine HCl = 201). Using the theoretical yield one kilogram of ephedrine HCl would yield 920 grams of methamphetamine HCl assuming adequate amounts of the other chemicals were used and the reaction was complete.

The actual yield of this reaction, however, is not 100% and is dependent upon many factors. In a clandestine laboratory setting, the overall yield of methamphetamine HCl from ephedrine HCl ranges from 50% to 75%. Thus, one kilogram of ephedrine HCl would produce 460 grams ($185/201 \times 50\%$) to 690 grams ($185/201 \times 75\%$) of methamphetamine HCl (Skinner, H.F., HI/red P Reduction of Ephedrine to Methamphetamine, DEA, April 1987). Using an average actual yield of 62.5% for this synthesis, one could reasonably expect that every kilogram of ephedrine HCl would produce 575 grams of methamphetamine HCl.

If you have any questions, please call Frank Sapienza at 307-7177.

Sincerely,

Frank Sapienza
Howard McClain, Jr.
Chief, Drug Control Section

The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product with the Lithium-Ammonia Reduction Method as Employed in Clandestine Laboratories

Nila Bremer, M. S. and Robin J. Woolery, M.S.

Iowa Division of Criminal Investigation Laboratory
Des Moines, IA 50319

Introduction

The predominant synthetic procedure for methamphetamine in the Midwest, and Iowa in particular, is the lithium-ammonia reduction method (also known as the "Nazi" method). Due to both state law and Federal sentencing guidelines, the analyst is expected to project both past and potential production (yield) of methamphetamine by the clandestine laboratories that are seized. As such information was not available for the type of procedures ("recipes") being employed by the operators, twenty-four quantities (batches) of methamphetamine were synthesized.

The samples from these clandestine laboratories consistently showed the presence of three substances (Figure 1): methamphetamine, pseudoephedrine (or ephedrine) and another compound with a mass spectral molecular ion of 150 daltons. The relative amounts of these three components were found to differ considerably from laboratory to laboratory with regional trends. The unknown compound (a Birch reduction by-product) has been tentatively identified as (S)-N-methyl-1-(1-(1,4-cyclohexadienyl))-2-propanamine¹ or 1-(1', 4'-cyclohexadienyl)-2-methylaminopropane² and will be referred to as CMP in this paper.

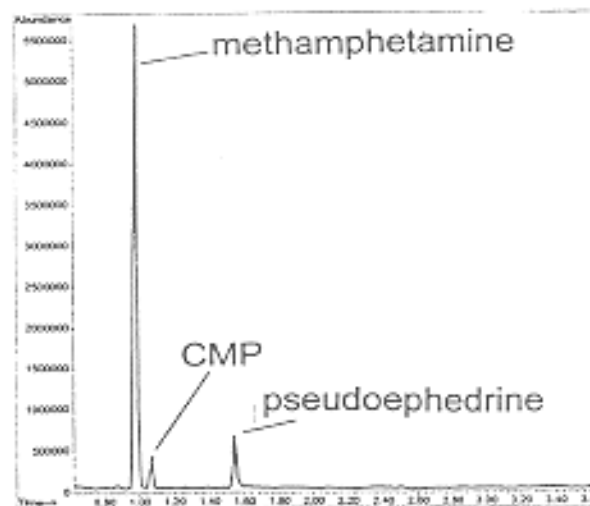


Figure 1. TIC of a Typical Finished Product from Li-NH₃ Reduction of Pseudoephedrine (Batch 6)

The primary purpose of this investigation was to determine the range of yields to be expected at the clandestine laboratory site. Other aspects to be investigated were the effects of changing certain variables in the process; the relative amounts of methamphetamine (purity), unreacted precursor and characteristic by-product (CMP) in the finished products; and other peripheral information that could explain observations during the seizures.

I. Effects of the Three Reaction Components and the Reaction Vessel Shape on Yield and Purity

Experimental

The procedure for this portion of the investigation (Recipe A) is based on that given in an interview with a defendant in early 1996. All procedures were done in such a way as to approximate the conditions at the clandestine laboratory site.

Anhydrous ammonia was placed in a 2-liter beaker, followed by the precursor. Lithium metal was added gradually with stirring until all the lithium had dissolved. The ammonia was allowed to evaporate. Diethyl ether was added to the solid mass that remained, and the mixture was allowed to sit for 30 minutes. The mixture was filtered. The ether solution was exposed to HCl (g), and the precipitate was filtered and dried.

The amount of precursor was standardized at 10 grams of pseudoephedrine hydrochloride (PsH), regardless of its source (tablets were presumed to contain the amount purported). The standard batch (Batch 1) also included 2.5 grams of lithium metal, 400 ml of anhydrous ammonia and approximately 700 ml of diethyl ether. Pure PsH and lithium wire were purchased from Sigma-Aldrich, Inc. The anhydrous ammonia was purchased from a local specialty gas company. The source of lithium from batteries was Energizer L91 High Energy batteries. Tablets, except in Batch 7, were red tablets (30 mg) with "L432" imprinted on one side. The tablets for Batch 7 were Geneva brand Pseudoephedrine HCl

(white, 60 mg). Precipitation was achieved using concentrated hydrochloric acid in a gas washing bottle with fritted disc. Ordinary coffee filters were used for filtration steps with plastic funnels for support, and the mixtures were stirred with ordinary large plastic spoons.

The electron impact (EI) mass spectra were obtained using a Hewlett-Packard 5970 mass selective detector. The ionization voltage was 70 eV and the source temperature was 280°C. For qualitative and comparative results, the samples were dissolved in methanol and were introduced into the mass spectrometer via the gas chromatograph equipped with a Supelco SPB™-5 15 m x 0.25 i.d. fused-silica column with a 0.25 µm thickness. For quantitative results, the samples (~10 mg) were dissolved in 10 ml of 0.5 mg/ml hexadecane in methanol:chloroform (9:1) and introduced as given above. The column temperature was programmed from 150 to 210°C at a rate of 25 degrees/min. following an initial time of 0.5 minute. For qualitative results, the column temperature was programmed from 140 to 255°C at a rate of 25 degrees/min. following an initial time of 0.5 minute.

Results and Discussion

A. Dry vs. Damp Precursor

The effects of a small amount of solvent in the precursor on the purity, yield and composition of the finished product are shown in Table 1. Batch 1 used PsH directly from the reagent bottle. In Batch 2, pure PsH was dampened with water and placed in an oven (65°C) for 12 hours before use. For Batch 6, approximately 0.5 ml of distilled water was added to pure PsH and in Batch 14, approximately 1 ml of ethanol was added.

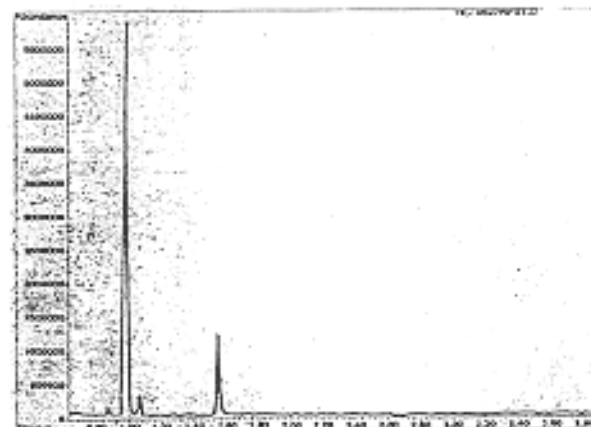


Figure 2. TIC of Standard Batch (Batch 1)

The total ion chromatogram (TIC) for the standard batch (Batch 1) is shown in Figure 2. The results from the four batches are shown in Table 1. The ethanol-dampened precursor produced a lower purity and yield than the other three, and the yields in all four instances were considerably lower than what was expected based on the literature.^{3,4,5}

Table 1. Effects of Solvents in Precursor Preparation

Preparation (Batch)	FP, g	% M	%CMP	% PsH	Yield
None (1)	5.66	69	5	18	42%
Water, dried (2)	4.40	88	0	6	42%
Water (6)	6.59	74	6	11	53%
EtOH (14)	5.72	46	40	6	29%

FP = weight of finished product; %CMP = % CMP HCl;

% M = % methamphetamine HCl;

% PsH = % pseudoephedrine HCl; EtOH = ethanol

B. Form of Precursor

The effects of the form of the precursor on the purity, yield and composition of the finished product are shown in Table 2. Batch 1 used PsH directly from the reagent bottle. In Batch 7, the tablets were coarsely crushed. In Batch 10, the tablets were coarsely crushed and soaked in 1 liter of distilled water for one hour. The mixture was filtered and the solution dried in a glass baking pan. The resulting residue was scraped from the pan.

Table 2. Effects of Form of Precursor

Form (Batch)	FP, g	% M	%CMP	% PsH	Yield
Pure (1)	5.66	69	5	18	42%
S/F (10)	4.70	69	7	6	35%
Cr (7)	5.13	30	47	18	17%

S/F = soaked, filtered tablets

Cr = crushed tablets

The results of using pure PsH versus precursor prepared by soaking and filtering tablets were comparable, whereas both the purity and yield were much lower and the amount of CMP was much higher with crushed tablets.

C. Amount of Lithium Metal

The effects of the amount of lithium used on the purity, yield and composition of the finished product are shown in Table 3. The comparison of lithium wire versus lithium from a battery (Batch 3) is also shown. There was no significant difference in the

results between the use of wire or a strip from a battery. The yields were approximately the same for all weights; however, the purity was higher when the larger amount was used. The % PsH was higher when 0.7 grams was used, since it was less than the stoichiometric amount needed for complete conversion.

Table 3. Effects of the Amount of Lithium

Li, g (Batch)	FP, g	% M	%CMP	% PsH	Yield
0.7 w(13)	7.07	46	0	37	35%
2.5 w(1)	5.66	69	5	18	42%
2.5 B(3)	5.43	71	8	16	41%
4.5 w(9)	4.36	80	5	5	38%

w = lithium wire; B = lithium strip from battery

D. Amount of Anhydrous Ammonia

The effects of the amount of anhydrous ammonia on the purity, yield and composition of the finished product are shown in Table 4.

Table 4. Amount of Anhydrous Ammonia Effects

AA, ml (Batch)	FP, g	% M	%CMP	% PsH	Yield
200 (4)	5.50	60	1	21	36%
400 (1)	5.66	69	5	18	42%
800 (5)	5.15	92	0	3	51%

AA = anhydrous ammonia

The larger amount of ammonia produced a finished product of higher purity. In two other batches in this study, where 1500 ml of anhydrous ammonia was used, finished products of high purity were also produced. These were Batch 21 (same procedure as in Part II C, 86%) and Batch 23 (see Part II B, 76%).

E. Shape of Reaction Vessel

A variety of reaction vessels have been found at clandestine laboratory sites in Iowa. To determine whether the shape of the reaction vessel affects the results, Batch 10 (see Part I B) was repeated using a standard glass pie pan. This container was chosen to simulate the use of oil change pans or glass baking dishes. The tablets used were the same brand and prepared in the same manner.

The effects of the shape of the reaction vessel on the purity, yield and composition of the finished product are shown in Figures 3 and 4. The low yield and large amount of CMP in Batch 11 may be explained by the larger amount of atmospheric moisture participating in the competing reactions of over

reduction and hydrogen gas formation as compared to the cylindrical reaction vessel.³ It can not be concluded that this same difference would be produced in "recipes" where the solvent is added 10 minutes after the lithium dissolves (see Part II C and D), without further investigation.

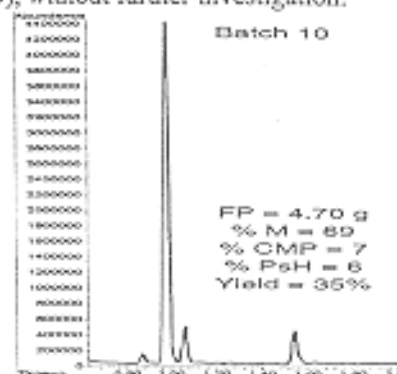


Figure 3. TIC of Batch 10 (Cylindrical Reaction Vessel)

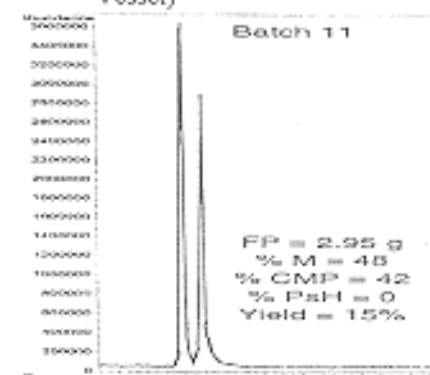


Figure 4. TIC of Batch 11 (Shallow Reaction Vessel)

II. Results from Other "Recipes"

Clandestine laboratory operators in Iowa have employed several versions ("recipes") of lithium-ammonia reduction in Iowa. Law enforcement personnel, subsequent to interviews with the subjects involved, have relayed these other "recipes" to the authors. These "recipes" were normalized to 10 grams of precursor and followed as closely as was possible.

A. Recipe B (24 Hours in Cooler/Camping Fuel)

Experimental Procedure

Anhydrous ammonia (400 ml) was placed in a gallon cooler with a screw-type lid. Ten grams of PsH, in the form of whole red tablets (L432), were added and stirred until the tablets completely softened and partially dissolved. Lithium strips from three batteries were added and stirred, forming a paste.

The lid was screwed on and the cooler was occasionally rocked for several hours. Twenty-four hours after the conversion, the mixture was stirred and a small amount of additional anhydrous ammonia was added followed by 700 ml of camping fuel. The mixture was transferred to a 2-liter beaker that was placed in a container of hot water. When the mixture achieved room temperature, it was filtered and finished in the usual manner as described in Part I.

Results

The results of Recipe B are shown in Figure 5. The purity and yield were lower than the standard batch. It is possible that the tablet excipients catalyzed the over reduction to CMP. Another contributing factor to the large amount of CMP may have been that the low volume of ammonia produced non-uniform contact of the pseudoephedrine molecules with the "solvated" electrons.

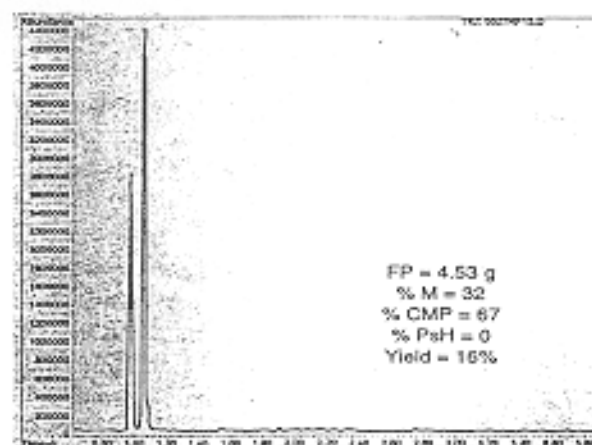


Figure 5. TIC of Recipe B (Batch 12)

B. Recipe C (Slow Lithium Addition, Hot Water Bath)

Experimental Procedure

The precursor for this synthesis was 336 red tablets with the marking "251" (30 mg), which is equivalent to 10 grams of pseudoephedrine HCl. The tablets were placed in 1 liter of distilled water for 1 hour. The excipients were filtered, and the solution was evaporated to dryness. The prepared precursor was placed in a 2-liter beaker and 1500 ml of anhydrous ammonia were added. Two-thirds of a strip of lithium (0.53 g) from a battery was added slowly with stirring. The last 1/3 of the strip (0.27 g) was added in two portions, with stirring between each addition. The mixture was further stirred until it was white. The beaker was placed in a container of

heated water to effect the vaporization of the ammonia. After the ammonia was extensively evaporated, the contents of four cans of starting fluid were added to the contents in the beaker. The mixture was allowed to sit for 30 minutes. The mixture was filtered. The methamphetamine was recovered as described in Part I.

Results

The results of Recipe C are shown in Figure 6. The weight of the finished product, purity and yield were higher than the standard "batch."

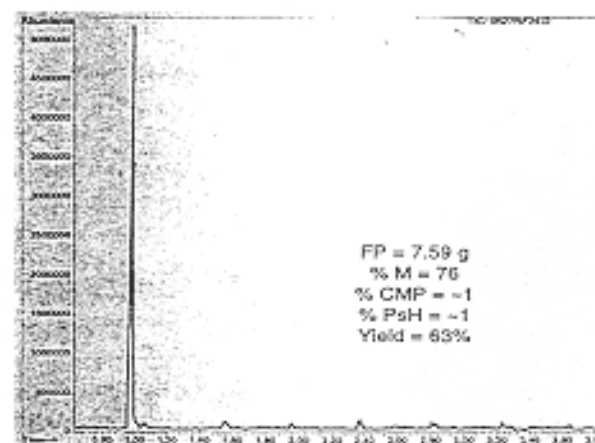


Figure 6. TIC of Recipe C (Batch 23)

This "recipe" gave the highest yield of all of the syntheses in the study. This may be due to the gradual addition of the lithium in combination with the separation of the precursor from the tablet excipients and a generous amount of anhydrous ammonia. Whether other brands of tablets would lead to a different yield was not investigated.

C. Recipe D (Solvent Added After 10 Minutes)

Experimental Procedure

The precursor for this synthesis was 336 red tablets with the marking "251" (30 mg), which is equivalent to 10 grams of pseudoephedrine HCl. The tablets were placed in 1 liter of distilled water for 1 hour. The excipients were filtered and the solution was evaporated to dryness. Anhydrous ammonia (600 ml) was placed in a 2-liter beaker. The prepared precursor was added slowly with stirring. One strip of lithium (0.8 g) from a battery was added and the mixture was stirred occasionally for 10 minutes. The contents of three cans of starting fluid were added to the beaker. The mixture was allowed to stand until

all the ammonia had evaporated. The methamphetamine was recovered as described in Part I.

Results

The results of Recipe D are shown in Figure 7. The results were comparable to the standard batch.

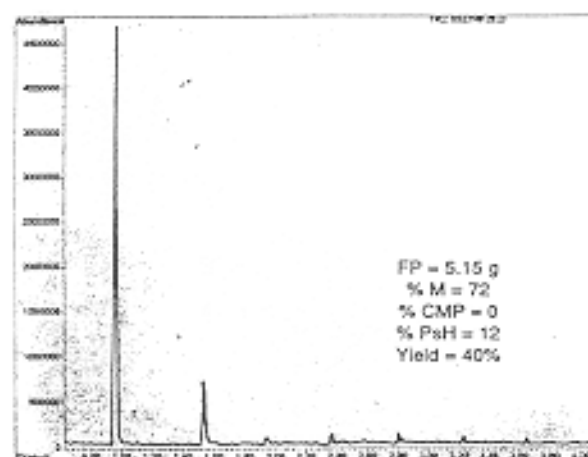


Figure 7. TIC of Recipe D (Batch 24)

Even though there were differences between Recipes C and D in the overall procedure and the amount of anhydrous ammonia, the compositions of the finished products were nearly the same. No detectable amount of CMP was produced with Recipe C or D. This may be due to the combination of the relatively slow addition of lithium metal in a quantity close to the stoichiometric amount and the absence of tablet excipients (see Part IV A).

D. Recipe E (Minimal Ammonia/ Camping Fuel)

Experimental Procedure

The precursor for this synthesis was 336 red tablets with the marking "L432" (30 mg), which is equivalent to 10 grams of pseudoephedrine HCl. After being crushed, the tablets were placed in a 2-liter beaker. Sufficient anhydrous ammonia to cover the powder (~200 ml) was added, and the mixture was stirred. One strip of lithium (0.8 g) from a battery was added, and the mixture was stirred for 10 minutes. Camping fuel (400 ml) was added and the mixture was stirred. The mixture was allowed to come to room temperature, subsequent to the evaporation of the ammonia, and was then filtered. The methamphetamine was recovered as described in Part I.

Results

The results of Recipe E are shown in Figure 8. The yield was lower than the standard batch. The purity of the finished product was comparable to that of the standard batch, however, the amount recovered was lower. The results were similar to the other batch where 200 ml of ammonia was used (Batch 4) as shown in Table 4.

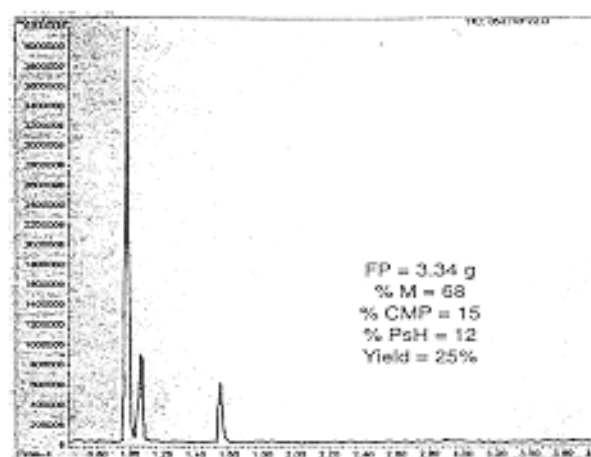


Figure 8. TIC of Recipe E (Batch 20)

III. Reproducibility

To determine reproducibility, the same conditions used in Batch 7 were repeated three times using Recipe A. This included the following: crushed tablets having the equivalent of 10 grams of PsH, 2.5 g Li wire, 400 ml anhydrous ammonia and 700 ml diethyl ether. Crushed tablets were used as the precursor to save costs and to more closely approximate actual clandestine laboratory conditions. No two batches were done on the same day.

Results

The results are shown in Table 5. There was no significant difference between the four batches in yield. Three of the four had similar purity.

Table 5. Reproducibility of Manufacture

Batch	FP, g	% M	%CMP	% PsH	Yield
7	5.13	30	47	18	17%
15	4.57	42	55	0	21%
16	5.99	37	56	0	24%
18	5.01	39	59	0	21%

The similarity in the TIC for the four batches is shown in Figure 9B. The notable observation is that in each case the %CMP is higher than the percentage of methamphetamine.

IV. Other Findings

A. Presence of Tablet Excipients

As a result of this study, it was observed that in six batches, the presence of tablet excipients in the reaction vessel led to a significant amount of CMP (see Figure 9B). In most of the syntheses using PsH either from the reagent bottle or extracted from tablets, a relatively small amount of CMP was produced as represented by six of these batches in Figure 9A. Similarly when tablet excipients were present, the yields and purities were lower than with pure or extracted precursor (see Figures 10 and 11). The exception to this tendency was found in Batch 20 (Figure 8). In Batch 20 where tablet excipients were present, the amount of CMP was one-fifth that of methamphetamine, however, the yield (25%) was comparable to the other five.

B. Weight of Waste Solid

The amount of waste solid from the reaction for those batches without tablet excipients and using 2.5 grams Li or greater was approximately 20 grams (18.3 to 25.5 g). The amount of waste solid from the reaction for those batches with approximately 45 grams of tablet excipients (336, 30 mg tablets) was ~60 grams (55 to 65 g). In the instance where 167 60-mg tablets were used, 41 grams of waste solid were produced. Three sets of conditions led to small amounts of waste solid: less than 1 gram of Li wire, Recipe D and Recipe D with 1500 ml ammonia instead of 600 ml (Batch 21). Therefore, the weight of the finished product can not be estimated from the weight of the waste solid found in filters at the site.

It was found that mixing 1 gram of Li wire with 400 ml of anhydrous ammonia and allowing the ammonia to evaporate led to 4.74 grams of solid. It can be postulated that the primary constituent of the solid is LiOH from the reaction with moisture in the air or from the pseudoephedrine molecule itself. This is supported by the chemical and physical properties of this solid as compared to that of pure LiOH.

If all of the lithium becomes LiOH, that would account for 8.6 grams in all batches using 2.5 grams

of the metal. Therefore, there are approximately 10 - 12 grams of unknown substances in the waste solid in those batches. In the batches where tablet excipients were not removed, the 60 grams of waste solid is comprised of 45 grams of excipients and approximately 15 grams of LiOH and unknown substances. It can be theorized that in the 4 - 5 hours while the ammonia is vaporizing, various interactions with the atmosphere may occur, leading to alkaline and neutral salts. There is also the puzzling disappearance of nearly 50% of the phenethylamine moiety during the procedure. Standard extractions of the waste solid do not recover this quantity of phenethylamines of any kind.

V. Observations

A variety of proportions of methamphetamine, CMP and pseudoephedrine in the finished product were produced in this study, but not as wide as that observed in case samples from clandestine laboratories in Iowa. Correlations between what "recipes" may have been employed at the scene to "recipes" in this study were found. For example, laboratories that were soaking tablets in ethanol had finished products similar to that in Batch 10 and laboratories that were using crushed red tablets had finished products like in Batches 12 and 16.

The general properties of anhydrous ammonia in an open container were observed. The average person does not have much experience with this liquid. The 400 milliliters of ammonia used in the standard batch and its variations (pure or relatively pure precursor) completely vaporized in 4 - 5 hours at an ambient temperature of 68°F. Those variations of the standard batch with tablet excipients required less time for the vaporization. Any container containing anhydrous ammonia that is not insulated will develop thick frost on the outside. The amount of ammonia fumes rising from the reaction mixture while there is thick frost is less than at other times in the procedure.

In contrast, it was observed that when anhydrous ammonia and an organic solvent are mixed, as in Recipe D, there is a distinctive appearance of the mixture as the ammonia vaporizes. The appearance is similar to carbon dioxide effervescing from a carbonated beverage. The recognition of this distinctive phenomenon can aid the investigator or chemist at the scene in the proper handling and sampling of the item.

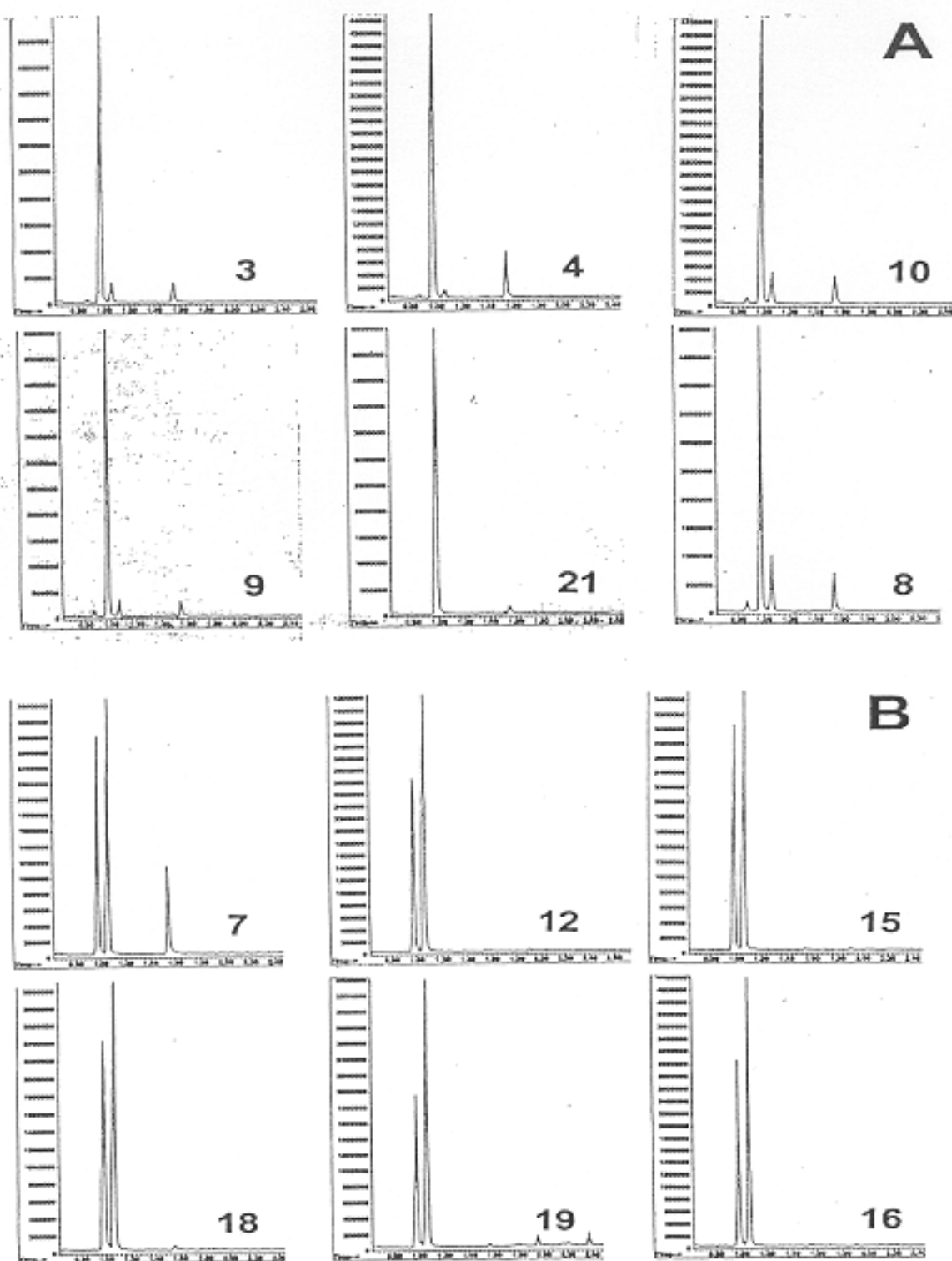


Figure 9. TIC of batches (9A) without tablet excipients and (9B) with tablet excipients

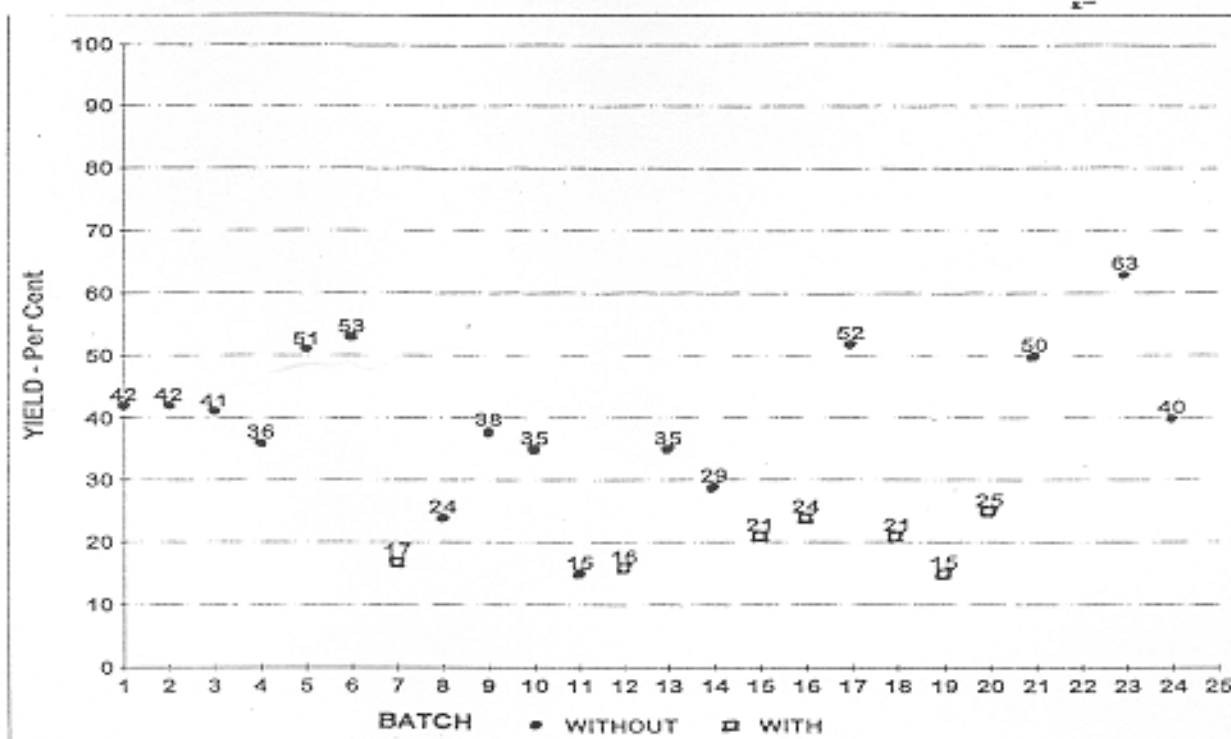


Figure 10. Yield With or Without Tablet Excipients in Precursor

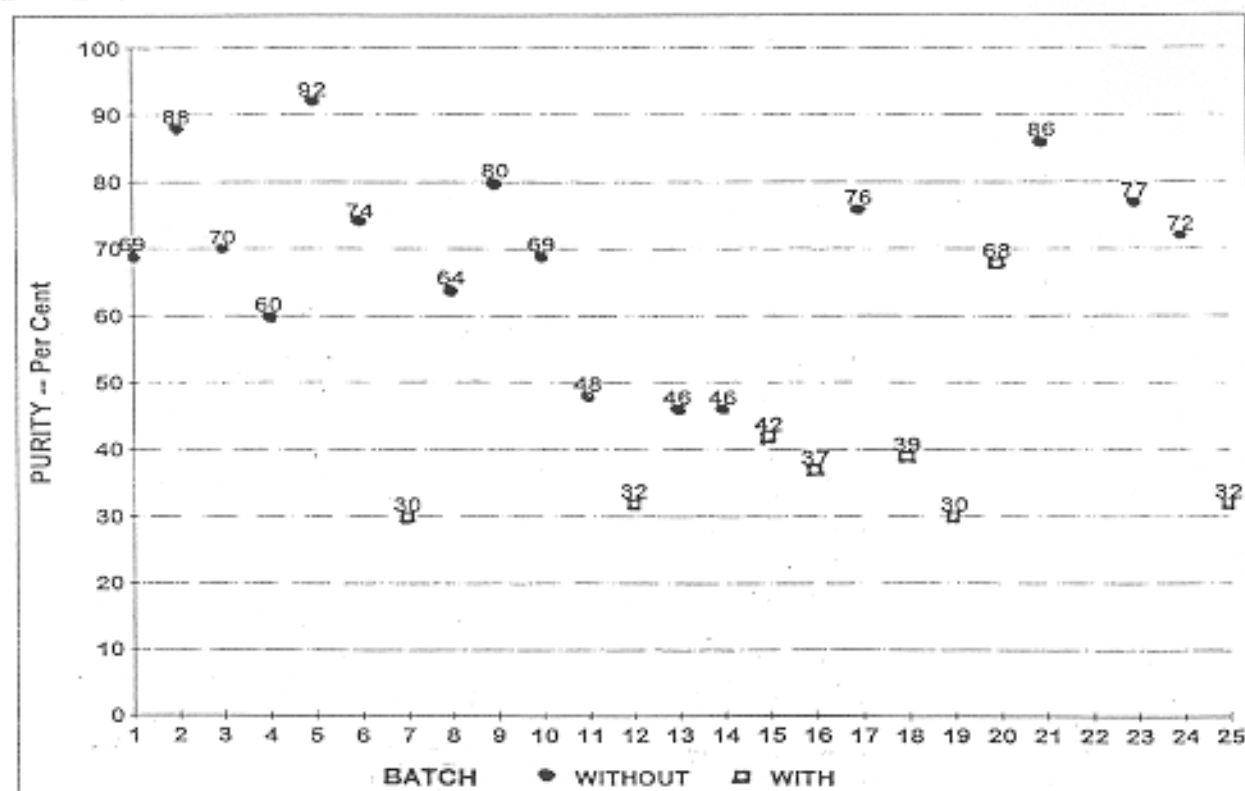


Figure 11. Purity of Finished Products With and Without Tablet Excipients in Precursor

VI. Conclusions

Yield

The range of yields for the various "recipes" and experimental conditions used in this study is shown in Figure 10. Based on this data, it is not likely that an operator would achieve a yield of 80% or higher in a typical clandestine laboratory. In the average situation where the exact procedure followed at a site is not known, a range of 40 - 50% yield of methamphetamine hydrochloride is a reasonable estimation. For those operations producing finished products similar to those in Figure 9B, the yield is more likely to be in the 15 - 30% range, due to the large amount of CMP produced.

Purity

The range of purities of the finished products in the various batches in this study is shown in Figure 11. A wide range was obtained, much like that observed in case samples. Factors that seem to lower purity include (1) impure precursor, (2) large surface area in reaction vessel, and (3) a departure up or down from the stoichiometric amount of lithium needed for complete conversion.

"Recipe" from Finished Product

In general, the exact version ("recipe") of the lithium-ammonia reduction method being employed at the clandestine laboratory can not be determined from the analysis of the finished product.

In the cases where operations are producing finished products similar to those in Figure 9B, it is likely that similar parameters were used as those in Batches 12 or 16. A large amount of CMP can be produced, however, with other experimental conditions as found in Batch 11 (shallow reaction vessel, Figure 4) and Batch 14 (ethanol-dampened precursor, Table 1).

In these two batches a large amount of CMP was also produced, although less than methamphetamine, even though no tablet excipients were present.

Whether the solvent was added before or after the ammonia had evaporated can not be determined from the analysis of the finished product. In the four batches where the solvent was added after 10 minutes of reaction time (Batches 19, 20, 21 and 24), the yields ranged from 15 - 40% and the purities ranged from 30 - 86% (see Figures 10 and 11).

Weight of the Finished Product

A wide range of weights of finished product was obtained in this study. The weights were much lower than might be expected and ranged from 2.95 grams in Batch 11 (shallow reaction vessel) to 7.07 grams in Batch 13 (Recipe A, 0.7 g of Li wire). Most were in the range of 4 - 6 grams. A lower than average weight was also produced with excess lithium (Batch 13) and using Recipe E (Part II D). In general, the amount of the precursor used for a given batch can not be estimated based on the weight of the finished product. Further, no correlation was found between the weight of the finished product and its purity.

Acknowledgments

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**LEAVING JURORS WITH A GOOD TASTE
IN THEIR MOUTHS**

CLOSINGS TO REMEMBER

2001 New Approaches for the Millennium
Williamsburg, Virginia
May 17 - 19, 2001

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CLOSING ARGUMENT

A defense lawyer's role in defending a citizen begins long before he or she ever steps foot in any courtroom, and often, unfortunately for the party-at-interest, continues long after the verdict has been rendered. However, nowhere in this process is the advocate's skill and talent so singularly on display as during the defense summation to the jury. Trial *is* theater, and closing argument of counsel is the advocate's consummate role. What follows is a brief catalogue of what my thirty years of practice have seen work in defense of the citizen accused.

WHAT LAUDABLE PRINCIPLES WILL A *NOT GUILTY* VERDICT VINDICATE?

You must convince jurors that they can go home to their spouses, their significant others, their friends and be proud of the verdict they have rendered.

The prosecutor will often argue, and all jurors intuit, that a guilty verdict will be seen as a positive step. It is generally perceived as having the salutary effect of removing a criminal from our streets, of making us feel safe in our homes, of making jurors feel they have done a public service.

For most, a not guilty verdict poses the more troublesome image of setting another criminal free to prey upon innocent citizens. It is difficult for many to see anything positive from such an act. You must give your jurors some reason to believe they can go home with their heads held up. You must imbue them with a sense that in *this case on this day* a "not guilty" verdict as to *this citizen* will be a positive step for good; that it will expose government abuse, overreaching or corruption; that it will right an unjust accusation or suspicion; that it will redress inept, unjustified or unsavory investigative or trial practices. You must be able to convince

jurors that they can go home and look their family in the eye or themselves in the mirror and say "I've done right!"

Jurors wield an awesome power. And with that power comes responsibility. Tomorrow, after all is said and done, the lawyers and the judge will move on to another case. The jurors will go home; but their decision will stand, and will forever have changed the life of the fellow citizen whose fate they have decided.

CANDOR, HONESTY AND FAIRNESS

Jurors will respect candor and frankness. Often, when everyone else is oozing with concern that "all we want is for you to be fair-minded jurors," counsel may want to insert a reality check:

"Quite frankly, I am not looking for fair jurors. First and foremost, I want jurors who will be able to see our side of this case. Juror's who will identify with my citizen, sitting here today."

This may be a good introduction to the difference between high sounding platitudes and what we all know to be human nature.

KNOW YOUR PLACE

This paper will not deal with wardrobe or health habits. Not because I have not conformed to the rules and/or superstitions such as wearing "sincere blue" for closing, but because I have watched compelling arguments come from advocates adorned with everything from ponytails to sued leather jackets with fringe. The point is that while substance, style and

presentation are paramount, you must develop your own. What works for Tony Serra or Jerry Spence, may not fit Albert Krieger. Be yourself.

Self-deprecation can be appropriate. I find it gives *me* some comfort to denigrate the lawyer's role in an effort to ease the tension inevitably created by some graphic confrontation between counsel and the court, the prosecution or some witness during the trial.

"I know that I may have seemed at times overly zealous. I told you at the outset that I consider it my job to do everything humanly possible to vigorously defend [my client] and his or her rights in every legal and ethical way possible. I am sure that is what you would want if you or someone you loved found yourself in [my client's] shoes. You may have noticed that on occasion I may have offended this prosecutor or our nice judge. If in my zeal I may have seemed to go too far; if for some reason I may have offended *you* in some way during this trial; then please, hold that against me after this trial is over, but don't hold that against [my client]."

PROBLEM SOLVING

Often, you will need to deal with a juror's natural tendency to feel that a "not guilty" verdict fails to solve the problem at hand. Generally, folks want their efforts to be meaningful. In some cases, you will need to counter a juror's sense that a "not guilty" verdict would be tantamount to a failure to resolve the problem at hand. There may be a need to answer, were possible, the nagging question: "if your client did not commit this reprehensible offense, then who did?"

DON'T TAKE ON MORE THAN IS NECESSARY

If you do not need to dispute a particular point to obtain a favorable verdict, then do not take it on. Common sense tells us that we do not need to contradict everything that a prosecution

witness says, and often the skill demonstrated in closing argument is how deftly counsel can distill the contradictions down to those salient issues that matter to his or her case. On the other hand, it is likewise true that it is often impossible to demonstrate the falsity of critical portions of a prosecution witness' testimony, even though we may be able to demonstrate conclusively that some other portion of their story is false or totally implausible.

BRING HOME CONTRADICTIONS IN PROSECUTION'S CASE

From Edward Bennett Williams's closing in his defense of Secretary of State (and former Texas Governor) John Connally, when expounding upon the contradiction in Government snitch, Jake Jacobson's "story:"

"What I have to say about...this third version of Mr. Jacobson's story, it is **like the old grandfather's clock that strikes *thirteen*. It calls into question all that has come before.**"

Tennessee Williams' lexicon brings us another word for liar. Edward Bennet Williams used this turn of phrase to describe a witness' propensity to lie:

"Have you ever witnessed such **mendacity**."

WHY WOULD THESE PROSECUTION WITNESSES BE TELLING THIS STORY?

The two questions you must answer in your closing are:

1. **Why would they be telling such a story, if it were not the truth? and**
2. **Why would they pick my client, out of the universe of people out there, to be saying such a things about him or her?**

EMPHASIZE WITNESS' MOTIVE FOR TELLING THIS STORY

Another masterful turn of phrase from William's close in the Connally case was his description of Jacobson's fear of prosecution for embezzling:

"He feared, members of the jury, the charge of embezzling his client's funds. He feared that with a passion. **And, so a case that was conceived in greed, was born in lies.**"

HOW CAN THEY CALL THIS SYSTEM FAIR?

Often the harder sell is to suggest a reason why the witness or witnesses would be saying such terrible things about the citizen you represent. Under the Federal Sentencing Guidelines, many witnesses are testifying in the hope of obtaining a reduction in their Guideline or Minimum Mandatory sentence, either under §5K1.1 or Rule 35 of the Federal Rules of Criminal Procedure [which as well provides for a prosecutor to seek a reduction in one's sentence, where they provide assistance *after* they have been sentenced].

"These days the government purchases the 'truth' from most cooperating witness, by paying them often large sums of cash, and by giving them something more valuable than lucre, their liberty. You can emphasize that under §5K1.1, it is not enough for such a thing to be 'true.' It is not enough even that the witness truly provides the prosecution with 'substantial assistance.' No, the witness must satisfy the whim of this particular prosecutor, because the decision of whether or not to file a 5K1.1 motion for downward departure is in his or her sole discretion. Neither his or her lawyer, I nor this Judge have any power to make them file such a motion. That is an awesome power.

The danger, gentlepersons of this jury, lies in the fact that under our current law, only one side of this dispute is allowed to pay for their testimony; only one side is permitted to purchase the 'truth.' How can we call an adversary system fair that allows only one side to buy testimony. What do you think they would do to you or to me, ladies and gentlemen of the jury, if you or I were to pay a witness, ten cents], much less thousands of dollars, for the truth that assisted a citizen like [my

client? What do you think they would do to you or me, ladies and gentlemen of the jury if we promised a witness that we could get charges dropped or a judge to sentence them below the minimum mandatory sentence imposed by Congress if only their 'truth' would help out a citizen, like [my client].

Imagine the message such a one-sided law sends to those serving lengthy sentences in federal prisons across this land. Do those convicted felons learn that some 'truth' they may hold, a 'truth' that might assist a fellow citizen might in turn assist them in obtaining a reduction in *their* punishment. No, to the contrary, they learn providing assistance to the citizen will not do anything other than create additional problems for them. For it is *only* if their 'truth' assists the prosecution, *only* if their 'truth' meets with the prosecution's theory of what happened that our system will reward what they come to you and say. What do you think that does to these respective parties ability to gather evidence, testimony and witnesses to support their view.

Some day, some place good people will look back on us and wonder: 'How could you call such a system fair?'

In a case tried long before the advent of the Federal Sentencing Guidelines, able lawyer Edward Bennett Williams brought home the dangers inherent in prosecution purchased testimony, contrasting the distinction between "truth" and "testimony" as follows:

"I want to say to you just two last things.

You know, I think in life you can bargain for and buy almost everything. You can bargain for and buy mansions and villas and priceless works of art. You can bargain for and buy fine jewelry and all the creature comforts that you can conjure up in your mind.

But thank God there are some things you can't buy and you can't bargain for. You can't buy and you can't bargain for justice, because if you do, it's injustice. You can't buy or bargain for love, because if you do, it isn't love that you get. And you can't buy or bargain for truth, because it isn't truth that you get, it's the truth with a cloud of suspicion over it.

You can buy and bargain for testimony, and that is what the prosecution did in this case, and that is why their case is in the state it is in at the present time.

This case is styled United States...against John Connally, but I want to tell you

something. The United States will win this case.

I saw one day on the wall of a courthouse, the oldest courthouse in England, the words, 'In this hallowed place of justice the Crown never loses because when the liberty of an Englishman is preserved against false witness, the Crown wins.'

After tramping for thirty years across this country in federal courthouses all over the land, I tell you the United States never loses because when the liberty and reputation of one of its citizens are preserved against false witness, the United States wins, the United States wins the day."

TESTIFYING FOR YOUR CLIENT

A number of years ago I watched fabled Texas trial lawyer, Warren Burnett defend Delia Gonzales, a South Texas lawyer indicted for inducing illegal immigration. Delia was in practice with her husband and it was apparent to everyone familiar with the case that Delia would have to testify in her own behalf if she expected to avoid conviction. Because of her unfortunate familiarity with similar problems in the past, lawyer Burnett chose not to put his client on the stand. Instead Burnett successfully incorporated the following almost allegorical attorney-client conversation into his closing argument in order to give his client a voice and highlight the ludicrousness of the prosecution's charges:

"Come with me. Be with me as a lawyer.

'What have you done, Delia?' 'I have been doing a lot of immigration work there in the office.'

'What do you mean, a lot of immigration work? I know nothing of it.' 'Well, there was a new law passed in 1977, took effect the 1st of the year, and under it for the first time we recognized really the broken families in this hemisphere, and for the first time sons, daughters, husband, wives, brothers, sisters are given a preference about getting together and a right to get together and live in this great nation.'

'Well, my God, Delia, what did you do? What was your part? What is it they claim is your crime?' 'They claim that I induced them illegally?'

'Induced?'

How could anyone of us induce someone? How can you persuade or encourage a husband to join a beloved wife?

How can you persuade a father to want to live with his child?

How do you persuade a son to want to be with his father?

'What have you done, woman?'

Do you understand that these men accused this woman of inducing children to want to be with their parents?

Do you understand that in this Court and before these people that this woman is accused in certain counts in this indictment of inducing a husband to want to live with his wife?

In other counts, of inducing a wife to want to live with a husband?

So with me when the story was told to me. I said, 'Delia, what is the law? What were you telling those people? I was telling them what anyone would tell them that knows anything about the law.' 'Well, what is it, for God's sake, tell me. I don't know, I never practiced immigration law, tell me.' 'Well, under the new law if the alien father, son, brother, sister, husband, wife crosses the border on the MICA -- 'What is a MICA?' '-- a document that permits them to cross and remain for 72 hours and go no farther into the interior than 25 miles.' 'All right. 'They cross on the MICA and then I file the I-130 for them.' 'What's the I-130?' 'It is a petition to have the government recognize that the wife is the wife, that the husband is the husband, that the son is the son and that the daughter is the daughter, and when I file that they are permitted to remain in the United States of America to travel where they wish to, work if they want to, and they all do, pending the adjudication of that petition.' 'Who adjudicates it?' 'Immigration adjudicates it.'

And I am told, months ago, that this case that I am going to end up trying. This is the case that I am going to end up defending."

USE OF TRILOGIES

Most world-class orators understand the importance of rhythm and cadence in creating memorable argument. Most also intuit the place that repeating or turning a phrase on three separate occasions has in enhancing the symmetry of their message. It is not that saying something once or twice cannot suffice, often once *is* enough. However, one has a hard time escaping the magnetism of Dr. Martin Luther King's use of the trilogy in his famed "I HAVE A DREAM" speech. I can still see the verbal imagery of all God's little creatures uniting. Notice above how on three separate, successive occasions Burnett turns the phrase "**How can you induce** a mother to want to be with her child?" And notice Burnett's variation of that trilogy theme in the following portion of his closing in that same case:

"When this case began it was in some way suggested to you that this woman was getting rich out of what she was doing, that she was charging some sort of an exorbitant fee.

You now know that to be false.

It was suggested to you that in some way because there had been advertising in a newspaper in Mexico, that that was in some way a violation of the law or behavior that was un-American.

You now know that to be false.

At the beginning of the trial it was suggested to you that these aliens were committing a crime, that is to say, that they were violating the criminal laws of the United States of America when they crossed the bridge with MICAs and filed the applications with this woman.

You now know that to be false.

It was suggested to you at the beginning of this trial that there was something wrong with a woman working in a law office, in this case for her husband, to do all the work on these cases.

We now know that that is false."

SYMPATHY FOR AND IDENTITY WITH YOUR CLIENT

THE "SCAPEGOAT" THEME

A common theme is to analogize your client to some historical or biblical character who was accused in order to justify official action or deflect blame on some more culpable person.

"Now, always, in all times of the history of America and, for that matter, other nations, other parts of the world, the bureaucracy, whether it be the bureaucracy of the king, the bureaucracy of the queen, the bureaucracy of the chief, of the dictator or of what we still call the democracy – it has always spoken to it's people through scapegoats.

Before the Germans could do as they would with the Jews, they prosecuted a handful in Court.

MR. BENNETT: Your Honor, I am going to object to that statement. There's nothing in the record anywhere approaching the analogy of that statement. For that reason, I ask the Court to instruct the jury that the remarks of counsel are not evidence and not to be considered as evidence.

MR. BURNETT: May I be heard, Your Honor?

THE COURT: Yes.

MR. BURNETT: There's no better piece of history known, and if the time should come, when an advocate cannot analogize on history, otherwise then of course, the role of the advocate would be meaningless.

THE COURT: Objection overruled.

MR. BURNETT: They tried a few in Court.... The king would find a scapegoat or two, and I am sad to say that this country, going into it a third century, cannot escape the fact, and we should not run from the notion that us, too, have been spoken to by our government through the use of the scapegoat.

We are not as a people that far advanced, but what out of the whole United States of America there happens to be only one indictment against a lawyer for declaring the law... You have a right to wonder from the evidence in this case, you have a

right to speculate about that fact...

Now, I will not be permitted to answer any of the things Mr. Beck will have to say.

People who have helped the poor are not strangers to the iron bars ...rope ...stake ...fire ...or even the cross, and they have always had plenty of defenders long after the act. And it's true. Look back in history of this country: The scapegoats have had the great defenders a generation or two later, but at the time of the injustice they had the "they" people.

Now, it is not going to do any good for you to defend Delia Gonzalez in five years or in ten years when finally they get around to the scandals coming out in the newspapers and find out what was really going on in the Immigration Service. You're seeing the tip of it. She needs to be defended now. The law defends her. If you execute it and carry it out, she will be defended."

As you can see from my closing in the "Brilab" prosecution of my fellow lawschool classmate, Randall "Buck" Wood (*See*: transcript following this paper), I stole Burnett's "scapegoat" theme, arguing for jurors to abide by their sincerely held concerns that the prosecution had not met their burden:

"I'm not going to pretend to defend the State of Texas, and I'm not going to pretend to defend the legislature. But I have never had a prouder day in my life than to stand here and ask you to return Buck Wood to the side of his fellow lawyers like myself who know him well. There have always been scapegoats from biblical times to the present, and there have always been their defenders the morning after. If you have a doubt in your heart, tomorrow morning at breakfast will be too late. Abide by it."

ANTICIPATING THE PROSECUTOR'S REBUTTAL

Different lawyers and different facts may call for different approaches, but generally one needs to deal with the fact that after defense counsel retakes his or her seat, the prosecution will again have an opportunity to speak to the jury, an argument that, except in rare circumstances

will go unanswered. A common approach is the following:

"Psychologists tell us that people find most believable those they hear from first, as well as those they hear from last. A sort of "FIFO" (or first in/first out) credibility gauge. Under our system, and because they have this heavy burden to prove their case beyond a reasonable doubt, the prosecutor over here gets to go first and last. We are sort of sandwiched in between.

So my client is going to have to rely upon you, when you go back to the jury room to deliberate, to respond as best you can to the arguments he or she is going to be making next. I will not be permitted to do so."

In Delia Gonzalez' defense Warren Burnette returned to the "scapegoat" theme in addressing the issue of rebutting the prosecutor's closing argument as follows:

Now, Bock is going to make you a speech. It will be what we call a steamwinder. That's his purpose in the case.

Now, let me tell you, up in Salem every time they convicted a witch and every time they burned one, there was somebody making it easy for them to do it. That was the man that made the speech. That was the man that made the closing speech. That was the man who came along and did the hatchet job and who aroused you.

Oh, you see it's always been known,... the Old Testament is full of it and they are still writing about it as though there's something new about it in the psychology textbooks of the day, but if ...if I want to bring out the worst that is in you towards your fellowman or woman, then I need to isolate that person. I need to get them apart. I need to get them to be something a little bit away from you, really need to get your attention sort of off of them, but I need, I need to get you separated.

Delia is not on the jury. She can't be in the jury room with you. That's the system we have. Maybe it won't always be that way, maybe there will come a time, a blessed time when you are all together when the judgments are made, but you owe her the obligation while you deliberate of thinking of her as a wife, the mother and the warm, human being that this evidence shows her to be and you owe her the obligation of saying that 'I will see no citizen branded a felon based upon the whooping and hollering of an ambitious prosecutor who will be somewhere else next week in court making the same speech.'

HOW CAN I FACE MY FAMILY?

As I suggested at the outset, a typical juror faces the prospect of returning home and having to explain to his or her spouse why they have acquitted someone charged with a criminal offense. What follows was Warren Burnett's explanation to the jury in Delia Gonzales' trial:

"Your lives have now touched that process and they are never going to be the same.

You are 'they'.

Now, let's just say that it's two weeks or a month from now and you have returned to your everyday lives, secure with your family, and some neighbor says, 'I heard you were up down in federal court, what kind of a case was it? Do you want to talk about it?' 'Yes. I will talk to you about it. They had a woman on trial, wife of a lawyer, worked in his office in Del Rio.' 'What did she do?' 'They claimed that she induced aliens to come into the United States.'

How in anybody's name can you induce an alien?

'Well, it was worse than that. They claimed that she was inducing wives to want to be with husbands, fathers with children.'

'Good Lord?'"

DEFINITION OF REASONABLE DOUBT "SUCH A DOUBT AS WOULD CAUSE YOU TO HESITATE"

One of the few things a defense lawyer has going for him or her during closing argument is the typical definition of "reasonable doubt" in federal criminal trials. The standard pattern jury charge is as follows:

"A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs." See: Fifth Circuit Pattern Jury Charges; *U.S. v. Alonzo*, 681

F.2d 997 (5th Cir. 1982), *cert. Denied*, 459 U.S. 1021 (1982).

Typically, defense counsel can forcefully argue such an instruction with respect to a discredited cooperating witnesses:

"I believe that His Honor will instruct you that a 'reasonable doubt' is such a doubt as would cause you to hesitate in matters of utmost importance to you or your loved ones. In our daily lives we all have to rely on the representations of others in all sorts of matters, from buying encyclopedias to used cars. If you wouldn't hesitate before acting on the advice of the likes of [the prosecution witness] in matters of utmost import in your life or the life of a loved one, then my client never had a chance when he walked into this courtroom."

After detailing all of the discrepancies and shortcomings of the prosecutions case against "Buck" Wood in the "Brilab" prosecution, I utilized this instruction in closing for the defense:

"I believe the court will instruct you that the definition of reasonable doubt is that it is such a doubt that would cause you to hesitate in matters of utmost importance in your life or in the life of your loved ones. I can only tell you that when you go back into that jury room and search in the place within you where you make those tough decisions about matters of importance to yourself or to your loved ones, that if that, if all of this doesn't create a reasonable doubt, Buck Wood never had a chance when he walked into this courtroom. If that doesn't cause you to hesitate before you would act in matters of utmost importance to yourself or your loved ones, Buck Wood never had a chance when he came in these doors. And that's all we ask is a chance for him to return to his family and to return to the side of his lawyers on this side of the bar."

GOVERNMENTS DO NOT HAVE "FRIENDS"

Craig Washington, the former U.S. Congressman from Houston, who defended the Speaker of the Texas House in the "Brilab" prosecution, masterfully juxtaposed the delicate tact, cordiality and politeness of your average Texas politician to the cold amorphous legal fiction affectionately referred to as our "government," arguing that:

"Maybe the government can't understand how it is that a man like [the Texas Speaker] could have \$5,000 passed to him and not want to embarrass that person. **Maybe the government has never had a friend.** If you have had a friend, then you can understand how you could be finessed into a situation the [the Texas Speaker] was finessed into. Being polite is not a crime yet in Texas. You don't have to be rude to your constituents to demonstrate you do not want to break the law."

THIS CITIZEN HAS ALREADY BEEN PUNISHED ENOUGH A "NOT-GUILTY" VERDICT DOES NOT CURE EVERYTHING

Continuing, lawyer Washington pointed out the stigma which attaches to an indictment for serious federal charges, particularly for an ambitious politician, with his eye on the Governor's Mansion:

"You know and I know that [the Texas Speaker] will never be Governor of this State because the most that he will ever get from all that he has been through is a not guilty verdict. There is a difference between not guilty and never having been charged, and for the rest of his life he will have to go around and try to explain to people that didn't hear your verdict – because you can be sure that it won't be played in the newspapers, in the media, for as many days running as was the charge that has been leveled against him."

TAPE RECORDED "STING" OPERATION

In the typical federal "sting" operation, a "converted" crook is wired and sent out to try to entice his family, friends and former associates to say something incriminating on his rolling recording device. The scenario usually involves a hustler-type, who knows he is recording an unwitting "victim." Often, the government "snitch" will promptly interrupt when his prey attempt to make some self-serving, exculpatory statement and will invariably recycle their sales pitch repeatedly until the target grunts an unsuspecting "Uh, huh," which appears on the printed

text of the transcript as an affirmative assent or agreement, rather than the mere punctuation intended to politely get this offensive salesman off their back. Similarly, those working the "pro-active investigative team" often have their own discussions, outside the presence and hearing of their targeted citizens. In "Brilab" we argued that there were in fact two movies playing on the government's tape recordings. One involving the "insiders," the cop-shop and "cooperating individuals" who would describe their activities in the clear language of "crime speak." Whereas whenever our clients, the "outsiders" were present or entered the room, the language would quickly be cleaned up, so as not to give notice of any criminal intent. Words like "bribery" were the vocabulary of the "insiders." When the "outsiders" were privy to their discussions, the government operatives were careful to describe the payments as "political contributions," which were legal under Texas law.

"There is something else that flows throughout this. That is what we talked about at the outset of this case, the insiders and outsiders. Throughout the tapes there is constant banter back and forth between L.G. Moore and Hauser. Is it all right to talk on this phone? Can we talk here? Is it cool to talk around all these people? If you will notice, there is never once not one instance where some of that kind of inside or outsider talk is mentioned in front of Buck Wood and Don Ray. You don't hear any, "is it all right to talk on this phone? Is it all right to say something in front of these folks?" As a matter of fact, Buck Wood and Don Ray are never present at any of the meetings on the 19th of October or the 8th of November with the speaker.

After the second meeting with the speaker on November 8, Joseph Hauser comes back to the motel room to meet with other insiders, the folks that are always talking about is it cool to talk on these phones? Can we talk in front of these people? And what you got here, you got an acknowledgment, Joseph Hauser saying, "Wood and Ray have no idea what the speaker is about, with all due respect for Wood and Ray. Didn't I tell you about that yesterday?" Absolutely. By the way, this is October 19. Do you remember when yesterday was? October 18, the day the tape ran out.

I don't remember hearing this conversation. That was another time when Mr. Hauser told us from the witness stand nothing happened after that tape ran out. I

will suggest to you something happened. They talked about Buck and Don not knowing about what was going on, like they did again on October 19.

"Absolutely. Absolutely. I've got news for you Woods and Ray are sharp, but they don't have a handle on this." That's correct. They don't have a handle on it, and they never did have a handle on it.

The statement that was made on November 8 by Joseph Hauser when the individuals met, the insiders, Wacks, Montague, Hauser, and L.G., Hauser gives a little warning. "Okay. Wood and Ray are coming. If there is anything you want to talk about or discuss before they come, let's do it now." A little insider talk. We can talk among ourselves. L.G., Hauser, Wacks, Montague, the insiders. What are they talking about? They are talking about the meeting on November 8 with the speaker. They embellish a little bit. They don't talk about a \$5,000 political contribution. They talk about it in cash. They talk about something else other than a \$5,000 political contribution. They talk about \$600,000 per year that they are going to be giving to somebody. Not in one lump sum, but per year. And they talk about fee splitting. That's what the insiders talk about, when they meet with Wacks and Montague who hadn't been at the meeting.

Well, what do they talk to Don and Buck about when they get there? Remember Hauser, in hushed tones, "Wood and Ray are coming. Anything else we need to talk about?" What do they talk about when Buck and Don get there? I can tell you what they don't talk about. I'll tell you what they don't talk about. They don't talk about cash. They don't talk about \$600,000, and they don't talk about fee splitting. What you hear is exactly what Ed Windler told you you should have heard. What you hear is a discussion about Joe Hauser and L.G. Moore.

L.G. says, "Joe, tell them what we did for the retirees, what the bottom line was, a hell of a deal for the retirees and a million dollars cheaper." He compares it to a metropolitan and gives them a little synopsis. That's all about the insurance program. That's what Mr. Windler says you were supposed to talk to them about first.

Then what happened? Well, then - - as a matter of fact, they used the word. First they talked about what a hell of a deal the insurance contract is. A million dollars cheaper. Then a commitment. The speaker says, "all I want to do is save the State of Texas a million dollars. That's all I want to do. I'll get to work on it." A commitment like Ed Windler says there should have been.

Then the transcript gets interesting. Then we wanted to talk to him about a political contribution. What did they do? L.G. says, "we gave him a nice political contribution." Exactly the terms of 3601. That makes it lawful. That's what makes it so confusing. That's what makes it so deceptive.

What does Hauser say? "He'll never report it." Buck Wood chimes in, interrupts, "Ohio, he'll report it. Maybe not in our name, L.G." Well, we made a political contribution and whose name would it be reported in? But he will report it. That makes it lawful, a political contribution made and reported in accordance with the law."

THE "SOFT ENTRAPMENT" ARGUMENT

It is hard enough to satisfy most federal courts that your facts will warrant an entrapment instruction, but it is usually even more difficult to get a jury to believe that the government made your client engage in conduct that most jurors want their fellow jurors to think they find abhorrent. In defending fellow lawyer "Buck" Wood in the "Brilab" case I argued that the recorded language used by FBI agents in their "sting" operation, aimed at the speaker of the Texas House of Representatives, were such as to make a knowledgeable attorney like my client (both FBI agents were forced to admit they had failed their respective states' bar exams) believe they were trying to make a "political contribution," rather than pay an illegal bribe.

These folks from California, Mr. Wacks and Mr. Hauser, never even bothered to read the bribery statute. The statute that's the foundation for many of these charges. They never even bothered to read that statute.

"Yet every single time they speak to my clients, every time they utter the term that has anything to do with the moving force in this whole transaction, what words do they use? The magic word from that statute, "political contribution." Political contribution. Perhaps they were about as careful in reading the law in this case as they were in reading the law for the bar exams.

But there was one person – there was one person who read that statute. Agent Ligarde from Austin, Texas. Had those folks been as careful as he was – too bad he came very late in the proceeding – had they been as careful as he was, they

would have understood that by definition a political contribution that is made and reported in accordance with law cannot be bribery by definition in Texas.

The court will instruct you that political contributions made and reported in accordance with law are not bribes under Texas law. Every time they spoke to my clients about this, they called it a political contribution. Every time they asked my clients a question with regard to it, he responded, 'he will report. The speak will report it.' A reasonable assumption based upon that magic word 'political contribution' that he will report it.

The Court will instruct you, I believe, that if you were convinced that someone had no previous intent to violate the law but they were induced into a course of conduct that the Government claims is illegal but which they reasonably believe that was legal, that under that kind of situation where the Government claims the conduct was illegal and the defendant claims that his activity was lawful, that public policy forbids a conviction. It's entrapment.

Agent Ligarde did read the statute after his interview. He said he felt it was his duty to read the statute. Agent Ligarde asked my client some questions. But he never asked my client a specific question as to whether or not my client knew of a political contribution.

When I talked to Agent Ligarde after that, in the following question, I asked him if he had ever asked Buck Wood and if Buck Wood knew about a political contribution, and if that's the only word that those individuals ever used with my client. That is, a political contribution, that might be an important distinction. That if every time the people talked to my clients they used the word political contribution, it might have been an important distinction to have asked him about it. And Agent Ligarde said in response to that question, 'you're correct.'

Lastly, I discussed with Agent Ligarde what the significance of that was. Agent Ligarde acknowledged what the significance of that was. Agent Ligarde acknowledged that there was a big difference if my client had said that it was a political contribution that he believed would be reported. And if the agent had used political contribution on each occasion when they talked to my client, that would make a big difference. Why? Because under the penal code that would make the difference. That word that they used, that word of art, makes a significant difference.

The prosecution brought in their own expert. Remember Chip Holt? It's a shame they didn't talk to Chip Holt before they put him on the witness stand. We might not be here today. What Chip Holt told the Government was - and I think it very clear even with respect to Buck Wood, who held a job very similar to Chip Holt's in the Secretary of State's Office, was that in response to Mr. Woods' question a

donor, which would have been L.G. or Mr. Hauser or the union or fidelity financial. You couldn't tell from the manner in which they spoke of it. The donor has no obligation to report it. More important, Buck Wood, who is the advisor to the donor, a third party, has no obligation to see that it is reported any more than a donor would have. And most important, that if the third party believed it was a political contribution, was told it was a political contribution, said it would be reported in accordance with the law, he has no obligation to report it. He has no obligation to see that it is reported. And anyone, and that would be in accordance with law, he would be complying with the law, he wouldn't be violating the law. And someone in Buck Wood's position, who had held the position he had, would be aware of that.

From Buck Wood's position, from his eyes, looking through his eyes, they had made it look like a political contribution. That's what they called it. That's what they told him it would be. That's the word they used every time they uttered anything even close to those circumstances."

PROFESSIONAL WITNESSES

Regardless what prospective jurors may profess in their self-serving answers to questions during voir dire, most folks find it an easy credibility choice between the accused citizen and his or her badge-bearing accuser. It is usually important to try and put the police officer's interest and bias on the table and in perspective. For example:

"Sure, [my client] has an interest in this case. For sure, he or she is undoubtedly the most interested party to these proceedings. His very liberty, his very life literally depends on its outcome."

But don't kid yourself, these police officers have an interest in what happens here as well. Their very rank and grade depends upon how well they are perceived to do their job, and that includes not only their work on the streets but their performance in this courtroom, as well. Their testimony here before you is part of their job, they are paid for testifying, just like they are paid for their undercover police work in the field.

And if self-preservation is the first law of the jungle, then trust me, self-justification is the second. We all have a tendency to remember facts in a light most favorable to ourselves, most favorable to our position. In that respect, police

officers really are just like anyone else with an interest in these proceedings.”

“JURY NULLIFICATION” BY ANY OTHER NAME

While arguing jury nullification straight-up will rarely be tolerated by either the prosecutor or the judge, and while a jury instruction is practically unheard of, there is nothing to prevent able counsel from reassuring the jury of its inviolate decision-making role in this process. Counsel would be remiss not to remind the jurors that:

“While His Honor is the Judge of the law, in our system of justice, you twelve citizens are the judges of the facts. And your decision as to the facts of this case, who to believe, what happened and why, is your decision and yours alone to make. No one will ever come and pry into your mind or to ask you to reconsider. You are here for one purpose and one purpose alone, to see that justice is done. Your only concern should be that after all is said and done, you can go home to your family, wake up in the morning, look yourself in the mirror and say to yourself: ‘I’ve done right.’”

THE STORY OF “BUSHELL’S CASE” AN HISTORICAL PERSPECTIVE OF THE RIGHT TO JURY TRIAL

I have found the story of “*Bushell’s Case*” to be a poignant reminder of the courage of those who sit in judgement upon their fellow citizen and the awesome power they have to do right.

“Some time ago I visited “Old Baileys,” which has stood for centuries as the criminal courts building in London, England. You know, the place where Rumpole practiced his art.

There is a cage-like dock in the center of the grand courtroom where the prisoners rise from the bowels of the building to confront their accuser and their fate.

And in "Old Baileys" there is but one plaque which adorns the walls. It commemorates "*Bushell's Case*" from 1670. That plaque is a testament to the courage and endurance of Edward Bushell and eleven other proud jurors who refused to return the verdict that the King awaited. Twelve jurors who withstood two nights without food or drink because they refused to return the verdict that the King awaited.

Bushell and his fellow jurors refused to convict two Quaker preachers who were charged with preaching to an unlawful assembly in violation of the British Conventicle Act, which established the Church of England as the "Official Church."

For their effort these twelve brave souls were fined and imprisoned for nine weeks for refusing to return the verdict that the King awaited. That ancient right of a juror to act according to his or her conscience is expressed in the Magna Carta and dates back to ancient Greece and Rome.

That man, that preacher who those courageous jurors saved was none other than William Penn, who later came to the Americas and founded Pennsylvania and Philadelphia where our Declaration of Independence and Constitution were written. And the rights established in that case, freedom of religion, freedom of speech and the right to peaceably assemble, are now part of the 1st Amendment to our Constitution. As a consequence of these jurors' imprisonment, Edward Bushell filed a writ of habeas corpus. He and the other recalcitrant jurors prevailed in the Court of Common Pleas, and the practice of punishing juries for verdicts unacceptable to the courts was abolished forever.

Jose Perales, who sits here before you today is no William Penn. But like that young Quaker preacher before him, Jose came to these shores to make a better life for himself and his young family.

But the hero of "*Bushell's Case*" was not William Penn. The heroes of that historic case were those twelve earnest people, who like yourselves refused to return the verdict that the King awaited. You ladies and gentlemen, stand in the large shoes of those who came before.

For the jurors in "*Bushell's Case*" were not Quakers. They did not take that courageous stand because they believed in the doctrine William Penn was preaching or because they had some stake in his cause. Those twelve jurors suffered mightily on a matter of principle, not their own but that of a lowly outcast who had gained disfavor with the Crown.

Like the jurors in "*Bushell's Case*," speak your conscience. Reunite Jose with his family and you, in a way you cannot yet understand, will be united with him as

well."

TIME HONORED HISTORICAL ANALOGIES

Courts are loathe to restrict counsel from making literary and historical analogies in closing argument. Take for example Edward Bennett Williams' biblical references, or the reference to the inscription on the wall of "the oldest courthouse in England," set out above. Even more to the point, Warren Burnett analogizing his client, Delia Gonzalez, to the scapegoats of the Nazi Holocaust. One could hardly conjure up a more succinct description of a lawyer's role in closing argument than Burnett's retort to the prosecutor's objection:

"Before the Germans could do as they would with the Jews, they prosecuted a handful in Court.

MR. BENNETT: Your Honor, I am going to object to that statement. There's nothing in the record anywhere approaching the analogy of that statement. For that reason, I ask the Court to instruct the jury that the remarks of counsel are not evidence and not to be considered as evidence.

MR. BURNETT: May I be heard, Your Honor?

THE COURT: Yes.

MR. BURNETT: There's no better piece of history known, and if the time should come, when an advocate cannot analogize on history, otherwise then of course, the role of the advocate would be meaningless.

THE COURT: Objection overruled."

ASK THE JURY TO ARGUE YOUR CASE FOR YOU

When Michael Tigar, a giant among midgets in our profession, argued for the life of

Terry Nichols, convicted in the Oklahoma City bombing trial, Tigar asked his jurors:

"I am done now, ladies and gentlemen of the jury. When I go home tonight my little daughter will ask me, 'what did you do today Daddy?'

I will tell her that I tried to save the life of one of God's creatures. And members of the jury **what will you say when you go home?"**

EXAMPLE OF DEFENSE CLOSING ARGUMENT

"BRILAB"

US v. RANDALL "BUCK" WOOD

No. H-80-74

1 MR. GOLDSTEIN: MAY IT PLEASE THE COURT,
2 LADIES AND GENTLEMEN:

3 I'M NOT GOING TO TALK TO YOU ABOUT
4 JOSEPH HAUSER. I WENT TO WASHINGTON AND TO FLORIDA AND
5 BROUGHT YOU SOME WITNESSES TO SHOW YOU AND TO TELL YOU A
6 LITTLE BIT ABOUT THOUSANDS OF VICTIMS OF JOSEPH HAUSER.
7 I THINK ENOUGH HAS BEEN SAID OF HIS CHARACTER.

8 I WOULD LIKE TO POINT OUT SOMETHING
9 ABOUT THE CHARACTER WITNESSES YOU HAVE HEARD ABOUT BUCK
10 WOOD. YOU HAVE HEARD FROM EVERYONE FROM HIS PREACHER TO
11 JUDGES FROM AUSTIN, FROM BEAUMONT, FROM HOUSTON, THE
12 SPEAKER OF THE TEXAS HOUSE, THE FORMER SPEAKER THAT THE
13 PROSECUTOR SAID WAS THE FATHER OF ALL THESE REFORMS TO
14 JOHN HANNA, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT
15 OF TEXAS, THE CHIEF LAW ENFORCEMENT OFFICER OF THE FEDERAL
16 GOVERNMENT FOR AN ENTIRE DISTRICT OF TEXAS. THEY TOLD
17 YOU, A UNITED STATES ATTORNEY TOLD YOU BUCK WOOD WAS
18 ENTITLED TO BELIEF UNDER OATH IN THIS COURT. EVERYONE,
19 FROM HIS ALLIES TO HIS ENEMIES, EVERYONE AGREED THAT THEY
20 MIGHT NOT AGREE WITH HIM ABOUT EVERYTHING, BUT THEY AGREED
21 AS TO ONE THING: HE HAD IMPECCABLE INTEGRITY. THEY WOULD
22 BELIEVE HIM. AGREE WITH HIM OR NOT.

23 THEY CAN DO A LOT TO US, BUT THIS IS
24 ONE THING THEY CAN'T TAKE FROM US. THAT'S OUR GOOD NAME.
25 THAT'S WHEN YOU GET TO THE BOTTOM LINE, AS MR. HAUSER WAS

1 FOND OF SAYING. THAT'S ALL WE MAY HAVE, AND THE COURT IS
2 GOING TO CHARGE YOU WITH RESPECT TO THOSE CHARACTER
3 WITNESSES THAT EVIDENCE OF CHARACTER ALONE, IF IT RENDERS
4 IT IMPROBABLE THAT SOMEONE COULD COMMIT A BRIBE, EVIDENCE
5 OF CHARACTER ALONE COULD CREATE A REASONABLE DOUBT.

6 BUT WE DON'T NEED TO WORRY ABOUT THAT
7 HERE. I MEAN, EVEN IF THAT WEREN'T TRUE, THERE IS REALLY
8 NO REASON TO BRIBE IN THIS CASE. I'M NOT SURE IF YOU
9 CAUGHT IT DURING THE TESTIMONY, BUT THERE IS NO REASON
10 TO BRIBE IN THIS CASE BECAUSE MR. JOHNSON, THE PERSON THAT
11 THEY WANTED TO TALK TO, MR. JOHNSON WAS ALREADY AGAINST
12 METROPOLITAN. HE WAS ALREADY IN FAVOR OF CHANGING THE PLAN.
13 HE DIDN'T NEED ANY HELP.

14 YOU KNOW, DON'T YOU THINK THAT IF
15 SOMEBODY WANTED TO ENGAGE IN A COURSE OF BRIBERY, THEY
16 WOULD COME BACK TO THOSE FOLKS THAT THEY WERE TRYING TO
17 GET SOME BIG BUCKS FROM AND SAY, THIS JOHNSON IS A TOUGH
18 NUT TO CRACK. WE ARE GOING TO NEED SOME BIG BUCKS.
19 SEND SOME MONEY DOWN HERE.

20 WHAT DID BUCK WOOD AND DON RAY SAY?
21 JOHNSON IS ALREADY ON OUR SIDE. HE'S ALREADY OUTRAGED.
22 HE ALREADY WANTS TO GO ALONG WITH THIS. THAT'S NOT LOGICAL
23 IF IT WERE BRIBERY. THERE WAS NO REASON TO BRIBE BECAUSE
24 ANY POLITICIAN IN TEXAS WITH HIS HEAD SCREWED ON STRAIGHT
25 WOULD BE IN FAVOR OF A PLAN THAT WOULD SAVE THE STATE OF

1 TEXAS AND THE TAX PAYERS A MILLION BUCKS AND INCREASE THE
2 BENEFITS TO RETIREES. WHY WOULD HE NOT?

3 AS A MATTER OF FACT, YOU HEARD THE
4 TESTIMONY. IF SOMEBODY HAD PRESENTED A PLAN LIKE THAT TO
5 A POLITICIAN IN TEXAS AND HE HAD IGNORED THEM OR TURNED
6 THEM DOWN, THEN HE WOULD HAVE BEEN IN TROUBLE. HE COULDN'T
7 AFFORD TO IGNORE IT. YOU DIDN'T NEED TO BRIBE ANYBODY TO
8 BE IN FAVOR OF A PLAN THAT WAS GOING TO SAVE THE STATE OF
9 TEXAS A MILLION BUCKS. ALL YOU NEEDED WAS A DETAILED
10 PROPOSAL.

11 WHAT THE FOLKS FROM PRUDENTIAL, THE
12 FEDERAL GOVERNMENT KEPT PROMISING, A DETAILED PROPOSAL
13 THAT WOULD DEMONSTRATE HOW THEY ARE GOING TO SAVE THE STATE
14 OF TEXAS A MILLION DOLLARS, INCREASE THE BENEFITS, AND
15 WOULD PROMULGATE A PLAN FOR COMPETITIVE BIDDING. THAT'S
16 ALL THEY EVER NEEDED. THAT'S ALL THEY EVER ASKED FOR.

17 ABOUT THAT COMPETITIVE BIDDING,
18 REMEMBER DON RAY'S CONVERSATION? HE TOLD THEM, "IF WE CAN
19 SWING IT, WE CAN GET A PLAN HERE THAT'S GOING TO ALLOW YOU
20 TO LOOK AT EVERYBODY'S BID AND EVERYBODY ELSE TO LOOK AT
21 YOUR BID." IF WE CAN SWING IT. IF SOMEBODY WERE ENGAGING
22 IN A BRIBERY SCHEME, WHY IN THE WORLD WOULD THEY WANT TO
23 SWING A DEAL THAT WOULD ALLOW EVERYBODY TO LOOK AT EVERYBODY
24 ELSE'S BID? THAT IS THE KIND OF CONDUCT THAT DISCOURAGES
25 THIS KIND OF CONDUCT, NOT ENCOURAGES IT.

1 FROM OCTOBER 5, 1979, TO JANUARY 8,
2 1980, BUCK WOOD AND DON RAY MADE OVER 40 SEPARATE REQUESTS
3 OF THOSE INDIVIDUALS FOR A DETAILED PROPOSAL SO THAT THEY
4 COULD TAKE THE BOARD MEMBERS A PROPOSAL THAT WOULD
5 DEMONSTRATE TO THEM WHY IT WAS THAT PRUDENTIAL WOULD BE
6 ABLE TO DELIVER ONCE THE BIDS WERE REOPENED. THAT'S ALL
7 BUCK WOOD AND DON RAY NEEDED; THAT'S ALL THEY EVER ASKED
8 FOR.

9 THE OCTOBER 2 MEETING -- THAT WAS THE
10 MEETING IN MY CLIENT'S OFFICE IN AUSTIN. IF YOU RECALL,
11 THERE WAS SOME DISCUSSION ABOUT WHO BROUGHT UP THE
12 SPEAKER'S NAME. MY CLIENT DIDN'T MENTION HIM BY NAME,
13 BUT HE SAYS, "WELL, BOB JOHNSON WORKS FOR THE SPEAKER."
14 MY CLIENT BROUGHT UP THE SPEAKER'S NAME IN PASSING. WHO
15 IS IT THAT CONTINUALLY -- REMEMBER WHEN WE KEPT PLAYING
16 THOSE TAPES OVER AND OVER? WHO IS IT? HAUSER SAYS,
17 "THE SPEAKER IS THE KEY." HAUSER SAYS, "I HEARD THAT THE
18 SPEAKER CONTROLS THE DENTAL PLAN." THERE WASN'T EVEN A
19 DENTAL PLAN, BUT THAT WAS HIS STORY.

20 HAUSER SAYS, "I HEARD YOU'RE NOT GOING
21 TO HAVE A CHINAMAN'S CHANCE OF GETTING THIS WITHOUT THE
22 SPEAKER. HE CONTROLS IT." WHAT DID BUCK WOOD AND DON
23 RAY SAY? PAGE 56 INSERT, THEY SAY, "THE SPEAKER'S NOT
24 THE KEY. WE CAN DO IT WITHOUT THE SPEAKER. HE'S NOT
25 REALLY THE KEY."

1 REMEMBER WE HAD MR. WACKS ON THE STAND.
2 WE HAD TO PLAY IT. THAT WAS RIGHT BEFORE I COULDN'T
3 TALK AND WALK AT THE SAME TIME, AND I KEPT PUSHING THE
4 BUTTON. AND THREE TIMES HE LISTENED TO IT, SAME PHRASE,
5 "WE CAN DO IT WITHOUT THE SPEAKER," AND HE STILL COULDN'T
6 HEAR IT. AND HE WAS THERE WHEN IT WAS SAID.

7 THEY DIDN'T SUGGEST THE SPEAKER. THEY
8 DISCOURAGED IT. "HE IS NOT THE KEY. WE CAN DO IT WITHOUT
9 HIM." ANY POLITICIAN WOULD HAVE DONE IT BECAUSE ANY
10 POLITICIAN WITH HIS HEAD SCREWED ON STRAIGHT WOULD HAVE
11 GONE FOR A PLAN LIKE THAT.

12 THEY DIDN'T SUGGEST POLITICAL CONTRIBUTIONS.
13 HAUSER AND L. G. DID. ON OCTOBER 2 IN MY CLIENT'S OFFICE
14 ALL THEY REALLY TALKED ABOUT WAS DISCUSSED THE OVERALL
15 WORKINGS OF THE INSURANCE BOARD. HANDED OUT WHO WAS ON THE
16 BOARD, WHEN THEIR TERMS EXPIRED. GAVE OUT COPIES OF THE
17 STATUTE. REMEMBER? AND DISCUSSED WITH THEM THE FACT THAT
18 THEY HAD ALREADY FOUND OUT MEMBERS OF THE BOARD WERE UPSET
19 IN THE MANNER IN WHICH METROPOLITAN HAD GOTTEN THE BID
20 WITH THE HIGH PREMIUMS.

21 EVERYBODY WAS UPSET WITH HIGH PREMIUMS.
22 RUSTY KELLY, IN PASSING, WAS SITTING THERE, AND THE MINUTE
23 THEY MENTIONED INSURANCE STARTED COMPLAINING ABOUT HIS
24 PREMIUM RISE, HOW HIS PREMIUMS HAD GONE UP. THEY WERE
25 COMPLAINING ABOUT THE REDUCED BENEFITS TO RETIREES.

1 THESE FOLKS FROM CALIFORNIA, MR. WACKS, MR. HAUSER, THEY
2 NEVER EVEN BOTHERED -- NOT A SINGLE WITNESS FROM THAT
3 WITNESS STAND, SAVE ONE, NONE OF THOSE WITNESSES EVER
4 BOTHERED TO READ THE STATUTE THAT TOLD THEM, AS MY CLIENTS
5 HAD TOLD THEM IN THE OFFICE, THAT YOU HAD TO HAVE THE LOW
6 BID TO GET THE CONTRACT ONCE IT WAS REOPENED. THESE FOLKS
7 FROM CALIFORNIA NEVER EVEN BOTHERED TO READ THE BRIBERY
8 STATUTE. THE STATUTE THAT'S THE FOUNDATION FOR MANY OF
9 THESE CHARGES. THEY NEVER EVEN BOTHERED TO READ THAT
10 STATUTE.

11 YET EVERY SINGLE TIME THEY SPEAK TO MY
12 CLIENTS, EVERY TIME THEY UTTER THE TERM THAT HAS ANYTHING
13 TO DO WITH THE MOVING FORCE IN THIS WHOLE TRANSACTION, WHAT
14 WORDS DO THEY USE? THE MAGIC WORD FROM THAT STATUTE,
15 "POLITICAL CONTRIBUTION." POLITICAL CONTRIBUTION. PERHAPS
16 THEY WERE ABOUT AS CAREFUL IN READING THE LAW IN THIS CASE
17 AS THEY WERE IN READING THE LAW FOR THE BAR EXAMS.

18 BUT THERE WAS ONE PERSON -- THERE WAS
19 ONE PERSON WHO READ THAT STATUTE. AGENT LIGARDE FROM
20 AUSTIN, TEXAS. HAD THOSE FOLKS BEEN AS CAREFUL AS HE
21 WAS -- TOO BAD HE CAME VERY LATE IN THE PROCEEDING -- HAD
22 THEY BEEN AS CAREFUL AS HE WAS, THEY WOULD HAVE UNDERSTOOD
23 THAT BY DEFINITION A POLITICAL CONTRIBUTION THAT IS MADE
24 AND REPORTED IN ACCORDANCE WITH LAW CANNOT BE BRIBERY BY
25 DEFINITION IN TEXAS.

1 THE COURT WILL INSTRUCT YOU THAT POLITICAL
2 CONTRIBUTIONS MADE AND REPORTED IN ACCORDANCE WITH LAW
3 ARE NOT BRIBES UNDER TEXAS LAW. EVERY TIME THEY SPOKE
4 TO MY CLIENTS ABOUT THIS, THEY CALLED IT A POLITICAL
5 CONTRIBUTION. EVERY TIME THEY ASKED MY CLIENTS A QUESTION
6 WITH REGARD TO IT, HE RESPONDED, "HE WILL REPORT. THE
7 SPEAKER WILL REPORT IT." A REASONABLE ASSUMPTION BASED
8 UPON THAT MAGIC WORD "POLITICAL CONTRIBUTION" THAT HE WILL
9 REPORT IT.

10 THE COURT WILL INSTRUCT YOU, I BELIEVE,
11 THAT IF YOU WERE CONVINCED THAT SOMEONE HAD NO PREVIOUS
12 INTENT TO VIOLATE THE LAW BUT THEY ARE INDUCED INTO A
13 COURSE OF CONDUCT THAT THE GOVERNMENT CLAIMS IS ILLEGAL
14 BUT WHICH THEY REASONABLY BELIEVE THAT WAS LEGAL, THAT
15 UNDER THAT KIND OF SITUATION WHERE THE GOVERNMENT CLAIMS
16 THE CONDUCT WAS ILLEGAL AND THE DEFENDANT CLAIMS THAT
17 HIS ACTIVITY WAS LAWFUL, THAT PUBLIC POLICY FORBIDS A
18 CONVICTION. IT'S ENTRAPMENT.

19 AGENT LIGARDE DID READ THE STATUTE
20 AFTER HIS INTERVIEW. HE SAID HE FELT IT WAS HIS DUTY TO
21 READ THE STATUTE. AGENT LIGARDE ASKED MY CLIENT SOME
22 QUESTIONS. BUT HE NEVER ASKED MY CLIENT A SPECIFIC
23 QUESTION AS TO WHETHER OR NOT MY CLIENT KNEW OF A POLITICAL
24 CONTRIBUTION.

25 WHEN I TALKED TO AGENT LIGARDE AFTER

1 THAT, IN THE FOLLOWING QUESTION, I ASKED HIM IF HE HAD
2 EVER ASKED BUCK WOOD AND IF BUCK WOOD KNEW ABOUT A POLITICAL
3 CONTRIBUTION, AND IF THAT'S THE ONLY WORD THAT THOSE
4 INDIVIDUALS EVER USED WITH MY CLIENT. THAT IS, A POLITICAL
5 CONTRIBUTION, THAT MIGHT BE AN IMPORTANT DISTINCTION.
6 THAT IF EVERY TIME THE PEOPLE TALKED TO MY CLIENTS THEY
7 USED THE WORD POLITICAL CONTRIBUTION, IT MIGHT HAVE BEEN
8 AN IMPORTANT DISTINCTION TO HAVE ASKED HIM ABOUT IT. AND
9 AGENT LIGARDE SAID IN RESPONSE TO THAT QUESTION, "YOU'RE
10 CORRECT."

11 LASTLY, I DISCUSSED WITH AGENT LIGARDE
12 WHAT THE SIGNIFICANCE OF THAT WAS. AGENT LIGARDE ACKNOWLEDGED
13 THAT THERE WAS A BIG DIFFERENCE IF MY CLIENT HAD SAID
14 THAT IT WAS A POLITICAL CONTRIBUTION THAT HE BELIEVED WOULD
15 BE REPORTED. AND IF THE AGENT HAD USED POLITICAL
16 CONTRIBUTION ON EACH OCCASION WHEN THEY TALKED TO MY
17 CLIENT, THAT WOULD MAKE A BIG DIFFERENCE. WHY? BECAUSE
18 UNDER THE PENAL CODE THAT WOULD MAKE THE DIFFERENCE ON
19 WHETHER IT CONSTITUTED A BRIBE. AGENT LIGARDE'S RESPONSE
20 WAS IT WOULD.

21 AGENT LIGARDE WAS THE ONLY FEDERAL
22 AGENT, A TEXAS AGENT, WHO BOTHERED TO READ THE STATUTE.
23 HE READ IT AFTERWARDS. WHAT HIS TESTIMONY IS IS THAT IT
24 WOULD HAVE MADE A DIFFERENCE. THAT WORD THAT THEY USED,
25 THAT WORD OF ART, MAKES A SIGNIFICANT DIFFERENCE.

1 THE PROSECUTION BROUGHT IN THEIR OWN
2 EXPERT. REMEMBER CHIP HOLT? IT'S A SHAME THEY DIDN'T
3 TALK TO CHIP HOLT BEFORE THEY PUT HIM ON THE WITNESS
4 STAND. WE MIGHT NOT BE HERE TODAY. WHAT CHIP HOLT TOLD
5 THE GOVERNMENT WAS -- AND I THINK IT VERY CLEAR EVEN
6 WITH RESPECT TO BUCK WOOD, WHO HELD A JOB VERY SIMILAR
7 TO CHIP HOLT'S IN THE SECRETARY OF STATE'S OFFICE, WAS
8 THAT IN RESPONSE TO MR. WOODS' QUESTION A DONOR, WHICH
9 WOULD HAVE BEEN L. G. OR MR. HAUSER OR THE UNION OR FIDELITY
10 FINANCIAL. YOU COULDN'T TELL FROM THE MANNER IN WHICH
11 THEY SPOKE OF IT. THE DONOR HAS NO OBLIGATION TO REPORT
12 IT. MORE IMPORTANT, BUCK WOOD, WHO IS THE ADVISOR TO THE
13 DONOR, A THIRD PARTY, HAS NO OBLIGATION TO SEE THAT IT IS
14 REPORTED ANY MORE THAN A DONOR WOULD HAVE. AND MOST
15 IMPORTANT, THAT IF THE THIRD PARTY BELIEVED IT WAS A POLITICAL
16 CONTRIBUTION, WAS TOLD IT WAS A POLITICAL CONTRIBUTION, SAID
17 IT WOULD BE REPORTED IN ACCORDANCE WITH THE LAW, HE HAS
18 NO OBLIGATION TO REPORT IT. HE HAS NO OBLIGATION TO SEE
19 THAT IT IS REPORTED. AND ANYONE, AND THAT WOULD BE IN
20 ACCORDANCE WITH LAW, HE WOULD BE COMPLYING WITH THE LAW,
21 HE WOULDN'T BE VIOLATING THE LAW. AND SOMEONE IN BUCK
22 WOOD'S POSITION, WHO HAD HELD THE POSITION HE HAD, WOULD
23 BE AWARE OF THAT.

24 FROM BUCK WOOD'S POSITION, FROM HIS
25 EYES, LOOKING THROUGH HIS EYES, THEY HAD MADE IT LOOK LIKE

1 A POLITICAL CONTRIBUTION. THAT'S WHAT THEY CALLED IT.
2 THAT'S WHAT THEY TOLD HIM IT WOULD BE. THAT'S THE WORD
3 THE USED EVERY TIME THEY UTTERED ANYTHING EVEN CLOSE TO
4 THOSE CIRCUMSTANCES.

5 ON OCTOBER 18, THEREAFTER, THE
6 PROSECUTOR DESCRIBES THIS AS A COACHING SESSION. REMEMBER
7 THIS IS WHEN THEY WERE IN THE MARRIOTT HOTEL ROOM RIGHT
8 BEFORE THE 19TH WHEN THEY GO TO VISIT THE SPEAKER THE
9 FIRST TIME. L. G. AND HAUSER ARE GOING TO GO TO A
10 BREAKFAST -- JUST FOLLOWING A BREAKFAST MEETING. SOME
11 LABOR LEADERS ARE GOING TO BE THERE. MY CLIENTS ALREADY
12 TOLD L. G., "LOOK, THE SPEAKER IS PROBABLY RUNNING FOR A
13 STATE-WIDE OFFICE. HE'S PROBABLY GOING TO PUT AN ARM ON
14 YOU. HE'S PROBABLY GOING TO WANT TO GET LABOR OFF HIS BACK."

15 HOW DOES L. G. OPEN THIS MEETING ON
16 THE 18TH IN THE MOTEL ROOM? WHAT DOES HE SAY? L. G.
17 SAYS, "WE'RE GOING TO GO RIGHT UP FRONT LEGITIMATE LIKE.
18 REPRESENTING PRUDENTIAL. WE THINK THERE IS SOME PROBLEMS
19 WITH THIS INSURANCE. WE THINK WE CAN DO THE PEOPLE OF
20 THE STATE OF TEXAS SOME GOOD."

21 WHAT DOES BUCK WOOD SAY? "WELL,
22 MAYBE HE CAN TAKE SOME POLITICAL ADVANTAGE OF THAT."
23 NOT WE CAN BRIBE HIM; NOT WE CAN PAY HIM SOME MONEY. HE
24 CAN TAKE SOME POLITICAL ADVANTAGE. WHAT ANY POLITICIAN
25 WOULD TAKE ADVANTAGE OF, SAVING THE STATE OF TEXAS A MILLION

1 BUCKS. IMPROVING THE POSITION OF THE RETIREES. IN THE
2 ENTIRE MEETING ON THE 18TH, WHICH THEY DESCRIBE AS A
3 BRIBE SESSION, THERE IS NEVER ONCE A MENTION OF ANY MONEY.
4 WHAT THEY ARE TALKING ABOUT IS POLITICAL SUPPORT. THEY
5 TALKED ABOUT LABOR. THEY TALKED ABOUT BUDDY TEMPLE AND
6 THE LIBERAL ELEMENT. MY CLIENT SAYS, "WELL, WHAT HE MIGHT
7 SAY, ALTHOUGH I DON'T THINK HE WILL, I SURE WOULD LIKE
8 YOU BOYS' HELP." IS THAT THE KIND OF THING SOMEONE WOULD
9 TALK ABOUT IN A BRIBE SITUATION, OR IS THAT THE KIND OF
10 THING THAT A POLITICIAN WHO IS MEETING WITH A BUNCH OF LABOR
11 LEADERS WHO WANTS SUPPORT FOR A STATE-WIDE RACE WOULD BE
12 EXPECTED TO TELL SOMEBODY? I SURE WOULD LIKE YOU BOYS'
13 HELP. POLITICAL SUPPORT.

14 WHAT DOES BUCK WOOD SAY ABOUT THE
15 POLITICAL SUPPORT? HE TELLS HIM, "GO EASY. DON'T BOWL
16 HIM OVER. IF HE MAKES A HUNT, YOU MAKE A HINT. IF HE
17 BRINGS IT UP, FINE. BUT DON'T BRING IT UP UNLESS HE DOES."
18 WHY? BECAUSE THEY DON'T WANT TO BLOW IT. I MEAN, THEY
19 HAVE ALREADY GOT JOHNSON ON THEIR SIDE. ANY POLITICIAN
20 WOULD BE IN FAVOR OF IT.

21 WHAT THEY ARE DREADFULLY AFRAID OF IS
22 TWO BULLS LIKE JOE HAUSER AND L. G. MOORE ARE GOING TO
23 BUST THROUGH THAT DOOR AND BLOW IT FOR THEM. THEY ARE
24 GOING TO OFFEND THE SPEAKER. THEY ARE GOING TO OFFEND
25 HIM IN SOME WAY. WHAT THEY ARE TELLING HIM IS THERE IS

1 ALWAYS ANOTHER DAY. YOU CAN TALK ABOUT POLITICAL SUPPORT
2 ANOTHER DAY. IF YOU WERE GOING TO BRIBE SOMEBODY, WOULD
3 YOU GO TALK TO THEM ABOUT WHAT YOU NEEDED TO TALK TO THEM
4 ABOUT ONE DAY AND WAIT TO TELL THEM THAT YOU'RE GOING TO
5 PAY THEM MONEY THREE WEEKS LATER? NO. WHAT MY CLIENTS ARE
6 TRYING TO TELL THEM IS SEPARATE IT A LITTLE BIT. DON'T
7 BLOW IT. WE CAN GET THIS CONTRACT. BECAUSE THEY THOUGHT
8 THEY WERE DEALING WITH PRUDENTIAL. THEY THOUGHT THAT
9 THESE GUYS WERE GOING TO BE ABLE TO COME THROUGH FOR THEM
10 WITH THE LOW BID.

11 IT WAS PRETTY OBVIOUS, BY THE WAY,
12 THAT DURING THAT DISCUSSION WHAT THEY WERE TRYING TO TELL
13 MR. HAUSER AND MR. MOORE TO DO WAS FIRST TALK ABOUT THE
14 PROGRAM AND THE PROPOSAL, GET HIS COMMITMENT, WAIT AND
15 THEN OBTAIN THE POLITICAL SUPPORT. IMAGINE IF WE COULD,
16 IF WE HAD TAPES, IF THEY HAVE BEEN EVESDROPPING, ED
17 WINDLER. REMEMBER THE GUY THAT HAD THE NEIGHBORHOOD
18 GROUPS? IMAGINE IF HE WAS THERE WITH ONE OF HIS NEIGHBORHOOD
19 GROUPS AND THEY WERE TRYING TO GET THE STREET SWEEPERS
20 BACK ON THE STREETS OR THEY WERE TRYING TO GET REZONING.
21 IMAGINE, IF YOU WOULD, WHAT HIS DISCUSSIONS WOULD HAVE
22 BEEN LIKE. HE WOULD HAVE TOLD YOU JUST LIKE THIS:

23 WE GO THERE, WE TRY AND TALK TO THE
24 POLITICIANS ABOUT A COMMITMENT. WE TELL THEM ABOUT OUR
25 PROPOSAL, WE GET THE COMMITMENT OR NOT. AND IF WE GET THE

1 COMMITMENT, THEN WE TALK TO THEM ABOUT POLITICAL SUPPORT.
2 THE SAME THING BUCK WOOD AND DON RAY WERE TELLING THOSE
3 TWO INDIVIDUALS ON OCTOBER 18.

4 THERE IS SOMETHING ELSE THAT FLOWS
5 THROUGHOUT THIS. THAT IS WHAT WE TALKED ABOUT AT THE
6 OUTSET OF THIS CASE, THE INSIDERS AND OUTSIDERS. THROUGH-
7 OUT THE TAPES THERE IS CONSTANT BANTER BACK AND FORTH
8 BETWEEN L. G. MOORE AND HAUSER. IS IT ALL RIGHT TO TALK
9 ON THIS PHONE? CAN WE TALK HERE? IS IT COOL TO TALK
10 AROUND ALL THESE PEOPLE? IF YOU WILL NOTICE, THERE IS
11 NEVER ONCE NOT ONE INSTANCE WHERE SOME OF THAT KIND OF
12 INSIDE OR OUTSIDER TALK IS MENTIONED IN FRONT OF BUCK
13 WOOD AND DON RAY. YOU DON'T HEAR ANY, "IS IT ALL RIGHT TO
14 TALK ON THIS PHONE? IS IT ALL RIGHT TO SAY SOMETHING IN
15 FRONT OF THESE FOLKS?" AS A MATTER OF FACT, BUCK WOOD
16 AND DON RAY ARE NEVER PRESENT AT ANY OF THE MEETINGS ON
17 THE 19TH OF OCTOBER OR THE 8TH OF NOVEMBER WITH THE
18 SPEAKER.

19 AFTER THE SECOND MEETING WITH THE
20 SPEAKER ON NOVEMBER 8, JOSEPH HAUSER COMES BACK TO THE
21 MOTEL ROOM TO MEET WITH THE OTHER INSIDERS, THE FOLKS
22 THAT ARE ALWAYS TALKING ABOUT IS IT COOL TO TALK ON THESE
23 PHONES? CAN WE TALK HERE IN FRONT OF THESE PEOPLE?
24 AND WHAT YOU GOT HERE, YOU GOT AN ACKNOWLEDGEMENT, JOSEPH
25 HAUSER SAYING, "WOOD AND RAY HAVE NO IDEA WHAT THE SPEAKER

1 IS ABOUT, WITH ALL DUE RESPECT FOR WOOD AND RAY. DIDN'T
2 I TELL YOU THAT YESTERDAY?" ABSOLUTELY. BY THE WAY, THIS
3 IS OCTOBER 19. DO YOU REMEMBER WHEN YESTERDAY WAS?
4 OCTOBER 18, THE DAY THE TAPE RAN OUT.

5 I DON'T REMEMBER HEARING THIS CONVERSATION.
6 THAT WAS ANOTHER TIME WHEN MR. HAUSER TOLD US FROM THE
7 WITNESS STAND NOTHING HAPPENED AFTER THAT TAPE RAN OUT.
8 I WILL SUGGEST TO YOU SOMETHING HAPPENED. THEY TALKED
9 ABOUT BUCK AND DON NOT KNOWING ABOUT WHAT WAS GOING ON,
10 LIKE THEY DID AGAIN ON OCTOBER 19. "ABSOLUTELY. ABSOLUTELY.
11 I'VE GOT NEWS FOR YOU WOODS AND RAY ARE SHARP, BUT THEY
12 DON'T HAVE A HANDLE ON THIS. " THAT'S CORRECT. THEY
13 DON'T HAVE A HANDLE ON IT, AND THEY NEVER DID HAVE A
14 HANDLE ON IT.

15 THE STATEMENT THAT WAS MADE ON
16 NOVEMBER 8 BY JOSEPH HAUSER WHEN THE INDIVIDUALS MET,
17 THE INSIDERS, WACKS, MONTAGUE, HAUSER, AND L. G., HAUSER
18 GIVES A LITTLE WARNING. "OKAY. WOOD AND RAY ARE COMING.
19 IF THERE IS ANYTHING YOU WANT TO TALK ABOUT OR DISCUSS
20 BEFORE THEY COME, LET'S DO IT NOW." A LITTLE INSIDER
21 TALK. WE CAN TALK AMONG OURSELVES. L. G., HAUSER, WACKS,
22 MONTAGUE, THE INSIDERS. WHAT ARE THEY TALKING ABOUT?
23 THEY ARE TALKING ABOUT THE MEETING ON NOVEMBER 8 WITH
24 THE SPEAKER. THEY EMBELLISH A LITTLE BIT. THEY DON'T
25 TALK ABOUT A \$5,000 POLITICAL CONTRIBUTION. THEY TALK

1 ABOUT IT IN CASH. THEY TALK ABOUT SOMETHING ELSE OTHER THAN
2 A \$5,000 POLITICAL CONTRIBUTION. THEY TALK ABOUT
3 \$600,000 PER YEAR THAT THEY ARE GOING TO BE GIVING TO
4 SOMEBODY. NOT IN ONE LUMP SUM, BUT PER YEAR. AND THEY
5 TALK ABOUT FEE SPLITTING. THAT'S WHAT THE INSIDERS TALK
6 ABOUT, WHEN THEY MEET WITH WACKS AND MONTAGUE WHO HADN'T
7 BEEN AT THE MEETING.

8 WELL, WHAT DO THEY TALK TO DON AND
9 BUCK ABOUT WHEN THEY GET THERE? REMEMBER HAUSER, IN HUSHED
10 TONES, "WOOD AND RAY ARE COMING. ANYTHING ELSE WE NEED
11 TO TALK ABOUT?" WHAT DO THEY TALK ABOUT WHEN BUCK AND DON
12 GET THERE? I CAN TELL YOU WHAT THEY DON'T TALK ABOUT.
13 I'LL TELL YOU WHAT THEY DON'T TALK ABOUT. THEY DON'T TALK
14 ABOUT CASH. THEY DON'T TALK ABOUT \$600,000, AND THEY
15 DON'T TALK ABOUT FEE SPLITTING. WHAT YOU HEAR IS EXACTLY
16 WHAT ED WINDLER TOLD YOU YOU SHOULD HAVE HEARD. WHAT YOU
17 HEAR IS A DISCUSSION BY JOE HAUSER AND L. G. MOORE.

18 L. G. SAYS, "JOE, TELL THEM WHAT WE
19 DID FOR THE RETIREES, WHAT THE BOTTOM LINE WAS, A HELL OF
20 A DEAL FOR THE RETIREES AND A MILLION DOLLARS CHEAPER."
21 HE COMPARES IT TO METROPOLITAN AND GIVES THEM A LITTLE
22 SYNOPSIS. THAT'S ALL ABOUT THE INSURANCE PROGRAM. THAT'S
23 WHAT MR. WINDLER SAYS YOU WERE SUPPOSED TO TALK TO THEM
24 ABOUT FIRST.

25 THEN WHAT HAPPENED? WELL, THEN -- AS

1 A MATTER OF A FACT, THEY USED THE WORD. FIRST THEY TALKED
2 ABOUT WHAT A HELL OF A DEAL THE INSURANCE CONTRACT IS.
3 A MILLION DOLLAR CHEAPER. THEN A COMMITMENT. THE SPEAKER
4 SAYS, "ALL I WANT TO DO IS SAVE THE STATE OF TEXAS A
5 MILLION DOLLARS. THAT'S ALL I WANT TO DO. I'LL GET TO
6 WORK ON IT." A COMMITMENT LIKE ED WINDLER SAYS THERE
7 SHOULD HAVE BEEN.

8 THEN THE TRANSCRIPT GETS INTERESTING.
9 THEN WE WANTED TO TALK TO HIM ABOUT A POLITICAL CONTRIBUTION.
10 WHAT DID THEY DO? L. G. SAYS, "WE GAVE HIM A NICE POLITICAL
11 CONTRIBUTION." EXACTLY THE TERMS OF 3601. THAT MAKES IT
12 LAWFUL. THAT'S WHAT MAKES IT SO CONFUSING. THAT'S WHAT
13 MADE IT SO DECEPTIVE.

14 WHAT DOES HAUSER SAY? "HE'LL NEVER
15 REPORT IT." BUCK WOOD CHIMES IN, INTERRUPTS, "OH, HE'LL
16 REPORT IT. MAYBE NOT IN YOUR NAME, L. G." WELL, WE MADE
17 A POLITICAL CONTRIBUTION AND WHOSE NAME WOULD IT BE REPORTED
18 IN? BUT HE WILL REPORT IT. THAT MAKES IT LAWFUL, A
19 POLITICAL CONTRIBUTION MADE AND REPORTED IN ACCORDANCE
20 WITH LAW.

21 JANUARY 8, A TELEPHONE CONVERSATION
22 THEREAFTER BETWEEN BUCK WOOD AND L. G. MOORE. BUCK WOOD
23 TELLS L.G., "I'M CONCERNED. WACKS SEEMS TO THINK THAT
24 JUST MOVING MONEY AROUND HERE WILL DO THE TRICK," HE SAYS.
25 "IT MIGHT HELP TO GET SOME PEOPLE TALKING TO POLITICIANS,

1 BUT IF THEY TRY AND BRIBE LEO GOSSETT, WE'RE ALL GOING TO
2 PRISON." WHAT WAS HE TRYING TO DO THERE? I SUGGEST TO
3 YOU HE WAS TRYING TO POLITELY TELL THEM ONCE AGAIN
4 MOVING MONEY AROUND HERE IS NOT GOING TO DO THE TRICK.
5 YOU'RE JUST GOING TO PUT EVERYBODY IN PRISON. HE WAS
6 TRYING TO POLITELY TELL THEM THE SAME THING JUST LIKE HE
7 TOLD THEM ON OCTOBER 2 WHEN HE SAID, "LET ME GIVE YOU A
8 LITTLE OVERVIEW OF TEXAS. I'M SURE YOU'VE OPERATED IN A
9 LOT OF STATES, MR. HAUSER. MOST OF THE BUREAUCRATS IN
10 TEXAS ARE AS HONEST AS THE DAY IS LONG. I DON'T SAY THAT
11 BECAUSE I'M FROM HERE. I'M TELLING YOU THAT BECAUSE I DO
12 BUSINESS WITH THEM ALL THE TIME. MOST OF THEM WOULD
13 ABSOLUTELY BE OFFENDED IF THEY THOUGHT ANYBODY WAS TRYING
14 TO INFLUENCE THEM IMPROPERLY."

15 WHAT BUCK WOOD WAS TRYING TO TELL THEM
16 WAS THE SAME THING HE TRIED TO TELL THEM ON JANUARY 8 WHEN
17 HE SAID TO L. G. MOORE, "BUT YOU ARE NOT GOING TO BUY
18 THIS CONTRACT, L. G. AND YOU KNOW, I'M AFRAID THAT SACKS
19 AND THEM'S IDEA THAT THEY WERE GOING TO GIVE YOU BOYS A
20 LOT OF MONEY, AND Y'ALL ARE GOING TO COME UP HERE AND BUY
21 THIS THING. IT AIN'T GOING TO WORK THAT WAY, L. G."

22 JUST LIKE ON NOVEMBER 28 WHEN BUCK
23 WOOD TELLS MICHAEL WACKS, "WELL, YOU KNOW, MIKE, I'M KIND
24 OF CONCERNED A LITTLE BIT BECAUSE, YOU KNOW, GOING TO
25 SEE CLAYTON IS FINE. IT'S REAL NEAT. BUT I HAVE TOLD YOU

1 FROM THE VERY FIRST THAT GETTING ON SOME SORT OF POLITICAL
2 CAMPAIGN ON THIS WAS A MISTAKE IN TEXAS. IT DOESN'T WORK
3 THAT WAY HERE." WELL, PERHAPS THE PROSECUTORS DIDN'T
4 GET THE POINT ABOUT THE JANUARY 8 TELEPHONE CONVERSATION.
5 BUT L. G. SURE DID. BECAUSE THE VERY NEXT TIME THAT L.
6 G. CALLS MICHAEL WACKS ON JANUARY 11, L. G. GIVES MICHAEL
7 WACKS THE SAME LECTURE THAT BUCK WOOD HAD JUST GIVEN TO
8 L. G.

9 WHAT L. G. SAYS TO MICHAEL WACKS IS
10 EXACTLY AND PRECISELY WHAT BUCK WOOD WAS TRYING TO TELL
11 THEM. IT IS IN THE HUMEROUS TONES AS L. G. CAN MAKE IT.
12 "THIS AIN'T LIKE A NORMAL DEAL, YOU KNOW. THIS ONE IS
13 TOTALLY, TOTALLY LEGIT. ALL WE GOT TO DO IS GO IN THERE
14 AND DO A BETTER JOB. WE JUST GOT TO DO A BETTER JOB
15 THAN THOSE OTHER COMPANIES. WHAT WE'VE GOT TO DO IS TAKE
16 CARE OF THE RETIREES. ALL WE'VE GOT TO DO IS COME IN
17 WITH A LOW BID. ALL WE GOT TO DO IS A BETTER JOB THAN THE
18 OTHER COMPANIES. ALL WE GOT TO DO IS HELP THE RETIREES.
19 ALL WE GOT TO DO IS COME IN WITH A LOWER BID. WE'VE GOT
20 TO GET OUR ACT TOGETHER SOON." L. G. IS TELLING THEM
21 EXACTLY WHAT BUCK WOOD HAS BEEN TRYING TO GET THE
22 MESSAGE ACROSS FOR MONTHS. DON'T THINK YOU ARE GOING
23 TO COME DOWN HERE AND BUY TEXAS. THAT'S WHAT WE WOULD
24 EXPECT A LAW-ABIDING YOUNG LAWYER, THE ADVICE THAT SOMEONE
25 WHO HAS WORKED HIS LIFE IN THE STATE GOVERNMENT, WOULD

1 TELL SOMEBODY WHEN THEY CAME INTO TEXAS. IT AIN'T GOING
2 TO WORK THAT WAY IN TEXAS. THAT'S WHAT EVERYONE WITH
3 PRIDE IN THEIR STATE SAID, LIKE BUCK WOOD. THEY DIDN'T
4 NEED TO BRIBE ANYBODY. THAT'S WHAT L. G. FINALLY TELLS
5 MICHAEL WACKS, BUT THAT'S WHAT BUCK WOOD HAD BEEN TELLING
6 THEM ALL ALONG.

7 JOHNSON WAS ALREADY, FROM THE OUTSET,
8 THEY TOLD THEM, WAS AGAINST METROPOLITAN. HE WANTED TO
9 REOPEN THE BIDS. ANY POLITICIAN WOULD HAVE BEEN IN FAVOR
10 OF THEM. ANY POLITICIAN WITH HIS HEAD SCREWED ON RIGHT
11 WOULD HAVE JUMPED AT THE CHANCE TO HAVE HELPED WITH A
12 CONTRACT THAT WOULD SAVE THE STATE OF TEXAS A MILLION
13 BUCKS AND HELP THE RETIREES. ALL THEY NEEDED WAS A
14 DETAILED PROPOSAL. THAT'S ALL THEY ASKED FOR. AND THAT'S
15 WHAT L. G. FINALLY SAID. HELP THE RETIREES. COME IN
16 WITH THE LOWER BID. GET THEM THE DETAILED PROPOSAL.

17 I'M TOO YOUNG TO PRETEND TO DEFEND
18 THE STATE OF TEXAS, AND I'M TOO YOUNG TO PRETEND TO
19 DEFEND THE LEGISLATURE. BUT I HAVE NEVER HAD A PROUDER
20 DAY IN MY LIFE THAN TO STAND HERE AND ASK YOU TO RETURN
21 BUCK WOOD TO THE SIDE OF HIS FELLOW LAWYERS LIKE MYSELF
22 WHO KNOW HIM WELL. THERE HAVE ALWAYS BEEN SCAPEGOATS
23 FROM BIBLICAL TIMES TO THE PRESENT, AND THERE HAS ALWAYS
24 BEEN THEIR DEFENDERS THE MORNING AFTER. IF YOU HAVE A
25 DOUBT IN YOUR HEART, TOMORROW MORNING AT BREAKFAST IS GOING

1 TO BE TOO LATE. ABIDE BY IT.

2 I BELIEVE THE COURT WILL INSTRUCT YOU
3 THAT THE DEFINITION OF REASONABLE DOUBT IS THAT IT IS SUCH
4 A DOUBT THAT WOULD CAUSE YOU TO HESITATE IN MATTERS OF
5 UTMOST IMPORTANCE IN YOUR LIFE OR IN THE LIFE OF YOUR
6 LOVED ONES. I CAN ONLY TELL YOU THAT WHEN YOU GO BACK
7 INTO THAT JURY ROOM AND SEARCH IN THE PLACE WITHIN YOU
8 WHERE YOU MAKE THOSE TOUGH DECISIONS ABOUT MATTERS OF
9 IMPORTANCE TO YOURSELF OR TO YOUR LOVED ONES, THAT IF
10 THAT, IF ALL OF THIS DOESN'T CREATE A REASONABLE DOUBT,
11 BUCK WOOD NEVER HAD A CHANCE WHEN HE WALKED INTO THIS
12 COURTROOM. IF THAT DOESN'T CAUSE YOU TO HESITATE BEFORE
13 YOU WOULD ACT IN MATTERS OF UTMOST IMPORTANCE TO YOURSELF
14 OR YOUR LOVED ONES, BUCK WOOD NEVER HAD A CHANCE WHEN HE
15 CAME IN THESE DOORS. AND THAT'S ALL WE ASK IS A CHANCE
16 TO RETURN TO HIS FAMILY AND TO RETURN TO THE SIDE OF HIS
17 LAWYERS ON THIS SIDE OF THE BAR.

18 THANK YOU, YOUR HONOR.
19
20
21
22
23
24
25

“STRANGE BEDFELLOWS:” PROBATION AS PROSECUTOR

Defender Services Division Training Branch

Administrative Office of the U.S. Courts

Winning Strategies 2001

CJA Panel Training Seminar

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[T]he probation movement developed from a philosophical posture antithetical to that of the Guidelines . . . in light of this conflict, the probation officer is not the proper “guardian” of the Guidelines. Like the proverbial fox guarding the chicken coop, the probation system is fundamentally unsuited to the task of implementing a sentencing structure to which it is philosophically opposed. More important, playing the role of guardian forces the probation officer to betray daily her philosophical origins and to portray a false vision of the probation system.

{Former Yale Law Student, current ND Cal Criminal AUSA} Sharon M. Bunzel, *Note: The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 Yale L.J. 933, 934 (Jan. 1995).

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Introduction

As correctly observed in the law review note cited at the outset of this outline, the role of Probation in the federal system has evolved and continues to change in light of new approaches adopted by Congress – such as the Federal Sentencing Guidelines, and, more recently, aggressive attempts to collect restitution and fines. From the defense perspective, there is a very real concern that this evolution will produce an officer more akin to a Special Assistant United States Attorney than to a neutral officer of the court.

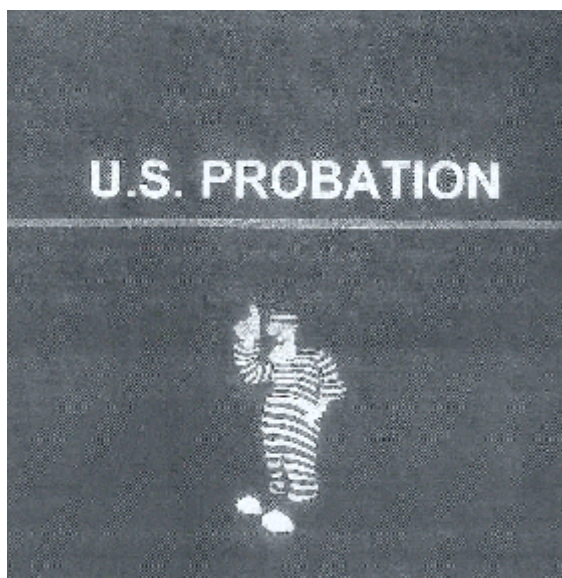


Image used by ND Cal Probation for its section of Memorandum of Understanding between Probation and FLU

This outline will discuss new dangers posed by the United States Office of Probation as it expands into fields traditionally the responsibility of the Office of the United States Attorney. It will also discuss some of the defense challenges available to counter these new challenges.

The outline is divided into three main sections. In **Section I**, we discuss some of the basics underlying the role of Probation and the role of defense counsel in the presentence and supervision process.

Sections II and III are specific case studies of the shifting role of the Office of Probation in two contexts. In **Section II**, we review the problems that arise when the Probation Officers prosecutes probation or supervised release violations, and offer some alternatives to help ensure the neutrality of violation

proceedings. **Section III** discusses the developing role of the Probation Officer as an investigative resource for the Financial Litigation Unit of Office of the United States Attorney, Financial Litigation Unit, and flags new exposures to criminal tax repercussions arising from this new role.

An initial caveat is in order. A good probation officer is often the best ally of a defendant in the federal criminal justice system – presenting mitigating circumstances in support of sentencing departures, identifying substance abuse problems and arranging for treatment, and tempering fines and restitution when the defendant is in a precarious financial situation. Our first recommended approach is always to cooperate and assist the Office of Probation, (at least to the extent this approach assists our clients). This outline, however, is intended to provide authority and ideas for those increasingly frequent cases where Probation seems to have undertaken a prosecutorial role.

I. The Basics: Statutory Authority for the Office of Probation, its Role is Post-Guidelines Practice, and its Relationship with the Defense

A. Controlling Federal Rules of Criminal Procedure

1. Federal Rule of Criminal Procedure 32

Rule 32. Sentence and Judgment (Excerpts):

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed

(2) Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

. . . .

(4) Contents of the Presentence Report. The presentence report must contain--

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

. . . .

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

. . . .

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

. . . .

(c) Sentence.

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

....

(4) In Camera Proceedings. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements--made under subdivision (c)(3)(B), (C), (D), and (E)--by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

....

(d) Judgment.

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

....

Fed. R. Crim. Pro. 32 (West 2000).

B. Rights Retained by the Defense When Dealing with Probation

1. Right to be Present During Probation Interviews

- a. In *United States v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1991), the Ninth Circuit considered whether defense counsel should be permitted to participate in probation interviews. The Court exercised its supervisory power and ordered defense counsel be permitted in all interviews. *Id.* at 1437. The Court catalogued the dangers

that await a lay defendant in the probation interview process, *id.* at 1436, and concluded that “there are numerous circumstances in which a defense attorney will be able to protect his client’s rights and interests – and thereby help obtain a shorter sentence or avoid a longer one – if he is permitted to be present and represent his client at the presentence interview.” *Id.* at 1436.

(1) **Fed. R. Crim. Pro. 32:** This right has been codified at Federal Rule of Criminal Procedure 32: “Presence of Counsel. On request, the defendant’s counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.” 18 U.S.C. § 32(b)(2).

2. **Right Against Self-Incrimination Survives Through Sentencing:** The Supreme Court has recognized that the right against self-incrimination continues through sentencing. *See Mitchell v. United States*, 119 S. Ct. 1307 (1999). In *Mitchell*, the issue before the Court was whether a sentencing court could draw an adverse inference from a defendant’s silence. *Id.* at 1309. The defendant was accused of conducting a series of sales for amounts of cocaine that triggered a higher sentence range. *Id.* at 1310. The sentencing court held against the defendant the fact that she had not come forward at sentencing and testified, rebutting these accusations. *Id.* The Supreme Court reversed. The Court observed that “Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences of further testimony.” *Id.* “Any effort by the State to compel the defendant to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.” *Id.* (internal citations and quotations omitted). The Court concluded that “The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.” *Id.* at 1315.

a. **Miranda Warnings:** The defendant’s right to remain silent, however, is not self-executing, and a defendant is not entitled to be given *Miranda* warnings before a presentence interview. *Minnesota v. Murphy*, 465 U.S. 420 (1984); *see United States v. Murphy*, 910 F.2d 1321 (6th Cir. 1990) (guidelines do not make *Miranda* warnings self-executing in probation interviews). *See also United States v. Nicolas*, 115 F.3d 703 (9th Cir. 1997) (failure to give *Miranda* warnings does not preclude subsequent use of statements).

II. Probation as Prosecutor: Probation “Form 12” Proceedings

Probation and supervised release violation proceedings create a somewhat unique situation for our adversarial system of justice. On the one hand, it is axiomatic that a judge called upon to be a fact finder in a judicial proceeding must remain neutral and must have no actual or perceived relationship with a fact witness. *See, e.g., Price Bros. Co v Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980)(“[F]inder of fact must be ‘free from external causes tending to disturb the exercise of deliberate and unbiased judgment . . .’”). On the other hand, courts have a unique relationship with probation officers, who act as arms of the court with respect to violation proceedings. *United States v. Mejia-Sanchez*, 172 F.3d 1172, 1175 (9th Cir. 1999)(probation officers are an investigative and supervisory arm of the court). When a probation officer submits a revocation petition (commonly referred to as a Form 12 petition) in which allegations are made which would require a probation officer to testify as a fact witness against the defendant, these two principles may and often do come into direct and unavoidable conflict.

The concern for the defendant in revocation proceedings relates to any exchange of information which might compromise a fair and impartial decision by the court on the merits of a revocation allegation. In the vast majority of revocation proceedings, at least one of the violation allegations will entail some improper behavior by the defendant which will require the testimony of the probation officer. By definition, the testimony will be adverse to the defendant, because the probation officer would not otherwise file the Form 12. Should the probation officer engage in *ex parte* communications with the court, either verbally or in writing, the argument can and should be made that the communication compromises the neutrality of the court and is therefore improper. The outline will explain methods of preventing such improper communications and suggest methods for raising these arguments in other contexts as well when it appears that a court’s impartiality will be called into question by communications with the probation officer.

A. Statutory Authority for Supervised Release and Probation Revocations. There are two main sources of statutory authority for revocation of probation and revocation of supervised release; Sections 3565 and 3583 of Title 18. Federal Rule of Criminal Procedure 32.1 provides the framework for both types of revocations.

1. 18 U.S.C. § 3565: Revocation of probation

(a) Continuation or revocation.--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and resentence the defendant under subchapter A.

(b) Mandatory revocation for possession of controlled substance or firearm or refusal to comply with drug testing.— If the defendant –

(1) possesses a controlled substance in violation of the condition set forth in section 3563(a)(3);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of probation prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing, thereby violating the condition imposed by section 3563(a)(4), the court shall revoke the sentence of probation and resentence the defendant under subchapter A to a sentence that includes a term of imprisonment.

(c) Delayed revocation.--The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

18 U.S.C. § 3565 (West 2000).

2. 18 U.S.C. § 3583, Inclusion of a Term of Supervised Release after Imprisonment

§ 3583. Inclusion of a term of supervised release after imprisonment

....

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation

and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.-- If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.--When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation.--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

18 U.S.C. § 3583 (West 2000).

3. Federal Rule of Criminal Procedure 32.1

Rule 32.1. Revocation or Modification of Probation or Supervised Release

(a) Revocation of Probation or Supervised Release.

(1) Preliminary Hearing. Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probably cause to hold the person for a revocation hearing. The person shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation;

(B) an opportunity to appear at the hearing and present evidence in the person's own behalf;

(C) upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the person's right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) Revocation Hearing. The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given

- (A) written notice of the alleged violation;
- (B) disclosure of the evidence against the person;
- (C) an opportunity to appear and to present evidence in the person's own behalf;
- (D) the opportunity to question adverse witnesses; and
- (E) notice of the person's right to be represented by counsel.

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

(c) Production of Statements.

(1) In General. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

Fed. R. Crim. Pro. 32.1 (West 2000).

B. The Initiation of Revocation Proceedings

- 1. Probation Officer Submits Form 12 to Court:** The majority of Courts now hold that submission of Form 12 to court by Probation Officer is proper. *See, United States v. Mejia-Sanchez*, 172 F.3d 1172 (9th Cir. 1999); *United States v. Davis*, 151 F.3d 1304,

(10th Cir. 1998); *United States v. Burnette*, 980 F. Supp.1429 (M.D.Ala. 1997); *United States v. Wilson*, 973 F. Supp.1031 (W.D. Okla.1997). *Contra*, *United States v. Jones*, 957 F. Supp. 1088 (E.D. Ark.1997)

- a. Reasoning of courts is that: (1) probation officer is required to report on progress of probationer pursuant to 18 U.S.C. § 3603 (2); and (2) it is the court, and not the probation officer, who decides whether to initiate revocation proceedings based upon the probation officer's allegations set forth in Form 12. *See Mejia-Sanchez*, 172 F.3d at 1174-75; *Davis*, 151 F.2d at 1307.
- b. This creates a legal dilemma; Supreme Court has held that court cannot initiate prosecution proceedings against defendant except for contempt committed in presence of the court. *See In Re Murchison*, 349 U.S. 133 (1955); *Lo-Ji Sales v. New York*, 442 U.S. 329 (1979).

C. Any *Ex Parte* Meeting between Probation Officer and Court is Improper.

1. Central Propositions

- a. Although revocation proceeding is not a "criminal proceeding," defendant is entitled to due process protections. *Minnesota v. Murphy*, 465 U.S. 434 (1984). *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Gagon v. Scarpell*, 411 U.S. 778, 779 (1973).
- b. Defendant entitled to neutral and independent decision maker at revocation proceedings. *See Shiff v. Dorsey*, 877 F.Supp. 73, 79 (D. Conn. 1994).
- c. No rule authorizes *ex parte* meetings between probation officer and court in revocation proceedings.
- d. Probation Officers sometimes act as arm of court, other times as arm of prosecutor. *See Morrissey*, 408 U.S. at 480 (probation office "sometimes an arm of the court and sometimes of the executive."), *Shiff*, 877 F. Supp. at 79 (probation officer initiating revocation proceedings acts like a prosecutor); *Ray v. Pickett*, 734 F.2d 370, 374 (8th Cir. 1984) (probation officer's role in initiating revocation proceedings similar to role of police officer). *See* 18 U.S.C. §3606 (probation officers authorized to make arrests).

2. When Probation Officer Becomes Adverse Fact Witness Against Defendant, Rules Prohibit *Ex Parte* Contact with Court

- a. Courts have held that *ex parte* meetings between government agents and court is improper. *See United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982)(*ex parte* communications with government agents improper) *United States v. Wolfson*, 634 F. 2d 1217 (9th Cir.1980)(*ex parte* recommendations from government counsel improper). Thus, any exchange of adverse information improper.
- b. Any reports submitted to court addressing general sentencing information also improper. Fed. R. Crim. P. 32(b)(1)(3) (presentence report may not be submitted to court unless authorized by defendant); *Gregg v United States*, 39 4 U.S. 490, 492 (1969) (presentence report may not be reviewed by court before adjudication of guilt).
- c. Wrong to claim that meeting between probation officer and court government authorized by rule allowing probation officer to meet with court in presentence context.
 - (1) Many courts hold that probation officer can meet with court to discuss presentence report. *See, e.g., United States v. Gonzales*, 765 F.2d 1393 (9th Cir. 1985); *United States v. Johnson*, 935 F.2d 47 (4th Cir. 1991).
 - (2) These courts all rely on assertion that such meetings are non-adversarial, and that probation officer acts as fact finder for court. *See, e.g. Johnson*, 935 F.2d at 50 (meeting non-adversarial, and constitutional issues regarding disclosure do not therefore arise).
 - (3) As noted above, this assumption invalid in revocation proceedings. *Shiff*, 877 F. Supp. at 79; *Pickett*, 734 F.2d at 374 (probation officer acts as adverse party).

D. Assumption That *Ex Parte* Meetings Are Proper In World of Guideline Sentencing Should Be Challenged

1. Courts have held that guidelines have not changed relationships between probation officer and court. *See, e.g., United States v. Belgard*, 894 F.2d 1092 (9th Cir. 1990)(court may properly use probation officer to collect facts for court); *United States v. Washington*, 146 F.3d 219 (4th Cir. 1998) (permissible for probation officer to collect facts and make guideline recommendation more severe than government because probation officer is neutral fact finder).
2. Many of these cases rely on *Williams v. New York*, 337 U.S. 241 (1949), for proposition that *ex parte* meetings are permissible. *Williams* addressed a different theory of sentencing (“retribution is no longer the dominant objective of the criminal law”).

3. Current rules require disclosure of all information used in sentencing with limited exceptions. *See* Fed. R. Crim. Pro. 32 (b). Due Process requires that any source of information be revealed to the defendant. *See United States v. Wise*, 990 F.2d 1545 (10th Cir. 1992). *See also Gardner v. Florida*, 430 U.S. 356 (1977) (court cannot receive confidential information in presentence process in capital case).
4. There are no sound policy reasons for *ex parte* meetings between probation officer and Court.
5. **Solution: Northern District Local Rule:** This rule was recently adopted by the Northern District of California Local Rules committee and is in use in that district. Probation routinely ignored the rule until defenders – just as routinely – identified the local rule violation during revocation proceedings.

(e) Presentence Report and Recommendation for Revocation of Probation or Supervised Release: A Probation Officer may initiate a revocation proceeding by the Submission of a Form 12 to the Court that placed the defendant on probation or supervised release. If the Court decides that a hearing is appropriate, it shall notify the parties and the Probation Officer. *The Probation Officer shall have no further contact with the Court with respect to the Form 12 prior to the hearing on the violation.* N.D. Cal. Local Crim. Rules 32.1-1(e) (effective May 2000).

III. Probation as Prosecutor: Restitution & Fines, Tax Forms, and FLU

The Office of Probation has long been charged with the responsibility of reviewing the financial situation of the defendant in the presentence process, and with making recommendations for fines and restitution orders. In the last several years, however, Congress, (and the Administrative Office of the United States Courts), have sought an increasingly aggressive role for Probation in financial litigation.

This section of the outline will review the statutory, rule, and guideline authority for orders of restitution and fines, and the authorization for the Probation Office to investigate financial matters. It will then discuss new, recent efforts to integrate the Office and Probation and the Financial Litigation Unit (“F.L.U.”) of the United States Attorney’s Office to recover monetary penalties, and the tax and criminal ramifications of this new alliance for the criminal defendant.

A. Statutory and Guideline Authority for Restitution, Fines, and Special Assessments

1. **The Federal Debt Collection Procedures Act of 1990.** The Federal Debt Collection Act became effective in 1991, and is codified at 28 U.S.C. §§ 3001-3308. The Act expanded the remedies available to enforce criminal debt, and – more specifically –

codified 18 U.S.C. § 3552(d) which let the government retain the PSR to collect monetary penalties.

- a. This addition is important to understand in order to appreciate the dangers posed by the new alliance between Probation and FLU. 18 U.S.C. § 3552(d) provides, “The court *shall* provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed.” 18 U.S.C. § 3552(d) (emphasis added).

2. Restitution: The primary statutory authority for restitution at sentencing has been codified at 18 U.S.C. § 3663-3664. Under 18 U.S.C. § 3663, the court may order restitution to the victim of a federal offense. *See* 18 U.S.C. § 3663(a)(1)(A). In fashioning a restitution order, the Court shall take into account the amount of loss sustained by each victim of the offense, and the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant’s dependants, and such other factors as the court deems appropriate. *Id.* at § 3663(b)(i)(I) and (II).

- a. A federal court is empowered to direct the Office of Probation to provide information to permit it to fashion a restitution order. *See* 18 U.S.C. § 3664(a). “The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant.” *Id.*
- b. The statute directs a defendant to submit financial information in the form of an affidavit. *See* 18 U.S.C. § 3664(d)(3). This affidavit shall include “a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant’s dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.”
- c. Sentencing Guideline § 5E1.1 sets forth the details of the imposition of a restitution order, and authorizes the court to require single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of the above. *See* U.S.S.G. § 5E1.1(e).

3. Mandatory Victims Restitution Act of 1996 (MVRA): Although discretionary restitution in a federal case has been authorized since the Federal Probation Act of 1925, mandatory restitution is a relatively recent development. In 1996, Congress passed the Mandatory Victims Restitution Act (“MVRA”). Mandatory Victims Restitution Act of 1996 (Pub.L. 104-132, Title II, Subtitle A, Apr. 24, 1996, 110 Stat. 1227) Although the MVRA amended many federal statutes, the heart of the act was the addition of two new

statutes: 18 USCA § 3663A, and 18 USCA § 3613A .

- a. **Offenses subject to *mandatory* restitution:** Crimes of violence, property offenses under Title 18, tampering with consumer products, child support, sexual abuse, child abuse and sexual exploitation of children, domestic violence, telemarketing fraud. *See Monograph 114* at III-6 (collecting statutes); *see also* 18 U.S.C. § 366A(c).
 - b. **Offense subject to *discretionary* restitution:** All title 18 offenses not subject to mandatory restitution, drug offense with identifiable victims,, drug offenses without identifiable victims (community restitution), air piracy offenses. *See Monograph 114* at III-7; *see also* 18 U.S.C. § 3663.
4. **Fines:** The decision on whether to impose a fine is controlled by 18 U.S.C. § 3572.. Factors going into whether to impose a fine include – among other factors – the defendant's income, earning capacity, and financial resources; the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose, and the need to deprive the defendant of illegally obtained gains from the offense. *See* 18 U.S.C. § 3571(a)(1) -(8).
 - a. Sentencing Guideline § 5E1.2 directs that the court “shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.” USSG § 5E1.2(a). The guideline sets forth a minimum and maximum fine structure, *id.* at § 5E1.2(c)(3), and permits the defendant to pay a lesser fine or avoid the fine altogether upon an adequate showing by the defense, *id.* at § 5E1.2(e).
5. **Special Assessments:** Special assessments are mandatory, and are imposed for every count of conviction except for forfeiture counts. *Monograph 114* at II-1; *see* 18 U.S.C. § 3013. Special assessments were created by the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473, Sec. 1405, 98 Stat. 2174 (October 12, 1984)).

B. New National Policies for United States Courts, United States Probation, and the United States Attorney's Office (in the guise of FLU)

1. The New Alliance: Monograph 114, *Criminal Monetary Penalties: A Guide to the Probation Officer's Role, Administrative Office of the United States Courts*. Since 1984, Congress has been increasingly interested in recovering criminal monetary penalties – an interest that intensified in the 1990's with the growing involvement of the DOJ and the Federal Judicial Conference in programs designed to promote recovery. See *Monograph 114* at I-7. Monograph 114 “consolidates and updates” Administrative Office policies on fine and restitutions, and provides new forms, new collections strategies, and – from the defense perspective – contemplates dangerous new liaisons with the Office of Probation and the Office of the United States Attorney's Office.

a. Although the defense may disagree with much in Monograph 114, it is a valuable resource that collects and clearly explains all statutes, federal rules of criminal procedure, and sentencing guidelines relating to the collection of criminal debt.

(1) Full citation for the Monograph: Federal Corrections and Supervision Division, Administrative Office of the United States Courts, *Criminal Monetary Penalties: A Guide to the Probation Officer's Role*, Monograph 114, September 19, 2000 (in this outline, “*Monograph 114*.”)

(2) Very difficult to locate this monograph – not available on Westlaw, and not found on Administrative Office's (“AO”) website. Ask your local Federal Public Defender to request a copy through the district court library (who will then probably borrow it from the Office of United States Probation).

(a) AFD Lisa Hay of Portland reports that she located the Monograph by faxing the Administrative Office: “I ordered Monograph 114 last year by faxing a request to the Administrative Office, Printing & Distribution, Fort Worth Texas (Fax 817-334-5227). I think it was free. I also picked up Monograph 112, Pretrial Services Investigation and Report.”

(3) AFD Ricardo Bascuas noted that the Monograph is mentioned in this year's annual Optimum Utilization report by the Administrative Office [p. 19]. That report is online at www.uscourts.gov. The “Optimum Utilization” report describes the new efforts of the Judiciary:

(a) INCREASE THE IDENTIFICATION OF ASSETS AND COLLECTION OF FINES AND RESTITUTION FROM OFFENDERS The Judiciary has developed a comprehensive monograph on the role of probation officers in the

collection of fines and restitution from offenders. The new monograph will be distributed to probation officers in fiscal year 2001. As part of this initiative, the Judiciary plans to work closely with the Financial Litigation Unit of the U.S. Attorney's Office to clarify roles and improve the identification of assets and the collection of payments from offenders. A distance-learning broadcast on the program occurred in November 2000 and nationwide implementation will take place in fiscal year 2001.

- b. **Goal of Monograph:** “This monograph consolidates and updates AO policy on fine and restitution procedures *and encourages close working relationships between the probation office, the clerk’s office, and the financial litigation unit of the United States attorney’s office* to ensure that court orders are enforced.” *Monograph 114* at I-2. (emphasis added).
- (1) **NB:** Notably, discussion of the defense and defense bar is conspicuously absent from *Monograph 114*. The Monograph does warn, however, “of the need to involve counsel of record when an offender is financially unable to afford an attorney. In such cases, the Criminal Justice Act (CJA) mandates representation by counsel whenever an offender is faced with a modification, reduction, or enlargement of a condition of supervision.” *Monograph 114* at VI-4.
- c. **Disclosure of Tax Returns:** *Monograph 114* compiles a new set of financial forms to be completed and turned in to Probation – Probation Forms 48 - 48 I. The central form is Probation Form 48, which is the general financial disclosure form. See *Monograph 114* at IV-3. Section “L” of this form requires the disclosure of tax returns – and asks for the defendant to identify what returns have been filed *in the last five years*. *Id.* at IV-9.
- (1) The Monograph explains that “The review of income tax returns and accompanying schedules is a critical component in determining a defendant’s ability to pay. Income tax returns . . . are confidential and protected by law . . . and therefore are not subject to disclosure to third parties Unauthorized disclosure can result in both civil and criminal penalties.” *Monograph 114* at IV-20.
- (a) The Monograph notes that an executed release form (Probation Form 2848-D) may be required to obtain tax returns, “but some districts have made arrangements with the IRS for an easy exchange of information.” *Id.* at IV-21.

2. **The New Probation / FLU Alliance:** Appendix G of Monograph 114 is a sample agreement between all parties in the federal system to more efficiently collect criminal debt – that is, all parties except the defense bar. “Appendix G contains a model memorandum of understanding that delineates suggested responsibilities for probation and clerk’s office staff and the staff of the United States attorney’s office to ensure adequate communication and coordination.” *Monograph 114* at I-4. The “Model Memorandum of Understanding” is divided into three main sections – the responsibilities of the United States Attorney’s Office, the responsibilities of the United States Office of Probation, and of the clerk’s office of the United States Courts.
- a. **New Alliance Responsibilities of the United States Attorney’s Office:** The model Memorandum of Understanding has thirty paragraphs discussing new responsibilities of the USAO. Some of them seem straightforward, such as sharing financial information with the Probation Office for the preparation of the PSR. *See Monograph 114, Appendix G* at 1 ¶ 1. Other responsibilities contemplate a new – and much greater – level of cooperation between the two agencies. Some examples follow:
- (1) The United States Attorney’s Office is to ensure that all plea agreements “provide that the defendant must provide complete information regarding all restitution victims and that the defendant will execute a financial statement, as well as any release of information authorizations which may be appropriate and / or submit to depositions / interviews as requested by the FLU.” *Id.* at 3 ¶ 12.
 - (a) This clause has been added to all N.D. Cal. plea agreements. In recent litigation contesting disclosure of tax returns, the United States Attorney’s Office threatened to seek a breach of the plea agreement based on this clause.
 - (2) The AUSA has the responsibility “[a]s soon as possible after sentencing . . . [to] ensure that the FLU receives a copy of the judgment *and the PSR.*” *Id.* at 3 ¶ 15.
 - (3) The model Memorandum contemplates a close working relationship between FLU and the United States Office of Probation. “The FLU will work with the USPO to maximize collection of criminal monetary penalties in cases under the USPO’s supervision. The FLU will take appropriate enforcement action in consultation with the USPO. The FLU will also issue subpoenas to depose offenders to determine assets when requested by the USPO.” *Id.* at 5 ¶ 26.

b. New Alliance Responsibilities of the Office of Probation: As with the United States Attorney's Office, many of the responsibilities of the Office of Probation seem routine. The model Memorandum of Understanding, however, does contemplate that probation will work much more closely with FLU at sentencing and during supervision.

- (1) During supervision, the Probation Officer is to reevaluate the financial information submitted for the PSR and new information submitted for supervision, "and immediately provide notice to the FLU of assets still available or new assets available to satisfy unpaid criminal monetary penalties." *Id.* at 8 ¶ 17.
- (2) The Probation Officer is to ask the defendant to complete a "Department of Justice Financial Statement if requested to do so by the FLU." Probation will then provide a copy of this statement to the FLU. *Id.* at 8 ¶ 18.
- (3) The Probation Office "will routinely share all financial information provided by the offender or as developed by the USPO with the FLU." *Id.* at 8 ¶ 22.
- (4) The Probation Officer can turn to FLU for assistance "in utilizing the FLU's enforced collection remedies, including garnishment, execution on property, debtor examinations, fraudulent transfers, mail covers, and installment payment orders for self-employed offenders." *Id.* at 8 ¶ 25.
- (5) If the Probation Office plans to revoke a defendant for non-payment, it will seek the assistance of the United States Attorney's Office. The Probation Office will share all evidence and develop "plans and strategies for documenting an offenders' failure to make bone fide efforts to pay outstanding penalties." *Id.* at 9 ¶ 27.

3. Defense Notice of New Alliance: Monograph 114 encourages a new alliance between probation and the Office of the United States Attorney. The Monograph, however, also cautions that the defense bar should not be excluded from this process. "Each district is encouraged to develop and negotiate a local memorandum of understanding among the various court units, including the probation and clerk's office, and the financial litigation unit of the United States attorney's office. *The Federal or Community Defender should also be advised of the content of the memorandum of understanding.*" Monograph 114 at VII-1 (emphasis added).

- a. Despite this warning in Monograph 114, the Federal Public Defender of the Northern District of California was not advised of this memorandum of understanding and new alliance until the issue of disclosure of tax returns was litigated in federal court. Based on our discussion with other defenders, the defense bar has also not been informed in other districts where this memorandum was adopted.

4. New Monograph 114 Ideas in Action: The Financial Investigation Desk Reference for U.S. Probation and Pretrial Services Offices: If Monograph 114 is the new Bible of the Probation Office for the collection of criminal penalties, the new “Desk Reference” is the daily hymnal. See Federal Judicial Center, *Financial Investigation Desk Reference for U.S. Probation and Pretrial Services Offices*, November 2000 (hereinafter “*Desk Reference*.”). This desk reference is the document that the average probation officer will be using in cases involving substantial or complex restitution and fines.

- a. The Desk Reference is available to Federal Defenders at <http://156.132.47.230:8081/newweb/jnetweb.nsf/>.
- b. The desk reference encourages Probation Officers to seek disclosure of tax returns, and compare them with financial information already provided by the defendant. “Upon the defendant’s completion of PROB 48 and PROB 48B, officers are encouraged to compare them with the defendant’s personal income tax return, Form 1040, including any attached schedules. Income tax returns and the accompanying schedules contain a wealth of information that can be used to verify data reported on PROB 48 and PROB 48B, and vice versa.” *Desk Reference* at I-27. The desk reference provides a “Reminder:” “Income tax returns are important because they usually are completed before conviction, whereas PROB 48 and PROB 48B are completed after conviction. Compare information on PROB 48 and PROB 48B with information on tax returns from prior years.” *Id.*
 - (1) If the Probation Officer suspects that the tax returns that have been disclosed are forged, he or she “should contact the Internal Revenue Service (IRS) for verification of adjusted gross income and taxes paid. An executed release form from the IRS (Form 8821) may be required to obtain this information. Some probation offices have made arrangements with the IRS for an easy exchange of information and have created standard release forms.” *Id.*
 - (2) The *Desk Reference* contains an important caveat not fully appreciated by most zealous officers: “Remember, information in tax returns is confidential and protected by law (26 U.S.C. § 61-3). Officers should be careful not to disclose this information to any parties except those for whom it was collected: the court, the U.S. Parole Commission, and the U.S. Bureau of Prisons. Disclosure of this information to unauthorized parties can result in both civil and criminal penalties. As a safeguard, officers should return copies of tax returns to the defendant unless there is specific reason for retaining them in the file. Supervisors should be consulted regarding any questions about disclosing income tax information.” *Id.* at I-28.

- c. **NB:** The *Desk Reference* includes many pages of detailed instructions to aid Probation Officers in analyzing each line of many different types of tax returns. The *Reference* also has several complex and thorough case studies of defendants who have submitted incomplete, inaccurate, or false financial information.

- (1) A defendant entering supervision has typically completed two federal forms under the penalty of perjury (and federal prosecution): his or her federal tax returns, and the probation forms submitted to probation. Defendants with “unorthodox” accounting methods, such as fraud clients, should accordingly take particular care in completing these financial worksheets and signing disclosure waivers.
- (2) Officers are instructed to compare tax forms voluntarily submitted with tax return *actually filed* with the IRS. *See, e.g., Desk Reference* at II-2 (Compare the copy of Form 1040 submitted by the offender with the copy for Form 1040 provided by the IRS If any discrepancies are found on the Form 1049, instruct the offender to file an amended return.”) In complex financial cases – particularly cases involving fraud – defense counsel would therefore be prudent to caution clients about this procedure, and examine tax returns (if they are disclosed) with a skeptical eye before submitted to the Office of Probation.

C. The Northern District of California Model: How the New Alliance Works. Although it is not clear exactly how many districts have the new Monograph 114 agreement in place, Probation in the Northern District of California has conceded that Memoranda of Understanding have already been adopted in several districts nationwide. Following is a detailed description of the N.D. Cal. agreement, taken from (originally undisclosed) materials provided to members of both offices in a joint US Attorney / Probation meeting. Agreements in other districts presumably closely resemble this model.

- 1. The Probation/US Attorney Agreement:** The ND Cal Memorandum of Understanding candidly begins with an admission that the pact has nothing to do with determining the ability to pay restitution, the necessity of waiving or reducing fines for indigent defendants, or any of the other rehabilitative functions traditionally associated with the Office of Probation. Instead, the agreement focuses on collection goals that were previously the main responsibilities of FLU:
 - a. “Introduction: In an effort to *more effectively collect criminal monetary penalties* (i.e. fines, special assessments, and restitutions) while the defendant is on probation/supervised release, the Probation Office and Financial Litigation Unit (FLU) of the U.S. Attorney’s Office have agreed to institute the following collection procedures for all new cases involving criminal monetary penalties totaling \$5,000 or more.” N.D. Cal. Probation/U.S. Attorney Agreement, at 1 (emphasis added).

2. **Probation Obtains Defendant's Consent:** The initial strategy in this alliance is for the probation officer to obtain the defendant's consent to permit the United States Attorney's Office and the Probation Office "to share all financial documents and information relating to the defendant." *Id.* at 1 ¶ I. If the defendant fails to execute the written consent, "the supervising officer will seek the defendant's compliance through the court." *Id.* at 1 ¶ I.A.
3. **A Tax Trap:** The Probation Office then effectively forges a tax return trap for the defendant. First, *during the PSR phase*, the probation officer "will obtain from the defendant copies of his or her federal income tax returns . . . and all attachments . . . filed for the current calendar year and each of the 4 prior calendar years." *Id.* at 1 ¶ II A.1.a. This provides the probation officer with tax forms *as disclosed* by the defendant.
 - a. The probation officer then sets into motion the process by which Probation and the United States Attorney can compare these self-disclosed forms with the tax forms *actually filed*. The officer is to ask the defendant to execute IRS form 8821 – Tax Information Authorization – for the current year and the previous four years. *Id.* at 1-2 ¶ II. A.1.b. The Probation Office will use this authorization to obtain the forms *filed* within the previous four years. *Id.* When the I.R.S. discloses the tax-return forms *filed*, the forms are then added to the defendant's file "and will be compared to the copies of the returns provided by the defendant." *Id.*
 - b. Upon the beginning of supervision the probation officer is to have already secured from the defendant a release permitting disclosure of "all financial documents and information" to the United States Attorney, Northern District of California. *Id.* at 1 ¶ 1.
 - c. The procedure creates a trap for the defendant who voluntarily discloses tax returns and then authorizes disclosure of the *filed* returns. By six months into the supervision process the Probation Office and United States Attorney's Office will have ensured that the defendant has voluntarily disclosed a set of tax returns, and will force him or her to authorize the release of the actual returns filed. The disclosure of information to a Probation Office is, of course, under penalty of perjury – thus the defendant may well be facing new perjury charges as well as possible tax fraud or tax evasion counts.
4. **FLU Now Supervises Probation:** Once the hapless defendant has been sentenced and begins supervision, the Probation Office and United States Attorney's Office step-up the financial review. The *Probation Officer* is directed to have the defendant complete a U.S. Department of Justice Financial Statement form. *Id.* at 2 ¶ II.B. Notably, this form is apparently not part the Kafka-esque labyrinth of Probation paperwork, but instead seems to be a form traditionally used by the Financial Litigation Unit of the United States Attorney's office.

- a. Once he or she begins supervision the defendant no longer has the presence of counsel in the probation interviews, and the supervising probation officer is instructed to secure what the previous probation officer could not: “the documents that the PSR probation officer was unable to obtain during the PSR phase.” *Id.* If any discrepancies exist, roughly two weeks later the supervising probation officer “will have the defendant complete a Probation Financial Statement.” *Id.* at 2 ¶ II C.
5. **Probation – Discovery Stalking Horse for FLU:** Before the defendant has spent six months on supervision, the Office of Probation has already secured from the defendant the vast majority of research and investigation that was traditionally the responsibility of the United States Attorney’s Office, Financial Litigation Unit. The Agreement accordingly contemplates an almost-complete shift of litigation and investigation responsibilities from FLU to the Probation Office. As does any dutiful federal law enforcement agent at the conclusion of the investigation process the probation officer forwards to his or her supervising Executive agency, (FLU), the results of their work:
 - (1) “A. Repayment Plan: After obtaining the above financial information and determining a proposed repayment plan for the defendant, the supervising probation officer will send the proposed repayment plan along with copies of all pertinent financial documents (e.g., financial statements, credit reports, asset searches) to FLU *for its review and concurrence.*” *Id.* at 2-3 ¶ III.A (emphasis added).
 - b. **Court Not Part of the Process:** The court is entirely superfluous in this new alliance. The probation officer does not meet with his or her own Probation Office supervisor, with a court representative, or with defense counsel and the defendant to discuss how to recover fines, restitution, and assessments. Instead, it is the United States Attorney’s Office, and specifically FLU, which signs off on the financial assessment and recovery plan:
 - (1) “After reviewing the probation officer’s proposed repayment plan and accompanying financial information, FLU will convey, in writing, its concurrence with or suggested modifications to the proposed repayment plan, whichever is appropriate. Furthermore, if warranted, FLU will set up a meeting with the probation officer to further discuss the proposed repayment plan.” *Id.* at 3 ¶ III A.2.
 - (2) If Probation and the United States Attorney’s FLU unit wish to exclude the Court from this process, they can do so by simply *agreeing* to do so (without notice to or leave of the Court):

(a) “B. Formal Discovery: Where appropriate and at the request of the supervising probation officer, the FLU will assist the supervising probation officer in obtaining financial information by conducting formal discovery (e.g., depositions, written interrogatories) from recalcitrant defendants, but only after the supervising probation officer has first sought assistance from the court to obtain such financial information, *unless both the FLU and Probation jointly agree to dispense with seeking the court’s assistance*. Because it is a time-consuming process, formal discovery should be used only as a last resort in obtaining financial information. *Id.* at 3 ¶ III B (emphasis added).

(3) In its collection efforts Probation now has the enforcement power of the Executive: “Where appropriate . . . the FLU will assist the supervising probation officer in collecting monetary penalties through such formal collection procedures as writs of garnishment and execution.” *Id.* at 3 ¶ III B.

D. Defense Arguments Against Disclosure of Tax Returns: Federal Courts Lack

Authority to Compel Disclosure: While the Probation Office obviously would like the unfettered disclosure of tax returns, that is not the procedure contemplated by Congress. In 26 U.S.C. § 6103, the citizen finds extensive protections precluding the routine disclosure of tax returns.

1. Section 6103 first clearly states the general rule: unless authorized by Title 26 “no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any matter in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.” 21 U.S.C. § 6103(a)(1). Returns may be disclosed to the Department of Justice only under certain limited circumstances. *See, e.g.*, 21 U.S.C. § 6103(h)(2). Those circumstances include tax or criminal proceedings before the grand jury or under the Federal Rules of Evidence, but the authorizing court is to “give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.” *Id.* § 6103(h)(2)(D).
 - a. Returns *may* be disclosed in criminal investigations. *See* 21 U.S.C. § 6103(i). An application for such returns, however, must meet specific and detailed pleading requirements and factual showings. *Id.* at § 6103(i)(1)(B)(i)-(iii). Further limitations restrict the *use* of the taxpayer information. *Id.* at § 6103(i)(4)(A)-(D). In reviewing the requested use of taxpayer information, the court is to again give “due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.” *Id.* at § 6103(i)(4)(D).
 - b. **Emphasis on confidentiality:** In light of the extensive requirements of § 6103, federal courts have repeatedly emphasized the confidential nature of tax returns. “Because of

our system of taxation through self assessment, the maximization of federal revenue hinges on complete and detailed reporting by each taxpayer. Such reporting is in a large part nourished by the confidential nature of the tax returns. In these times of mushrooming federal budgets and increasing complexities in the federal tax laws, we should loathe tampering with the success of the reporting system.” *Heathman v. United States District Court*, 503 F.3d 1032, 1036 (9th Cir. 1974). *See also, United States v. Jackson*, 850 F. Supp. 1481, 1503 (D. Kansas 1994) (“The defendants have not shown that statutory grounds exist on which this information could be sought by the government and ordered by the court. *When Congress chooses to speak with such specificity, courts must heed its language.* Under the statutory scheme, the court cannot order disclosure of information under § 6103(i)(4)(A), unless the prosecution acquires it upon a proper application and court order.”)(internal quotes and citation omitted) (emphasis added); .

E. Defense Arguments Against Disclosure of Tax Returns -- Tax Fraud and Sentencing

Exposure: The obvious concern regarding disclosure of tax returns to Probation – and the government – is obviously exposure to new tax fraud or tax evasion counts. Assume, for example, a year of fraudulent criminal activity that produces a relatively modest \$14,000 in taxable (but unreported) income. With sophisticated concealment, the Offense Level for this tax evasion would be 14. *See* USSG § 2T1.1(a)(1), (b)(1), (b)(2). For a client with no prior convictions, that results in a range of 15-21 months.

1. **Tax Counts May Not Group:** Note that there is a circuit split on whether tax counts group with underlying criminal conduct. *Compare United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997), with *United States v. Vitale*, 159 F.3d 810 (3d Cir. 1998).
2. **Tax Codes and Self-Incrimination: Analogy to *Marchetti*:** In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court considered the assertion of a Fifth Amendment privilege against disclosure for a defendant convicted under wagering tax laws. *Id.* at 41. The issue before the Court was whether the *method* used by Congress “in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment.” *Id.* at 44. The tax codes at issue required that a defendant report wagers and register with the IRS and provide the names of their agents and employees. *Id.* at 42.
 - a. The Court concluded that tax provisions “may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination.” *Id.*
 - b. Two lessons from the *Marchetti* opinion bear upon the disclosure of tax returns to Probation.

- (1) The first is that in *Marchetti*, the issue of tax returns and the failure to disclose returns arose from the application of an authorizing federal statute. *Id.* at 42-43. In the presentence context, by contrast, there is no statutory basis for the court's jurisdiction to compel disclosure of tax returns outside of the provisions of 26 U.S.C. § 6103.
- (2) Moreover, in determining that there was a "real and appreciable" danger of self-incrimination the Court in *Marchetti* noted that the disclosure of the tax returns was effectively a pretext for federal investigation of wagering: In *Marchetti*, (as in the presentence context), an agency sought disclosure of tax returns for one putative purpose and then promptly disclosed the return to an Executive investigatory body (in the presentence context, FLU). In both *Marchetti* and the presentence context assertion of the Fifth Amendment privilege is entirely appropriate.

3. Prosecutions from PSR? The United States Attorney's Office argues that the United States Attorney's Manual precludes prosecutions arising out of information discovered in the presentence report.

- a. There is, however, no real remedy for violations of the United States Attorney's Manual. *See, e.g., United States v. Snell*, 592 F.2d 1083, 1087 (9th Cir. 1979) ("Assuming *arguendo* that the second prosecution violates the *Petite* policy, we conclude that such a violation of the internal housekeeping rules of the Department of Justice does not entitle Snell to a dismissal of the indictment.")

F. Defense Arguments Against Disclosure of Tax Returns – *Hubbell* and Rights Against Self-Incrimination: The Supreme Court recently reaffirmed a defendant's right against self-incrimination in the context of the government's use of coerced testimony. *See United States v. Hubbell*, 120 S. Ct. 2037 (2000).

1. In *Hubbell*, the Court faced yet another example of continued abusive prosecution from the Office of the Independent Counsel. Defendant Webster Hubbell had previously entered a plea to mail fraud and tax evasion relating to billing practices in an Arkansas law firm. *Hubbell*, 120 S. Ct. at 2040. That plea resulted in a twenty-one month prison sentence. *Id.* In the plea agreement, Mr. Hubbell agreed to provide the government with "'full, complete, accurate, and truthful information' about matters relating to the Whitewater investigation." *Id.*
 - a. While imprisoned for that offense, the Independent Counsel served Mr. Hubbell with a subpoena duces tecum calling for the production of eleven categories of documents.

Id. The subpoena was to be returned to a federal grand jury. *Id.*

- b. Mr. Hubbell appeared before the grand jury and invoked his Fifth Amendment privilege. He declined to answer whether responsive documents were in his possession. *Id.* The prosecutor produced a *Kastigar* order under 18 U.S.C. § 6003(a), directing him to respond and granting immunity “to the extent allowed by law.” *Id.* Mr. Hubbell then produced over thirteen thousand pages of documents.

(1) **Analogy to New Alliance:** The government in the context of tax returns and PSR’s disclaims any intention of prosecuting defendants based on materials in the presentence report. Similarly, the government in *Hubbell* promised not to prosecute the defendant after production of the documents in compliance with the *Kastigar* order. *Id.* at 2041.

(a) Despite that promise, the government in *Hubbell* took the information produced by the defendant and ultimately returned *another* indictment against him alleging tax crimes, mail, and wire fraud. *Id.* The district court in *Hubbell* characterized the subpoena duces tecum as “the quintessential fishing expedition,” and dismissed the indictment. *Id.*

- c. The Supreme Court granted the Independent Counsel’s petition for a writ of certiorari to determine “the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena.” *Id.* at 2042. The Court in *Hubbell* began by parsing out the different protections implied by the prohibition of a person being “compelled in any criminal case to be a witness against himself.” *Id.* at 2042. First, only communications that are “testimonial” in character fall within the ambit of the right. *Id.* Incriminating evidence that is simply the by-product of obeying regulatory requirements – such as *filing* income tax returns – are not protected testimonial acts. *Id.* at 2043.

(1) The Court in *Hubbell* repeated the “settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not ‘compelled’ within the meaning of the privilege.” *Id.* at 2043.

(2) The Supreme Court in *Hubbell* held that when the government broke its *Kastigar* promise and prosecuted a defendant who produced documents in response to a grand jury subpoena, and when the government could not show an independent basis for a subsequent prosecution, the indictment should be dismissed. *Id.* at 2048.

- (3) The Court in *Hubbell* cites *Fisher v. United States*, 425 U.S. 391 (1976), in which the government actually complied with procedural protections and sought summons for the production of tax-preparation papers. See *Hubbell*, 120 S. Ct. at 2043 (discussing IRS’ summonses issued to defendant).
- (a) The government and Probation cannot explain why they are now exempt from this jurisdictional requirement, when every example cited throughout *Hubbell* discusses grand jury subpoenas or valid summonses as a predicate for the assertion of the privilege.
- (4) The Court in *Hubbell* continues in its decision to provide one its most comprehensive and complete explications of a defendant’s privilege against self-incrimination. The Court explains the origins of the *Kastigar* decision and immunity law, and traces the creation of 18 U.S.C. § 6002 – the codification of *Kastigar* rights. *Id.* at 2044-45. The Court warned that when the prosecutes a defendant for matters related to testimony given under a grant of immunity, the prosecution bears an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. *Id.* at 2045.
- (5) The Court emphasized that even though the *contents* of a document may not be inculpatory, the testimony “inherent in the act of producing those documents” may trigger the Fifth Amendment protection. *Id.* at 2045-46. In the *Hubbell* case, for example, the act of producing the documents sought in the subpoena duces tecum “could provide the prosecutor with a ‘lead to incriminating evidence’ or ‘a link in the chain of evidence needed to prosecute.’” *Id.* at 2046. That is, in fact, exactly what happened: the documents produced under compulsion by Mr. Hubbell lead the Independent Counsel to a second round of charges. *Id.* at 2047-48. Mr. Hubbell was entitled to *Kastigar* immunity before he produced these documents under compulsion. *Id.* at 2048. When the government could not prove an independent basis for its prosecution, dismissal of the indictment was the correct remedy. *Id.*
- (6) The true holding of the Court in *Hubbell* was an affirmance and expansion of the protections afforded by the Fifth Amendment: “In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of these sources.” *Id.* at 2047.

G. Defense Arguments Against Disclosure of Tax Returns – Not Necessary for the PSR or Supervision:

It is a fair question as to why the Probation Office needs tax returns at all to “verify” financial information. Tax returns are self-reporting documents and are only as reliable as the self-reporting taxpayer and the preparer of the return. The typical tax return certainly does not report all expenses and debt accumulated by the defendant. The government and Probation Office cannot explain why one self-reporting financial document filed under the threat of perjury – the Probation financial work sheet – cannot be used to “verify” financial information, while another self-reporting financial document filed under threat of perjury – tax returns – can.

1. A defendant’s financial information can only “verified” by external financial sources. Specifically, verification of financial information is best accomplished by using pay stubs, mortgage statements, and waivers that permit Probation to seek bank account records. Combined with the credit reports inevitably run by Probation and the self-reporting financial form, the Probation Office has more than ample information with which to “verify the financial information provided by the defendant.”

H. Defense Arguments Against Disclosure of Tax Returns – Constitutional Challenges: In response to a national e-mail about this subject, Peter Fucci of the Miami Federal Defender’s office had a creative idea regarding constitutional challenges:

1. “Regarding your memorandum about the FLU unit and tax returns: You may want to consider two arguments if you have not already done so. First, the practice could constitute an unconstitutional delegation. Clearly, the federal government is not delegating a ministerial act. *Compare United States v. Bernadine*, 237 F.3d 1279 (11th Cir. 2001).
2. Second, and another aspect of the delegation argument, Congress delegated the duty of maintenance of tax returns *to the IRS*. I believe that either a tax statute or a regulation requires returns to be kept for three years.
3. Third, this latter point gives rise to an equal protection claim as there does not even seem to be a rational basis for invasion of a privacy right, which, as you know, would require strict scrutiny.”

I. Defense Arguments Against Disclosure of Tax Returns – Probation as Prosecutor: We end this outline by sounding a theme first mentioned at the outset; probation and prosecutorial functions make for “strange philosophical bedfellows.” *Bunzel, The Probation Officer and the Federal Sentencing Guidelines*, *supra* at pg. 1. From our perspective, one of the strongest arguments against his new alliance between the United States Attorney and Probation is that it fatally undermines the appearance of neutrality critical for an effective Probation Office.

A defendant cannot be candid in a presentence interview when the author of the PSR has met – secretly – with the government and devised a scheme by which confidential financial documents will be forcibly produced.

1. This erosion of probation neutrality will continued unchecked if not challenged by the defense bar. Citing *Monograph 114*, ask the United States Attorney and the Office of Probation in your district to reveal any Memorandum of Understanding – then e-mail us and let us know what you’ve learned.
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APPRENDI v. NEW JERSEY — LOWER COURT DECISIONS

As of April 25, 2001

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INTRODUCTION

This outline summarizes selected decisions of the federal appellate and district courts interpreting *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). It is organized by the type of offense, followed by post-conviction cases and non-drug sentencing guidelines cases. Within each section, cases are listed by circuit. Where there is more than one case from a circuit, they appear in reverse chronological order. District court cases are listed within each circuit following appellate decisions.

8 U.S.C. § 1326 — ILLEGAL REENTRY AFTER DEPORTATION

The following cases reject any challenge to a conviction and enhanced sentence in cases where the aggravated felony is not alleged in the indictment, proved to a jury nor admitted by the defendant during the guilty plea, beyond a reasonable doubt on the ground that *Apprendi* did not overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) which held that the aggravated felony which enhances the maximum sentence in a § 1326(a) case is not an element of the offense that must be alleged in the indictment, or found by a jury, beyond a reasonable doubt. These courts note that despite language in *Apprendi* that casts doubt on its continued viability, *Almendarez-Torres* remains binding precedent until such time as the Supreme Court abrogates its holding.

United States v. Latorre Benavides, 241 F.3d 262 (2d Cir. 2001)

United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001)

United States v. Raya-Ramirez, No. 00-3839NE, __ F.3d __, 2001 WL 300563 (8th Cir. Mar. 29, 2001).

United States v. Pacheco-Zepeda, 234 F.3d 411 (9th Cir.2001),

United States v. Guadamuz-Solis, 232 F.3d 1363 (11th Cir. 2000).

United States v. Nunes, No. 99 CR 830, __ F. Supp. 2d __, 2000 WL 1741890 (N. D. Ill. Nov. 22, 2000)

18 U.S.C. § 924(c) — USING GUN IN CONNECTION WITH CERTAIN OFFENSES

First Circuit

United States v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000). In a case that creates a conflict with the Third, Fourth, Ninth, and Tenth Circuits in pre-*Apprendi* cases, the First Circuit held that harmless error analysis applies to the failure to allege an element in the indictment—in this case that the firearm used during the robbery of an armored car depot was a semiautomatic assault weapon. At the time of the offense, § 924(c)(1) specified a mandatory five-year sentence for the use of a firearm, but if a semiautomatic weapon was used, the mandatory sentence increased to ten years. This element also was not submitted to the jury for a finding beyond a reasonable doubt. In upholding the enhanced sentence, the First Circuit reasoned that the defendants were not prejudiced by the error because the jury, based on trial evidence, would have found beyond a reasonable doubt that the defendants used a semiautomatic assault weapon (the element) and because the defendants were not alleging that they lacked fair notice of the aggravated nature of the firearm. The court rejected the proposition that a failure to allege an element in the indictment is a structural error not subject to harmless error review. Similarly, relying on *Neder v. United States*, 527 U.S. 1, 15 (1999), the court of appeals found that failure to submit an element to the jury is subject to harmless error review. Significantly, in a footnote, the court also explained that it was not deciding “whether the proper remedy would be remanding for reindictment or for resentencing” because defendants had “overreach[ed]” in their “choice of remedy,” as the indictment fairly charged the “basic” use of a firearm offense under § 924(c)(1) and there was no question that the government proved the elements of that offense beyond a reasonable doubt so that the “only possible relief for the defendants would be a remand for reindictment or resentencing.” *Mojica-Baez*, slip op. at *18, n.9 (internal citations omitted).

Second Circuit

United States v. Tran, 234 F.3d 798 (2d Cir. 2000). In a decision applying not *Apprendi* but another recent Supreme court case, *Castillo v. United States*, 120 S. Ct. 2090 (2000) (use of word “machinegun” in 18 U.S.C. § 924(c) states element of separate, aggravated offense), the Second Circuit found that the failure to allege type of weapon is a jurisdictional error that is not subject to harmless error analysis. However, the court remanded not just for simple resentencing but allowed for the possibility of reindictment.

Fourth Circuit

United States v. Harris, 243 F.3d 806 (4th Cir. 2001). In a prosecution under § 924(c), as amended in 1998, whether defendant “brandished” a firearm is a sentencing factor, rather than element of the crime of carrying a firearm in relation to drug trafficking, and thus need not be charged in indictment and proved beyond reasonable doubt. Although this factor increases the mandatory minimum it does not increase the statutory maximum.

Sixth Circuit

United States v. Brady, 239 F.3d 802, 807 (6th Cir. 2001) . In a case involving a violation of §924(c) before its 1998 amendment, the 6th Circuit found that whether the firearm used is a short-barreled shotgun is an element of the offense that must be alleged in the indictment and proved to the jury beyond a reasonable doubt as that factor increased the sentence from a mandatory 5-year term to a mandatory 10-year term.

Eighth Circuit

United States v. Carlson, 217 F.3d 986 (8th Cir. 2000). In a case involving a guilty plea to a § 924(c)(1) charge (as amended after *Bailey*), the Eighth Circuit found that whether a defendant “brandished” a firearm so as to trigger the seven-year mandatory minimum consecutive term—rather than the five-year mandatory consecutive term for the offense in its simplest form—is a factor to be determined by the district court at sentencing and not an element which must be charged in the indictment. The Court found that because the factor increased the mandatory minimum but not the statutory maximum, *Apprendi* did not require a different result.

Tenth Circuit

United States v. David Owens, Jr., CR-00-24-L (W.D. Okla. July 26, 2000) (AFPD Tony Lacy). At a sentencing on July 26, the district court imposed a five-year sentence of imprisonment rather than the aggravated seven-year penalty for “brandishing” a firearm under § 924(c)(1). The U.S. Attorney’s office and the probation officer acquiesced to the defendant’s objection that “brandishing” was an element of the offense such that the seven-year mandatory minimum for “brandishing” a firearm could not be imposed absent the guarantees required by *Apprendi*. The case, which had been tried to a jury in April, involved an attempted carjacking (18 U.S.C. § 2119), using and carrying a firearm during and in relation to the commission of a crime of violence (18 U.S.C. § 924(c)(1)), and being a felon-in-possession (18 U.S.C. § 922(g)(1)).

Eleventh Circuit

United States v. Pounds, 230 F.3d 1317 (11th Cir. 2000). In a prosecution under 18 U.S.C. § 924(c)(1)(A), the court of appeals held that whether a firearm was discharged, § 924(c)(1)(A)(iii), is a factor to be determined by the district court at sentencing rather than an element of the offense because that factor only increases the mandatory minimum penalty to ten years; it does not alter the statutory maximum penalty, which is life for all violations of § 924(c).

18 U.S.C. § 924(e) — ARMED CAREER CRIMINAL ACT

The following cases hold that the recidivist provision in §924(e) which enhances the maximum penalty from ten years to life and requires imposition of mandatory minimum 15-year sentence is a sentencing factor not implicated by the holding of *Apprendi* despite language in *Apprendi* suggesting that *Almendarez-Torres* may have been wrongly decided.

Third Circuit

United States v. Mack, 229 F.3d 226 (3d Cir. 2000). A defendant convicted of being a felon-in-possession of a firearm (18 U.S.C. §922(g)) may have his sentence enhanced to a maximum sentence of life pursuant to 18 U.S.C. § 924(e) from the basic ten-year maximum penalty upon a finding by a preponderance of the evidence by the district court that he was previously convicted of three specified felonies without violating the rule in *Apprendi*, which expressly excludes prior convictions from its application. In a concurrence, Chief Judge Becker addresses the possibility that guideline enhancements that increase the maximum guideline sentence without increasing the statutory maximum sentence may run afoul of the rule in *Apprendi*.

Tenth Circuit

United States v. Dorris, 236 F.3d 582 (10th Cir. 2000)

Eleventh Circuit

United States v. Thomas, 242 F.3d 1028 (11th Cir. 2001).

18 U.S.C. § 1341 — MAIL FRAUD

Ninth Circuit

United States v. Pavelcik, No. 99-50316, 2000 WL 1141096 (9th Cir. Aug. 11, 2000) (unpublished). The Ninth Circuit vacated a five-year statutory sentence enhancement imposed after a guilty plea to mail fraud through telemarketing upon concession by the government that the five-year enhancement for committing the offense through telemarketing, as set out in 18 U.S.C. § 2326, is a separate element of a crime subject to indictment and proof beyond reasonable doubt.

18 U.S.C. § 1958 — “MURDER FOR HIRE”

United States v. Smith, No. 99-3826. ___ F.3d ___, 2000 WL 1724977 (8th Cir. Nov. 21, 2000). On an appeal from a resentencing following successful a § 2255 motion in a case involving a conviction under 18 U.S.C. § 1958(a), travel in interstate commerce with intent to commit murder, the

Eighth Circuit declined to decide whether the language “if death resulted” in the statute is an element where the defendant did not raise an *Apprendi* challenge, even though death was not alleged in indictment. The court affirmed the life sentence on basis of the Sentencing Guidelines calculations.

18 U.S.C. § 1963 — RICO

United States v. Corrado, 227 F.3d 543 (6th Cir. 2000). *Apprendi* does not require that a jury determine the extent of a criminal forfeiture flowing from convictions for conspiracy under RICO where the jury had determined that defendants were guilty of the RICO charges beyond a reasonable doubt based on specific charges and defendants were put on notice under the indictment that criminal forfeitures under 18 U.S.C. § 1963 would be pursued upon conviction of the criminal charges.

18 U.S.C. § 3559(c) — “THREE STRIKES”

Sixth Circuit

United States v. Gatewood, 230 F.3d 186 (6th Cir. 2000) (en banc). The Sixth Circuit ruled that the prior felony convictions on which the government sought to rely in seeking a mandatory life sentence were not elements of the offense but mere sentencing factors, which did not have to be set forth in the indictment. Although noting that the different concurrences in *Apprendi* cast doubt on the correctness of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the Constitution does not require Congress to treat prior convictions that enhance sentences as elements of the offense, the court nevertheless rejected the argument because “*Almendarez-Torres* remains the law.”

Ninth Circuit

United States v. Williams, No. 99-10475, 2000 WL 1175695 (9th Cir. Aug. 18, 2000) (unpublished). The court held that *Apprendi* does not require the government to prove the fact of prior convictions by a standard higher than preponderance before it can seek to impose life imprisonment pursuant to 18 U.S.C. § 3559(c).

18 U.S.C. § 3592 – FEDERAL DEATH PENALTY ACT

United States v. Allen, No. 98-2549, __ F.3d __, 2001 WL 360712 (8th Cir. Apr. 12, 2001) The 5th Amendment’s indictment clause does not require that the aggravating factors and mental culpability required to trigger imposition of the death penalty be alleged in the indictment as these factors are not elements of the crime under the holding of *Apprendi* as they do not increase the maximum penalty allowable for killing a person during an armed bank robbery (18 U.S.C. § 2113(e)) and for using a firearm during the crime of violence and committing a murder (18 U.S.C. § 924(j)) which both carry a maximum penalty

of death; the proof of aggravating factors and mental culpability that a jury must find are merely additional safeguards that Congress has granted for capital cases.

21 U.S.C. §§ 841, 846, 848 — DRUGS

Supreme Court

In the following cases, all involving drug offenses, the Supreme Court has granted the writ of certiorari, vacated the judgment and remanded the case for further consideration in light of *Apprendi*. They are listed by circuit, and in reverse chronological order within each circuit.

Knight v. United States, No. 00-5719, ___ S. Ct. ___, 2000 WL 1199233 (Nov. 13, 2000) (case below: 216 F.3d 1077 (3rd Cir. May 24, 2000) (unpublished, No. 99-3667)).

Blue v. United States and Gibson v. United States, 121 S. Ct. 31 (2000) (case below: 187 F.3d 631 (4th Cir. July 27, 1999) (unpublished, No. 96-4369)).

Clinton v. United States, 121 S. Ct. 296 (2000) (case below: *United States v. Reliford*, 210 F.3d 285 (5th Cir. 2000)).

Burton v. United States, 121 S. Ct. 32 (2000) (case below: *United States v. Crawford*, 211 F.3d 125 (5th Cir. Mar. 8, 2000) (unpublished, No. 98-20294)).

Humphrey v. United States, No. 00-5644, ___ S. Ct. ___, 2000 WL 1199070 (Nov. 13, 2000) (case below: 210 F.3d 373, 2000 WL 353712 (6th Cir. Mar 28, 2000) (unpublished, No. 98-3440)).

Hughes v. United States, No. 00-192, ___ S. Ct. ___, 2000 WL 1201887 (Nov. 6, 2000) (case below: 213 F.3d 323 (7th Cir. 2000)).

Whitt v. United States, No. 00-183, ___ S. Ct. ___, 2000 WL 1201687 (Nov. 6, 2000) (case below: 211 F.3d 1022 (7th Cir. 2000)).

Jackson v. United States, No. 99-10055, ___ S. Ct. ___, 2000 WL 840430 (Oct. 30, 2000) (case below: 207 F.3d 910 (7th Cir. 2000)).

Smith v. United States, 121 S. Ct. 336 (2000) (case below: 215 F.3d 1331 (7th Cir. Jun 5, 2000) (unpublished, No. 99-4253)).

(Carless) Jones v. United States, 120 S. Ct. 2739 (2000) (case below: 194 F.3d 1178 (10th Cir. 1999)).

Curry v. United States, No. 99-10265, ___ S. Ct. ___, 2000 WL 876642 (Oct. 30, 2000) (case below: 211 F.3d 129 (11th Cir. Mar. 10, 2000) (unpublished, No. 98-9621)).

Hester v. United States, 121 S. Ct. 336 (2000) (case below: 199 F.3d 1287 (11th Cir. 2000)).

Brown v. United States, 121 S. Ct. 295 (2000) (case below: 207 F.3d 662 (11th Cir. Jan. 10, 2000) (unpublished, No. 99-2272)).

Wims v. United States, 121 S. Ct. 32 (2000) (case below: 207 F.3d 661 (11th Cir. Jan 4, 2000) (unpublished, No. 98-3684)).

Second Circuit

United States v. Maslin, No. 99-CR-159-7, ___ F. Supp. 2d ___, 2000 WL 1294254 (N.D.N.Y. Sept. 14, 2000 (original order issued July 31)). In one of the first cases to apply *Apprendi*, the court wrote that it “finds that empaneling a jury solely to determine drug quantity or, in the alternative, re-empaneling the original jury in this matter to determine drug quantity, would unduly prejudice Defendant. Defendant is entitled to have a jury determine all elements of the crime, including quantity, without the prejudicing effect of a prior determination of guilt. Finally, the Court is aware that it could re-sentence Defendant pursuant to 21 U.S.C. § 841(b)(1)(D). Because, however, the government continues to argue that Defendant should be sentenced pursuant to § 841(b)(1)(C), or, in the alternative, that the Court should empanel a jury to determine drug quantity, it appears that the government does not consent to sentencing under subparagraph (C) and, thus, Defendant would be entitled to a new trial.”

Fourth Circuit

United States v. Angle, 230 F.3d 113 (4th Cir. 2000). In a cocaine conspiracy case where the indictment did not allege quantity and the quantity determination was made by the district court at sentencing, the Fourth Circuit held that a sentence may not exceed the twenty-year statutory term of imprisonment for the standard offense set out in 21 U.S.C. § 841(b)(1)(C); however, for sentences below the twenty-year statutory maximum “drug amount is still a proper aggravating or mitigating factor to be considered by the judge in determining a sentence at or below” that maximum. **Note: opinion withdrawn, rehearing en banc granted.**

United States v. Henderson, 105 F. Supp. 2d 523 (S.D. W. Va. 2000). At sentencing after conviction by a jury resulting from a trial held before *Apprendi* was decided, the district court ruled that *Apprendi* requires that “quantity” in federal drug offenses must be charged in the indictment, submitted to the jury, and found beyond a reasonable doubt. Consequently, the district court found that it was prohibited from imposing statutory minimum sentences and could sentence the defendant only under the unenhanced twenty-year maximum penalty provided in § 841(b)(1)(C). The court, however, rejected the defendant’s argument that *Apprendi* also prohibits it from making relevant conduct findings. The case involved one count of conspiracy to distribute methamphetamine and marijuana; one count of aiding and abetting moneylaundering; one count of aiding and abetting attempted possession of methamphetamine with

intent to distribute; and one § 924(c) count. Because multiple counts were involved, the district court was able to impose the total guideline sentence of 360 months imprisonment for the drug and money laundering counts by imposing consecutive sentences on the separate counts without exceeding the twenty-year maximum available for unaggravated drug offenses under § 841(b)(1)(C); a five-year consecutive term of imprisonment on the § 924(c) count was also imposed.

Fifth Circuit

United States v. Keith, No. 99-50692, ___ F.3d ___, 2000 WL 1532802 (5th Cir. Oct. 17, 2000) (per curiam). On rehearing by the panel, the Fifth Circuit found no *Apprendi* error where the twenty-year statutory mandatory minimum recidivist sentence imposed under 21 U.S.C. § 841(b)(1)(A) did not exceed the thirty-year recidivist statutory maximum set out in 21 U.S.C. § 841(b)(1)(C).

United States v. Doggett, 230 F.3d 160 (5th Cir. 2000). The Fifth Circuit held that *Apprendi* overrules circuit precedent that treated drug quantity as a sentence enhancement rather than as an element. Hence, in order to impose a sentence beyond the statutory maximum of twenty years for the basic offense, the quantity must be alleged in the indictment and submitted to the jury for a finding beyond a reasonable doubt. However, for recidivist offenders, the maximum penalty of the basic offense is thirty years even if the prior is not alleged in the indictment, because *Apprendi* limits its holding to facts other than prior convictions. Further, *Apprendi* does not “invalidate a court’s factual finding for the purposes of determining the applicable Sentencing Guidelines.”

United States v. Meshack, 225 F.3d 556 (5th Cir. 2000). In a case in which the government conceded that *Apprendi* mandated correction of the sentences because the quantity of drugs was neither alleged in the indictment nor submitted to the jury for a finding beyond a reasonable doubt, the Fifth Circuit, after conducting plain error review, upheld those sentences that did not exceed the twenty-year maximum penalty for the “basic” offense described in 21 U.S.C. § 841(b)(1)(C). In addition, the court upheld the relevant conduct findings under the Sentencing Guidelines, relying on the narrow holding of *Apprendi* (only if the maximum increases) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), although the court acknowledged that the Supreme Court noted that it might reconsider *McMillan* in the future. The Fifth Circuit explained that a sentence pursuant to the Guidelines does not violate *Apprendi* although based on “non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury,” quoting *United States v. Aguayo-Delgado*, 220 F.3d 926, 934 (8th Cir. 2000). With respect to another defendant whose life sentences exceeded the *Apprendi*-allowable maximum, the court vacated and remanded to the district court in the first instance to decide whether to resentence at the lowest statutory drug amount or to allow a retrial of the count. The court also remanded to correct the terms of supervised release.

United States v. Ramirez, No. 99-50768 (5th Cir. July 14, 2000) (unpublished). In a heroin case tried to a jury where the indictment did not allege a quantity, the Fifth Circuit remanded the case to determine, in light of *Apprendi*, whether the district court relied on the quantity of drugs in imposing two concurrent five-year terms of supervised release, which terms are authorized under § 841(b)(1)(B) only when offenses involve more than 100 grams of heroin. This was the only relief sought, as the two

concurrent 110-month sentences of imprisonment did not exceed the twenty-year maximum authorized under the default provisions of § 841(b)(1)(C).

Sixth Circuit

United States v. Flowal, 234 F.3d 932 (6th Cir. 2001). Where indictment does not allege quantity and jury was not required to find explicit quantity, mandatory minimum provisions of §841 could not be applied to defendant as mandatory minimum under statutory scheme had not been triggered by jury finding; accord ***United States v. Ramirez***, 242 F.3d 348 (6th Cir. 2001)

United States v. Page, No. 99-5361, ___ F.3d ___, 2000 WL 1682523 (6th Cir. Nov. 19, 2000). Following its *Rebmann* decision, the Sixth Circuit applied *Apprendi* to drug quantities in an appeal challenging only the sentences. The court reversed the sentence of one defendant who had been convicted of only one count, but declined to reverse the sentences for the other defendants, who were convicted of multiple counts. Although the court acknowledged language in *Apprendi* about the irrelevance of other counts in conducting the constitutional analysis, 120 S. Ct. at 2354, the court still agreed with the government that the defendants could not show any prejudice under plain error analysis because at resentencing, the district court would run the sentences consecutively under U.S.S.G. § 5G1.2 to reach the same results.

United States v. Rebmann, 226 F.3d 521 (6th Cir. 2000). Finding *Apprendi* error because the statutory maximum was increased based on a fact that had not been alleged in the indictment nor proved beyond a reasonable doubt, the Sixth Circuit vacated a twenty-four year sentence in a case where the female defendant had pleaded guilty to a heroin charge. The sentencing court found on a preponderance of evidence at sentencing that the defendant's husband died from the use of heroin, which fact triggered a twenty-year mandatory minimum with a maximum sentence of life; without this sentencing enhancement, the statutory maximum was twenty years and the defendant's guideline range was 24-30 months.

United States v. Garcia, No. 92-20103, ___ F. Supp. 2d ___, 2000 WL 1597757 (E.D. Mich. Oct. 26, 2000). The court in this case dismissed the fourth superseding indictment, filed in August 2000, more than eight years after the offense allegedly occurred and more than two years after the second superseding indictment had been filed, on which the defendant had been arraigned. The government acknowledged that it filed the fourth superseding indictment, which alleged both drug quantity and the defendant's prior convictions, in order to comply with *Apprendi*. The court found that this indictment did not relate back to the second. The court rejected the government's argument that "the Fourth Superseding Indictment does not broaden the charges in this case because the defendant's life sentence for the (now reversed) conviction under [the] First Superseding Indictment, which is essentially the same as the charges contained in the Second Superseding Indictment, was based on judicial findings under the preponderance-of-evidence standard. The Fourth Superseding Indictment merely transfers the responsibility for those findings to the jury, and enhances the standard of proof in the defendant's favor." The court observed that "[a]lthough the government's argument has a practical appeal, the Court cannot accept it because it is contrary to fundamental constitutional principles. In *Apprendi*, the Supreme Court held that a defendant has a constitutional right to have his trial jury determine beyond a reasonable doubt

all the facts which establish or increase the maximum penalty to which the defendant is exposed. Furthermore, under the Fifth Amendment, a federal defendant has a right to prosecution by grand jury indictment. In *Stirone v. United States*, 361 U.S. 212 (1960), the Supreme Court reaffirmed the rule that ‘after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.’” (Citations omitted.) The court concluded that because the fourth superseding indictment did not relate back to the second, it violated the five-year statute of limitations for drug offenses. However, the court based its decision only upon the quantity of drugs charged. It expressly declined to address whether *Apprendi* affects drug quantity determinations under the Guidelines, or whether *Apprendi* applies to prior convictions.

Seventh Circuit

United States v. Cavender, 228 F.3d 792 (7th Cir. 2000). Without deciding whether circuit precedent holding that drug quantities in Title 21 prosecutions are sentencing enhancements rather than elements should be reconsidered, the Seventh Circuit found that any error was harmless where the indictment charged that defendants had handled “multiple kilograms of mixtures containing cocaine base” and that evidence was “put before the jury.” Although the court’s holding addresses the *Apprendi* claim of one of the defendants who pleaded guilty, it does not discuss the standard of proof applied by the district court.

United States v. Smith, 223 F.3d 554 (7th Cir. 2000). The Seventh Circuit held that *Apprendi* does not require it to define the mandatory life provisions for certain classes of offenders convicted of engaging in a continuing criminal enterprise (CCE) as separate offenses rather than as sentencing enhancements. The basic CCE offense requires a twenty-year minimum sentence with a maximum penalty of life imprisonment, but if a defendant is a leader or organizer of an enterprise and the enterprise either involved a specified quantity of drugs or specified amount of gross receipts, a life sentence is mandatory. 21 U.S.C. § 848(b). The defendants argued that the particular findings that trigger the mandatory life sentence are elements of a distinct offense that must be charged and proved beyond a reasonable doubt. In a very good and concise analysis of the issue, the court ultimately decided that the rationale of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which has not been overruled by the Supreme Court, controlled the question before it and rejected the defendants’ argument.

United States v. Scott, 116 F. Supp. 2d 987 (C.D. Ill. 2000). This case involved a conspiracy alleging both marijuana and cocaine. In responding to sentencing objections, the court found that its failure to instruct the jury on the need to find drug quantities was plain, but that under *Neder v. United States*, 527 U.S. 1 (1999), the error was harmless. The court found that the jury could not have concluded that there was no cocaine involved in the offense in light of the evidence presented at trial, because every witness testified that the conspiracy involved both marijuana and cocaine. The court found that the thirty-year maximum of § 841(b)(1)(C) applied (the defendant had a prior conviction), that the guideline range was 262-327 months, and that there was no *Apprendi* violation because the range was within the maximum..

Eighth Circuit

United States v. Bradford, No. 99-3018, ___ F.3d ___, 2001 WL 363912 (8th Cir. Apr. 13, 2001). Where indictment and jury finding did not specify drug quantities, 8th Circuit remanded for resentencing the cases of defendants whose sentences exceeded the 20-year (or 30-year where prior had been alleged) maximum allowable under basic provision of drug statute, 21 U.S.C. § 841(C); despite authority to stack sentences on multiple counts of conviction, Circuit refused to recalculate sentences itself or speculate as to the sentence that the district court would have imposed given the “fairly broad discretion [available under guidelines] to impose either concurrent or consecutive sentences. Seemingly distinguishing *Aguayo-Delgado*, *infra*, Circuit also remanded sentence of defendant who received mandatory minimum 20-year sentence based on prior conviction “in light of the record” and in light of district court’s statement that it was “required by statute to impose mandatory term” although it recognized that under circuit precedent, it could simply affirm sentence which was within maximum allowable under §841(C).

United States v. Nicholson, 231 F.3d 445 (8th Cir. 2000). In a case where the defendant was charged with conspiracy to distribute and with possession with intent to distribute, there was evidence before the jury concerning the defendant’s involvement in both marijuana and cocaine transactions, and the jury was instructed that it could find that Mr. Jenkins violated § 841(a) even if it found “that the controlled substance distributed was not cocaine base, but another controlled substance, either cocaine, marijuana, or PCP,” the statutory maximums for the offenses could be based only upon marijuana, not upon cocaine or crack. The court found that “We cannot rule out the possibility that the jury followed this instruction and convicted Mr. Jenkins on a finding of marijuana distribution even though his indictment alleged cocaine base.” Consequently, the court reversed Jenkins’ sentence and remanded with instructions that the statutory maximum on each count be limited to five years.

United States v. Chavez, No. 00-1404, ___ F.3d ___, 2000 WL 1556050 (8th Cir. Oct. 20, 2000). The Eighth Circuit rejected the argument that drug quantities used to determine the guideline sentence must be found by a jury beyond a reasonable doubt. The court held that it is sufficient under the constitutional rule enunciated in *Apprendi* if the jury verdict—here, by way of a verdict form—establishes a quantity of methamphetamine sufficient to trigger the application of § 841(b)(1)(A), with its maximum statutory penalty of life.

United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000). In a case tried to a jury that involved a conspiracy to distribute methamphetamine, the Eighth Circuit held that *Apprendi* did not require reversal even though the indictment failed to allege the quantity, the question was not submitted to the jury, and the quantity was determined by the district court on a preponderance standard at sentencing. The Eighth Circuit reasoned that under the jury verdict, the defendant’s maximum penalty was up to thirty years imprisonment (assuming a prior felony conviction) without reference to any drug quantity under 21 U.S.C. § 841(b)(1)(C). As the quantity determination did not result in a sentence in excess of the maximum penalty for which the defendant was liable under the jury verdict, the case was controlled by *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), not overruled by *Apprendi*, which permits the non-jury factual findings to limit the discretion of the district court to require imposition of the twenty-year mandatory minimum term of imprisonment and the ten-year term of supervised release applicable under § 841(b)(1)(B).

United States v. Sheppard, 219 F.3d 766 (8th Cir. 2000). Applying a different analysis but reaching the same result, the Eighth Circuit upheld the conviction and sentence, ruling that any error in failing to treat “drug type and quantity as an element of the crime was harmless error.” In this case, the indictment alleged both the type and quantity of drugs—a conspiracy involving more than 500 grams of methamphetamine—but the district court refused to instruct the jury that drug quantity was an element of the offense; instead the jury was given a special interrogatory on which it found that “more than 500 grams of methamphetamine were involved in [the defendant’s] offense.” Because the district court’s sentencing finding was consistent with the special interrogatory and the quantity was alleged in the indictment, the Eighth Circuit reasoned that the defendant received all of the Fifth and Sixth Amendment protections required by *Apprendi*. In a footnote, the court also noted that the twenty-year mandatory minimum sentence imposed was within the § 841(b)(1)(C) default maximum, but notably in this case, decided on the same day as *Aguayo-Delgado*, *supra*, there is no mention of *McMillan*. Finally, the court rejected the defendant’s argument that, to convict him, the government had to prove that he actually knew the exact nature of the substance with which he was dealing; it is only necessary for the government to prove that defendant knew that it was a controlled substance.

Ninth Circuit

United States v. Garcia-Guizar, 227 F.3d 1125 (9th Cir. 2000). Where the actual sentence imposed on the defendant charged in a multi-count methamphetamine distribution case was less than the twenty-year statutory maximum penalty to which the defendant was subject under the facts as found by the jury, the defendant’s substantial rights were not affected so as to require the sentence to be vacated, even where the judge plainly erred by making a quantity finding using a preponderance standard at sentencing and where the indictment failed to allege quantity as an element. The Ninth Circuit also assumed for purposes of the decision that *Apprendi* prohibits any increase of a mandatory minimum penalty in such circumstances, but again found that the defendant was not prejudiced as his guideline sentence, not implicated by the *Apprendi* rule, exceeded the increased mandatory minimum.

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). On a direct appeal in a multi-count marijuana case, where the indictment specified the number of marijuana plants but the jury was instructed that it only need find a “measurable or detectable amount,” the court of appeals vacated the ten-year mandatory minimum sentence and remanded for resentencing “subject to the maximum sentence supported by the facts found by the jury beyond a reasonable doubt, consistently with *Apprendi*,” namely the five-year maximum applicable under 21 U.S.C. § 841(b)(1)(D). Because the *Apprendi* issue was not raised below by the defendant, the court of appeals reviewed the entirety of the record, including the contrary evidence presented by the defendant, to determine if the error was harmless under the rationale of *Neder v. United States*, 527 U.S. 1 (1999). Notably, in assessing the error, the court of appeals does not address whether multiple counts permit the stacking of five-year terms so as to make the error harmless if multiple counts are present. In concurring specially, Judge Reinhardt also explained that the more stringent *Neder* analysis is not applicable in *Apprendi*-error drug cases for two alternative reasons: (1) in drug cases, unlike in *Neder*, the defendant has been sentenced for an aggravated offense of which the jury did not convict him, or (2) by its own terms, *Neder* is limited in scope and does not apply.

Tenth Circuit

United States v. Wilson, No. 99-6233, 2000 WL 1199101 (10th Cir. Aug. 23, 2000) (unpublished). The Tenth Circuit vacated a life sentence that was imposed as a result of the improper aggregation of drug quantities involved in the offense of conviction with other relevant conduct not involved in the offense of conviction, an issue that was raised pro se by the defendant in a supplemental brief in which he argued that he was subject to a maximum penalty of forty years based on his plea to distributing ten grams of crack cocaine. In footnote 1, the court admonished that there may be an *Apprendi* claim that “might implicate further sentencing limitations” because the record suggested that no drug quantity was included in the indictment. Presumably, if no drug amount was alleged in the distribution count, the defendant’s sentence could not exceed twenty years.

Eleventh Circuit

United States v. Gerrow, 232 F.3d 831 (11th Cir.2000). Where the defendants were sentenced to 151 months and to 235 months respectively, the Eleventh Circuit found no error because these terms were within the unenhanced maximum of twenty years provided by § 841(b)(1)(C). Each defendant was also sentenced to five years of supervised release, where § 841(b)(1)(C) calls only for a minimum of three. The Eleventh Circuit has not decided whether this provision is limited by the cap in 18 U.S.C. § 3583(b)(2). Because the defendants did not raise any objection below, the Eleventh Circuit reviewed only for plain error. It found none, both because it has not ruled on the issue previously and because the other circuits are split, with the majority position going against the defendants.

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000). The defendant received thirty-two years of imprisonment on a count of possession of 14.8 grams of cocaine base. He requested a jury instruction on quantity at trial, which was denied, and raised the issue again at sentencing. The Eleventh Circuit found *Apprendi* error, but also found it to be harmless, because the quantity of drug was not contested at trial and a police officer testified that the defendant had admitted that the drugs were his. On appeal, in a supplemental brief, the defendant also challenged the lack of allegation of drug quantity in the indictment, an issue he had not raised below. The Eleventh Circuit refused to consider this issue because it had not been raised in the opening brief, even though it was based on *Apprendi*.

United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000). Reversing circuit precedent in light of *Apprendi*, the Eleventh Circuit held that drug quantity is an element of a prosecution under 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B), the mandatory minimum sections, which must be charged in the indictment and proved to a jury beyond a reasonable doubt. Where the indictment failed to allege the quantity of cocaine base involved in a charge of possession with intent to distribute, and that quantity was not submitted to the jury for a finding beyond reasonable doubt, the sentence could not exceed the twenty-year maximum prescribed in § 841(b)(1)(C) for convictions involving an undetermined amount of cocaine base. Although the government had filed a recidivist enhancement information as provided in 21 U.S.C. § 851, the defendant’s sentence on remand was not subject to the thirty-year maximum available for recidivists under § 841(b)(1)(C), as the government had waived the issue when it failed to object or to appeal once the district court failed to impose the recidivist enhancement at the original sentencing. On remand, the offense

level under the career offender guideline applicable to the defendant was the one corresponding to the twenty-year unenhanced maximum penalty.

United States v. Swatzie, 228 F.3d 1278 (11th Cir. 2000). Because the court concluded both that the evidence of the quantity and type of drug involved in the offense was overwhelming and that the defendant had not even hinted that he lacked fair notice sufficient to permit him to defend against the charges, the Eleventh Circuit found no plain *Apprendi* error in a case where after a jury trial, the district court imposed a sentence based on its findings of drug type and quantity made using a preponderance-of-evidence standard, the indictment failed to specify any quantity and specified both cocaine hydrochloride and cocaine base, and the jury had not been required to make a quantity determination.

United States v. Walker, 228 F.3d 1276 (11th Cir. 2000). The primary issue raised in this case involved a non-*Apprendi* challenge to the imposition of a life sentence in a cocaine base conspiracy on the basis of the defendant's prior conviction on two predicate drug offenses. In a footnote, however, the Eleventh Circuit rejected any *Apprendi* challenge on the basis that the case was distinguishable from *Apprendi* as the defendant lost his right to appeal the *Apprendi* issue when he pleaded guilty and accepted the drug quantity alleged in the PSR; no reference is made to whether a specified quantity was alleged in the indictment. Significantly, the court of appeals appeared to read *Apprendi* as applying only to jury trials, disregarding the fact that *Apprendi* itself involved a guilty plea.

United States v. Salery, No. CR-00-16-N, ___ F. Supp. 2d ___, 2000 WL 1693756 (M.D. Ala. Nov. 9, 2000). In ruling on PSR objections, the court found "that *Apprendi* does not permit a court to assume that a jury made a determination on a specific drug quantity simply because the indictment charged the quantity and the government presented evidence as to the quantity charged." However, the court did find that it could use the defendants' prior felony drug convictions to enhance their sentences without a determination by the jury as to the convictions.

28 U.S.C. §§ 2254, 2255 — HABEAS / POST-CONVICTION

First Circuit

United States v. Sustache-Rivera, 221 F.3d 8 (1st Cir. 2000). In this habeas petition, the First Circuit conceded that, after *Apprendi*, *Jones v. United States*, 119 S. Ct. 1215 (1999), may be a case of constitutional stature that merits a second habeas petition. This would be an important development, because *Jones* previously had been considered a case involving statutory interpretation—which would be barred by AEDPA from successive habeas attack. However, because the Supreme Court has not made *Jones* retroactive to cases on collateral review, the petitioner in *Sustache-Rivera* could not bring a second or successive petition.

Norton v. United States, No. Civ. A. 00-12198-WGY, ___ F. Supp. 2d ___, 2000 WL 1612294 (D. Mass. Oct. 26, 2000). The court dismissed a defendant's second motion under 28 U.S.C. § 2255 challenging his sentence under the Armed Career Criminal Act because the court found it had no

subject matter jurisdiction under the AEDPA. The court also rejected the defendant's claim of § 2241 relief, both because the motion was filed in the wrong court and because the motion challenged the validity of the sentence, not its execution. In a second case considered in the same opinion, the court rejected the defendant's claim of relief under the All Writs Act, 28 U.S.C. § 1651. Finally, the court declined to appoint an attorney for either defendant on the basis both of lack of jurisdiction over the claims and the lack of merit to the claims (*Apprendi* does not apply to prior convictions).

Second Circuit

Parise v. United States, No. 3:95CR00135 PCD, ___ F. Supp. 2d ___, 2000 WL 1611999 (D. Conn. Oct. 25, 2000). The court granted relief to a defendant who brought a § 2255 motion challenging his sentence under § 841. He was convicted both of possession with intent to distribute, and of conspiracy. The indictment had alleged more than 500 grams of cocaine for each count, i.e., a violation of § 841(b)(1)(B), but the sentencing court found more than five kilos were involved, i.e., a violation of § 841(b)(1)(A). However, the defendant had a prior conviction, so the statutory minimum went from ten years to twenty years, which he received. In granting the § 2255 motion, the court wrote: "While the 240 months sits within the permitted range for the crime for which Parise was convicted, the justification for enhancing the sentence above the range authorized by the Sentencing Guidelines was a statute under which he was not indicted. The Guidelines range already factored in his criminal history and the Court's finding of 5 kilograms. Thus, by relying on § 841(b)(1)(A) as authority for enhancing the sentence from 188-235 months to 240 months, the Court necessarily made a finding of fact that subjected Parise to a greater sentence than that authorized by the jury's verdict. This case is distinguishable from *Apprendi* in that *Apprendi* focused on criminal penalties that were beyond the statutory maximum. Here, Parise's sentence did not exceed that set by § 841(b)(1)(B). However, the principles upon which *Apprendi* relied are equally applicable in the instant case where the criminal penalty involved exceeded that provided by the Sentencing Guidelines. Sections 841(b)(1)(A) and (B) are no doubt 'separate offense[s] calling for . . . separate penalt[ies].' [Citation omitted.] By applying the prior conviction provision of § 841(b)(1)(A), Parise was exposed to a greater punishment than he would have received under § 841(b)(1)(B), as the former triggered a mandatory minimum that required raising the sentence he otherwise would have received under § 841(b)(1)(B) and the Sentencing Guidelines. The maximum sentence statutorily authorized in Parise's case, given the Guidelines, was 235 months. Using a statute under which he was not convicted as authority for enhancing his statute was not proper." Notably, the court implicitly assumed that *Apprendi* is retroactive.

Robinson v. United States, No. 00 Civ. 7493 LAK, ___ F. Supp. 2d ___, 2000 WL 1585686 (S.D.N.Y. Oct. 25, 2000). On a first § 2255 motion that claimed relief from an § 841 conviction on the grounds that "(1) the charge to the jury erroneously failed to require a jury finding as to the quantity of drugs, (2) movant was deprived of the effective assistance of trial counsel in that trial counsel failed to object to the charge on the ground that it failed to require a jury finding as to the quantity of drugs, and (3) the indictment deprived movant of due process in that it failed to charge as an element of the charged offenses a prior . . . felony conviction later used as a basis for enhancing his sentence pursuant to 21 U.S.C. § 851," the court ordered appointment of an attorney because "of the possibly meritorious nature of at least the first of movant's assertions."

Third Circuit

United States v. Harris, No. Civ. A. 00-5194(JEI), ___ F. Supp. 2d ___, 2000 WL 1641073 (D.N.J. Nov. 1, 2000). In this case, the defendant was originally convicted in the Eastern District of Virginia and was incarcerated at Fort Dix, NJ. His previous § 2255 motion had been denied, as was his request to file a second or successive motion. The court in the District of New Jersey agreed it could hear the defendant's case as a § 2241 petition. The court found that "In this matter the indictment specifically charged that the defendant's violation of § 841(a) and § 846 involved more than five kilograms of cocaine. Thus the trial court acted correctly when it sentenced the petitioner to a term within the range provided in § 841(b)(1)(A) following a determination of the actual amount by a preponderance of the evidence at sentencing and enhancing the penalty as provided in the Guidelines." The habeas court also found that the precise quantity for guideline sentencing purposes need not be found beyond a reasonable doubt. However, it acknowledged Justice O'Connor's dissent in *Apprendi* and Chief Judge Becker's concurrence in *Mack*, and granted a certificate of appealability.

Williams v. United States, No. Civ. A. 99-2756, ___ F. Supp. 2d ___, 2000 WL 1342541 (E.D. Pa. Sept. 18, 2000). In a § 2255 motion presenting both *Apprendi* and non-*Apprendi* claims, the court rejected the non-*Apprendi* claims as time-barred, but acknowledged that the limitation period for the *Apprendi* claim "arguably runs from the date of the Supreme Court decision." The court, however, rejected the movant's *Apprendi* claim on its merits (prior convictions excluded from the decision's holding).

Doe v. United States, 112 F. Supp. 2d 398 (D.N.J. 2000). The district court permitted an amendment, filed beyond the one-year statute of limitations, of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, implicitly finding that the petitioner's *Apprendi* claim was timely because it asserted a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The petition, which claimed that allowing district court to determine the drug quantity based on preponderance violates due process and the right to trial by jury, was denied on the merits, however. The district court held that the 151-month term of imprisonment imposed did not exceed the statutory maximum (life) for the offense for which petitioner was charged and to which he pleaded guilty—conspiring to distribute more than five kilograms of cocaine.

Fifth Circuit

In re Tatum, 233 F.3d 857 (5th Cir. 2000). The Fifth Circuit held that *Apprendi* does not apply retroactively to second or successive § 2255 motions because the Supreme Court has neither held that *Apprendi* is retroactive nor has it applied the decision on collateral review.

Seventh Circuit

Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000). The Seventh Circuit denied an application to file a second or successive petition to vacate, set aside or correct sentence filed by a defendant who was serving an enhanced sentence under the Armed Career Criminal Act ("ACCA") based on three prior felony convictions. The defendant alleged that under the rule of *Apprendi*, one of his prior convictions could not

have resulted in a felony sentence, so it should be reclassified as a misdemeanor and thus would no longer be a predicate prior for ACCA purposes. The Seventh Circuit held that until the Supreme Court declares that *Apprendi* is to be applied retroactively or applies *Apprendi* retroactively, it will not grant leave to file second or successive petitions under 28 U.S.C. §§ 2254 or 2255.

Hernandez v. United States, 226 F.3d 839 (7th Cir. 2000). A successive petition to vacate a sentence that rests on a new rule of constitutional that has not yet been certified by the Supreme Court to be retroactive should be dismissed without prejudice. In this case, which involved a conviction for conspiracy to kidnap and for kidnapping, the court dismissed the petition with prejudice because the petitioner was challenging sentencing enhancements that, although they increased his guideline sentence, still resulted in a sentence within the prescribed statutory maximum penalty.

Eighth Circuit

Rodgers v. United States, 229 F.3d 704 (8th Cir. 2000). Where a defendant seeks leave to file a second or successive petition to set aside, vacate or correct a sentence pursuant to 28 U.S.C. § 2255, the court of appeals lacks power to grant leave, as the statutory language plainly authorizes only the Supreme Court to certify whether a new rule of constitutional law is retroactive. For initial § 2255 claims, however, no such limitation applies and the Eighth Circuit has previously accepted review of *Apprendi* claims raised in a § 2255 petition for the first time (the court did not, however, cite any example).

United States v. Murphy, 109 F. Supp. 2d 1059 (D. Minn. 2000). On a motion to vacate, set aside or correct a sentence filed pursuant to 28 U.S.C. § 2255, the district court found that *Apprendi* is to be applied retroactively because it establishes a “watershed rule of criminal procedure,” making it applicable under the second *Teague* exception. *Teague v. Lane*, 489 U.S. 288, 305-10 (1989). The court vacated the 300-month sentence imposed under § 841(b)(1)(A) after a jury trial in which the jury was instructed that the government was not required to prove the precise amount of the cocaine base alleged in the indictment and imposed the twenty-year maximum penalty permissible under § 841(b)(1)(C), which does not include a quantity determination.

Ninth Circuit

Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000). In an appeal from the denial of a § 2254 petition arising out of a state attempted-murder conviction, the Ninth Circuit held that *Apprendi* does not apply retroactively under *Teague* to a claim of constructive amendment of the charging document.

United States v. Pittman, No. CV 00-449-MA, CR 96-293-MA, ___ F. Supp. 2d ___, 2000 WL 1708962 (D. Or. Nov. 15, 2000). In denying movant’s first § 2255 motion, the court ruled that while *Apprendi* is a new rule, it is not a “watershed” rule warranting retroactive application under the second exception of *Teague v. Lane*. The court also declined to consider whether the first *Teague* exception might apply. Factors in the court’s decision appear to be that the defendant had pled guilty, that the plea agreement clearly stated the quantity and that a mandatory minimum applied, and that the defendant did not contest the quantity.

Eleventh Circuit

In re Joshua, 224 F.3d 1281 (11th Cir. 2000). Agreeing with the First Circuit in *Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir. 2000), the Eleventh Circuit holds that for purposes of second or successive petitions to vacate, set aside or correct a sentence, the Supreme Court must make the new rule of constitutional law retroactive to cases on collateral review before such petitions may be entertained by the lower federal courts. “It is not enough that the new rule is or will be applied retroactively by the Eleventh Circuit or that it satisfies the criteria for retroactive application set forth by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989).” Petitioner’s application for leave to file a second petition was denied.

SENTENCING GUIDELINES

The following cases hold that enhancements under the Sentencing Guidelines may be imposed based on a finding by the district court at sentencing on a preponderance of the evidence standard.

In Re Sealed Case, No. 00-3057, 2001 WL 409116 (D.C. Cir. Apr. 24, 2001)

United States v. Caba, 241 F.3d 98, 101 (1st Cir.2001)

United States v. Garcia, 240 F.3d 180, 184 (2d Cir.2001)

United States v. Williams, 235 F.3d 858, 862-63 (3d Cir.2000)

United States v. Kinter, 235 F.3d 192, 198-201 (4th Cir.2000)

United States v. Keith, 230 F.3d 784, 786-87 (5th Cir.2000)

United States v. Munoz, 233 F.3d 410, 413-14 (6th Cir.2000)

Hernandez v. United States, 226 F.3d 839, 841 (7th Cir.2000)

United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir.2000)

United States v. Hernandez-Guardado, 228 F.3d 1017, 1027 (9th Cir.2000)

United States v. Heckard, 238 F.3d 1222, 1235-36 (10th Cir.2001)

United States v. Nealy, 232 F.3d 825, 829 (11th Cir.2000).

Sixth Circuit

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000). In a case involving a RICO conspiracy, the Sixth Circuit found that the government need not prove underlying acts of racketeering beyond a reasonable doubt in order to use the underlying conduct as relevant conduct in calculating the defendant’s sentence. It was permissible to determine the base offense level based on a finding by a preponderance of evidence that one of the objects of the conspiracy was a plot to commit murder, because the defendant’s sentence did not exceed the twenty-year statutory maximum for a RICO conspiracy under 18 U.S.C. § 1963, without regard to the murder conspiracy. As a result, *Appendi* did not require that the plot to commit murder be submitted to the jury under the reasonable doubt standard.

Ninth Circuit

United States v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000). The imposition of a two-level sentencing guidelines enhancement in a prosecution for transporting an illegal alien based upon a finding by the district court that the offense involved an intentional or reckless risk of injury to another did not violate *Apprendi* where the enhancement did not increase the term of imprisonment beyond the prescribed statutory maximum.

United States v. Valensia, 222 F. 3d 1173 (9th Cir. 2000). The Ninth Circuit held that due process is satisfied where the district court applied a preponderance-of-evidence standard in making findings on guidelines enhancements based on uncharged conduct. The court rejected the defendant's request that it impose a clear and convincing standard where the totality of enhancements for the defendant's role as manager of a drug enterprise (two levels) and for possession of firearm (two levels) resulted in a sentence of 262 months, increased from a range of 168-210 months. In determining when due process requires a standard greater than preponderance, the court, relying on *Apprendi*, applied a five-factor analysis, one of which is whether the enhanced sentence falls within the maximum sentence for the offense alleged in the indictment.

THE BASICS OF A CRIMINAL APPEAL

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Although the United States Supreme Court has held that a defendant has no constitutional right to appeal his conviction or sentence, see Griffin v. Illinois, 351 U.S. 12, 18 (1956), a criminal defendant does have a statutory right to appeal and a right to counsel on appeal. See 18 U.S.C. §3742; 28 U.S.C. §1291; FRCP 44. To secure his right to appeal, a defendant must simply instruct his trial attorney to file a notice of appeal.¹

Initiating the Appeal

An appeal commences with the filing of the Notice of Appeal. FRAP 3. It must be filed within 10 days of the entry of the judgment being appealed. The time limit is jurisdictional,² but in practice usually is more than 10 days from sentencing as it often takes the clerk several days (or longer) to enter judgment. Upon a showing of good cause, the district court may extend the time for the filing of a notice of appeal up to 30 additional days. Nothing extends the time further (although if the cause of the failure to file a timely notice of appeal is ineffective assistance of counsel, a defendant may be able to obtain the relief of an untimely appeal). A notice of appeal filed after a decision or order but before entry of judgment is treated as filed the day judgment is entered. FRAP 4(b).³

The notice of appeal must specify the judgment, order or part thereof appealed from. Upon filing of the notice, the clerk of the district court serves the notice of appeal on all parties.

Two issues must be resolved before the filing of a notice of appeal: whether to appeal and what to appeal. While both decisions are ultimately the client's, he will need advice from his lawyer to make the best decision.

In deciding whether to appeal, the inquiry is basically one of what's to gain and what's to lose. Several factors should be considered. Is the decision appealable? (In general, a conviction and sentence are, but a discretionary decision not to depart, for example, is not.) Is there an adverse consequence possible or likely if an appeal is pursued? (If a challengeable plea is vacated, for example, is the client likely to fare worse when he returns to district court? Or if his sentence is more favorable than likely on remand because, for example, no one discovered a prior conviction, does he want to take the risk it will be discovered during appeal or proceedings following remand?) Is there a waiver of appeal as part of the plea agreement? (If so, the government may contend simply filing the notice of appeal is a breach of the plea agreement.) Is the government going to appeal? (If so and its appeal is potentially meritorious, the client may want his attorney to pursue the possibility of an agreement that he will not appeal if the government won't either.)

Even if the client has nothing to lose by appeal, he may have nothing to gain. In advising a client on whether to appeal, it is often helpful to explain some of the basic rules on appeal, such as the limitations

of appellate review (restricted to issues within the four corners of the record, review is basically only for legal errors not for factual “mistakes”), the substantial evidence rule (court will look at the evidence “in the light most favorable to the judgment,” will uphold any finding supported by substantial evidence, and will affirm any conviction as long as a rational trier of fact could have found the essential elements of the charges beyond a reasonable doubt), and appellate standards of review (de novo, abuse of discretion, clearly erroneous). It is also useful to explain to the client about harmless error, the ‘so what?’ aspect of appellate issues, advising the client that it is not sufficient to show there was error but usually relief will require a showing of prejudice also.

If the client wants to appeal, then he must decide what to appeal. Usually that will be both conviction and sentence, but there may be either a tactical reason or a personal choice not to appeal both. The sentence may have been favorable in a way that raises questions, so prudence may dictate appealing only the conviction. Or the client may not be dissatisfied with the conviction and wish to appeal only the sentence.⁴

The Record on Appeal

Counsel bears the primary responsibility for getting the record for appeal. The record on appeal consists of the transcript of any proceedings held in the district court (and designated by either side), all papers and exhibits filed in the district court and the clerk’s docket. If the entire transcript is going to be ordered, counsel designates it, using the district court’s transcript designation form, within 21 days of the filing of the notice of appeal. If less than the entire transcript is to be ordered, appellant must give notice to appellee within 7 days of the filing of the notice of appeal indicating what transcripts will be designated. Appellee then has 7 days to respond, indicating any additional transcripts it wishes designated. Appellant then designates the transcripts desired by either side within 21 days of the filing of the notice of appeal. FRAP 10; Circuit Rule 10-3.2.

It is important to designate transcripts of all proceedings necessary for a full appellate review. In an appeal following trial, that would usually include transcripts of hearings on all pretrial motions, voir dire, opening statements, all testimony and hearings during trial, closing arguments, jury instructions, motion for new trial proceedings, and sentencing. In a particular case, it may also include status hearings, bail hearings, or any other proceedings in which anything of potential appellate significance occurred. In an appeal following a guilty plea, necessary transcripts would usually be limited to a hearing on any pretrial motion preserved for appeal by the plea, the change of plea proceedings and sentencing.

The mechanics of designating the record are simple. Counsel merely fills out the district court’s transcript designation form. That form calls for the date of proceedings for which transcripts are being designated, the nature of the proceeding and the court reporter.

At the time of designation, counsel must make arrangements for paying for the transcripts. If counsel is retained, he makes arrangements directly with the court reporter to pay for the transcripts on or before the date the designation is filed with the district court. If appellant is proceeding in forma pauperis, a CJA Voucher Form must be submitted to the district court for approval at the time the designation is filed. Counsel may wish to file, in add-on to the CJA Voucher Form, an ex parte application and proposed order for payment for the transcripts designated. When the court acts on the voucher, it is returned to the court reporter. If the court has denied (crossed out) transcripts requested on the voucher, counsel is dependent upon the court reporter advising him, and such advice is often not made. With an ex parte application,

counsel will receive notice directly from the court that payment for all the transcripts has been ordered or what transcripts were denied; only with that timely information can counsel decide whether the challenge the district court's denial of payment for any requested transcripts.

While district courts seem to approve payment for transcripts of pretrial hearings, testimony and sentencing without any statement by counsel as to why such transcripts are necessary, many district courts seem to deny payment for transcripts of voir dire, opening statements, jury instructions, closing argument and other less-commonly-requested proceedings unless counsel gives a specific reason for needing the transcripts for appeal.⁵ There is no requirement, however, that counsel provide the court with a specific reason for requesting or needing a transcript; it is sufficient that counsel state merely that the transcripts requested are, in his opinion, necessary for adequate representation, without saying why. See United States v. MacCollom, 426 U.S. 317, 323-325 (1976) [an indigent pursuing his statutory right of appeal has an "unconditional" right to a free transcript without any showing of need]; see also Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Long v. District Court of Iowa, 385 U.S. 192 (1966); Britt v. North Carolina, 404 U.S. 226 (1971).⁶ Often there is no specific reason for requesting a particular transcript. Counsel may not think there is any appellate issue in closing argument but will usually want a transcript of argument anyway, for it will frequently prove useful in arguing prejudice or in assessing the impact of some other error in the case. The United States Supreme Court law is clear, and counsel should not feel shy about requesting transcripts without saying more than that they are necessary for adequate representation.

If the district court denies any transcript requested, counsel should consider making a motion in the Court of Appeals (pursuant to FRAP 27) for the transcripts. Proper representation of a client on appeal is dependent upon having a full and complete record to review. Without a complete record, counsel cannot be sure he has seen and considered every potential appellate issue; nor can he certify in an Anders (v. California, 386 U.S. 738 (1967)) brief that there are no arguable issues on appeal if he has not even reviewed parts of the district court proceedings. See Hardy v. United States, 375 U.S. 277, 280 (1964), in which the Court held that counsel cannot satisfy his obligation under Ellis v. United States, 356 U.S. 674 (1958) [the precursor to Anders] unless he has reviewed the entire transcript.

If counsel on appeal was not counsel in the district court, he should do two things about the time the record is designated. First, he should file a notice of appearance with the Court of Appeals, advising that court that he is now counsel; that will ensure that all communication is made with appellate counsel and not with trial counsel. (Such notice is not really necessary if the Court of Appeals appointed appellate counsel because the court's docket will, of course, reflect that appointment; it is necessary, however, if appellate counsel is retained or was appointed to do the appeal by the district court.) Second, counsel should contact the client to let him know who his new lawyer is. In addition to introducing himself at this stage, counsel may also wish to seek his client's views about the appeal, his concerns and his thoughts about potential appellate issues.

Shortly after the notice of appeal is filed, the district court clerk sets a briefing schedule. This will include the dates on which the transcripts are due, the opening brief is due, appellee's brief is due and the reply brief is due. Except in expedited appeals (in which the briefing schedule is shortened) or appeals in particularly lengthy or complex cases (in which the briefing schedule is lengthened), the usual briefing schedule is: transcripts due 30 days from designation, opening brief due 40 days after transcripts filed,

appellee's brief due 30 days after opening brief, and reply brief due 14 days after appellee's brief. FRAP 31.

Although this schedule will be modified if the transcripts are not timely filed, counsel must request an extension of time to obtain more than 40 days from the filing of the transcripts in which to prepare and file the opening brief. If counsel will need no more than 14 additional days, he can request and obtain an extension by telephone: counsel first advises the government that he is going to request the extension; he then calls the clerk of the Court of Appeals and requests the extension, advising the clerk of the reason for the requested extension and telling her that he has notified the other side. The clerk will grant the extension on the telephone, providing counsel with the new due dates for the briefs. Counsel must send a letter that day to opposing counsel advising him of the new due dates. Then when the opening brief is filed, a copy of that letter is attached. Except in "extraordinary and compelling circumstances," a telephonic extension precludes any further extension. An extension of more than 14 days must be requested by written motion filed (not just mailed) at least 7 days before the current due date and must contain information regarding when the brief is due, when it was first due, the length of the requested extension, the reason an extension is necessary (the press of other business will not suffice), a representation that the brief will be filed within the extension period and whether the other side objects to the requested extension. Circuit Rule 31-2.2. The court disfavors more than one 30-day extension but will grant a successive extension upon a showing of diligence and need.

Although FRAP 11(b) states that it is the duty of the reporter to either file the transcripts on time or request an extension within that period, as a matter of practice, counsel must monitor the preparation of the transcripts. This is so because Circuit Rule 11-1.2 requires counsel to notify the court if the transcripts are not filed on time. Such notice must be filed within 14 days of the date the transcripts were due and must indicate when the transcripts were designated, when financial arrangements were made or the CJA voucher was approved, the dates of hearings for which transcripts have not yet been filed and the name of the reporter assigned to those hearings. Upon the filing of the notice of reporter default, the Court of Appeals will issue a new briefing schedule, including a new due date for transcripts.

The transcript is filed in the district court, which issues a certificate of record to the Court of Appeals. The certificate indicates that the Court of Appeals considers the record filed. Circuit Rule 11-2. Although the rule puts no duty on counsel regarding the certificate of record, the clerk of the Court of Appeals will often instruct counsel to obtain the certificate of record when it has not been filed by the district court clerk. This can usually be done simply by calling the district court clerk and requesting issuance of the certificate.

Reviewing the Record

Once the record arrives, the work on the actual appeal begins. The entire record, including all transcripts and all pleadings filed in the district court, should be reviewed. It's easier to work with the record later if counsel takes notes as he reviews. These RT notes generally include summary notations to witnesses' testimony, arguments on motions or objections, and other proceedings, along with page references thereto.⁷ They provide a useful way of writing the brief and citing to the record without having to constantly go back and fumble through the transcripts. (They may also help to refresh counsel's recollection about a case years later if that becomes necessary or allow an attorney who takes over a case to get a relatively-quick understanding.)

After fully reviewing the record, counsel must decide what the potential appellate issues are. At this stage, it's usually better to be over-inclusive, including any issue that was litigated in the district court or that strikes appellate counsel as even potentially problematic. Some of these issues will be rejected after research, full consideration or consultation with the client; but being generous in preparing the initial list of potential appellate issues helps to ensure nothing is missed.

Counsel should seriously consult with his client. That is not always easy since most appellate clients are in federal prison halfway across the country and a personal visit is not feasible. Nevertheless, most prisons cooperate in setting up telephone conversations between prisoners and their attorneys. And many clients are able to communicate meaningfully in writing.

The client should be consulted about several matters. Why did he appeal? What are his hopes and expectations relative to the appeal? What does he see as the issues for appeal? What did he find confusing or unfair about any of the district court proceedings?

There are several reasons for these inquiries. First, it is possible that the client has something legally significant to say. Second, a client deserves a response to his concerns. It may be that he is entirely off the mark in thinking that the suppression issue is a good, or even viable, appellate issue, but he is entitled to an explanation from his attorney as to why that is. Most clients are able to understand and accept a full and fair explanation, even if they don't like the result. Moreover, sometimes clients appeal for non-apparent or non-obvious reasons and counsel can only ascertain what those might be by inquiring. A client may accept he has no chance of obtaining relief on appeal but may be seeking to postpone the loss of a license or surrendering into custody by litigating the appeal. Counsel cannot be responsive to those concerns unless he knows them.

Counsel should listen to the client and be responsive. That will include clear explanations about the limitations, rules and restrictions of appeal, how the appellate process works, what the odds of obtaining relief are, the types of relief which are possible or likely in his case, and, if applicable, the alternatives if there are no arguable issues on appeal.

The choice of what issues will be raised on appeal is, according to the United States Supreme Court, the attorney's and not the client's; and counsel is free to reject even an arguable issue the client is adamant about. See Jones v. Barnes, 463 U.S. 745 (1983). Counsel should, however, give serious thought to any arguable issue the client wishes raised. The client is, of course, the one who suffers the consequences of a conviction, sentence and lost appeal; and he will probably have an easier time accepting those consequences if he feels like his issues were at least raised, that he got his day in court. (Counsel cannot raise a frivolous issue regardless of how much the client insists, although the line between arguable and frivolous is often less than clear.)

This type of broad and responsive discussion with the client will benefit both the attorney and the client over the course of the appeal. The client is more likely to feel as if his concerns were addressed and someone fought for him. He's more likely to understand what happened and why, and that will help him accept the outcome of the appeal even if he doesn't obtain relief. And the attorney will have an easier time getting the client to make the most reasonable choices.

If appellate counsel was not trial counsel, he should seek to discuss the case with the attorney who represented the client in district court. Trial counsel usually will have thoughts about the case, and some

might prove useful on appeal. He may mention something not apparent from the record (a jury note not answered in open court, for example). He might be able to provide information necessary to respond to the client. That is particularly true if the client is complaining about trial counsel. Such complaints are often based on a simple lack of knowledge about what trial counsel actually did, who he talked with, what investigation was done. Appellate counsel may be able to satisfy the client's concerns or answer his questions (or, at least, rule out the possibility of an ineffective of assistance claim) simply by getting information from trial counsel.

Appellant's Opening Brief

The review of the record, consultation with the client, discussion with trial counsel and research and thought will result in a list of arguable issues for appeal. This list will usually be substantially shorter than the initial issues lists, although it may include an issue or two that hadn't made it on that original list. It's then time to actually prepare the opening brief.

An attorney once asked Oliver Wendall Holmes for advice about how to prepare a good brief; and Holmes replied simply, "Decide what your case is about." That is a key in appellate work. Counsel must decide what the case is about, what the theme of the brief should be; only then will he have a chance of making the appellate court see what is really at stake.

Counsel should look for a way that the issues fit together. For example, perhaps there is an argument about the exclusion of proffered defense evidence and also an argument about error in the instructions which will allow counsel to present the case as one where the defendant was denied his right to have the jury find his guilt or innocence (because he didn't get all the facts before the jury for their evaluation and they didn't evaluate even what they had under the proper law). Or perhaps there is a suppression issue and an issue involving the admission of other-crimes evidence and that allows counsel to argue defendant was made to spend the trial answering evidence the jury should never even have heard.

There are two main advantages to this type of theme building in the brief. First, no one issue has to stand on its own, for counsel has made them all interconnected to one harm suffered by appellant. That makes it harder for the court to find any error was harmless. Second, a theme helps the appellate judges get the "feel" for the case that counsel wants the court to have. Counsel wants the court to think and feel that the case is about what he says its about. ("This case is about a defendant with a viable defense that the jury never heard." "This case is about a trial that involved so many collateral issues that the jury could not have focused on the defendant's actual guilt in this matter." Etc.)

In choosing what issues to include in the brief, no good issue should be rejected just because it doesn't fit the theme; but counsel may wish to include a weaker issue because it does fit the theme. For example, a sufficiency argument not strong enough that counsel would raise it by itself may be worth including to set the court up with the notion that the case, even if legally sufficient, was very close before it considers the issue of whether error in jury instructions or in the reply to a jury question was prejudicial.

The opening brief must include the following sections (in this order): Table of Contents, Table of Authorities, Statement of Issues Presented, Statement of Jurisdiction, Statement of the Case (Course of Proceedings, Statement of Facts), Summary of Argument, Arguments, Conclusion, Certificate of Related Cases and Certificate of Compliance. FRAP 28; Circuit Rule 28-2.

The Statement of Issues Presented is exactly that. It is usually done in question form, with one question for each issue raised. For example, "Did the trial court err in admitting evidence of appellant's prior narcotics conviction?" or "Were appellant's rights under the Compulsory Process Clause violated when the district court refused to issue the writ of habeas corpus ad testificandum?"

The Statement of Jurisdiction includes the nature of the case ("This is an appeal from a judgment rendered by the Honorable John Smith on February 1, 1997, sentencing appellant to prison for 120 months for his conviction for armed bank robbery and use of a firearm."), the timeliness of the appeal ("Appellant filed a timely notice of appeal on February 9, 1997."), and the bases for both the district court's and the appellate court's jurisdiction ("The district court had jurisdiction pursuant to 18 U.S.C. §3231; this court has jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.").

The Statement of the Case includes The Course of Proceedings and a Statement of Facts. The Course of Proceedings is basically the procedural history of the case. It is not necessary (and is usually distracting) to include every procedural step the case went through, but the most important procedural steps (indictment, trial or plea, verdict, sentencing) should be included, as should any procedural step relative to an issue raised on appeal. Thus, while it is unnecessarily cumbersome to include a statement about each motion filed, counsel should, for example, include a statement such as "Appellant's motion in limine to exclude the testimony of the government's narcotics expert was denied" when he will argue in the brief that the court erred in admitting the expert testimony. The appellant's current bail status must be set forth in the brief, and it makes sense to place it in the Course of Proceedings, usually right after the statement of sentence. ("Appellant was sentenced to 108 months in prison. He is presently in custody serving that sentence.")

The Statement of Facts is the factual background to the offense of conviction. Counsel should attempt to make the statement readable, like a story. It is not usually good practice to simply state the evidence witness by witness or in the order it was presented at trial. The goal is to get the court to begin looking at the case in a certain way, and the statement of facts can be useful in that endeavor. Counsel should be fair, but it is possible to relate the facts in the light most favorable to the judgment while still putting them in a way not too unfavorable to the client. It is important to stay within the appellate record, citing to the record to support any facts set forth.

FRAP 28 states that the Statement of Facts should include the facts relevant to any issue raised. That will sometimes naturally fit within a statement of facts, such as when the issue involves evidence appellant will argue was improperly admitted or a claim of insufficient evidence. There are times, however, when the background to an issue raised is more procedural (and then the supporting facts might be more logically placed in the Course of Proceedings) or somewhat fact and procedure independent. In almost all situations, in any case, counsel will want to put the facts underlying any particular issue in the argument on that issue so that the court can find the facts and the legal analysis in the same place.

The Summary of Argument can be the single most important part of the brief. It's essentially an introduction into the case for the court. In one or two pages, the Summary of Argument tells the court what the case is about, what the theme is, why it matters. Counsel can use this summary to bring the arguments that will follow together and to give the court the feel he wants it to have for the case. Counsel should consider the Summary of Argument the one thing a judge may read right before argument to remind himself of what the case is about.

The argument section includes, of course, each argument. Each argument should have its own headnote, which should be brief but complete, stating the claimed error and the legal grounds urged for reversal. ("The district court violated appellant's Sixth Amendment and Rule 43 right to be present at every stage of the trial when it held in-chamber conferences with two jurors.") The arguments themselves should be carefully organized. A useful organization might include an introduction (a statement of the importance of the right involved), the factual background (the facts relevant to the contention, including the ruling of the district court), the legal analysis (the violation, case law, logic and persuasion), and a conclusion or prejudice section (why the violation matters and what the proper remedy is). Within each argument counsel must state the standard of review, the standard under which the court reviews the error urged (de novo, abuse of discretion, clearly erroneous, plain error). Usually, that will fit most appropriately at the end of the introduction.

The conclusion to the brief should clearly state the relief requested. The Certificate of Related Cases is simply a statement by counsel of what cases counsel knows to be related (usually either codefendant' pending appeals or a case with the same issue as one raised in the brief) or a statement that counsel knows of no related cases. The Certificate of Compliance is counsel's statement that the brief conforms to the rules regarding page or word limits and typeface (proportionately-spaced typeface of 14 or more points and no more than 14,000 words or a monospaced typeface of 10.5 or less characters per inch and no more than 40 pages or 14,000 words). Circuit Rule 32. Counsel can move for permission to exceed the length limitations, but the court looks with disfavor on such requests. The motion must be filed at least seven days before the opening brief is due and must set forth in detail the reasons why counsel cannot argue his case in the usually-allowed space.

The opening brief must be accompanied by the Excerpts of Record. The Excerpt is basically a volume of parts of the record that are necessary for the judges' review of the issues raised, for all the judges usually will not have the entire record available to them. The Excerpts must include the docket sheet, the indictment, the notice of appeal, the judgment or order appealed from (usually the Judgment and Commitment Order), any specific finding or order relating to an issue on appeal, the relevant portions of the transcript relating to any appellate issue regarding a suppression motion or a change of plea proceeding or sentencing, the relevant portions of the transcript relating to any other issue on appeal, any jury instruction that is the basis for a challenge on appeal, and any exhibit that is the basis for a challenge on appeal. There is also a catch-all providing that the Excerpts must include "any other specific portions of any documents in the record that are cited in appellant's brief and necessary to the resolution of an issue on appeal." Circuit Rule 30-1.3; emphasis added. What it all comes down to is if counsel thinks the court needs to see some part of the record or document to understand or resolve an issue raised on appeal, he better include it in the Excerpts. If the presentence report or sentencing position papers are referred to in the brief, four copies of such papers should be filed under seal with the Court of Appeals; they should not be included in the Excerpts.

The brief may be filed by mail and is deemed filed the day it was mailed. Counsel must file an original and 15 copies of the brief and 5 copies of the Excerpts of Record. Circuit Rules 30-1 and 31-1. The brief must be served on the government. If counsel has been including his client in the appellate process, the brief should be more or less what the client expects. It is usually a good idea when sending the client a copy of the brief to include a letter reminding him of what counsel had said would be raised and, while telling him there is no way to know for certain what the outcome will be, giving him some idea of the likelihood of success. That should make an affirmance less surprising to him.

If counsel can find no arguable issue to raise on appeal, there are two options. If the client agrees to give up his appeal, counsel can file a motion to have the appeal voluntarily dismissed. Such a motion must be supported by both counsel's declaration that he has advised his client of his right to appeal and the client has agreed to forego it and the client's written waiver of his right to appeal. Upon the filing of such a motion, the Court of Appeals will dismiss the appeal and the judgment will be final. The client's willingness to have his appeal dismissed when counsel advises him there are no arguable issues on appeal is often dependent upon what type of relationship he has had with his appellate attorney. If there has been ongoing communication and counsel has fully explained all the rules, procedures and applicable law and been responsive to the client's concerns and thoughts, the client is more likely to see counsel's point that there is no viable way to challenge the conviction or sentence and is more likely to accept counsel's advice to forego the appeal. If, however, the first communication between appellate counsel and the client is a letter advising the client there are no issues on appeal and he should consider giving up his appeal, the client is less likely to feel anyone really cares about his predicament and thus will probably not be inclined to have his appeal dismissed.

If there are no arguable appellate issues and the client will not forego the appeal, counsel will have to file a motion to withdraw with a brief pursuant to Anders v. California, 386 U.S. 738. In Anders, the United States Supreme Court held that appointed appellate counsel who does not find any arguable issue to be raised on appeal can move to withdraw from the case by advising the court of his evaluation and "referring to anything in the record that might arguably support the appeal." Id. at 744. This concept of a brief referring to anything that "might arguably support the appeal" is somewhat inconsistent with the notion that counsel is moving to withdraw for the very reason that he sees no arguable issue on appeal, but counsel's motion to withdraw can be supported with reference to those issues litigated in the district court. Counsel should be careful not to argue against his client by actually briefing the issues and thereby establishing they are frivolous; it is sufficient for counsel to state the issue, put forth the underlying facts, and tell the court the applicable standard of review.

An Anders brief would thus include, in order, the Motion to Withdraw, Statement of Jurisdiction, Statement of the Case (Course of Proceedings, Statement of Facts), Argument or Discussion of Legal Issues (as described in preceding paragraph), Conclusion, and Certificate of Related Cases. The filing must be accompanied by Excerpts of the Record (as discussed earlier).

If counsel files an Anders brief, the client is given time (usually 30 days) to file his own brief with the court. The court then reviews the record and determines if the appeal is frivolous. If it finds it is, it will grant counsel's motion to withdraw and dismiss the appeal. If the court's review suggest an arguable issue, the court will request counsel (or new counsel) to brief it.

Reply Brief

The government gets 30 days (or longer if an extension is granted) to file its Appellee's Brief, answering the contentions raised in the opening brief. Appellant then gets 14 days to reply.

The reply brief should not be a mere restatement of the opening brief but should be responsive to the arguments in the government's brief. There is no requirement that every argument in the opening brief must be replied to, and counsel should reply only if there is something genuinely responsive to say. (Indeed, there is no requirement that a reply brief be filed at all, although counsel will generally want to file one in any case with a realistically meritorious issue.)

Counsel should be careful not to let the government recast his contentions. Often the government will restructure appellant's argument (sometimes deliberately but often just from lack of understanding) and then answer the argument as restructured without ever answering the contention actually raised. The reply brief is the opportunity to bring the court back to appellant's approach as well as answer any of the potentially problematic points the government has raised.

Counsel cannot raise any new issues in the reply brief; if that becomes necessary, counsel will have to seek leave to file a supplemental brief. The reply brief may not exceed 7,000 words if proportionately spaced or 20 pages if monospaced. It must include a Table of Contents, Table of Authorities and Certificate of Compliance. The same number of reply briefs as an opening brief (original plus 15) must be filed.

Oral Argument

Counsel will get an opportunity to argue the case only if the panel of three judges assigned to the case calendars the matter, which is far from always. FRAP 34 states that oral argument will be allowed unless the appeal is frivolous, the dispositive issue has been recently authoritatively decided or "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." The last reason is broad and pretty much allows the court to avoid argument in any case.

Counsel is notified by the court as to whether argument will be heard. If the court has elected to schedule the matter, it will send counsel a copy of the calendar on which the case has been placed. Such notice is usually provided about six weeks before the court date. Any request for postponement must be by written motion filed "reasonably in advance" of the scheduled date. Counsel should hesitate to request rescheduling unless he can show good cause, for the court may respond to such a request by taking the matter off calendar altogether. Prior to argument, counsel must complete and return to the court the form included with the calendar notice indicating the name of the attorney who will appear for argument and certifying he is admitted to practice in the circuit.

If the court does not intend to calendar the case for argument, it will notify counsel and allow 10 days for counsel to file a statement setting forth the reasons why argument should take place. Circuit Rule 34-4. Notice that the court does not plan to calendar the case is not necessarily a negative sign, but counsel will probably want to seek argument in any case in which the issues are complex.

Many attorneys have a tendency to view oral argument as not particularly significant or difficult. They believe they are adequately familiar with the case after all the briefing and argument won't require much thought or preparation. Although that may be true of some cases, it is often a mistake to approach argument that way. The court has calendared the matter because it does not consider the case clear cut one way or another. Argument is the opportunity to discover what the judges may be concerned about and to be responsive to those concerns. Such responsiveness takes serious thought and preparation, for only then will counsel be prepared for what may come up at argument.

Counsel should use oral argument to emphasize the essence of his case, the theme, what the case is about. The court is usually familiar with the basic facts and the general arguments, so counsel shouldn't reiterate what's in the brief. Counsel has only 10 or 20 minutes to make his case, so he needs to use the time wisely. He should be careful not to let the court (or opposing counsel) recast the issue or get diverted by irrelevant concerns. Thus, while it's important to answer the court's questions, there's nothing wrong with

saying, for example, "Yes, there was a jury instruction on materiality, but that's not the issue. The issue is the exclusion of evidence regarding the lack of materiality, and no instruction can cure that error."

Counsel should not be afraid to make a concession as long as it doesn't defeat his argument. It's not a bad idea, for example, when arguing a fact-independent issue (like trial court's error in denying defendant's request to substitute counsel) to answer the court's question about the overwhelming evidence of guilty by saying, "The evidence against appellant was very strong. That made it all the more critical that he be allowed counsel in whom he had confidence."

Given the short time allowed for argument, it is usually not a good idea to spend too much time (or any time at all depending on the issues) on specific cases and their holdings. Usually an argument is better served if counsel assumes the court is familiar with the present state of the law (although listens, and is responsive to, clues that the court may not be) and uses his time to tell the court why that controls the present case, or how it should be expanded.

Counsel should usually save some time for rebuttal argument. That way counsel has an opportunity to both respond to any argument the government made and to close after hearing the concerns the court has raised (concerns which sometimes do not surface until the court begins to question the government). It's always nice to have the last word, and counsel does not want to walk out of the courthouse thinking of all the things he could have said if he only had the opportunity.

Counsel may wish to inform his client afterwards how argument went. Not only does this keep the client abreast of the progress of his appeal, it can also provide him some additional warning regarding the probable outcome. Counsel should advise his client that argument is not always a good predictor of the decision but can nevertheless point out that the court seemed to have some apparent concerns.

Rehearing

The court's opinion may issue within days of argument (or submission without argument) or it may take a year (or longer); usually it's a matter of a few weeks to a couple months. When it issues, counsel will have to decide whether to petition for rehearing if the client lost, whether in part or in whole. If the opinion misstates or unfairly states the facts or the law, or unfairly applies the law to the facts, counsel may wish to request the panel to reconsider, pointing out the errors in the opinion.

If the opinion decides an issue of more global importance or is inconsistent with other opinions in the circuit, a petition for rehearing with a suggestion for rehearing en banc may be appropriate. Rehearing en banc is review by a panel of 13 judges. FRAP 35 notes that rehearing en banc is not favored and will ordinarily be considered only when "consideration by the full court is necessary to secure or maintain uniformity of its decisions" or "the proceeding involves a question of exceptional importance." If neither of those circumstances arguably exist but counsel still feels the decision is wrong, a petition for rehearing to the panel that decided the case is more appropriate than a suggestion for rehearing en banc, although a combined petition for rehearing and suggestion for rehearing en banc may be reasonable when separate issues meet different requirements for rehearing or when a single issue was based on a mistake of fact but also is an issue of exceptional importance.

A petition for rehearing and/or suggestion for rehearing en banc must be filed within 14 days of the date the opinion issued (unless an extension is granted upon written request). The petition cannot be more

than 15 pages if monospaced or 4,200 words if proportionately spaced. An original and three copies is all that must be filed of a petition for rehearing, although an original and 40 copies must be filed if there is a suggestion for rehearing en banc. FRAP 40; Circuit Rule 40-1.

Petition for Certiorari

Counsel is required to file a petition for certiorari, asking the United States Supreme Court to review the case, unless the client waives his right to such a petition. The Supreme Court takes only about 100 cases a year, so it restricts its review to cases with issues of broad impact or real significance. A Court of Appeals decision which creates an inter-circuit disparity or significantly restricts or expands a principle established by the Supreme Court or involves an issue of extreme importance is the most likely candidate for certiorari. Not many cases fall into one of those categories, and often counsel's best advice to the client will be to forego a petition for certiorari.

If a defendant/appellant has lost in the Court of Appeals, a petition for certiorari is often his last hope of challenging his conviction and/or sentence. Clients tend not to be enthusiastic about giving up their last hope but will do so in many cases if they can see that the hope of certiorari is not realistic. Counsel's ability to get the client to see that in a case where certiorari will be futile will depend, in large part, on what type of relationship appellate counsel has had with his client. If counsel has consulted with his client, been responsive to his concerns and been realistic in the strengths or weaknesses of the arguments raised, the client is more likely to accept counsel's advice as the best judgment of a true advocate for him and less likely to see it as an attempt to simply get out of work.

If the case is one in which certiorari would be futile, counsel should write the client as soon as the opinion issues, enclosing a copy. He should explain the opinion to the client, remind him (if applicable) that the result was pretty much what they expected given the weaknesses in the arguments or the way the court responded at oral argument, and advise him of his options. Counsel should fully explain what a petition for certiorari is, how infrequently they are granted, what types of cases the Supreme Court is interested in, and why this case does not fit the criteria. Counsel may not want to state any firm advice at this point but rather ask the client to think about these matters and then contact him again in a week or two, stating that after giving thorough consideration to the matter he believes certiorari would be a waste of time.

If the client agrees to forego a petition for certiorari, counsel should have him sign a statement to that effect. Under Circuit Rule 4-1(d), that statement is supposed to be filed with the Court of Appeals together with a declaration from counsel indicating that a petition for certiorari will not be filed because the client has waived his right to such a proceeding. In practice, however, it is probably sufficient that counsel simply put the client's waiver in his file.

If the client insists on a petition for certiorari and yet counsel believes such a petition would be frivolous, counsel may move with the Court of Appeals for leave to withdraw so that he does not have to file the frivolous petition for certiorari, advising the court why a petition for certiorari would be frivolous. See Austin v. United States, 115 S.Ct. 380 (1994). Such a motion is supposed to be filed within 21 days of the issuance of the opinion. As a practical matter, that is very difficult, for it hardly gives counsel sufficient time to advise a client and let him adjust to losing in the Court of Appeals before seeking a waiver of certiorari. If an Austin motion is filed, counsel must notify his client, explain the motion and advise the client of the procedures for petitioning for certiorari pro se. If a petition for certiorari is going to be filed (either because counsel believes such a petition has arguable merit or his client insists on a petition and an Austin

motion is not filed and granted), it must be filed within 90 days of either the date the opinion issued or the date rehearing was denied, whichever is later. A request for extension to file the petition for certiorari must be made with the Supreme Court in writing.

A petition for certiorari includes in order: Motion to Proceed in Forma Pauperis, Question Presented (a statement of the question presented), Table of Contents, Table of Authorities, the Petition (“John Smith petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.”), Opinion Below (a statement of the Court of Appeals decision and a notation that a copy thereof is attached in the Appendix), Jurisdiction (a statement of the jurisdiction of the Court of Appeals and of the Supreme Court), Constitutional Provision Involved (a quotation of the constitutional provision, or part thereof, at issue in the case), Statement of Case (the procedural history of the case as relevant to the petition, usually what happened in the district court on the issue, what was raised on appeal regarding the issue and how the appellate court ruled), Reasons for Granting the Writ (the section which discusses the importance of the issue and why the Supreme Court should get involved), Conclusion, and Appendix (with the Court of Appeals decision). A Certificate of Mailing must also be included. An original and ten copies must be filed with the Clerk of the Supreme Court.

Endnotes

1. An appeal from the denial of a motion under 28 U.S.C. §2255 or for a petition for writ of habeas corpus under 28 U.S.C. §2241 or §2254 is not an appeal as a matter of right. Because such proceedings are considered technically civil in nature, they are governed by somewhat different rules than criminal appeals. Although not expressly dealt with in this article, appeals in those proceedings are substantively quite similar to criminal appeals even though the procedural rules are different.
2. Failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is grounds only for whatever action the Court of Appeals deems appropriate, although that may include dismissal. FRAP 3.
3. When the government has a right to appeal (18 U.S.C. §3731), it has 30 days in which to file a notice of appeal. The 30 days runs from either the entry of the judgment or order appealed from or from the filing of a notice of appeal by any defendant.
4. If a client wants to appeal any part of the judgment, it makes sense to appeal both conviction and sentence unless there is a tactical reason not to. That allows for a review of all district court proceedings which may reveal an unexpected challenge or may provide additional material from which to cull prejudice. For example, there may be no sentencing issue but may be some comment made by the judge at sentencing (such as “This was a very close case on the issue of predisposition”) that can be used to bolster the argument that a guilt error (such as error in giving erroneous entrapment instruction) was prejudicial.
5. The CJA Voucher form sets up this dichotomy because it has a general provision (box 10) for a listing of requested transcripts but has a “special authorization” provision (box 13) for opening statements, closing arguments, voir dire and jury instructions, thereby suggesting something “special” is needed before transcripts of the listed proceedings can be authorized. There does not appear to be any authority for that difference, and it is inconsistent with established United States Supreme Court authority that an indigent appellant has a constitutional and statutory right to a full transcript on appeal without any particularized showing.

6. When counsel signs in box 11 on the CJA Voucher Form, he is affirming that the requested transcripts are “necessary for adequate representation.”

7. Circuit Rule 11-1.3 states that the transcript pages “shall” be “uniformly and consecutively numbered throughout all volumes,” but in many districts the reporters paginate each volume of transcript independently. Even upon request, the Court of Appeals will not enforce the rule. Thus, it is usually necessary to cite to the record with an identifying marker to the volume as well as the page - such as 10/15/96 RT 19 to refer to page 19 of the transcript volume for October 15, 1996 - and that’s how RT notes should be taken.

Courtroom Technology From the Judges' Perspective:

A brief review of courtroom technology of particular interest to the trial judge

By Fredric I. Lederer¹

(This article has been reformatted to make it easier to read. It is available in its original format at [http://courtroom21.net/About_Us/Articles/judicial.html#Courtroom Technology From the Judges' Perspective](http://courtroom21.net/About_Us/Articles/judicial.html#Courtroom%20Technology%20From%20the%20Judges'%20Perspective))

We live in a technological age, and the technology of everyday life is affecting case dispositions increasingly quickly. Technology came to our courthouses long ago, and jurisdictions throughout Canada and the United States today are using case management systems and experimenting with electronic filing and electronic case information accessibility. Judges are using personal computers, including laptop machines and even pocket-sized new generation of sub-laptop data retrieval systems such as the US Robotics Pilot. Now technology is coming to our courtrooms. Whether we consider extraordinary matters such as the Exxon Valdez or O.J. Simpson cases, the increasing number of technology-equipped courtrooms, or just the anecdotal experiences of judges, blossoming judicial experience with and interest in courtroom technology is apparent. Indeed, during 1997 the Electronic Courtroom Project of the Administrative Office of the United States Courts is evaluating different technologies in up to thirty different full-time United States federal courtrooms. After all, "The judicial system is the most expensive machine ever invented for finding out what happened and what to do about it,"² and it is our responsibility to continually consider whether we might improve that system.

If nothing else, courtroom technology holds the promise of effecting significant direct and indirect financial savings. But what of the judge's perspective? After all, the judge, especially the trial judge, holds a unique position with special responsibility. Although all participants in adjudication are at least theoretically united in some common systemic goals, it would be dangerously unrealistic for those considering the adoption of courtroom technology to ignore the disparate viewpoints held. However much litigants may want economy and rapidity, for example, they usually prefer most to win. Ethical lawyers may take a more systemic position but are necessarily focused on the moment's case, its likely result, and the hope for further, successful, cases. The court administrator wishes for all good things but is increasingly under financial pressure to accomplish today's needs, to say nothing of tomorrow's, with yesterday's budget. Ultimately it will come down to the judge, for who else is sufficiently concerned with both the short and long-term need to do justice?

In an ideal world, adjudicative changes would improve the administration of justice by making it more certain, more accurate, faster, and less expensive. Before we can reasonably ask judges to sign on for what some reasonably fear to be a distracting high technology roller coaster ride, we ought to briefly

examine some of the courtroom technologies now in use and ask fundamentally whether they can help the judge. This is not suggest that changes that assist court administrators, lawyers, court reporters, litigants, jurors, citizens generally, and the like are unimportant. Quite the contrary. To hazard an analogy, the adjudicative process can be compared to an exploration voyage into an unknown sea characterized by questionable facts and ambiguous law.³ If we are to remodel, reequip, and reprovision the vessel, it would be foolhardy indeed not to ensure that the changes satisfy our captain's experienced judgment.

Our enhanced vessel is likely to come equipped with the latest in technology based chambers and courtroom case courtroom record systems, document imaging and retrieval equipment, information and evidence review and presentation systems, and video and document- conferencing capabilities. To what extent would they prove useful to the judge?

Technology Based Court Record

Most of our appellate systems require verbatim records when serious cases are appealed. Judges have two interests in the court record: that it is accessible in a timely fashion for them to clarify factual and legal matters during trial, including the preparation of jury instructions, and that the record be accurate.⁴ Conscientious and competent judges are best supported by accurate trial records. The more accurate the record, the less likely that the case will be reversed. Indeed, one study by the National Center for State Courts has determined that comprehensive video records increase appellate affirmances.⁵ Current technology presents three alternative ways of making more useful records: real-time, video, and digital audio.

Real-time transcription by trained stenographic court reporters permits accurate immediate access to transcript. Judge and counsel each have access immediately to a draft quality transcript that can be privately and secretly annotated. Current technology even permits incorporation in the digital record of evidentiary images; we lack only a simple commercially available system to do so. Instead, various firms now make this capability available for pretrial depositions. Real-time also easily permits the hard-of-hearing who can read to serve as judge, counsel, witness, or juror.

Video records are routinely used directly in the United States only in Kentucky. In the numerous other jurisdictions that use videotape, the records are transcribed. Although their potential accuracy is of great significance,⁶ at present video records are not of great direct value to the judge as a separate index must be made of the tape's contents.

Digital audio creates a more useful audio record than does traditional analog tape recorder systems. The new digital systems record on computer hard disk and can be backed up to other media. These systems are often characterized by a monitor (a person who needs far less training than a traditional court reporter) who can make text annotations, e.g., a text index, which becomes back of the digital record and which can be searched in order to rapidly locate the nearest audio recording in time to that index item. Although entirely dissimilar to real-time stenographic reporting and far less useful, these systems are more useful to the judge than are traditional tape recoding systems. As these systems are now available for laptop computer systems, judges can now maintain their own electronic records.

Current technology does not yet support automated transcription by computer of courtroom testimony. We assume that the continuing improvements in speech recognition will greatly assist stenomask reporting in the mid-term future. Whether - and when - automated transcription will be available is speculative at best.

Document Imaging

Document imaging refers to the practice of “scanning” a document, photograph, or other image so that a computer picture of the image is stored for later retrieval. When scanned with optical character recognition, “OCR,” the computer version can be searched by its word content just as lawyers and judges now regularly conduct electronic computer research. Many judges have tried cases in which counsel have used imaged documents, usually recorded on a CD-Rom disk and played back in court by computer. Anecdotal evidence indicates that judges have found this method of presenting evidence to be highly efficient and desirable. Lawyers are impelled to use imaging because it is an extraordinarily useful litigation support tool. Judges usually find that it decreases courtroom clutter and increases disposition speed. When imaged evidence is used electronically in the courtroom, our experience has been that a significant time savings results. This occurs because the usual counsel mechanics of obtaining a document and walking about the courtroom showing it to opposing counsel, the witness, and the judge, accompanied in a jury trial with jury publication, can all be eliminated in favor of controlled display on monitors. Of course, this not only requires installed technology display systems, but also sometimes requires that the trial judge require that counsel change long established patterns of evidence handling and presentation. Whether judges should encourage or require imaging in cases, including criminal cases, in which counsel do not intend to use it for litigation support is unclear. We believe, however, that an inexpensive court installed and operated system can be created that would permit imaging conducted solely for the judge's and clerk's convenience.⁷

Evidence Presentation Systems

The judge's primary responsibility is to ensure that justice is done under the law. Accuracy of fact-finding is thus a matter of real judicial concern. Anything that can improve the quality of that fact-finding should be of judicial importance. Current evidentiary display systems permit the easy and clear use and display of photographs, charts, documents, pictorial graphics, and computer-based material, including animations. Often instantaneous side-by-side comparisons, electronic underlining or circling of evidence is available, and whiteboard systems permit witnesses to sketch intersections and other matters with instant computer recording so that alteration by adverse witnesses doesn't destroy the evidence.

Judges and lawyers have known for centuries that “pictures are worth a thousand words,” and there is general agreement that jurors retain far more information when it is presented visually as well as orally. Some testimony is almost useless without a visual component. The workings of a machine, interior of the body, or even a complicated street intersection cry out for visual explanation. The new technologies, primarily DOAR Communicator type TV camera systems that display photos and documents, and computer-based systems largely obviate the need for large (and expensive) courtroom demonstrative

evidence exhibits. Further, Courtroom 21 experimentation confirms that the display systems significantly improve the speed of evidence presentation.

This is not to suggest that technological evidence presentation systems are trouble-free. Judges have always had to determine whether visual information is misleading or overly prejudicial, and technology based evidence presentation can increase the number of and difficulty of such rulings. Further, there are any number of questions concerning how we display evidence which have inadequate scientific answers at present. Is a document or photograph unduly prejudicial because it is displayed on a 10-foot diameter screen in front of a jury? Do jurors react differently in some manner to material presented on a television or monitor rather than physically? There is much that we do not know. What we may know unscientifically is that evidentiary comprehension can improve and time in presentation can be saved.

Video First Appearances, Hearings and Testimony

Throughout the world, courts are increasingly using remote video for judicial uses. Perhaps the most widespread use is remote testimony by victims in child abuse cases. In the United States, the most common use is remote first appearances in criminal cases. Defendants appear before magistrates via two-way television thus saving the cost and risk of transportation to the courthouse. These uses are only the proverbial tip of the iceberg. Courts have used two-way television for remote testimony in at least civil cases in Australia, Canada, and the United States. Indeed, the Federal Rules of Civil Procedure were amended in the United States on December 1, 1996, to permit the use of remote testimony when approved by the judge.⁸

There can be little doubt that high technology witness testimony can be extraordinarily cost effective. If non-satellite, ISDN, or fractional T1 video is used, one hour of coast to coast high quality testimony would cost no more than \$ 36.00 in telecommunications charges. Although all participants in the legal process have an interest in lowering the costs of litigation, for the sitting trial judge, live televised testimony's primary benefit is the elimination of the delays that are all too commonplace - especially with expert witnesses in civil cases.

At the same time, chambers based video-conferencing permits highly efficient docketing, hearings, and settlement conferences. Captain Drew Swank of the Courtroom 21 staff suggests that video may be especially useful in judge conducted alternative dispute resolution. Inexpensive video communications also enables judge-to-judge and court administration communications.

Yet, again, we must concede that the judge concerned above all with accuracy of fact-finding must have a substantial concern. What are the real human consequences of remote video communications? Are remote trial witnesses, for example, more or less credible in actuality and perception than witnesses in the courtroom? We simply don't know the answer to this critical and fundamental question. The first known limited experiment designed to answer this question was conducted in October, 1996 in Courtroom 21. We await analysis of the data.

What we do know about video conferencing is that the convenience and cost savings are substantial. Ultimately, we expect remote testimony, from courthouse to courthouse to be routine, if only because of the cost savings. Whether it should actually be permitted will rest on judicial decisions dealing with fundamental questions of human behavior.

Conclusion

My intent in this paper has been to briefly review courtroom technology from the judge's special perspective. As is all too often the situation, we can say with certainty that technology is not a panacea for the judge. Initially we would be wise to remember Chief Justice Burger's reflection:

Concepts of justice must have hands and feet . . . to carry out justice in every case in the shortest possible time and the lowest possible cost. This is the challenge to every lawyer and judge in America.⁹

Yet, at the same time there are other and weightier considerations: "A good and faithful judge prefers what is right to expedient."¹⁰ And as much as we might sometimes care to play ostrich, anyone familiar with technology would be forced to concur with C.P. Snow's observation that, "Technology . . . is a queer thing. It brings you great gifts with one hand, and it stabs you in the back with the other."¹¹

Accordingly, we are left with the judge's on-going responsibility to assure justice. We know that technology can improve adjudicative accuracy while increasing disposition speed and effecting potentially substantial economies. Yet we can also guarantee that courtroom technology will not be trouble-free. Rather than justifying those few judges who would much prefer to keep the computer and television outside the courtroom, however, this real and important concern justifies only the same type of individual case-by-case concern that has characterized implementation of every evidentiary and procedural change. Our exploration vessel will not plunge starward at warp speed. Rather we will probe the legal and factual sargasso seas with the type of careful analytical progress customary to judicial probes. Ultimately technology will provide extraordinarily useful tools for our judicial captains, but it will be imperative that they play a major role in the selection and implementation of those tools.

Endnotes

1. Chancellor Professor of Law and Director, Courtroom 21, William & Mary School of Law. Courtroom 21, "The Courtroom of the 21st Century Today," is the world's most technologically advanced courtroom. Located in Williamsburg, Virginia, USA, it is a joint project of the William & Mary Law School and the National Center for State Courts. Although I spent seven years as a limited jurisdiction trial judge and now preside over moot cases in Courtroom 21, I make no claim of significant judicial perspective.
2. Judge Irving R. Kaufman, United States Court of Appeals for the Second Circuit, Time, May 5, 1980, James B. Simpson, Webster's II New Riverside Desk Quotations 70 (1992).

3. We will not ordinarily equip our vessel, however, for a “five year mission to boldly go where no man has gone before.” The nature of ordinary adjudication must place real resource constraints on us.
4. In theory, trial judges do their best at trial; and care not about any appeals. Being human, of course, and valuing their professional reputations, many judges do not wish to be unnecessarily reversed.
5. James A. Maher, National Center for State Courts, Do Video Transcripts Affect the Scope of Appellate Review? An Evaluation in the Kentucky Court of Appeals (1990).
6. Inadequate audio can adversely affects a video record.
7. This would obviate document storage.
8. “In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.”

Fed. R. Civ. P. 43(a).

The Advisory Committee Notes to the amendment explain:

The requirement that testimony be taken “orally” is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to

testify from a different place.

Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be

represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

9. Chief Justice Warren E. Burger, Speech to the American Bar Association, October 1, 1972, James B. Simpson, Webster's II New Riverside Desk Quotations 70 (1992).
10. Horace, *Carmina*, David Shrager & Elizabeth Frost, The Quotable Lawyer 142 (1986).
11. C.P. Snow, N.Y. Times, March 15, 1971, James B. Simpson, Webster's II New Riverside Desk Quotations 158 (1992).

UNITED STATES SUPREME COURT REVIEW - PREVIEW - OVERVIEW

Criminal Cases Decided During The
October 1999 - 2000 Term
Thru May 7, 2001

Paul M. Rashkind
Chief of Appellate Division
Office of the Federal Public Defender, S.D. Fla.

I. PRELIMINARY PROCEEDINGS

- A. **Fifth Amendment Privilege Against Self-Incrimination.** *Ohio v. Reiner*, 121 S. Ct. ____ (Mar. 19, 2001) (per curiam). Witness has a Fifth Amendment privilege against self-incrimination even though she protests her innocence. “[O]ur precedents dictate that the privilege protects the innocent as well as the guilty...” If the witness has a reasonable fear that her answers to the possible questions might tend to incriminate her, the privilege applies, even though her answers will deny involvement in a crime.
- B. **Immunity - Production of Business Records.** *United States v. Hubbell*, 120 S. Ct. 2037 (2000). Privilege against self-incrimination protects information previously recorded in voluntarily created documents that defendant delivered to government pursuant to an immunized act of production. Therefore, the Whitewater Independent Counsel could not use such documents to prepare indictment against the immunized person who produced the documents.
- C. **Ex Post Facto Clause**
 - 1. **Change in Burden of Proof.** *Carmell v. Texas*, 120 S. Ct. 1620 (2000). Prior to 1993, Texas law required that a minor victim of a sexual offense inform a third party within six months of the alleged offense in order for conviction of such offense to be “supportable” on uncorroborated testimony of the victim. In 1993, the law was amended to delete this requirement. In this case, the

victim disclosed in 1995 an alleged assault that took place in 1992. Texas held that the law was merely a rule of procedure, within the meaning of the Ex Post Facto Clause, *Hopt v. Utah*, 110 U.S. 574 (1884), and thus it was applicable upon its adoption to pending and future prosecutions. If the old law applied in this case, the defendant would have been entitled to an acquittal. The Supreme Court held that the retrospective application of the statute that repealed the corroboration requirement violates the Ex Post Facto Clause.

2. **Judicial Abrogation of Defense.** *Rogers v. Tennessee*, 120 S. Ct. 2004 (cert. granted May 22, 2000); reported below at 992 S.W.2d 993 (Tenn. 1999). Tennessee judicially abrogated the common-law “year-and-a-day rule,” which precluded a homicide prosecution unless the victim died within a year-and-a-day of the inflicted injury. Thereafter, Tennessee attempted to prosecute a homicide that occurred five years before the rule was abolished. Does the ex post facto application of the judicial decision abrogating the rule to a homicide that occurred five years prior to this change in the substantive law violate the Fifth and Fourteenth Amendments?
3. **Sexually Violent Predator Laws: Civil Commitment, Due Process, Double Jeopardy, Ex Post Facto.** *Seling v. Young*, 121 S. Ct. 727 (2001). The State of Washington’s Community Protection Act of 1990 authorizes the civil commitment of “sexually violent predators.” A committed person challenged the law “as applied,” contending that the commitment failed to meet its designated purposes and was therefore merely punitive. Prior Supreme Court precedent, *Kansas v. Hendricks*, 521 U.S. 346 (1998), held that a similar commitment scheme, Kansas’ Sexually Violent Predator Act, on its face, met substantive due process requirements, was nonpunitive, and thus did not violate the Double Jeopardy and Ex Post Facto Clause. Here, the Supreme Court held that the Washington law could not be subject to an “as applied” constitutional challenge – i.e., that the state manner of enforcement of the Act as to this petitioner’s conditions of confinement was punitive – to circumvent the holding of *Kansas v. Hendricks*. The Court noted that the plaintiff, held in

confinement under the Act, might have other remedies, including showing that the law was actually “punitive” in nature, or by seeking Due Process relief. The Court did not reach the question whether the overall manner of enforcement of a statute – as to all confinees – could be a factor in determining whether the statute itself was civil or criminal.

II. RIGHT TO COUNSEL

A. The Exclusionary Rule: 18 U.S.C. § 3501 vs. *Miranda*. *Dickerson v. United States*, 120 S. Ct. 2236 (2000). Congress does not have the power through legislation to repeal the holding of *Miranda v. Arizona*, as it governs the admissibility of confessions at criminal trials, since *Miranda*’s holding is a rule of constitutional law. The standard for admissibility is whether the suspect received Miranda warnings before being interrogated, not the standard set forth in 18 U.S.C. § 3501, where the admissibility of such statements turns only on whether they were voluntarily made.

B. Waiver in Interrogation of Related Crime. *Texas v. Cobb*, 121 S. Ct. ____ (Apr. 20, 2001). Cobb was indicted for burglary. He accepted appointment of counsel. Subsequently, without getting counsel’s permission, police initiated interrogation of Cobb about missing residents of another home he burglarized. Cobb gave a statement implicating himself in the related burglary, in which the residents had been murdered. Texas held that his right to counsel had attached before interrogation, and his subsequent waiver of rights violated *Michigan v. Jackson*, 475 U.S. 625 (1986), since counsel had not acceded to Cobb’s interview on this occasion. Counsel had previously granted permission for interrogation on a different, but related crime, before Cobb became a suspect in this burglary, but the Texas court held that was not relevant and fruits of this interrogation must be suppressed. U.S. Supreme Court reversed, holding that the confession was not obtained in violation of the Sixth Amendment right to counsel because the right to counsel in the first burglary case did not extend to the “factually-related” murder case. The Court acknowledged that some other courts had extended *McNeil v. Wisconsin*, 501 U.S. 171 (1991) (right to counsel is “offense specific”) based on *Maine v. Moulton*, 474 U.S. 159 (1985) and *Brewer v. Williams*, 430 U.S. 387 (1977). But the Supreme Court rejected this

interpretation, holding neither case specifically addressed the issue, and that “constitutional rights are not defined by inferences from opinions which did not address the question.” To determine whether the new interrogation involves the same offense, or merely a related offense, the Court used the very strict *Blockberger* test: “The test to be applied to determine whether there are two offense or one, is whether each [statutory] provision requires proof of a fact which the other does not.”

III. SEARCH & SEIZURE

A. Residences.

1. **Securing Residence During Search Warrant Application.** *Illinois v. McArthur*, 121 S. Ct. 946 (2001). As she finished moving out of their trailer home, McArthur’s estranged wife, Tera, told the police that “Chuck had dope in there.” Armed with this probable cause to believe that Chuck McArthur had hidden marijuana in his trailer home, police applied for a search warrant for the home. During the two-hour application process, police removed Chuck from his trailer home, secured it, and refused to allow him to re-enter, unless accompanied by a police officer, who could prevent removal or destruction of evidence. Illinois court suppressed evidence found during search, finding that the procedures violated the Fourth Amendment. U.S. Supreme Court reversed, holding that the brief seizure of the premises was permissible under the Fourth Amendment, given the nature of the intrusion and the law enforcement interest at stake.
2. **Thermal Imaging Inside Home.** *Kyllo v. United States*, 121 S. Ct. 29 (cert. granted Sept. 26, 2000); reported below at 190 F.3d 1041 (9th Cir. 2000). Court of Appeals held that scanning of home with thermal imaging device that detects waste heat signature of objects, but not of intimate activities, is not a search. Question presented: Does warrantless use of thermal imaging device to detect heat sources within home constitute unreasonable search and seizure under the Fourth Amendment?

B. Vehicles.

1. **Routine Traffic Stop Checkpoints.** *City of Indianapolis v. Edmond*, 121 S. Ct. 447 (2000). Routine traffic checkpoints, set up for the sole purpose of investigating criminal activity, are used in many communities. A predetermined number of cars are pulled over at one time at “narcotic checkpoints,” in hopes of catching people using or selling drugs. Motorists are asked to show a drivers license and car registration, while drug-sniffing dogs walk around the stopped car. The detention lasts approximately three minutes. The Supreme Court held that the checkpoint program in Indianapolis violates the Fourth Amendment. Although the Court has recognized brief, suspicionless seizures at fixed checkpoints to intercept illegal aliens, drunk drivers and licensure violations, it has never approved a checkpoint program, the primary purpose of which is to detect evidence of ordinary criminal wrongdoing. Allowing such checkpoints permits police to construct a roadblock for almost any conceivable law enforcement purpose.
2. **Custodial Arrest for Traffic Stop.** *Atwater v. Lago Vista*, 121 S. Ct. ____ (Apr. 24, 2001). The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine.
3. **Luggage Search.** *Bond v. United States*, 120 S. Ct. 1462 (2000). Bus passenger placed his carry on luggage in an overhead compartment. Border patrol agent reached into bin and squeezed the bag while conducting an immigration inspection of bus passengers at a regular checkpoint. Fifth Circuit held that bus passenger had no expectation of privacy in the bag in the bin, thus there was no search. Supreme Court held: Squeezing of canvas bag in overhead rack of bus was a “search” within the meaning of the Fourth Amendment and therefore could not be performed without individualized suspicion of criminal activity.

C. Pedestrians

1. **Investigative Detention.** *Florida v. J.L.*, 120 S. Ct. 1375 (2000). Police had an anonymous tip that youth wearing plaid shirt and

standing with other black males at a particular location was carrying a gun. Police conducted a stop and frisk. Florida court held that stop and frisk could not be based on a tip that failed to allege suspicious activity that police could verify or to accurately predict future illegal activity. U.S. Supreme Court held that the anonymous tip was not sufficient to provide reasonable suspicion of criminal activity justifying a stop and frisk of individual under *Terry v. Ohio*, 392 U.S. 1 (1968). Further, the Court held that there is no “firearm exception” to the requirement of adequate individualized suspicion.

D. Hospital Patients - Drug Tests. *Ferguson v. Charleston, S.C.*, 121 S. Ct. ____ (Mar. 21, 2001). Concerned about cocaine use during pregnancy, State hospital and police set up a task force for drug-testing patients, including a required chain-of-custody, and for hospital staff to assist in the prosecution of mothers whose newborn children tested positive for cocaine. The procedure also included drug counseling during the pregnancy. Court of Appeals affirmed the procedure, based on “special needs,” a Fourth Amendment exception permitting searches under limited circumstances, for non-law enforcement ends. Supreme Court reversed, holding that the hospital’s performance of a diagnostic test to obtain evidence of a patient’s criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. The Court rejected the “special needs” exception due to the close involvement of police in the policy and procedure. This allowed the Court to distinguish its earlier drug-testing cases, which had approved testing in non-law enforcement settings.

E. Unlawful Wiretapping Sanctions. *Bartnicki v. Vopper*, and *United States v. Vopper*, 120 S. Ct. 2716 (cert. granted June 26, 2000); reported below at 200 F.3d 109 (3rd Cir. 1999). One of the provisions of the federal (and Pennsylvania) wiretap laws, 18 U.S.C. § 2511(1)(c), bars the intentional disclosure of the contents of a wire, oral or electronic communication by one who has reason to know that the information was obtained in violation of the interception law. Questions presented: (1) Do the state and federal laws violate the First Amendment to the extent they prohibit disclosure or other use of an unlawfully intercepted communication by one who was not involved in the illegal interception, but who knows or has reason to know that the communication was

unlawfully intercepted? (2) Does imposition of civil liability under 18 U.S.C. §§ 2511(1)(c)&(d) for using or disclosing contents of such conversations violate the First Amendment, where there is neither allegation nor proof that the disclosing party participated in, or encouraged, the underlying unlawful interception?

- F. Forfeiture; Adequacy of Notice.** *Dusenbery v. United States*, 121 S. Ct. 301 (cert. granted Feb. 26, 2001); unpublished decision below (6th Cir. 2000). Should Supreme Court resolve conflict among circuits about whether a prisoner must receive “actual notice” for an adequate forfeiture notification?

IV. CRIMES - ELEMENTS AND BURDENS OF PROOF

- A. Bank Robbery - Lesser Included Offense of Bank Larceny.** *Carter v. United States*, 120 S. Ct. 2159 (2000). Bank larceny, 18 U.S.C. § 2113(a) is not a lesser included offense of bank robbery under § 2113(b).
- B. Mail Fraud.** *Cleveland v. United States*, 121 S. Ct. 365 (Nov. 7, 2000). State and municipal licenses, generally, and unissued video poker licenses in particular, are not “property” of the government, such that a person can violate the mail fraud law by defrauding the government with fraudulent attempts to obtain such licenses.
- C. Federal Arson.** *Jones v. United States*, 120 S. Ct. 1904 (2000). Jones was convicted of tossing a molotov cocktail into the living room of his cousin’s home, causing great damage. The Supreme Court reversed: An owner-occupied residence not used for any commercial purpose does not qualify as property “used in” commerce or commerce-affecting activity under 18 U.S.C. § 844(i). Therefore, arson of such a dwelling is not subject to federal prosecution under § 844(i).
- D. Federal Program Fraud and Bribery.** *Fischer v. United States*, 120 S. Ct. 1780 (2000). Medicare payments to hospital for services provided to Medicare patients qualify as “benefits” to meet jurisdictional requirements of 18 U.S.C. § 666, permitting federalizing of crimes of theft, embezzlement and bribery involving a hospital.

V. TRIAL

- A. **Evidence: Waiver of *In Limine* Issues – Prior Criminal Conviction.** *Ohler v. United States*, 120 S. Ct. 1851 (2000). Defendant waived her right to appeal ruling granting the government’s motion *in limine* to introduce evidence of her prior conviction under FED. R. CRIM. P. 609(a)(1), when she attempted to “remove the sting” of conviction by introducing conviction while testifying on direct examination.

VI. SENTENCING

A. Enhancements.

1. **Firearms – 924(c)(1).** *Castillo v. United States*, 120 S. Ct. 2090 (2000). 18 U.S.C. § 924(c), which enhances punishment if a machinegun is involved, uses the word to state an element of a separate firearms use offense, to be determined by a jury, and not a mere sentencing factor, to be determined by a judge.
2. **Hate Crimes Enhancement.** *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). New Jersey’s hate crime law allows an extended sentence if a defendant acted with a purpose to intimidate because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. New Jersey’s Supreme Court held that the sentence enhancer is not an element of the crime of possession of a firearm for an unlawful purpose, which avoids the need for a jury determination on the issue. U.S. Supreme Court reversed, in a decision with far-reaching implications, holding that Due Process requires that a factual determination be made by a jury (based on proof beyond a reasonable doubt) if the fact may increase punishment beyond the regular statutory maximum.

- B. **Consolidation of Priors - Appellate Standard of Review.** *Buford v. United States*, 121 S. Ct. ____ (Mar. 20, 2001). “Related” convictions are counted as only one when applying the career offender guidelines. Court of Appeals held that it should use a deferential standard of review when reviewing district court’s determination that prior convictions are “related.” Supreme Court affirmed, holding that deferential review, not *de novo* review, is appropriate.

VII. APPEALS

- A. **Review of Adequacy of Guilty Plea Colloquy.** *United States v. Vonn*, 121 S. Ct. 1185 (2001); reported below at 224 F.3d 1152 (9th Cir. 2000). Is district court's failure to advise defendant of his right to counsel (as required by Rule 11(c)(3)) subject to plain error review, where defendant fails to posit a timely objection to the oversight? Also, in determining if a defendant's substantial rights have been violated by the error, is the Court of Appeals limited to only the transcript of the guilty plea colloquy, or may the appellate court also consider other official parts of the record, which occurred prior to the plea colloquy?

VIII. DEATH PENALTY

A. Jury Instructions.

1. **Ineligibility for Parole.** *Ramdass v. Angelone*, 120 S. Ct. 2113 (2000). Ramdass was convicted of capital murder in 1993. At the sentencing phase, he was denied the opportunity to advise the jury that his conviction made him ineligible for parole, a right later recognized by the U.S. Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). In the case's first appearance before the U.S. Supreme Court, the case was remanded to the Virginia Supreme Court for reconsideration under *Simmons*. Virginia court held that Ramdass was not actually statutorily ineligible for parole and the Fourth Circuit held that, based on the state court's finding, *Simmons* is inapplicable. Supreme Court affirmed, holding that a defendant sentenced to death was not entitled to habeas relief on the ground that the jury should have been told that the defendant was ineligible for parole, because, under state law, it only "looked like" the defendant would "turn out" to be parole ineligible based on a pending criminal case.
2. **More *Simmons*.** *Shafer v. South Carolina*, 121 S. Ct. 561 (2001). Despite the U.S. Supreme Court's decision in 1994 in *Simmons v. South Carolina* (see above), South Carolina Supreme Court held that it does not apply in that state, because the state has a new sentencing scheme. Under the new law, as the South Carolina Supreme Court sees it, the defendant could be sentenced

to death, life without the possibility of parole, or a mandatory minimum 30 years imprisonment. Question presented: Were petitioner's due process rights under *Simmons* violated by trial court's refusal to instruct the jury that "under South Carolina law, [the defendant] would be ineligible for parole if the jury were to vote for a life sentence" (see *Ramdass* above), and by the South Carolina Supreme Court's holding that *Simmons* no longer applies to that state's capital cases? U.S. Supreme Court reversed, holding that South Carolina misinterpreted *Simmons*, since there are not three options under the state's current sentencing scheme, but rather only two: If a jury finds an aggravating circumstance it must recommend either death or life without parole..

3. **Failure to Answer Jury's Request for Clarification.** *Weeks v. Angelone*, 120 S. Ct. 727 (2000). Trial judge gave a standard death penalty instruction, of the type approved in *Buchanan v. Angelone*, 522 U.S. 269 (1998). Jury requested clarification, asking whether it was *required* to impose the death penalty upon finding of at least one aggravating factor. Trial judge answered by telling the jury to, "See second paragraph of Instruction 2 ...". Supreme Court held that this response is constitutionally sufficient, even if the legally correct answer may have been misleading about whether the jury was empowered to withhold the death penalty under these circumstances. Courts assume that jurors will follow the law, so if the stated law is correct, the Court assumes the jury followed the law.
4. **Mitigation.** *Penry v. Johnson*, 121 S. Ct. 510 (cert. granted Nov. 27, 2000); reported below at 215 F.3d 504 (5th Cir. 2000). Whether the jury was properly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage, and background of abuse as a whole and beyond the scope of the special issues submitted by the court in order to decline to impose the death penalty.

B. Cruel and Unusual Punishment.

1. **Execution of Mentally Retarded Person.** *McCarver v. North Carolina*, 121 S. Ct. 1221 (cert. granted Mar. 26, 2001). Whether execution of a mentally retarded person is unconstitutional, as cruel and unusual punishment? In this case the Supreme Court is agreeing to rehear the issue, which was decided adversely in *Penry v. Lynough*, 492 U.S. 392 (1989) (execution of moderately retarded person is not unconstitutional). In 1989 only the federal government and one state prohibited execution of the mentally retarded, but now there appears to be a national consensus against such executions. Today eleven more states prohibit such executions and 12 states have no death penalty at all.

IX. PAROLE AND OTHER EARLY RELEASE

- A. **Supervised Release - Imposition of New Term Upon Revocation.** *Johnson v. United States*, 120 S. Ct. 1795 (2000). Defendant's supervised release term was revoked and he was sentenced to 18 months incarceration, to be followed by a new 12-month term of supervised release, pursuant to 18 U.S.C. § 3583. Supreme Court held that both the prior and amended versions of section 3583 authorize the re-imposition of supervised release upon violation of the original term.
- B. **Ex Post Facto Clause.** *Garner v. Jones*, 120 S. Ct. 1362 (2000). Georgia Parole Board's extension of time period between parole reconsideration hearings (from three years, at time of respondent's offenses, to eight years), did not constitute ex post facto law because the extension was not shown to have created a significant risk of increasing the measure of respondent's punishment, in light of the fact that state parole board was vested with considerable discretion.

X. PRISONER'S RIGHTS

- A. **Prison Litigation Reform Act - Automatic Stay.** *Miller v. French; United States v. French*, 120 S. Ct. 2246 (2000). Section 3626(e) of Prison Litigation Reform Act automatically stays prospective relief under a prisons conditions consent decree, after a specified period of time, in the absence of a ruling on a motion to modify or terminate the decree that

triggered the stay. The Supreme Court held that the automatic stay provision is not subject to the application of equitable principles; and the statute does not unconstitutionally violate the separation of powers by legislatively specifying rule of decision or legislatively annulling judgment.

- B. Early Release Programs.** *Lopez v. Davis*, 121 S. Ct. 714 (2001). Title 18 U.S.C. § 3621(e)(2) states that the Bureau of Prisons “may” reduce a prisoner’s sentence by up to one year if the prisoner completes a residential drug treatment program. BOP has exercised its discretion to categorically deny such relief to convicted felons-in-possession and those whose sentences were enhanced for using a dangerous weapon during the commission of a drug offense, even though their offenses were nonviolent. The Supreme Court upheld the BOP regulation, holding that it is a permissible exercise of the BOP’s discretion under § 3621(e)(2)(B).
- C. Prisoner’s Right to Give Legal Assistance.** *Shaw v. Murphy*, 121 S. Ct. ____ (Apr. 18, 2001). Inmates do not possess a special First Amendment right to provide legal assistance to fellow inmates.
- D. Indefinite Detention of Aliens.**

 - 1. Stateless Resident Alien.** *Zadvydas v. Underdown*, 121 S. Ct. 297 (cert. granted Oct. 10, 2000); reported below at 185 F.3d 279 (5th Cir. 1999). Court of Appeals held that Due Process is not violated by indefinite detention of stateless resident alien, following final deportation order, based on either dangerousness or flight risk, while good faith efforts are underway to effectuate deportation, where reasonable parole and periodic review procedures are in place. Questions presented: Does the Constitution prohibit prolonged, indefinite detention of immigrant after final order of deportation when deportation cannot be effectuated? Did court err by treating resident alien like an excludable alien, who can be indefinitely detained?
 - 2. Beyond 90-Day Removal Period.** *Ashcroft v. Ma*, 121 S. Ct. 297 (cert. granted Oct. 10, 2000); reported below at 208 F.3d 815 (9th Cir. 2000). Under 8 U.S.C. § 1231(a)(6), the Attorney General is authorized to detain “beyond the removal period” certain aliens

who have been ordered removed. Court of Appeals held that this law permits detention beyond 90 days only for a reasonable time and bars detention beyond 90 days if there is no reasonable likelihood that the country of origin will permit the alien's return in the foreseeable future. Question presented: Is Attorney General authorized to continue to detain alien beyond 90-day removal period (under 8 U.S.C. § 1231(a)(6)) if alien cannot be removed immediately, but the AG has determined that the alien poses a danger to the community, and alien's custody is subject to periodic administrative review?

XI. COLLATERAL RELIEF: HABEAS CORPUS, §§ 2254 AND 2255

- A. Subject Matter - Priors Used for Enhancement.** *Daniels v. United States*, 121 S. Ct. ____ (Apr. 25, 2001). Defendant was sentenced under the Armed Career Criminal Act. He attempted to invoke 28 U.S.C. §2255 to collaterally attack his prior state convictions, used to enhance his sentence, on the grounds of ineffective assistance of counsel. Court of Appeals held that § 2255 could not be invoked for this purpose. Supreme Court affirmed, holding that a defendant may not use federal habeas corpus to reopen his federal sentence and challenge constitutionally infirm prior convictions used for sentencing enhancement. The Court recognized an exception: the defendant could attack a prior conviction if he claimed that the conviction was obtained in violation of the right to counsel and he raised that claim at his federal sentencing proceeding (*U.S. v. Custis*). The Court also observed: "We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own. The circumstances of this case do not require us to determine whether a defendant could use a motion under §2255 to challenge a federal sentence based on such a conviction."
- B. Custody Requirement.** *Lackawanna County, Pa., District Attorney v. Coss*, 121 S. Ct. ____ (Apr. 25, 2001). Title 28 U.S.C. § 2254 permits habeas corpus relief only if the petitioner is in custody. Defendant's federal sentence was enhanced based on a prior state sentence that he had fully served. Court of Appeals held he should be permitted to challenge the prior sentence, based on ineffectiveness of counsel, and be resentenced, even though he was no longer in custody on the prior

sentence. Supreme Court reversed, holding that a defendant could not obtain habeas relief under § 2254 for a conviction (with an expired sentence) that was used to enhance another sentence. *Daniels* was extended to 2254 petitions, but the *Custis* exception remains in 2254 cases as well.

C. Procedural Default.

1. **Exhaustion - Second or Successive Petition.** *Slack v. McDaniel*, 120 S. Ct. 1595 (2000). The district court ruled that because a prior federal habeas petition that contained unexhausted claims had been dismissed without prejudice, the petitioner's new federal habeas petition should be considered a "second or successive" petition, which triggered the "abuse of the writ" bar to the filing of previously raised claims. The Supreme court ruled, however, a habeas petition that is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive" petition in the habeas context. The Supreme Court also decided several procedural questions: (1) When a notice of appeal of a denial of federal habeas relief is filed after the effective date of the AEDPA, the appeal is governed by the AEDPA amendments regarding appeals; (2) AEDPA permits appeals of orders which dismiss habeas petitions on procedural grounds. (3) AEDPA requires that a habeas petitioner whose petition was denied on procedural grounds must receive a certificate of appealability (COA) before being able to prosecute an appeal. In order to qualify for a COA, the habeas petitioner must show that "jurists of reason" would find it "debatable" whether the district court's procedural ruling was correct, and "jurists of reason" would find it debatable whether the petition states a valid claim of the denial of a constitutional right. In this case, reasonable jurists could conclude that the district court's procedural ruling was wrong, because, in fact, it was erroneous.
2. **Ineffective Counsel As Cause for Default.** *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000) A federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another habeas claim

when the ineffective assistance claim is itself procedurally defaulted.

3. **Failure to Develop Factual Basis In State Court.** *Williams v. Taylor*, 120 S. Ct. 1479 (2000). Provision in AEDPA instructing federal judges not to grant evidentiary hearings to habeas corpus petitioners if the petitioner has “failed to develop factual basis of claim” only applies to petitioners who showed a lack of diligence, or if there was some fault attributable to petitioner or his counsel – it is not a strict liability standard, contrary to the Fourth Circuit’s interpretation. In light of this standard, petitioner is not foreclosed from receiving a hearing on his claim that his trial was tainted by juror bias, and by prosecutorial misconduct, although he is barred from a claim that the state withheld exculpatory evidence, as the basis for that claim was available to him during the state court proceedings.
4. **Tolling AEDPA Time When State Claim Not Properly Filed.** *Artuz v. Bennett*, 121 S. Ct. 361 (2000). 28 U.S.C. § 2244(d)(2) provides that federal habeas corpus one-year time limitation is tolled during the pendency of a “properly filed” state petition for collateral relief. Prosecution argued that applications are not properly filed in state court, if some of the claims are procedurally barred. Court of Appeals held that the time was tolled as long as the petition was filed in state court, without regard for whether it suffered mandatory procedural bar under state law. Supreme Court affirmed, holding that time is tolled if the petition is filed in a state court, even if that state court has no power to hear the merits of the application, based on a procedural default that is ascertained only by reading the petition, *e.g.* failure to raise issue on direct appeal. This probably does not apply to petitions that were time-barred under the state’s rules.
5. **Tolling AEDPA Time When Federal § 2254 Pending with Unexhausted Claims.** *Duncan v. Walker*, 121 S. Ct. 753 (cert. granted Nov. 13, 2000); reported below at 208 F.3d 357 (2nd Cir. 2000). Whether the time during which a federal 2254 proceeding is pending (but later dismissed based on failure to exhaust state claims) tolls the one-year time limitation under AEDPA.

6. **Court Personnel Involvement.** *Lee v. Kemna*, 121 S. Ct. 1186 (cert. granted Feb. 26, 2001); reported below at 213 F.3d 1037 (8th Cir. 2000). Whether procedural default bars habeas claim that due process was violated by denial of continuance to obtain alibi witnesses, where court personnel misadvised witnesses about their need for attendance. Also, whether violation of state procedural rule bars relief despite these facts; and whether the actual innocence exception to procedural bar applies to these facts.

D. Standards for Relief.

1. **Ineffective Assistance of Counsel; Meeting the *Strickland* Prejudice Prong for Sentencing Guidelines Errors.** *Glover v. United States*, 121 S. Ct. 696 (2001). Court of Appeals held that, assuming habeas petitioner's attorney was ineffective at sentencing, collateral attack was not permitted because 2-level error caused only a 6 - 21 month difference in sentence; this is insufficiently significant to satisfy the prejudice prong of *Strickland v. Washington*. Supreme Court granted cert to determine if additional 6 - 21 month sentence in prison due to counsel's error relating to U.S. Sentencing Guidelines satisfies *Strickland's* prejudice prong. Supreme Court reversed, holding that the Seventh Circuit erred in engrafting onto the prejudice branch of the *Strickland* test the requirement that any increase in sentence must meet a standard of significance. Any additional sentence is significant under the prejudice prong of the *Strickland* test. The difference in sentence may be applicable, however, under the "deficient performance" prong of *Strickland*. Thus, a lawyer's failure to raise an issue may not be legally deficient if the net sentence does not change remarkably; but once the deficiency prong is met, prejudice occurs regardless of the amount of additional sentence it caused.

2. **Ineffective Assistance of Counsel; Standards for Federal Relief.** *Williams v. Taylor*, 120 S. Ct. 1479 (2000). AEDPA provides that federal courts in habeas corpus proceedings may not grant relief to habeas petitioners who claim that the state courts violated their constitutional rights, unless the state court's finding that no constitutional violation existed was "contrary to, or involved an unreasonable application of, clearly established federal law" as determined by the Supreme Court. The Fourth Circuit held that this limitation meant that all reasonable jurists would have to agree that the state court ruling was unreasonable. Supreme Court held that the Fourth Circuit's interpretation was wrong. Rather, the inquiry under the statute should be whether the state court's application of clearly established law was *objectively* unreasonable. Under this standard, petitioner demonstrated that the Virginia courts' denial of his claim that he suffered ineffective assistance of counsel at his capital sentencing proceeding was "unreasonable" under clearly established standards of *Strickland v. Washington*, 466 U.S. 668 (1984).
3. **Ineffective Assistance of Counsel; Conflict of Interest.** *Mickens v. Taylor*, 121 S. Ct. ____ (cert. granted Apr. 13, 2001). Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

E. Retroactivity under *Teague v. Lane*.

1. **Retroactivity of State Case Law.** *Fiore v. White*, 121 S. Ct. 712 (2001) (per curiam). State defendant was convicted of operating a hazardous waste facility without a permit, even though he had a permit. His conviction was affirmed in state court, but the conviction of his co-defendant was subsequently reversed because the statute does not permit the conviction of one who has a permit. Fiore was denied relief in habeas proceedings. In federal court, he made a Fourteenth Amendment claim that he was entitled to the benefit of the state appellate decision that reversed his co-defendant's conviction. Federal court of appeals held that states

are under no constitutional obligation to apply their own decisions retroactively and that new state law decisions are not applicable retroactively on federal habeas corpus. Initially, the U.S. Supreme Court certified a question to the Pennsylvania Supreme Court to determine if the co-defendant's case was new law or an application of existing law. The Pennsylvania Supreme Court, responding to the certified question, made clear that retroactivity is not at issue; that the co-defendant's appellate decision merely clarified the law existing at the time of Fiore's conviction. The U.S. Supreme Court held, therefore, "that [the Pennsylvania Supreme Court's] "interpretation of its statute makes clear that Fiore did not violate the statute. We consequently find that his conviction is not consistent with the demands of the Federal Due Process Clause. See *Jackson v. Virginia*, 443 U. S. 307, 316 (1979)."

XII. SIGNIFICANT NON-CRIMINAL CASES

- A. Elections; Equal Protection.** *Bush v. Gore*, 121 S. Ct. 525 (Dec. 12, 2000). "The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution and failing to comply with 3 U. S. C. §5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause." Explaining why the Florida Supreme Court's decision would not be remanded for further proceedings, the U.S. Supreme Court majority held: "Because it is evident that any recount seeking to meet the December 12 [Safe Harbor] date will be unconstitutional ..., we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed."
- B. Funding Restrictions on Legal Services Lawyers.** *Legal Services Corporation v. Velazquez*, 121 S. Ct. 1043 (2001). Congressional funding restrictions designed to control legal advice an LSC lawyer gives a client, or issues litigated on behalf of a client, are unconstitutional. Although the government has the latitude to ensure that its own message is being delivered, neither that latitude nor its rationale applies to subsidies for private speech in every instance. The LSC program was

designed to facilitate private speech, not to promote a governmental message. An LSC attorney speaks on behalf of a private, indigent client in a welfare benefits claim, while the Government's message is delivered by the attorney defending the benefits decision. The attorney's advice to the client and advocacy to the courts cannot be classified as governmental speech even under a generous understanding of that concept.

- C. **Free Speech.** *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000). City ordinance banning nude dancing satisfies four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968) applied to regulation of expressive conduct, because it is not related to the suppression of expression, it is content neutral and it furthers important governmental interest in combating harmful secondary effects associated with nude dancing (including increase in neighborhood prostitution and other criminal activity). Case was not mooted when respondent closed the bar in question, because respondent might reopen a similar club, and because city suffers an ongoing injury in being barred from enforcing its public nudity ordinance.
- D. **Abortion Clinic Protests.** *Hill v. Colorado*, 120 S. Ct. 2480 (2000). State statute that establishes eight-foot floating buffer zone "in public way or sidewalk area" within 100 foot radius of health care facility entrances and that prohibits any person from "knowingly approach[ing]" person in such zone for purpose of counseling without that person's consent does not violate the First Amendment.
- E. **Civil Remedies for Gender-Based Violence.** *United States v. Morrison*, 120 S. Ct. 1740 (2000). Civil remedy provision of federal Violence Against Women Act is unconstitutional.
- F. **Unlawful Wiretapping Sanctions vs. First Amendment.** *Bartnicki v. Vopper*, and *United States v. Vopper*, 120 S. Ct. 2716 (cert. granted June 26, 2000); reported below at 200 F.3d 109 (3rd Cir. 1999). One of the provisions of the federal (and Pennsylvania) wiretap laws, 18 U.S.C. § 2511(1)(c), bars the intentional disclosure of the contents of a wire, oral or electronic communication by one who has reason to know that the information was obtained in violation of the interception law. Questions presented: (1) Do the state and federal laws violate the First Amendment

to the extent they prohibit disclosure or other use of an unlawfully intercepted communication by one who was not involved in the illegal interception, but who knows or has reason to know that the communication was unlawfully intercepted? (2) Does imposition of civil liability under 18 U.S.C. §§ 2511(1)(c)&(d) for using or disclosing contents of such conversations violate the First Amendment, where there is neither allegation nor proof that the disclosing party participated in, or encouraged, the underlying unlawful interception?

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Eyewitness Identification – Can You Believe It?

Solomon M. Fulero, Ph.D., J.D.
Dayton, Ohio

Andrew Wise, Esquire
Detroit, Michigan

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	X	
<i>Plaintiff-Appellee,</i>	.	
	.	
v.	.	No. 98-1722
	.	
	.	
JAMES SMITHERS,	.	
<i>Defendant-Appellant.</i>	.	
	.	
	N	

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 97-80248—Avern Cohn, District Judge.

Argued: August 6, 1999

Decided and Filed: May 8, 2000

Before: BATCHELDER and COLE, Circuit Judges;
MARBLEY, District Judge.

COUNSEL

ARGUED: Andrew N. Wise, FEDERAL PUBLIC
DEFENDERS OFFICE, Detroit, Michigan, for Appellant.
Kathleen Moro Nesi, ASSISTANT UNITED STATES

* The Honorable Algenon L. Marbley, United States District Judge for
the Southern District of Ohio, sitting by designation.

ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF:** Andrew N. Wise, FEDERAL PUBLIC DEFENDERS OFFICE, Detroit, Michigan, for Appellant. Kathleen Moro Nesi, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

MARBLEY, D. J., delivered the opinion of the court, in which COLE, J., joined. BATCHELDER, J. (pp. 21-46), delivered a separate dissenting opinion.

OPINION

ALGENON L. MARBLEY, District Judge. Appellant James Smithers was convicted of bank robbery in violation of 18 U.S.C. § 2113(a). Smithers now appeals various aspects of his trial, including the district court's exclusion of the testimony of an eyewitness identification expert, the limitation of Smithers's wife's testimony, and the district court's response to questions posed by the jury after it began deliberating. For the following reasons, we **REVERSE** the conviction below and **REMAND** this case for a new trial pursuant to the law set forth herein.

I.

On the morning of November 12, 1996, a man walked into the Monroe Bank and Trust in Terence, Michigan, and presented bank teller Teresa Marino a note. The note read, "I have a gun. Give me your large bills." Ms. Marino complied with the demand by turning over the money from her teller drawer. The robber asked for more money, and Ms. Marino unlocked her other drawer and gave him three packs of large bills totaling \$3,400. When the robber repeated his demand for more money, Ms. Marino told him that was all she had, and he ran from the bank. The entire incident lasted about two minutes.

understanding but for the particularized resolution of legal disputes.

509 U.S. at 596-97. I fear that the majority's opinion here will only undermine the balance between truth-seeking and fairness that the Rules have so carefully crafted, without adding much at all to the efficacy—at least in this circuit—of criminal justice. Indeed, the majority here holds that “Expert testimony regarding eyewitness identification must be recognized as scientifically commensurate with all other psychological studies, and may often be a valid source of information to help jurors understand the factors that effect [sic] eyewitness identifications.” The effect of the majority's opinion is to establish the district court as the gatekeeper with discretion only to admit, but not to exclude, expert testimony relative to eyewitness identification.

For all of the foregoing reasons, I respectfully dissent.

Two other witnesses observed the robbery. The first, Debra White, was also working as a teller at the bank on November 12, 1996. She was sitting at a desk behind Ms. Marino when she noticed an unfamiliar customer standing at Ms. Marino's teller station. Ms. White looked away for a moment and when she looked back, the man grabbed the money and walked quickly out of the bank. Ms. White asked Ms. Marino if she had been robbed. Learning that she had, Ms. White yelled that they had been robbed and went to lock the bank doors. While doing so, she observed the robber getting into the passenger side of a car parked in the parking lot.

Timothy Wilson, the second witness, was a bank customer who walked into the bank at the same time as the robber. The robber held the door open for him as they both entered the building. Mr. Wilson saw the robber go straight to the teller and then leave the bank quickly.

Investigators from the Monroe County Sheriff's Department spoke to the witnesses that day. Ms. Marino, who was approximately three feet from the robber, described him as a white male in his late twenties wearing a Nike jacket, baseball cap and sunglasses, over 6' 2" tall, 180-185 pounds, with long bushy dark hair, a moustache and a thin beard. Ms. White described the robber as taller than average, with squinty eyes and wearing a bulky striped jacket. Ms. White described the car as a two-toned brown and black, late 1970's Monte Carlo, with a cream colored landau roof and an Ohio license plate. Mr. Wilson recalled the robber as a very tall man, with a moustache and partial beard, wearing a baseball cap, dark sunglasses and a winter jacket.

The next day, officers of the Toledo Police Department noticed a vehicle fitting the description of the car used in the robbery at an apartment complex in Toledo. Monroe County Detective Thomas Redmond drove Ms. White to the vehicle, a 1976 Oldsmobile Cutlass, which she identified as the car used in the robbery. The car was registered to James Smithers.

Officers then went to Smithers's home, where his wife, Josette Smithers, informed them that he was at his parents' house. The officers searched Smithers's apartment but found no incriminating evidence. They located Smithers at his parents' home, and he accompanied the police to his apartment. Smithers told the officers that he bought the vehicle from his brother-in-law, Steve Dallas, who still retained a set of keys to the car. Smithers also stated that on the morning of November 12, 1996, he had noticed his rear license plate was missing, so he had moved his front plate to the rear. He also claimed to have noticed gas missing from the car on other mornings; later, Smithers said that there was a hole in the gas tank. Smithers consented to a search of the car, which produced no incriminating evidence. Smithers voluntarily went to the sheriff's department where he provided handwriting samples and was photographed and fingerprinted. When photographing him, Detective Redmond noted Smithers's height as 6' 6 ½".

Detective Redmond prepared a photo spread of six photographs, including a photo of Smithers. On November 14, 1996, Detective Redmond showed the photo spread to Ms. Marino, Mr. Wilson and Ms. White. Ms. Marino and Mr. Wilson could not identify the robber from the photo spread. Ms. White picked out Mr. Smithers. Immediately after her identification, Ms. White told Ms. Marino that she had been able to identify the robber from the photo spread.

Smithers's handwriting exemplars were submitted to the FBI laboratory for analysis. The results were inconclusive. The demand note was submitted to the Michigan State Police Laboratory for fingerprint analysis. The analysis produced one identifiable print. The government claims the print was inconclusive; Smithers claims the analysis showed that the print did not belong to him.

Peter Smith, an FBI examiner who specializes in analyzing exhibits in photographic form, performed a height analysis of the robber depicted in the bank videotape. Mr. Smith concluded that the robber measured approximately 6' 5". Mr.

to be allowed to testify in every case in which eyewitness testimony is relevant. This would constitute a gross overburdening of the trial process by testimony about matters which juries have always been deemed competent to evaluate"); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. Unit B 1982) ("To admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence"); *Sabetta*, 680 A.2d at 933 ("it would effectively invade the province of the jury and . . . open a floodgate whereby experts would testify on every conceivable aspect of a witness's credibility"). The logical conclusion of today's holding—if not its implicit intent—is likely to be precisely this type of snowball effect in our circuit.

Acutely aware of the dangers of permitting expert testimony without a rigorous performance of the gatekeeping function, *Daubert* observed:

It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment--often of great consequence--about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic

Fulero's exclusion lies not with the district court's legal analysis but with Smithers's inadequate production.

The cases holding that expert testimony regarding eyewitness identification is too general and those finding that it comments too directly on witness credibility delimit the narrow range of circumstances in which this testimony is properly admissible. Unless a very small number of eyewitness identifications form the only evidentiary basis for a conviction, and the proffered testimony relates directly to the facts of the case without commenting on the eyewitnesses' credibility, the need for this testimony will simply not be so great that alternative means of cautioning the jury on this subject will not suffice. *See, e.g., Rincon*, 28 F.3d at 923-26. The existence of other inculpatory evidence will usually render any error in excluding the expert testimony harmless. *See Smith*, 736 F.2d at 1107; *Hall*, 165 F.3d at 1107-08; *Smith*, 156 F.3d at 1053-54; *Blade*, 811 F.2d at 465; *Moore*, 786 F.2d at 1313. Here, the fact that three witnesses identified Smithers adds to the probability of their accuracy. Moreover, the Government presented the identification of Smithers's car at the bank, the photo analysis showing that Smithers and the robber shared the rare characteristic of being over 6'5" tall, and a series of lies Smithers told police regarding his whereabouts. While this is not overwhelming evidence, it does alleviate considerably any concern that Smithers was convicted solely on the basis of erroneous eyewitness testimony.

The various failings in Fulero's proposed testimony accentuate the jurisprudential danger posed by the majority's opinion. Its tangible eagerness to find that the district court abused its discretion in excluding this testimony is likely to set a precedent requiring admission of evidence tending to erode further the jury's responsibility for making credibility determinations. Other courts have recognized this danger and steered clear of it. *See, e.g., Alexander*, 816 F.2d at 169 ("Requiring the admission of the expert testimony proffered in *Moore* would have established a rule that experts testifying generally as to the value of eyewitness testimony would have

Smith also conducted a comparative analysis of the robber in the bank photos with a photograph of Smithers. He could neither positively identify nor eliminate Smithers as the bank robber.

On June 16, 1997, a grand jury returned an indictment charging Smithers with one count of bank robbery in violation of 18 U.S.C. § 2113(a).

On December 18, 1997, Smithers filed a ten-page motion *in limine* to determine the admissibility of certain expert testimony regarding eyewitness testimony. The district court commenced Smithers's jury trial on January 14, 1998. After the jury was empaneled, the district court heard argument on Smithers's motion *in limine*, and denied the motion, noting that everything an expert would have to say about eyewitness identification was within the jury's "common knowledge." The court stated that it would give an instruction on eyewitness testimony. Smithers's attorney requested permission to make a written proffer, which the court allowed.

The government presented its case, including eyewitness testimony from Ms. Marino, Ms. White and Mr. Wilson. Despite their prior inability to identify Smithers from a photo spread, Ms. Marino and Mr. Wilson identified Smithers as the robber in court. Ms. Marino and Ms. White testified that they did not notice that the robber had any distinguishing features. The government rested on January 16, 1998.

Smithers filed his renewed motion *in limine* and offer of proof, regarding expert testimony, on eyewitness identification on January 20, 1998. This proffer described the anticipated testimony of Dr. Solomon Fulero, a proposed expert on eyewitness identification. It noted that Dr. Fulero would "educate the jury about the general factors that may affect eyewitness accuracy," including the specific the issues of: (1) "detail salience" (the fact that eyewitnesses tend to focus on unusual characteristics of people they observe); (2) the relationship between the time that has passed since observing the event and the accuracy of recalling it; (3) the

effect of post-identification events on memory; (4) the fact that when one person both prepares and administers a photo spread, the likelihood of misidentification increases; (5) the “conformity effect” (the fact that witnesses’ memories are altered by talking about the event with each other after it occurs); and (6) the relationship between a witness’s confidence in her recollection and its accuracy. Regarding the issue of detail salience, the proffer stated that “[h]ad Mr. Smithers been the robber, the eyewitnesses would have observed and been able to recall the large scar on Mr. Smithers’ [sic] neck.”

After hearing oral argument on the Defendant’s renewed motion, the district court ruled that it would exclude the expert testimony:

[p]rimarily because it’s late in the day. It should have been done much earlier. On the other hand, I think you’ve got a very good, if there’s a conviction, I think you’ve made an excellent record that I’ve abused my discretion in failing to allow it, and I think there’s a certain – I prefer to see it that way.

The court also opined that Dr. Fulero’s testimony was “not a scientifically valid opinion,” “a jury can fully understand that its [sic] got an obligation to be somewhat skeptical of eyewitness testimony,” and “admission of Dr. Fulero’s testimony is in this case is almost tantamount to the Court declaring the defendant not guilty as a matter of law. . . . [A]bsent the eyewitness testimony I don’t think there’s enough here to go to the jury.” Finally, the district court remarked, “I’m also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it’s the defendant’s fate that’s at stake, but you can always argue for a new trial if he’s convicted.”

After this ruling, Smithers presented a few witnesses, including his wife, who attempted to establish an alibi defense. Ms. Smithers testified that Smithers was sleeping in their house from 3:00 a.m. to 11:30 a.m. the morning of November 12, and that as a light sleeper she would have

our legal system is the sole province of the jury. *See Greenwell*, 184 F.3d at 496; *Gacy*, 994 F.2d at 313-14; *Murrian*, *supra*, at 380. As illustrated above, a number of courts have cited this tenet as a basis for excluding eyewitness identification experts. That threat was also present in this case, as the majority points out, because Dr. Fulero proposed to testify, among other things, that the eyewitnesses “would have observed and been able to recall the large scar on Mr. Smithers’ neck. That deformity would have been *more* memorable to the witnesses.” The majority opinion says that the solution to this admittedly inadmissible testimony is simply to excise the offending language. This ignores the fact that at the second hearing, Smithers identified the scar as “the key issue that [Fulero] would address.” Removing this aspect of Fulero’s testimony would gut the remainder of the majority’s reasoning as to why Fulero’s testimony should have been admitted. Nor is this one sentence the only example of how Fulero’s testimony would have stepped over the line. Smithers argued in his renewed motion that “Fulero would testify regarding the perception of the bank robber by [the witnesses] and how [various factors] *are directly related to the accuracy of their identification testimony.*” (emphasis added). Again: “Fulero would thus testify that the photo spread procedures, and the witness’ numerous meetings with the police, FBI, and each other, *would have directly influenced* the witness’ ability to recall the particular characteristics of the bank robber with any degree of accuracy.” (emphasis added). Other portions of the motion are phrased in a more appropriate form, indicating that Fulero would testify to research data as it relates to particular conditions experienced by the witnesses, leaving the application of that information to counsel and the jury. But these examples more than adequately justify the district court’s conclusion that Fulero (who, incidentally, is also an attorney) would have acted as more of an advocate than a scientific expert in this case. The majority’s decision merely to excise the offending portions of the testimony not only leaves very little testimony that is even arguably relevant, but relieves Smithers of his burden of proving that the testimony he proffered is admissible. Once again, the blame for

The presence of a person labeled an “expert” by the court in the witness stand inevitably carries the risk of jurors’ accepting that person’s testimony as scientifically irrefutable truth. This simple fact underlies the special importance given to the court’s gatekeeping function with expert testimony, and it is in the majority’s flat rejection of this concept that its reasoning is the shakiest. In its fifth footnote, the majority observes: “it appears the trial court thought the expert nature of the testimony would unduly impress the jury; this is an improper factor upon which to exclude expert testimony, for if this were the test, no expert could *ever* testify.” While it may be correct as a hypothetical matter that exclusion of a witness solely because he was an expert would be an abuse of discretion, that is simply not what occurred here. Rather, the court reasoned that cross-examination and a jury instruction were preferable to permitting the jury to hear testimony that was only marginally relevant and demonstrably prejudicial to the Government. The court was in good company in this conclusion. *Daubert* itself observed that “[e]xpert testimony can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses.” 509 U.S. at 595. A number of other courts addressing eyewitness identification expert testimony have explicitly cited the expert’s “aura of reliability” as a prejudicial factor weighing against its admissibility. See *Lumpkin*, 192 F.3d at 289; *Brien*, 59 F.3d at 276-77; *Blade*, 811 F.2d at 465; *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); *Fosher*, 590 F.2d at 383-84 (collecting cases referencing the “aura of reliability”); *Downing*, 609 F.Supp. 784; *United States v. Collins*, 395 F.Supp. 629, 636-37 (M.D. Penn. 1975). The majority’s citation-free asseveration on this subject is simply untenable.

Expert testimony on eyewitness identifications can also be unduly prejudicial when it is phrased so as to comment directly on the credibility of the eyewitness. No court in any context would allow one witness to testify to the credibility of another, because assessment of the credibility of witnesses in

heard her husband leave the apartment. Ms. Smithers also spoke about her husband’s appearance, maintaining that Smithers weighed 245 pounds in November of 1996, is 6' 8" tall and has a four-inch long scar on the right front side of his neck.

The case was submitted to the jury on January 21, 1998. The next day, the jury returned a verdict of guilty. The district court sentenced Smithers on June 4, 1998, to a forty-one month term of imprisonment. Smithers timely filed a notice of appeal on June 8, 1998. Smithers now appeals various aspects of his trial, only one of which we address today: the exclusion of Dr. Fulero as an eyewitness expert.

II.

Generally, a trial court’s evidentiary determinations are reviewed for an abuse of discretion. See *United States v. Moore*, 954 F.2d 379, 381 (6th Cir. 1992).

Smithers argues that the district court’s denial of his motion to introduce testimony by an identification expert warrants the reversal of his conviction. The crucial element of the government’s case was eyewitness identification of the defendant and his car, Smithers argues, and Dr. Fulero’s testimony involved a proper subject that would have been helpful to the jury in evaluating this issue. Smithers, therefore, contends that the decision to exclude this expert’s testimony, to indulge the district judge in his rather eccentric courtroom experiment, was improper. The government counters that the district court’s decision was well within its discretion. The district court properly excluded Dr. Fulero’s testimony, the prosecution argues, based upon its lack of scientific validity, invasion of the jury’s province, possibility of confusion and the tardiness of Smithers’s proffer.

Courts’ treatments of expert testimony regarding eyewitness identification has experienced a dramatic transformation in the past twenty years and is still in a state of flux. Beginning in the early 1970’s, defense attorneys began to bring expert testimony into the courtroom. Then, courts were uniformly

skeptical about admitting such testimony, elaborating a host of reasons why eyewitness experts should not be allowed to testify. In the first case to address the issue, *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973), the Ninth Circuit held that the district court did not err in excluding expert testimony regarding eyewitness identification because cross-examination was sufficient to reveal any weaknesses in the identifications. After that decision, a series of cases rejected similar evidence for a variety of reasons. See, e.g., *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984) (finding the question is within the expertise of jurors); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) (reasoning that identification was adequately addressed through cross-examination); *United States v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1980) (finding no general acceptance in scientific community); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (ruling that the testimony would be prejudicial).

This trend shifted with a series of decisions in the 1980's, with the emerging view that expert testimony may be offered, in certain circumstances, on the subject of the psychological factors which influence the memory process. See, e.g., *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986) (finding that “[i]n a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged . . .”); *United States v. Downing*, 753 F.2d 1224, 1232 (3d Cir. 1985) (reasoning that “expert testimony on eyewitness perception and memory [should] be admitted at least in some circumstances”); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) (“The day may have arrived, therefore, when Dr. Fulero’s testimony can be said to conform to a generally accepted explanatory theory.”). State court decisions also reflect this trend. See, e.g., *State v. Buell*, 489 N.E.2d 795 (Ohio 1986) (overruling per se rule and holding expert testimony admissible to inform jury about factors generally affecting memory process). Indeed, several courts have held that it is an abuse of discretion to exclude such expert testimony. See, e.g., *United States v. Stevens*, 935 F.2d 1380, 1400-01 (3d Cir. 1991) (reversing and remanding for

cross-examination to inquire into the witness’ opportunity for observation, his capacity for observation, his attention and interest and his distraction or division of attention” (internal quotations and citations omitted)). The witness’s cross-examination testimony can then be framed as the defendant chooses in closing argument to maximize its potential to undermine the identification. See *Currie*, 515 S.E.2d at 339. What the defendant is unable to establish by these means—e.g., the counter-intuitive concept suggested by psychological research that confidence in one’s recollection does not necessarily reflect accuracy—can be ably communicated by the court in its jury instructions. Instructions have an advantage over experts in that they can be informed by advances in social science research while communicating only those theories that are relevant to the facts of the case, and avoiding the extra delay and expense of producing and rebutting expert testimony, all without the imprimatur of scientific reliability that accompanies expert testimony. Certainly the utility of jury instructions in these situations was aptly demonstrated in this case, where the district court skillfully addressed Smithers’s concerns by adopting an instruction specifically tailored to explain the possible deficiencies of the identifications in this case. In any event, given the utility of cross-examination and jury instructions combined, it is little wonder that the vast majority of appellate cases have found the choice of these mechanisms over expert testimony, even if the expert may have some particular insight that would not be otherwise revealed, not to be an abuse of the district court’s broad discretion under *Kumho Tire*, *Daubert*, and Rule 702. See *Moore*, 882 F.2d at 1110-11; *Hall*, 165 F.3d at 1107; *Smith*, 122 F.3d at 1358-59; *Hicks*, 103 F.3d at 847; *Kime*, 99 F.3d at 884; *Ginn*, 87 F.3d at 370; *Rincon*, 28 F.3d at 925-26; *Jordan*, 983 F.2d at 938-39; *Curry*, 977 F.2d at 1051; *Blade*, 811 F.2d at 464-65; *Moore*, 786 F.2d at 1311-12; *Fosher*, 590 F.2d at 382; *McClendon*, 730 A.2d at 1115-16; *McMullen*, 714 So.2d at 370; *Gaines*, 926 P.2d at 662-63; *Buell*, 489 N.E.2d at 803-04; *Currie*, 515 S.E.2d at 339.

might help jurors reach better decisions. Juries have a hard time distinguishing "junk science" from the real thing, but aside from some tinkering with the expert testimony admitted at trial, this shortcoming has been tolerated. Jurors reach compromise verdicts, although they aren't supposed to. Juries return inconsistent verdicts, representing irrational behavior or disobedience to their instructions. Juries act in ways no reasonable person would act. This is the standard for granting judgment notwithstanding the verdict in a civil case, or acquittal after verdict in a criminal case, or reducing an award of damages, and there are plenty of occasions for these post-verdict correctives. Yet for all of this, courts do not discard the premises of the jury system, postulates embedded in the Constitution and thus, within our legal system, unassailable. This shows up in a striking fact about the Supreme Court's treatment of social science: of the 92 cases between 1970 and 1988 addressing issues of evidence and trial procedure, not one relied on the extensive body of evidence about jurors' conduct.

(citations omitted).

No psychological study will ever bear directly on the specific persons making an eyewitness identification in court; psychological experts will always be forced to extrapolate from studies done on other people and opine on the relevance such data might have to the facts at hand. Cross-examination of the identifying witnesses, on the other hand, will always provide more relevant testimony, because by definition the inquiry is limited to what the eyewitnesses themselves saw and experienced. See *Smith*, 122 F.3d at 1359 ("defendants who want to attack the reliability of eyewitness recollection are free to use the powerful tool of cross-examination to do so"). Indeed, to a certain extent, lawyers are abdicating their own roles when they seek to rely on experts instead of cross-examination to discredit an eyewitness identification. See *Amaral*, 488 F.2d at 1153 ("Our legal system places primary reliance for the ascertainment of truth on the test of cross-examination. [...] It is the responsibility of counsel during

new trial); *Smith*, 736 F.2d at 1107 (holding error harmless in light of other inculpatory evidence); *Downing*, 753 F.2d at 1232 (holding error harmless in light of other inculpatory evidence); *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983) (reversing and remanding for new trial). This jurisprudential trend is not surprising in light of modern scientific studies which show that, while juries rely heavily on eyewitness testimony, it can be untrustworthy under certain circumstances.¹

¹ A plethora of recent studies show that the accuracy of an eyewitness identification depends on how the event is observed, retained and recalled. See generally Roger V. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1018-22 (1995). Memory and perception may be affected by factors such as:

- (1) the retention interval, which concerns the rate at which a person's memory declines over time; (2) the assimilation factor, which concerns a witness's incorporation of information gained subsequent to an event into his or her memory of that event; and (3) the confidence-accuracy relationship, which concerns the correlation between a witness's confidence in his or her memory and the accuracy of that memory. Other relevant factors include: (4) stress; (5) the violence of the situation; (6) the selectivity of perception; (7) expectancy; (8) the effect of repeated viewings; (9) and the cross-racial aspects of identification, that is where the eyewitness and the actor in the situation are of different racial groups.

Alan K. Stetler, *Particular Subjects of Expert and Opinion Evidence*, 31A AM. JUR. EXPERT § 371 (1989). Accordingly, "a jury should consider several factors in judging the accuracy of an eyewitness identification. Social science data suggests, however, that jurors are unaware of several scientific principles affecting eyewitness identifications." Handberg, *supra*, at 1022. In fact, because many of the factors affecting eyewitness impressions are counter-intuitive, many jurors' assumptions about how memories are created are actively wrong. See *Downing*, 753 F.2d at 1231 (finding that "[f]actors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most") (citations omitted).

This ignorance can lead to devastating results. One study has estimated that half of all wrongful convictions result from false identifications. See Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 243 (1986) (citing a 1983 Ohio State University doctoral dissertation). And "[i]t has been estimated

Recognizing the dichotomy between eyewitness errors and jurors' reliance on eyewitness testimony, this Circuit has held that expert testimony on the subject of eyewitness identification is admissible. In *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984), this Court held that a trial court abused its discretion in excluding such an expert. In *Smith*, the defendant sought to introduce the testimony of psychologist Solomon Fulero – the same expert Smithers attempted to introduce at his trial – as an expert in the field of eyewitness identification to shed light upon an eyewitness's testimony. The lower court excluded the testimony, finding that it was inadmissible pursuant to Federal Rule of Evidence 403. On appeal, this Court applied the four prong test for expert testimony articulated in *United States v. Green*, 548 F.2d 1261 (6th Cir. 1977): (1) that the witness, a qualified expert, (2) was testifying to a proper subject, (3) which conformed to a generally accepted explanatory theory, and (4) the probative value of the testimony outweighed its prejudicial effect.

that more than 4,250 Americans per year are wrongfully convicted due to sincere, yet woefully inaccurate eyewitness identifications.” ANDRE A. MOENSSENS ET AL., *SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES* § 19.15, at 1171-72 (4th ed. 1995) (citing *United States v. Wade*, 388 U.S. 218 (1967)). A principal cause of such convictions is “the fact that, in general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers.” PATRICK M. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 19 (1965). Many jurists agree that eyewitness identifications are the most devastating and persuasive evidence in criminal trials. See, e.g., *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (stating that “[t]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”) (Brennan, J., dissenting) (citations omitted); *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (stating that “juries unfortunately are often unduly receptive to [identification] evidence”) (Marshall, J., dissenting); Hon. D. Duff McKee, *Challenge to Eyewitness Identification Through Expert Testimony*, 35 AM. JUR. POF 3d 1, § 1 (1996) (“Eyewitness testimony may be the least reliable, and yet the most compelling.”). Jurors tend to overestimate the accuracy of eyewitness identifications because they often do not know the factors they should consider when analyzing this testimony. See Handberg, *supra*, at 1022.

reconstructionists or DNA experts) typically focus on the data to which the scientific method is applied, which is subject to objective analysis. The certainty of the testimony of social scientists, however, is limited by the nature of their field. They typically base their opinions on studies of small groups of people under laboratory conditions; those studies are then interpreted and extrapolated to predict the likelihood that another person under similar but non-controlled conditions will manifest similar behavior. Each step of this analysis—the choice of sample and control groups, the conditions under which they are observed, the cause and nature of the observed behavior, and the likelihood that the observed behavior will be replicated by a different person in a non-controlled setting—is influenced by the personal opinion of the individual expert. Nor will there be much similarity between the persons typically studied by social scientists and the witnesses in any given criminal trial. The studies are virtually always based on college students or other readily available test subjects in a controlled environment (which are the most easily measurable), not individuals involved in real world incidents such as actual robbery victims. See, e.g., *United States v. Hines*, 55 F.Supp.2d 62, 72 (D. Mass. 1999) (assessing relevance of studies of college students); Brian L. Cutler and Steven D. Penrod, *Assessing the Accuracy of Eye-Witness Identifications*, in *HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS* 193 (R. Bull and D. Carson ed. 1995) (Attachment E to Smithers’s Motion in *Limine*) (“Most of what is known about the psychology of eye-witness memory has been acquired through laboratory experiments”). The limits of social science testimony were aptly expressed in *Gacy v. Welborn*, 994 F.2d 305, 313-14 (7th Cir. 1993):

Social science has challenged many premises of the jury system. Students of the subject believe, for example, that jurors give too much weight to eyewitness evidence and not enough weight to other kinds. Still, the ability of jurors to sift good evidence from bad is an axiom of the system, so courts not only permit juries to decide these cases but also bypass the sort of empirical findings that

announce what facts about the testimony the court would have discovered in a hearing. Instead, we should follow the lead of our sister circuits which, upon a finding that the district court has not assessed an eyewitness identification expert's relevance in a manner consistent with Rule 702, have remanded the matter without further discussion. *See, e.g., Hall*, 165 F.3d at 1102; *United States v. Amador-Galvan*, 9 F.3d 1414, 1417-18 (9th Cir. 1993); *Downing*, 753 F.2d at 1226. I take some comfort in the fact that the majority's *sua sponte* application of *Daubert* and glowing praise for eyewitness identification expert testimony are dicta, since they exceed the actual holding that the court abused its discretion. To the extent, however, that the opinion as a whole is seen as persuasive authority cementing the already-extant impression that our circuit is among the most receptive to this type of testimony, *see* Murrian, *supra*, at 392, it does our jurisprudence a disservice.

III. The Merit of Expert Testimony on Eyewitness Identifications

The trepidation with which nearly all appellate courts have treated this subject is representative of a broader reluctance, which I share, to admit the expert testimony of social scientists with the same deference given to the testimony of those in the physical sciences. I do not seek to discredit the value of these researchers' work; the ever-expanding psychological disciplines have done much in the past several decades to explode commonly held misconceptions and enrich our understanding of human behaviors. As even those courts most opposed to admitting the testimony in court have acknowledged, those benefits include an enhanced insight into the fallibility of eyewitness identification that can inform our trial procedures. *See, e.g., Hall*, 165 F.3d at 1104. The difficulty arises in treating psychological theories as if they were as demonstrably reliable as the laws of physics. Conclusions reached by applying the laws of all but the most theoretical of physical sciences to a particular set of facts are verifiable through replication; disagreements between dueling experts in the physical sciences (e.g., accident

Applying that standard, the Court noted that the offered testimony would have been based on "a hypothetical factual situation identical" to the facts of the case and would have explained: (1) that a witness who does not identify the defendant in a first line-up may "unconsciously transfer" his visualization of the defendant to a second line-up and thereby incorrectly identify the defendant the second time; (2) that studies demonstrate the inherent unreliability of cross-racial identifications; and (3) that an encounter during a stressful situation decreases the eyewitness's ability to perceive and remember and decreases the probability of an accurate identification. *See Smith*, 736 F.2d at 1105-06. The *Smith* Court held that expert testimony on the reliability of eyewitness identification met the "helpfulness" test of Federal Rule of Evidence 702 and therefore had been excluded improperly at trial. The Court explained that "[i]n reviewing a 403 balancing, the court must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect," *id.* at 1107, and concluded that "[s]uch testimony might have been relevant to the exact facts before the court and not only might have assisted the jury, but might have refuted their otherwise common assumptions about the reliability of eyewitness identification." *Id.* at 1106. Further, the *Smith* Court expressed its acceptance of psychological studies as a scientifically sound and proper subject of expert testimony, noting, "[t]he science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research." *Id.* at 1107.

Smith's conviction was nonetheless affirmed on the ground that any error by the district court in excluding the proffered testimony was harmless. The *Smith* Court noted that the government had not only presented three witnesses who identified the defendant as the perpetrator, but that the defendant's palm print was recovered at the scene of the crime, thus "wholly discrediting the defendant's alibi" defense. *Id.* at 1107-08. Because there was other significant inculpatory evidence, the trial court's error was deemed harmless, and the defendant's conviction was affirmed.

Smithers now argues that the proper standard for the admission of eyewitness expert testimony is that set out in *Smith*. We disagree. The significance of *Smith* in terms of evaluating expert testimony is questionable after the landmark decision of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court articulated the test that trial courts must use in determining whether scientific evidence and testimony is admissible. According to *Daubert*, a district court must “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.* at 589. *Daubert* thus requires trial courts to perform a two-step inquiry. First, the court must determine whether the expert’s testimony reflects “scientific knowledge,” that is, the court must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-93. Second, the court must ensure that the proposed expert testimony is relevant to the task at hand and will serve to aid the trier of fact. *See id.* The Supreme Court referred to this second prong as the “fit” requirement. *See id.*

Citing the concurring opinion of Justice Scalia’s in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), the Dissent proclaims that *Daubert* is not “holy writ” to evaluate proffered experts under Rule 702. While it is true that the *Daubert* factors “do not constitute a ‘definitive checklist or test . . . ,’” *Kumho Tire*, 119 S. Ct. at 1175 (citing *Daubert*, 509 U.S. at 593), the Supreme Court did conclude that “[a] trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.” *Id.* at 1176. The Court also stressed:

We conclude that *Daubert*’s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, ‘establishes a standard of evidentiary reliability.’ . . . It ‘requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.’ . . . And where such testimony’s factual

was not indifference to the law, but an assurance that she had done well in preserving a record of her objection for appeal. The observation that admitting Fulero’s testimony would have been “tantamount to the Court declaring the defendant not guilty as a matter of law” and that “absent the eyewitness testimony I don’t think there’s enough here to go to the jury” correctly describes the severely prejudicial effect that Fulero’s testimony likely would have had on the Government’s case. Finally, the court’s “experiment” remark, while perhaps inappropriate, was made well after the motion had twice been denied and was the last statement made on the record before Smithers rested his case. It did not form the basis for the court’s exclusion of Fulero, nor did it prejudice Smithers in any other way. I do not agree that this single comment can justify the majority’s finding of a patent abuse of discretion.

The majority ultimately concludes that this case must be remanded for a new trial that, presumably, will include “a *Daubert* test,”⁷ whatever that may be. Were that the extent of our holding, my difference of opinion with the majority would simply be a disagreement about what *Daubert* requires and how the district court should have proceeded here. But the majority does not stop there. Instead, it proceeds into a lengthy explanation of what the court might have found had it applied *Daubert* to the majority’s liking. This, in my view, is wholly improper. Not only does this exceed our function as an appellate court, but it is anathema to the law that the majority had theretofore laid out; if the gatekeeping function is truly in the district court’s discretion and requires a fact-finding hearing, and the district court in this case has failed to exercise that discretion as utterly as the majority concludes, then surely the record before us is inadequate to permit us to

⁷Of course, in order to perform a more detailed inquiry next time, the district court should have the discretion to require Smithers to present his witness for voir dire, or at least to make an effort to present a sufficiently detailed proffer in a timely fashion. Unfortunately, the majority’s opinion would appear to curtain that discretion considerably, if, indeed, the majority’s opinion leaves any room for the district court to perform any further inquiry at all.

order to alleviate the genuine concerns that Smithers had raised. The majority is resolute in its conviction that the district court failed to “apply *Daubert*,” but it fails to explain how that court could have done any better with no more information than Smithers provided.

This case presents very few of the “narrow circumstances” identified by other courts in which this kind of expert testimony can be relevant. See *Smith*, 156 F.3d 1046, 1052; *Harris*, 995 F.2d at 535-36. There was no problem of cross-racial identification. The passage of time has been found to be a relevant factor when the recalled event occurred forty years prior, see *Krist v. Eli Lilly and Co.*, 897 F.2d 293, 297-98 (7th Cir. 1990), but not when the time lapse was a “routine” one of “merely” six years. See *Curry*, 977 F.2d at 1052. Here, the time between the robbery and Ms. White’s positive identification of Smithers in the photo array was two days; the time between the robbery and the trial was only one and a half years. Moreover, although Smithers alleges that there was an unconscious transference of mistaken identifications among the witnesses, the court explicitly found that all the evidence presented at the hearing appeared to suggest otherwise.

Furthermore, the majority identifies its primary basis for finding an abuse of discretion as the court’s “experiment” comment, explaining that “[b]asing an evidentiary decision on personal curiosity rather than applicable case law and the rules of evidence is a patent abuse of discretion.” The fact that these offhand statements were made is unfortunate. We review them on the cold record, separated them from their context and texture, including the voice inflection and facial expressions of their delivery. But the proceedings described above make it clear that the district court did not base its exclusion of Fulero on the sinister whimsy that the majority imputes to it. The statements were made at the close of the second hearing, after the court had again denied the motion and instead awarded Smithers a strongly worded instruction. The court’s comment to Smithers’s counsel that she had “made an excellent record that I’ve abused my discretion”

basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge *must* determine whether the testimony has ‘a reliable basis in the knowledge and experience of [the relevant] discipline.’

Id. at 1175 (citations omitted) (emphasis added).

The Supreme Court in *Kumho* indicated that the standards set forth in *Daubert*, depending on the “particular circumstances of the particular case,” *id.*, should be flexibly applied. Contrary to the Dissent, the Supreme Court’s reasoning does not indicate that *Daubert* should be abandoned totally. This Court finds that in the case *sub judice*, given the expert and the testimony that was proffered, the standards of *Daubert* should have been applied.²

While it is true that several post-*Daubert* eyewitness identification cases have found that the exclusion of the testimony was not an abuse of discretion, see, e.g., *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999); *United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996); *United States v. Brien*, 59 F.3d 274 (1st Cir. 1995); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994), the lesson from these cases is not that expert

²The Dissent finds that the Supreme Court’s *Daubert* decision is:

[n]ot ‘holy writ’ that the district court must invoke by name in order to pass our scrutiny.

Instead, the Dissent suggests that the district court should have instead relied on a pre-*Daubert* Third Circuit precedent, *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), and *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), as the standard for outlining the steps that Smithers should have followed in making his proffer to the Court. Apparently, the Third Circuit has provided what the Dissent characterizes as “holy writ,” notwithstanding the fact that *Stevens* and *Downing* are pre-*Daubert* authority and that the proffer of testimony that these Third Circuit cases require does not meet *Daubert*’s standard for determining whether scientific evidence is admissible.

testimony on eyewitness identification is never appropriate; rather, the cases indicate that courts must consider whether the testimony would be helpful or confusing to the jury. The cases also discuss whether this type of testimony touched on the “ultimate issue” in the case and therefore usurped the jury’s role; whether there was other evidence against the defendant; and whether the jury could more properly evaluate the reliability of eyewitness testimony through cross-examination. In light of these cases, we believe that the district court should have performed its analysis under the rule of *Daubert*, rather than, as Smithers argues, that of *Smith*. In any event, the trial court did not analyze the admissibility of the expert testimony in this case under *either* of these cases.

We find that the district court abused its discretion in excluding Dr. Fulero’s testimony, without first conducting a hearing pursuant to *Daubert*. There are several bases for this conclusion. As a threshold consideration, we address the district court’s “experiment” comment. The district court explained that it was interested in seeing what a jury would do absent the expert testimony because it would make the trial “more interesting.” The district court stated:

I’m also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it’s the defendant’s fate that’s at stake, but you can always argue for a new trial if he’s convicted.

This comment is gamesmanship at its worst and reveals a troubling disregard for this Defendant’s rights, relegating those rights to mere abstractions. The district court’s reasoning that it could indulge in this experiment because Smithers could “always appeal” ironically turned this trial into a laboratory experiment where the judge felt free to play with evidentiary variables at the cost of the Defendant’s rights. Basing an evidentiary decision on personal curiosity rather than on applicable case law and the rules of evidence is a patent abuse of discretion.

indeed, is precisely the kind of proceeding that *Kumho Tire* expressly gives the district courts the discretion to avoid.

The majority acknowledges that although the district court did not explicitly explain that it was doing so, it did conduct some inquiry into relevance when it decided that the jury was aware of its obligation to be skeptical of eyewitness testimony. The record of the second hearing, however, reveals that the district court in fact looked carefully at the issue of relevance. Even at this point, Smithers did not make Dr. Fulero available for voir dire by the Government, but the court initiated a lengthy discussion with Smithers’s counsel on Fulero’s familiarity with the facts of the case, including Smithers’s scar, the photo lineup procedure, and the stress of the robbery. These are precisely the questions the district court needed to ask to determine the relevance and “fit” of Fulero’s testimony to the particular facts of the case. After hearing Smithers’s answers, the court concluded that Fulero would have acted in this case as more of an advocate than a neutral, scientific expert—a characterization borrowed from *Rincon*. See 28 F.3d at 923. The majority fails to suggest any means whatever by which the court could have conducted a better inquiry under the circumstances. Instead it flatly pronounces that the court’s conclusion was “simply wrong” because it would lead to the “absurd” result of never allowing such expert testimony.

I suspect that the Seventh and Eleventh Circuits might take umbrage at the majority’s characterizing as “absurd,” their strong presumptions against expert testimony regarding eyewitness identifications, see *Hall*, 165 F.3d at 1103; *Smith*, 122 F.3d at 1357. More importantly, I think it is the majority’s conclusion that is simply wrong. The majority fails to explain how this extreme result would follow from the district court’s observation. Indeed, if the district court meant flatly to disallow expert testimony concerning eyewitness identifications, it would not have gone out of its way at this hearing to replace *sua sponte* the pattern jury instruction on eyewitness identifications to which Smithers had already agreed with what it saw as “a much stronger instruction” in

28 F.3d 921 (9th Cir. 1994) and our decision in *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984) (per curiam). The Government’s brief went further to explain why the testimony would be unhelpful and prejudicial in this case, and why cross-examination and jury instructions would better address Smithers’s concerns. The court demonstrated its reliance on these briefs when it began the relevant portion of the motion hearing by noting its belief that the Government’s arguments were persuasive, informing Smithers that he could discredit the eyewitness identifications through cross-examination, and asking for Smithers’s assistance in choosing an appropriate jury instruction. As recounted above, the court pressed Smithers for additional details on how Fulero’s testimony would relate to the facts of the case, but no such details were forthcoming. This left the court with little basis upon which to conclude that the Government was in error in its contention that the testimony would only confuse the jury and invade its province by commenting directly on the credibility of the witnesses. Whether Smithers was unable to demonstrate the relevance of the testimony at this hearing on the first day of trial or was simply procrastinating, the onus should fall on him; the court dealt appropriately with the information and arguments presented to it.

The court also acted properly once Smithers—at the close of his defense—finally proffered the details of Fulero’s testimony. At one point during the hearing on the renewed motion to permit Fulero to testify, the court—addressing the prosecutor—explained its reliance on *Rincon*, and noted, consistent with the “reliability” element of *Daubert*, that “the good professor in his affidavit and in his background and in the literature that was cited to me suggests that the fragility . . . of eyewitness testimony has been established scientifically and that he brings an expertise that may assist the jury.” How the majority can hold, in light of this statement and the Government’s decision not to challenge Fulero’s competence, that “the district court did not make *any* determination as to this expert’s scientific reasoning or methodology” is puzzling. And because reliability was never at issue, any further inquiry into the reliability of the testimony was unnecessary and,

We do not, however, base our decision on the district court’s “experiment” comment alone. Even without this comment, the district court erred in its evidentiary analysis by failing to apply the *Daubert* test to the proposed expert testimony. Although the decision of whether to admit a witness’s testimony is left to the sound discretion of the trial court, a trial court cannot make an arbitrary decision. When a defendant’s liberty is at stake, it is incumbent upon the trial court to apply the correct law, follow the appropriate decision-making steps and articulate the bases upon which its decision rests. Here, the district court should have applied the analytical principles set forth in *Daubert*, but it did not.

Under *Daubert*, a trial court should consider: (1) whether the reasoning or methodology underlying the expert’s testimony is scientifically valid; and (2) whether that reasoning or methodology properly could be applied to the facts at issue to aid the trier of fact. The district court, in neglecting to undertake a *Daubert* analysis, failed to take these factors into consideration. Indeed, the district court did not make *any* determination as to this expert’s scientific reasoning or methodology. We find that if the district court had given this issue proper consideration, it may have deemed Dr. Fulero’s testimony scientifically valid.

Following *Kumho Tire*, 119 S. Ct. at 1176, we next consider the way the district court may have examined the *Daubert* factors in the present case. Tellingly, this Court has already accredited Dr. Fulero’s science and methodology. In *Smith*, this Court not only noted the jurisprudential movement toward admitting psychological studies of eyewitness experts in general, but praised the qualifications and scientific methods of this same expert witness, Dr. Fulero. In addition, the district court could have concluded that this testimony—describing psychological factors such as detail salience, the conformity effect, the dynamics of photo identifications and the confidence-accuracy relationships—could have been applied to the facts at issue in this case. Information about the effects of detail salience would bear on the witnesses’ failure to notice Smithers’s conspicuous scar; evidence about the

conformity effect would apply to Ms. Marino's and Mr. Wilson's ability to identify Smithers only after they had spoken with Ms. White; the suggestibility of photo identifications created and administered by a single person would apply to the procedures that Detective Redmond used; and explaining the lack of correlation between confidence and accuracy would bear upon the credibility of all of the eyewitnesses. Had the district court conducted a proper evaluation of this testimony, we believe it may have found that Dr. Fulero's testimony met the first requirement of the *Daubert* test.

The trial court should have next considered whether the proposed expert testimony was relevant to the task at hand and would aid the trier of fact. The district court did, to some extent, discuss this second *Daubert* prong (even if it did not explicitly note that it was doing so), by stating that "a jury can fully understand" its "obligation to be somewhat skeptical of eyewitness testimony." This point addresses whether the testimony would "aid the trier of fact." The court's statement, however, is simply wrong, and the district court, on remand, should reconsider this factor. As noted above, jurors tend to be unduly receptive to, rather than skeptical of, eyewitness testimony. Further, accepting the district court's analysis that all jurors are aware of their obligation to be skeptical would lead to absurd results: expert testimony on eyewitness identification would *never* be admissible. As demonstrated by abundant case law, this is not the conclusion that has been reached by courts addressing this issue. Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive. In *Smith* we recognized the expediency of expert testimony to address these complex issues and to inform jurors fully of the issues they must decide.

The Dissent counters by arguing that eyewitness identification experts are not necessary because cross-examination and jury instructions should be the tools used in a trial to discredit and flush-out eyewitness testimony.

referenced the decision). Instead, our task is to review the district court's performance of its gatekeeping function in light of "the facts of [the] particular case," *Kumho Tire*, 119 S.Ct. at 1175 (internal quotations omitted), granting "the trial judge [] considerable leeway in deciding in [this] particular case how to go about determining whether [this] particular expert testimony is reliable." *Id.* at 1176. In so doing, we must be mindful of the principles behind *Daubert*, but "the factors it mentions do not constitute a definitive checklist or test." *Id.* at 1175 (internal quotations omitted).

I would hold that the way in which the district court conducted its analysis of the admissibility of Dr. Fulero's testimony was not abusive of the court's discretion. The core holding of the *Daubert* decision was that admission of expert testimony is governed by the Federal Rules of Evidence and not the theretofore majority rule of "general acceptance" by the scientific community. *See Daubert*, 509 U.S. at 587. The primary "locus" of the court's power to evaluate experts rests in Rule 702. *See id.* at 589. Rule 702 requires that the testimony be reliable and relevant to be admitted. Because the Government has chosen not to contest Dr. Fulero's qualifications as a psychologist or the abstract scientific validity of the studies he proposes to testify from, either at trial or on appeal, we may assume that Smithers has satisfied the reliability requirement. *See Greenwell*, 184 F.3d at 498. Instead, the Government has consistently focused its challenge on the relevance aspect of Rule 702, which "further requires that the evidence or testimony assist the trier of fact to understand the evidence or determine a fact in issue. [...] The consideration has been aptly described . . . as one of 'fit.'" 'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert*, 509 U.S. at 591 (internal quotations omitted). The district court here examined briefs on the issue from both sides in preparation for the hearing on Smithers's *limine* motion. Both briefs recited the applicable factors from *Daubert* and Rules 702 and 403. Both examined the leading cases on this type of testimony, both before and after *Daubert*, focusing especially on *United States v. Rincon*,

The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert testimony. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid unjustifiable expense and delay as part of their search for truth and the just determination of proceedings. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. And the Eleventh Circuit erred insofar as it held to the contrary.

Kumho Tire, 119 S.Ct. at 1176 (internal citations, quotations and alterations omitted). The court's failure specifically to cite *Daubert* as its basis for excluding Dr. Fulero does not itself mandate remand. See *Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir. 1999) ("Although the trial court is not required to hold an actual hearing to comply with *Daubert*, the court is required to make an initial assessment of the relevance and reliability of the expert testimony. Because the district court did not hold a *Daubert* hearing we must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony"); see also *Hall*, 165 F.3d at 1102 (approving of the district court's evaluation of the testimony in a hearing that did not explicitly cite the two *Daubert* prongs but frequently

Unfortunately, the Dissent's homage to trial procedures does not extend to expert witness testimony. The same argument can be made for the admission of expert testimony: cross-examination and jury instructions can be used to question the qualifications of the proffered expert, undermine the basis of the expert's theories, explain the limits of social science's validation studies and pick apart research methods. The only reason given by the Dissent for why cross-examination and jury instructions can serve these goals for eyewitness testimony, but not for expert testimony, is that the jury may take the expert's testimony as "scientifically irrefutable truth." The Dissent's selective faith in the collective intelligence, common sense and decision-making ability of the jury is disheartening, and is also inconsistent with the Dissent's deference to the jury on other matters, including judging the credibility of eyewitness identifications.

Further, based on the comment that Smithers's proffer of Dr. Fulero's testimony was "too late in the day," the Dissent crafts a legal basis for the district court's exclusion based on Federal Rule of Evidence 403. The Dissent concludes that Rule 403 permits the exclusion of relevant evidence based on "delay." FED. R. EVID. 403. The Dissent misquotes and misconstrues the meaning of "delay" in Rule 403. Not all delay authorizes the exclusion of relevant evidence – only "undue delay." Moreover, the term "delay" does not connote delay in the submission of motions or proffers; rather, it encompasses the prolonging of the length of the trial, and can be read properly in conjunction with the other exclusionary factors: "waste of time, or needless presentation of cumulative evidence." See, e.g., *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977); *United States v. International Bus. Mach.*, 87 F.R.D. 411 (S.D.N.Y. 1980); *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10 (D. Conn. 1977).

"Delay" is a consideration of efficiency and is not readily distinguishable from "waste of time." CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5218 (1978); see also

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.5 (1995) (concluding that “undue delay, waste of time or needless presentation of cumulative evidence” are concerns for the “concessions to the shortness of life,” “the limited resources of the judicial system,” and the presentation of cumulative evidence) (footnote omitted). “Delay” in Rule 403 does not mean “filed late” as the Dissent concludes.

Furthermore, the cases cited by the Dissent to support the contention that the basis for the district court’s exclusion of Dr. Fulero’s testimony was a consideration of “delay” under Rule 403 do not explicitly cite to the Rule nor do they mention delay as a factor. *See United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992); *United States v. Dowling*, 855 F.2d 114, 118 (3d Cir. 1988).

The exclusion of Dr. Fulero’s testimony because the evidence was presented “late in the day,” contrary to the Dissent’s assertion, was not a proper basis for exclusion. First, the Defendant filed his ten-page motion *in limine* requesting a ruling on this issue a full month before trial. At the beginning of trial, Smithers renewed his motion orally. A week later, he submitted an additional seven-page brief on the subject. Thus, it is impossible to say that either the court or the government did not have adequate notice of the issue. Second, “a criminal defendant’s relevant evidence may generally not be excluded on the basis of a discovery sanction. The defendant’s Sixth Amendment right to an effective defense will usually outweigh the interest served by pretrial discovery orders.” *United States v. Collins*, No. 87-5077, 1988 WL 4434, at *2 (6th Cir. Jan. 25, 1988). Given the importance of eyewitness testimony in this case, the district court should not have excluded Dr. Fulero’s testimony based on its supposed tardiness.³

³The government argues additionally that Smithers’s proffer demonstrates that the expert testimony would have invaded the jury’s province. Specifically, the government points to the sentence in the proffer which states, “Had Mr. Smithers been the robber, the eyewitnesses would have observed and been able to recall the large scar on Mr.

“a criminal defendant’s relevant evidence may generally not be excluded on the basis of a discovery sanction.” The *Collins* court expressly distinguished the case from one determining whether such evidence was admissible pursuant to our then-recent *Smith* decision. In fact, the *Collins* court followed *Smith* in declining to rule that the testimony was admissible as a matter of law, and proceeded to find the error harmless in light of other evidence. *See id.* at **2. *Collins*, then, is completely inapposite to this case, which involves an admissibility determination and not a discovery sanction. Moreover, reliance on unpublished cases in a subsequent written opinion for purposes other than establishing preclusion or law of the case, unless the prior case is truly of such precedential value that it probably should have been published, does violence to the policy we have promulgated in 6. Cir. R. 28(g). This dubious use of *Collins* will only have the unfortunate side effect of encouraging lawyers to cite other unpublished decisions to us in the future, despite the clear intent of the rule.

II. The District Court’s Application of *Daubert*

The majority finds that the district court abused its discretion by failing to apply the evidentiary gatekeeping principles of *Daubert*. I am not convinced that the court committed this error, or that remand would be necessary even if it did.

The majority pays passing obeisance to the abuse of discretion standard by which we review a district court’s decision to exclude expert testimony, but wholly fails to apply in this case the deference that standard requires. The factors listed in *Daubert* were meant to suggest to federal courts the relevant subjects of analysis when evaluating proffered experts under Rule 702, but they are “not holy writ” that the district court must invoke by name in order to pass our scrutiny. *Kumho Tire Co. Ltd. v. Carmichael*, 119 S.Ct. 1167, 1179 (1999) (Scalia, J., concurring). The Supreme Court has recently instructed that

notice given); *United States v. Dowling*, 855 F.2d 114, 118 (3d Cir. 1988) (upholding exclusion when 5 days notice given in trial held in the Virgin Islands); see also Hon. Robert P. Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379, 395-96 (1998-99) (instructing practitioners that “The offer of proof should establish the factors in the particular case which call for expert testimony, such as the extreme stress of the witness, differences in age or race of the defendant and the eyewitness, and suggestive line up techniques. If the factors necessitating expert testimony are not established, and the court excludes the expert testimony, the decision will likely be upheld on appeal”). These decisions and commentary contradict the majority’s blanket statement that delay is “not a proper basis for exclusion.”⁶

It is important to note that the majority relies solely on *United States v. Collins*, No. 87-5077, 1988 WL 4434 (6th Cir. Jan. 25, 1988) (per curiam) (unpublished), for the proposition that tardiness is not a proper basis for exclusion of expert testimony. This use of *Collins* is both misleading and inappropriate. In *Collins*, which is not only unpublished but is pre-*Daubert*, the defendant proffered a psychologist who would testify that the tendency to fill in gaps in perception made the eyewitness identifications in the case unreliable. See *id.* at **1. The district court excluded the witness for only one reason—he had not been listed as a witness as instructed by a pretrial order. No admissibility determination of any kind was made. The witness was therefore excluded *solely* to punish the defendant for noncompliance with a discovery order. It was in this context that the court made the statement quoted by the majority here:

⁶ As I believe my discussion here makes clear, I understand “delay” to mean “prolonging of the length of the trial,” and not, as the majority suggests I mean, merely “filed late.” This certainly appears to have been the district court’s understanding as well, since its ruling was made immediately before Smithers rested his case, and granting the motion would have required a “lengthy voir dire,” more preparation by the Government, and the direct and cross-examination of Dr. Fulero.

Finally, we find that the trial court’s error was not harmless. The complexion of the proceedings likely would have changed had the district court conducted a *Daubert* hearing and determined that Dr. Fulero’s testimony was admissible. And, as the Dissent properly points out, expert testimony should be admitted in the precise situation presented to the trial court in this case — that is, when there is no other inculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications. See *Smith*, 736 F.2d at 1107; *Moore*, 786 F.2d at 1313; *Downing*, 753 F.2d at 1226.⁴ Here, eyewitness testimony was the crucial, if not the sole basis for Smithers’s conviction.

Smithers’s neck.” We agree with the government that this was poorly chosen wording, and that no expert may testify as to what witness did or did not see. In a case heavily dependent upon eyewitness identification, such testimony could usurp the jury’s function and produce an improper comment on the ultimate issue to be decided in the case. The district court, however, did not even mention, much less base its decision on the language in this sentence. Even if it had, the proper solution would have been to excise the inappropriate portion of the proffer rather than to exclude all of the testimony, the remainder of which dealt only with the psychological factors which may have impacted the perception and memory of the witnesses in this case. This evidence would have been both relevant and helpful to the jury.

⁴ As one commentator has indicated:

[t]here are some indications of a compromise position that would be more favorably inclined toward [eyewitness identification] testimony when specific factors of need arise. Where identification rests on testimony by someone who knew the defendant well and was in a good position to see the crime, or where the identification seems strongly established for other reasons (like physical evidence connecting defendant to the crime), there is little reason to admit such testimony. Where identity is a crucial and closely contested issue, however, and where critical testimony is given by people who did not know the perpetrator and had only a short time to see him or were limited or distracted by other factors, expert testimony seems more clearly warranted.

The district court in this case concluded that “[a]dmission of Dr. Fulero’s testimony in this case is almost tantamount to the Court declaring the defendant not guilty as a matter of law. . . . absent the eyewitness testimony I don’t think there’s enough here to go to the jury.” The lower court did not seem to realize that eyewitness expert testimony is most appropriate in such situations.⁵

The district court should have conducted a hearing under *Daubert* and analyzed the evidence to determine whether Dr. Fulero’s proffered testimony reflects scientific knowledge, and whether the testimony was relevant and would have aided the trier of fact. Based on its failure to perform the correct legal analysis—the *Daubert* analysis—as well as its “experiment” rationale for excluding the testimony, we find that the district court abused its discretion. We therefore **REVERSE** Smithers’s conviction and **REMAND** this case for proceedings in accordance with this decision.⁶

⁵ Presumably, the district court was trying to express that the expert testimony would be unduly prejudicial. This conclusion is flawed. First, as the *Smith* Court noted, “in reviewing a 403 balancing [in a criminal case], the court must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect.” 736 F.2d at 1107. The district court did not apply this standard here. Second, it appears the trial court thought the expert nature of the testimony would unduly impress the jury; this is an improper factor upon which to exclude expert testimony, for if this were the test, no expert could ever testify. The court erred in concluding that merely because testimony is given by an expert, it must be excluded.

⁶ Smithers also appealed his conviction on two other grounds: (1) the district court’s exclusion of a portion of the testimony of Smithers’s wife on relevancy grounds, and (2) the district court’s response to questions posed by the jury after it began deliberating. Because we have remanded this case for a new trial based on the district court’s failure to conduct a *Daubert* test before excluding the eyewitness expert’s testimony, these additional issues are moot.

“Admittedly, Your Honor.” A lengthier conversation on the merits of the testimony ensued, followed by the court’s decision to continue to exclude the testimony, primarily because of the delay.

Federal Rule of Evidence 403 permits relevant evidence to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, delay, waste of time, or needless presentation of cumulative evidence.” (emphasis added). A district court has “very broad” discretion in making this determination. See *United States v. Hawkins*, 969 F.2d 169, 174 (6th Cir.1992). A *Daubert* analysis includes a consideration of Rule 403, see *Daubert*, 509 U.S. at 595; *Rincon*, 28 F.3d at 925, and several courts have held that Rule 702’s “helpfulness” inquiry incorporates Rule 403’s concern for undue prejudice. See *Hall*, 165 F.3d at 1104; *Kime*, 99 F.3d at 884; *Curry*, 977 F.2d at 1051. The district court was well within its discretion to refuse to require the Government to prepare a response to an expert witness when the first inkling of what the witness would testify to was not given to the Government until the middle of the trial, after the Government had rested its own case. There is no basis for the majority’s holding that Smithers’s initial motion—which did little more than introduce Dr. Fulero and his field of study—or his renewed motion at the start of trial, or his mid-trial brief, put the Government on sufficient notice of the substance or foundation of Fulero’s testimony so as to permit the Government to prepare a rebuttal, either to the motions or the testimony. The consequences of Smithers’s procrastination should rest on him, not on the Government. Other courts have held that initial notice of the intent to call an eyewitness identification expert witness only a few days before trial is grounds for exclusion. See *Dorsey*, 45 F.3d at 816 (remarking “the case law is clear that it is not an abuse of discretion . . . to disallow expert testimony where a late proffer of evidence by the defense substantially prejudices the government in its ability to find its own expert and conduct similar testing” and upholding exclusion when notice given on first day of trial); *Curry*, 977 F.2d at 1052 (upholding exclusion when 4 days

me his curriculum vitae I'd be happy to entertain [an instruction.]” It was after this exchange that Smithers asserted for the first time that Fulero would “testify to the specifics of the case and explain to the jury that there are scientific studies that have shown that eyewitness identification is flawed.” Smithers still did not, however, cite a specific theory or fact in the case to which these “scientific studies” would relate. The court then concluded that “[none of the cases] cited to me . . . suggests that this is admissible evidence. The government’s brief is very persuasive, *and I don’t have a report from the expert*. No, I think . . . you’re asking him to comment upon Debra White’s credibility.” (emphasis added). Smithers conceded the motion and asked permission to proffer the evidence. The court agreed, and although it offered several times to accept an oral proffer at that time, Smithers insisted on delivering it in writing.

It was in the written proffer, which was not filed until after the Government had rested its case and immediately before Smithers rested his, that Smithers first made any colorable attempt to tie Dr. Fulero’s testimony to the facts of the case. Smithers identified the stress of the robbery, “detail salience” relating to Smithers’s scar, the length of time between the robbery and the trial, the “conformity effect” of subsequently received information, the photo spread methodology,⁵ and the relationship between the witnesses’ confidence and accuracy as relevant subjects for Fulero’s testimony. Smithers also took issue with the adequacy of a jury instruction in counteracting the fallibility of eyewitness identifications. Smithers had made *none* of these arguments before this point in the proceedings, either orally or in writing, despite several opportunities to do so. It was in this context that the court held another hearing on the motion, and remarked, “you finally got your act together with this latest filing Much different from the first filing,” to which Smithers responded,

⁵ Smithers now proposed to have Fulero testify to the efficacy of the photo spread, despite having no response to the Government’s observation in its prior brief that Smithers had thus far proposed no such thing.

DISSENT

ALICE M. BATCHELDER, Circuit Judge, dissenting. I would hold that the district court’s decision to exclude Dr. Fulero’s testimony should be affirmed on the basis of Smithers’s delay in proffering it in its specifics to the court and Government. If we are to reach the merits of the decision, however, I am not nearly so certain as the majority is that the court did not perform the proper legal analysis. Certainly we should make that decision on the basis of a review of the entire record and not, as does the majority, largely on the basis of a handful of unfortunate but irrelevant remarks by the district court. In any event, once we have decided, as the majority has, that the court did not perform the proper *Daubert* analysis, our response should be to remand the issue for a proper hearing. We should not proceed to do that analysis ourselves, nor should we issue what is essentially a blanket endorsement of expert testimony on a subject deserving of, at best, our careful and skeptical scrutiny, effectively warning the district courts in this circuit that in the future it will be an abuse of discretion *not* to accept such experts. For these reasons, I must dissent.

I. Delay

As the majority noted, the district court’s primary reason for denying the renewed motion to permit Fulero to testify was that it was made “too late in the day.” In reasoning that Smithers’s initial motion *in limine* put the Government on sufficient notice of Fulero’s testimony, the majority makes no mention of the paucity of detail which that motion contained. Furthermore, the legal foundation of the majority’s reasoning is, in my view, erroneous.

A brief overview of the appellate courts’ reception of expert testimony on the fallibility of eyewitness identifications is necessary in order to explain the inadequacy of Smithers’s

initial motion. The majority correctly observes that for approximately the first decade or so in which such testimony was submitted, courts were “uniformly skeptical . . . for a host of reasons.” These reasons included distrust of the science behind the testimony, a concern that the majority goes to considerable lengths to dispel. But this was hardly the only reason given for disallowing the testimony, and that skepticism rightly continues in the appellate courts today. The majority opinion in this case acknowledges some of these decisions, but sidesteps the unanimous hesitancy among appellate courts to open the door too far to this testimony. In many cases, the excluded testimony is either a generic, scholarly exploration of psychological theory, bearing little relation to the facts of the particular case, *see, e.g., United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995); *United States v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994); *Jordan v. Ducharme*, 983 F.2d 933, 939 (9th Cir. 1994); *United States v. Blade*, 811 F.2d 461, 464-65 (8th Cir. 1987); *United States v. Fosher*, 590 F.2d 381, 382-83 (1st Cir. 1979), or else so specifically directed at the validity of a particular witness’s testimony as to usurp the jury’s role in determining credibility, *see, e.g., United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996); *United States v. Dorsey*, 45 F.3d 809, 812 (4th Cir. 1995); *United States v. Moore*, 786 F.2d 1308, 1311-12 (5th Cir. 1986); *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986); *State v. Gaines*, 926 P.2d 641, 645 (Kan. 1996); *State v. Sabetta*, 680 A.2d 927, 933 (R.I. 1996). In either situation, even though the testimony may have provided some measure of insight that the jury otherwise would not have possessed, the risk of the jury’s being unduly swayed by testimony with the imprimatur of scientific expertise has been deemed significant enough that the decision to exclude it could not be considered an abuse of the trial court’s considerable discretion with regard to evidentiary matters. This is especially so in light of the fact that the more traditional methods of exposing the fallibility of eyewitness identifications—cross-examination, jury instruction and closing argument—are more efficacious and far less risky

confidence relationship, etc.) may be applicable in the situation at hand. The memorandum’s attachments—Fulero’s vita and a selection of journal articles on the topic—plainly did nothing to provide the needed specificity. The Government made precisely this point in its response memorandum,⁴ and cited a number of authorities suggesting that cross-examination and jury instructions were better alternatives. At the hearing, the court began the discussion by opining that “the government writes a pretty persuasive brief. You can argue to the jury people make mistakes all the time. You can bring out the discrepancies [through cross-examination and a jury instruction].” Smithers responded by defending the scientific validity of the testimony. The court asked, “Has [the expert] rendered a report?” Receiving a negative response, the court continued: “I would have to go through a long voir dire ahead of time. I think if you’re going to have an expert you’ve got to have a report. You’ve given

clearly inapplicable in this case. *Daubert* cited as an example of scientific testimony the Seventh Circuit’s treatment of spectrographic voice identification technique. One method of examining this technique’s reliability was to ask how often it produced an erroneous result. Here, the proposed “technique” is of the exactly opposite type; it seeks not to make an identification, but to explain the reasons why an identification may be incorrect. Hence, a proper analogy to this *Daubert* observation might be to ask how often this technique correctly ascertains that an identification is wrong.

Nevertheless, Smithers continued: “[T]he question of known rate of error is addressed by the [Handberg] article included as Attachment C This article analyzes in detail the effect that certain variables are likely to have on the ability of eyewitnesses to correctly identify persons they have previously seen, pointing out the rate of error in making identifications. [This] forms parts of the scientific basis of Dr. Fulero’s testimony.” This passing reference was Smithers’s entire treatment of the “rate of error” issue, and does not provide the needed specificity.

⁴The Government noted that “Fulero’s testimony . . . would likewise be of dubious assistance to the jury. His testimony does not relate to a specific fact in this case, such as the efficacy of the photo spread. Instead, defendant will offer his testimony regarding the general problems arising from eyewitness identification, in contrast to the specific issues that were presented in the *Smith* case.”

Stevens, 935 F.2d at 1397 (quoting *Downing*, 753 F.2d at 1242).¹ The *Downing* court remanded its case for a proper Rule 702 hearing on the proposed expert testimony, because the district court had merely held a brief sidebar on the issue on the tenth day of trial without a voir dire of the witness or any time for either party to present its view. See *Downing*, 753 F.2d at 1228.² Here, however, the district court properly held a pretrial hearing on various motions *in limine*, including this one, but the content of Smithers's supporting memorandum was woefully inadequate to enable the court to exercise its discretion in an informed manner. The 10-page supporting memorandum recited the applicable standards of *Daubert* and Rules 702 and 403, defended the legitimacy of Dr. Fulero's field of study and academic qualifications, and included a few paragraphs indicting the reliability of eyewitness identifications in general. It contained absolutely no attempt to explain how the testimony would relate to the facts of the case or which of the psychological theories on memory³ (e.g., stress, "forgetting curve," accuracy-

¹Contrary to the majority's characterization of this citation, I do not offer this quotation as a "holy writ" or rigid "test" that the district court should have adhered to, but rather as a common-sense explanation of Smithers's burden to establish the relevance of his proffered testimony to the case. For this reason, the *Stevens* court's reasoning—or, for that matter, the identical emphasis on specificity in our *Smith* decision—is made no less valid by the fact that it pre-dates *Daubert*.

²Tellingly, the district court on remand again dismissed the testimony, this time as unhelpful to the jury and more prejudicial to the prosecution than it was probative to the defense. See 609 F.Supp. 784 (E.D. Pa. 1985). The judgment was affirmed without opinion. See No. 85-1359, 780 F.2d 1017 (3d Cir. Nov. 25, 1985) (table).

³The only assertion made in this memorandum that could arguably be considered "specific" to Fulero's testimony in this case is the reference to the "known rate of error." This brief discussion actually originated from Smithers's recitation of the *Daubert* analysis. Smithers was "unclear how the third step in the *Daubert* analysis, reviewing the rate of known error, would apply to this form of scientific testimony." Not only is this rate-of-error inquiry not a "step" mandated by *Daubert* but simply one of its "general observations," *Daubert*, 509 U.S. at 593-94, it is also

than expert testimony that can at best be only marginally relevant to the facts at hand. See *Moore v. Tate*, 882 F.2d 1107, 1110-11 (6th Cir. 1989); *Hall*, 165 F.3d at 1107; *United States v. Smith*, 122 F.3d 1355, 1358-59 (11th Cir. 1997); *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996); *Kime*, 99 F.3d at 884; *United States v. Ginn*, 87 F.3d 367, 370 (9th Cir. 1996); *Rincon*, 28 F.3d at 925-26; *Jordan*, 983 F.2d at 938-39; *United States v. Curry*, 977 F.2d 1042, 1051 (7th Cir. 1992); *Blade*, 811 F.2d at 464-65; *Moore*, 786 F.2d at 1311-12; *Fosher*, 590 F.2d at 382; *State v. McClendon*, 730 A.2d 1107, 1115-16 (Conn. 1999); *McMullen v. State*, 714 So.2d 368, 370 (Fla. 1998); *Gaines*, 926 P.2d at 662-63; *State v. Buell*, 489 N.E.2d 795, 803-04 (Ohio 1986); *Currie v. Commonwealth*, 515 S.E.2d 335, 339 (Ct. App. Va. 1999). The grounds on which these courts have explained their rulings vary—the testimony was unhelpful, the subject was within the jury's common knowledge, the subject was not a proper one for expert testimony under Evidence Rule 702 or some analogous test, or the prejudice substantially outweighed the probative value pursuant to Rule 403—but the results were the same.

I will concede that the concept of expert testimony on the subject of eyewitness identification, and the scientific research behind the testimony, has gained some acceptance and respect in our courts since it was introduced. But the majority's own recounting of the case law on this subject reveals that the appropriateness of using such testimony in court—instead of its traditional alternatives—to counteract the deficiencies of eyewitness identifications is still very much in controversy, for all of the reasons detailed above. The recent trend has been towards allowing the testimony in a limited number of "narrow circumstances," but this merely reflects the liberality of Rule 702 and the gradual maturing of the research, not the "dramatic transformation" of judicial attitudes that the majority claims. See *United States v. Smith*, 156 F.3d 1046, 1052 (10th Cir. 1998) (holding that cross-examination and common sense will presumptively suffice outside the "narrow circumstances [of] cross-racial identification, identification after a long delay, identification

[...] under stress, and [...] the feedback factor and unconscious transference”); *United States v. Harris*, 995 F.2d 532, 535-36 (4th Cir. 1993) (same); *Currie*, 515 S.E.2d at 338 (same); *Brien*, 59 F.3d at 277 (“a door once largely shut is now somewhat ajar”). Some of our sister circuits expressly retain their jaundiced view of this type of testimony. *See Hall*, 165 F.3d at 1104 (“This Court has a long line of cases which reflect our disfavor of expert testimony on the reliability of eyewitness identification”); *Smith*, 122 F.3d at 1357 (“This Court has consistently looked unfavorably on such testimony”). Every court to address the issue has left the admissibility of the testimony to the sound discretion of the district court on a case-by-case basis, either on the authority of *Daubert*, Rule 702, or an analogous state rule. No appellate court has adopted a presumption or per se rule in favor of admitting eyewitness identification expert testimony, something the majority’s opinion comes dangerously close to doing. Many courts have expressly disavowed such a rule. *See Smith*, 122 F.3d at 1359; *United States v. Alexander*, 816 F.2d 164, 169 (5th Cir. 1987); *Blade*, 811 F.2d at 465; *Langford*, 802 F.2d at 1179; *Sabetta*, 680 A.2d at 933.

Moreover, the only federal appellate decisions finding the exclusion of this type of expert testimony to be an abuse of discretion are readily distinguishable from the instant case. In *United States v. Stevens*, 935 F.2d 1380, 1397 (3d Cir. 1991), the Third Circuit reviewed a district court’s decision to admit the expert’s testimony as to some psychological theories but not others. The dangers of the expert’s testimony in general, then, were not at issue. The panel reversed because it found no reason why the excluded theories did not “fit” the facts of the case as much as those that were admitted. In *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985), the district court erroneously excluded the testimony per se instead of performing its gatekeeping function. In this circuit’s *Smith* decision, the Government conceded Dr. Fulero’s expertise, *see* 736 F.2d at 1105, and the proffer there specifically tied the theories of transference and cross-racial identification to the facts of that case. *See id.* at 1106. We used this specificity to distinguish *Fosher*, which was

representative of the cases finding expert testimony too removed from the particular facts to be helpful. *See id.* The lack of specificity in Smithers’s proffer likens this case to *Fosher* far more than to *Smith*. Apart from this distinction, the majority opinion’s characterization of *Smith*’s holding is troubling. At most, this court said in *Smith* that Dr. Fulero’s testimony on the reliability of eyewitness testimony *might* meet the *Green* criteria, and *might* have been improperly excluded. We did not, as the majority opinion claims, express our “acceptance of psychological studies as a scientifically sound and proper subject of expert testimony, noting, ‘[the] science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research.’” What we noted is that Dr. Fulero had testified to that effect, *see id.*, and, in the final analysis, held that “*even if it were error* to exclude the expert’s testimony, such error was ‘harmless.’” *Id.* at 1106-07 (emphasis added). It is also worth noting that the analysis in *Smith* was not unanimous; the concurring judge did not find an abuse of discretion. Since the *Smith* case, no Sixth Circuit decision has reversed a district court’s exclusion of expert testimony on eyewitness identifications as an abuse of discretion.

I will address in a later segment of this dissent my view of this testimony’s utility, but for now it suffices to say that because the range of circumstances in which this testimony should be admitted is so narrow, the party offering it should be required as a threshold matter to make

an on-the-record detailed proffer to the court, including an explanation of precisely how the expert’s testimony is relevant to the eyewitness identifications under consideration. The offer of proof should establish the presence of factors (e.g., stress, or differences in race or age as between the eyewitness and the defendant) which have been found by researchers to impair the accuracy of eyewitness identifications.

IN THE COURT OF COMMON PLEAS,

COUNTY, OHIO

CRIMINAL DIVISION

STATE OF OHIO,)

Plaintiff)

-vs-)

Defendant)

CASE NO.

AFFIDAVIT

STATE OF OHIO) SS:
COUNTY OF)

SOLOMON M. FULERO, Ph.D., J.D., being first duly sworn, deposes and states as follows:

1. QUALIFICATIONS. I am both a licensed psychologist and an attorney. My present academic positions include Clinical Assistant Professor of Psychology at the Wright State University Schools of Professional Psychology and of Medicine, and Professor and Department Chair of Psychology at Sinclair College in Dayton, Ohio.

In addition to my academic appointments, I am a practicing attorney in the State of Ohio, having been admitted to the Bar in May 1980, and to the Federal Bar (Southern District of Ohio, Western Division) in June 1980. I am also a practicing psychologist, and a frequent consultant to attorneys on issues of psychology and law, including eyewitness identification. In addition to the numerous cases in which I have consulted on the issue of eyewitness identification, I have testified as an expert witness on the psychology of eyewitness identification in criminal trials in the following cases:

I. City of Dayton, Ohio:

City of Dayton v. Click, Dayton Municipal Court, Case No. 86-CRB-7608 (Duncan, J.)

II. State of Ohio

State v. Barnett, Montgomery County Court of Common Pleas, Case No. 80CR1953 (Kessler, J.)

State v. Alford, Montgomery County Court of Common Pleas, Case No. 83CR2225 (Meagher, J.)

State v. Harris, Montgomery County Court of Common Pleas, Case No. 84 CR 319 (Meagher, J.)

State v. Jones, Montgomery County Court of Common Pleas, Case No. 84 CR 62 (Kessler, J.)

State v. Swofford, Montgomery County Court of Common Pleas, Case No 84CR1691 (Yeazel, J.)
(motion to suppress)

State v. Cook, Hamilton County Court of Common Pleas, Case No. B901379 (Ruehlman, J.)
State v. Barron, Montgomery County Common Pleas Court, Case No. 90CR1339 (Kilpatrick, J.)
State v. McCrary, Hamilton County Court of Common Pleas, Case No. B93-6444 (Ruehlman, J.)
State v. Moore, Montgomery County Court of Common Pleas, Case No. 90 CR 2843 (Porter, J.)
State v. Knight, Franklin County Court of Common Pleas, Case No. 93CR-04-2364 (Shewart, J.)
State v. Brown, Montgomery County Court of Common Pleas, Case No. 91 CR 711 (Foley, J.)
State v. Walter, Summit County Juvenile Court, Case No. 91-5-1814 (Robinson, J.)
State v. Beitzel, Tuscarawas County Court of Common Pleas, Case No. 90CR-070-199 (Lile, J.)
State v. Rowe, Franklin County Court of Common Pleas, Case No. 91CR-07-3955 (Cain, J.)
State v. Layton, Lucas County Court of Common Pleas, Case No. 90-6410 (Grigsby, visiting J.)
State v. Ford, Montgomery County Court of Common Pleas, Case No. 86 CR 51 (McMillan, J.)
State v. Robertson, Montgomery County Common Pleas Ct., Case No. 88CR3178 (McMillan, J.)
State v. Miller, Lucas County Court of Common Pleas, Case No. CR93-5161 (Franks, J.)
State v. Creemer, Hamilton County Court of Common Pleas, Case No. B-920392 (Nurre, J.)
State v. Chilton, Montgomery County Common Pleas Ct., Case No. 86CR2520 (Riley, visiting J.)
State v. Hart, Tuscarawas County Court of Common Pleas, Case No. 90CR 080225 (O'Farrell, J.)
State v. Roundtree, Wayne County Court of Common Pleas, Case No. 95-CR-0237 (Brown, J.)
State v. Simone, Champaign County Court of Common Pleas, Case No. 89 CR 13 (Wilson, J.)
State v. Pierce, Athens County Court of Common Pleas, Case No. 89 CR (Goldsberry, J.)
State v. Mallory, Montgomery County Court of Common Pleas, Case No. 93 CR 3341 (Dodge, J.)
State v. Konoff, Ottawa County Court of Common Pleas, Case No. 3959 (Thierry, J.)
State v. Wilson, Lake County Court of Common Pleas, Case No. 92 CR 14 (Jackson, J.)
State v. Storer, Clark County Common Pleas, Case No. 87CR212 (Henderson, J.) (trial and retrial)
State v. Ligier, Montgomery County Court of Common Pleas, Case No. 88 CR 3429 (Meagher, J.)
State v. Radford, Montgomery County Common Pleas Ct., Case No. 88 CR 3040 (Kessler, J.)
State v. Dowd, Lake County Court of Common Pleas, Case No. 89 CR 13 (Jackson, J.)
State v. Craft, Auglaize County Court of Common Pleas, Case No. 93-C-22 (Rumer, visiting J.)
State v. Baird, Franklin County Court of Common Pleas, Case No. 95-CR-6077 (Johnson, J.)
State v. Johnson, Lucas County Court of Common Pleas, Case No. CR-88-6580 (Doneghy, J.)
State v. Green, Delaware County Court of Common Pleas, Case No. 83 CR 121 (Shaw, J.)
State v. Everette, Montgomery County Court of Common Pleas, Case No. 91 CR (Foley, J.)
State v. Johnson, Lucas County Court of Common Pleas, Case No. (Knepper, J.)
State v. Elliott, Tuscarawas County Common Pleas Ct., Case No. 91-CR-030050 (O'Farrell, J.)
State v. Lytle, Summit County Common Pleas Ct., Case No. CR95-08-2080 (Schneiderman, J.)
State v. Ross, Mahoning County Court of Common Pleas, Case No. 96-CR-192 (Krichbaum, J.)
 (penalty phase of capital case)
State v. Hurston, Montgomery County Common Pleas, Case No. 96CR1618 (Langer, J., and Ingram, visiting J.)
State v. McDade, Lake County Court of Common Pleas, Case No. 96-CR-00327 (Mitrovich, J.)
State v. Robinson, Montgomery County Court of Common Pleas, Case No. 97-CR-581 (Foley, J.)
State v. Auge, Franklin County Court of Common Pleas, Case No. CR-95-4115 (Sadler, J.)
State v. Brust, Franklin County Court of Common Pleas, Case No. 97CR-08-4790 (Cain, J.)
State v. Banks, Tuscarawas County Common Pleas Ct., Case No. 97-CR-040055 (motion to suppress and trial) (O'Farrell, J.)
State v. Hairston, Montgomery County Court of Common Pleas, Case No. 98-CR-238 (Petzold, J.)
State v. Beckham, Montgomery County Court of Common Pleas, Case No. 97-CR-3557 (Donovan, J.)
State v. Sinkfield, Montgomery County Court of Common Pleas, Case No. 96-CR-395 (Froelich, J.)
State v. Nichols, Franklin County Court of Common Pleas, Case No. 95CR-07-4299 (Cain, J.)

III. Federal Courts (Ohio, New York, Kentucky, Pennsylvania, Virgin Islands, New Jersey)

United States v. Armstrong, United States District Court, Southern District of Ohio, Western Division, Case No. CR-3-84-64 (Rice, J.)

United States v. Stewart, United States District Court, Southern District of Ohio, Western Division, Case No. CR-3-84-65 (Rice, J.)

United States v. Radford, United States District Court, Southern District of Ohio, Eastern Division, Case No. _____, (Graham, J.)

United States v. Robinson, U.S. District Court, Northern District of Ohio, Case No. _____, (Aldrich, J.)

United States v. Walker, United States District Court, Northern District of New York, Case No. 94-CR-328 (McAvoy, J.)

United States v. Miller, United States District Court, Eastern District of Kentucky at Covington, Case No. 84-24 (Bertlesman, J.)

United States v. Sebetich, United States District Court, Western District of Pennsylvania, Case No. 84-53 (Downing hearing, McCune, J.)

United States v. Tyler, United States District Court, Western District of Pennsylvania, Case No. 87-128, (Downing hearing, Ziegler, J.)

United States v. Lake, United States District Court of the Virgin Islands, Division of St. Thomas and St. John, Case No. CR96-161 (Moore, J.)

United States v. Thompson, United States District Court of the Virgin Islands, Division of St. Thomas and St. John, Case No. CR96-95 (Moore, J.)

United States v. Nunes, United States District Court, District of New Jersey, Case No. CR96-231(WHW) (Walls, J.)

IV. Other state courts (Illinois, Virginia, West Virginia, Wisconsin, Indiana, New York, Virginia, Missouri, Michigan, Texas, South Carolina, District of Columbia)

State of Illinois v. Enis, Lake County Circuit Court, Case No. 89-_____, (Motion hearing, Gosharian, J.); see also *People v. Enis*, 564 N.E. 2d 1155, 139 Ill.2d 264 (1990).

State of Wisconsin v. Miller, Fond du Lac County Circuit Ct., Case No. 90CF257 (Mickiewicz, J.)

State of West Virginia v. Hawkins, Monongalia County Circuit Ct., Case No. 93F13 (Starcher, J.)

Sanamiego v. State of Indiana, Adams Cty. Superior Ct., Case 01C01-8706-CF-018 (Caffee, J.)

Williams v. State of Indiana, Allen County Superior Ct., Case 02D04-9208-CF-431 (Surbeck, J.)

State of Indiana v. Floyd, Hamilton County Superior Ct., Case 29D02-9705-CF-039 (_____, J.)

State of Indiana v. Carter, Martin County Circuit Ct., Case No. 51C01-9309-CF-79 (Howell, J.)

People of the State of New York v. Rojas, Supreme Court of New York County, Part 78, Case No. 01868-91 (Leff, J.)

People of the State of New York v. Melendez, Rensselaer County Court, Case No. B-10702 (McGrath, J.)

State of Missouri v. Dailey, St. Louis City Circuit Court, State of Missouri, Cause No. 971-0611A, Division No. 16 (_____, J.)

State of Michigan v. Smith, Washtenaw County Circuit Court, Case No. 96-6543-FC (Shelton, J.)

Commonwealth of Virginia v. Currie, Circuit Court for the City of Alexandria, Case No. CF970531 (Swersky, J.)

State of Texas v. Ramirez, 154th District Court of Lamb County, Texas, Case No. 3084 (Klein, J.)

United States of America v. Battle, Superior Court of the District of Columbia, Case No. F2951-98 (Winston, J.)

State of South Carolina v. Thompson, Florence County Court of General Sessions, Case No. 98-GS-21-347 (Floyd, J.)

State of South Carolina v. Johnson, Richland County Court of General Sessions, Case No. 99-GS-40-40014 (Barber, J.)

V. Administrative hearings (Michigan)

In the matter of Insurance Bureau, Petitioner, v. Mark Sager, Respondent, Docket No. 98-0125, Enforcement Case No. 96-116 (Jones, Administrative Law Judge)

(See also *United States v. Smith*, 736 F.2d 1103 (1984), a federal Sixth Circuit Court of Appeals Case, and *Moore v. Tate*, Case No. C-3-86-366, D.C. S.D. Ohio, decided Aug. 11, 1988, both of which addressed the issue of the admissibility of my testimony. In the latter, the federal magistrate ruled the exclusion of my testimony in a state court to be a violation of the defendant's federal constitutional rights, although the Sixth Circuit later overruled, 882 F.2d 1107 (1989). More recently, in *State v. Echols*, Hamilton County Court of Common Pleas, Case No. B-9603651 (Tracey, J.), the First Circuit Court of Appeals in the State of Ohio overturned a conviction based in part on the exclusion of my testimony; see 1998 WL 337063).

My educational background is as follows: I received a Bachelor of Arts in psychology/sociology with Honors from the University of Maryland (1973); a Master of Arts in Psychology (1975) and a Doctor of Philosophy in Psychology (1979) from the University of Oregon; and a Juris Doctor from the University of Oregon School of Law (1979). I received a Russell Sage Foundation Law and Social Science Residency Fellowship in 1977-78 and 1978-79, which I did at the University of Oregon School of Law. I am a member of the following professional organizations: American Psychological Association, Midwestern Psychological Association, Society for Personality and Social Psychology, American Bar Association, Dayton Bar Association, Greene County Bar Association, and American Psychology-Law Society. I have testified before the Ohio Senate Judiciary Committee on psychology and law issues, and was appointed by then-Lieutenant Governor Michael DeWine to a seven-member blue ribbon panel on the issues of competency to stand trial and sanity (our work later resulted in S.B. 285, making several changes to the law in those areas).

I have taught numerous classes and have given numerous seminars, workshops, and presentations on law and psychology, including the issue of eyewitness identification. I have consulted with both NBC (Dateline) and CBS (48 Hours), and appeared in shows on the topic of eyewitness identification. My own research has resulted in some 40-50 publications in the area of psychology and law in major journals (and law reviews) in my field, including the *Journal of Experimental Social Psychology*, *Psychology*, *Public Policy and Law*, *Contemporary Psychology*, *Law and Human Behavior*, *Behavioral Sciences and the Law*, *Professional Psychology*, *Ohio Northern Law Review*, and *Ohio State Law Journal*. I act as a peer reviewer for several scientific journals as well as for grant proposals submitted to government agencies in the area of psychology and law. I am on the Editorial Board of the major journal in my field, *Law and Human Behavior*. I am the author of *Ohio Psychology and Law Handbook*, published in 1988 by Ohio Psychology Publishing Company. I write a continuing column in the *Ohio Psychologist*, the official publication of the Ohio Psychological Association. The column deals with psychology and law, including eyewitness identification. Most recently, I served on a panel appointed by Attorney General Janet Reno, the Technical Working Group on Eyewitness Evidence (TWGEE). This panel was constituted after the United States Department of Justice,

through the National Institute of Justice, published a document entitled Convicted by Juries, Exonerated by Science in 1995. This document was a study of some 35 cases in which criminal defendants were convicted by juries and later exonerated by use of DNA evidence. Of those cases, approximately 32 were cases of mistaken identification. The TWGEE panel, composed of law enforcement officers, prosecutors, defense attorneys, and eyewitness scientists, completed a document entitled Eyewitness Evidence: A Guide for Law Enforcement, to be published by the National Institute of Justice in 1999.

2. **SCIENTIFIC FOUNDATION OF TESTIMONY.** In an effort to clarify the scope and intent of my testimony in such cases, I wish to make clear in this section the scientific basis of this scientific contributions of psychologists to the understanding of human visual perception, with special emphasis on the social and cognitive factors that affect eyewitness accuracy. The main points of my testimony are outlined more specifically in the last part of this Affidavit. These factors are backed up by specific experimental research by psychologists in social psychology, experimental psychology, and cognitive psychology, dating back to as far as 1895 and continuing on today. This ongoing research amounts to some 300-400 articles per year, as well as at least 10 books specifically on the topic of eyewitness testimony published in the last 15 years. It is this research from which I draw these findings and upon which I base my opinions and other conclusions.

This scientific research typically utilizes previously tested filmed crimes or accidents to test hundreds of eyewitnesses. This allows us to check and verify the accuracy of a given eyewitness against an objective standard of accuracy. In such studies, we learn a great deal about the typical response of the average witness under the conditions that exist in the crime or accident situation. All witnesses are then tested with carefully constructed line-ups and/or photospreads under controlled conditions. Thousands of experimental subjects have undergone these procedures. These studies combine to permit an expert to provide the court and the jury with a more complete understanding of the psychology of eyewitness identification. Further, and more importantly, this scientific research has highlighted a critical issue that makes expert testimony in this area vital for jurors who must make all-important decisions about the accuracy of an eyewitness identification: laypersons acting as jurors hold many misconceptions about eyewitness testimony and eyewitness identification. In other areas, they may be aware of relevant factors, but may discount or inappropriately weigh those factors. It is to this issue that I turn next.

3. **POWER OF EYEWITNESS TESTIMONY.** The impact of eyewitness identification has been noted by legal experts for many years. The paradigmatic eyewitness testimony situation is where the crime victim takes the stand during the trial, points to the defendant in front of the jury, and says, "He's the one--I'll never forget that face!"

Indeed, lawyers and judges report that eyewitness testimony is powerful and dramatic evidence, and its presence or absence will often determine whether or not a case

is pursued initially as well as whether or not a conviction is obtained. In England, a committee was established in 1974 to review the problem of eyewitness identification, chaired by the noted jurist Lord Devlin. The final report of Devlin committee was issued in April 1976. This committee examined all lineups ("identification parades") held in England and Wales in the year 1973. There were a total of 2,116 lineups. After being identified in a lineup, 850 people were prosecuted, and 82% of those were convicted. Even more interesting is the fact that 347 people were prosecuted even though the only evidence against them was the identification by one (169 cases) or more (178 cases) eyewitnesses. Of these 347 cases, 74 % resulted in conviction. Clearly, eyewitness testimony is extremely powerful.

This conclusion is supported by scientific research. The ideal way to determine the power of an eyewitness identification would be to conduct a trial that contains such an identification and then to compare the outcome of the trial to the identical trial conducted without it. While this is impossible in actual cases, it is possible in the laboratory. Dr. Elizabeth Loftus of the University of Washington, one of the foremost authorities in this field and psychologist who has testified as an expert in over sixty cases, reports in her book *Eyewitness Testimony* (Harvard University Press, 1979) a study she conducted using 150 students asked to play the role of jurors trying a criminal case. Each student received a written description of a grocery store robbery in which two people were killed, and a summary of the evidence and arguments presented at the trial. One group of subjects, 50 in number, was told that there were no eyewitnesses to the crime.

Based on the other evidence in the case, 10% of these found the defendant guilty. A second group of 50 subjects was given the same evidence as the first group, with one addition: the store clerk's testimony that he has seen the defendant shoot the two victims. With this addition, full 72% found the defendant guilty—a testimonial to the power of an eyewitness. But even more interesting were the result of the third group of 50 subjects, who were also told about the store clerk, but were given the additional information that on cross-examination, the clerk admitted that on the day of the robbery he had not been wearing his glasses, and that his vision was worse than 20/400 without his glasses (so that he could not have seen the perpetrator's face). The clerk, however, maintained his identification confidently (we will address this factor later). Under this condition, some 68% of the jurors still voted guilty.

Clearly, jurors weigh an eyewitness identification, particularly one made with a great deal of certainty, more heavily than virtually any other form of evidence. Given this fact, what does psychology have to say about eyewitness identification? As several researchers have noted, the research shows that eyewitness testimony is less reliable than is commonly assumed. Eyewitnesses to crimes and accidents are being asked to do something that normal human memory is not well-designed to do. When we look at the power of eyewitness evidence in the light of the factors that have been shown to affect accuracy, it is clear that expert testimony in this area can be of tremendous assistance to a finder of fact faced with what is always a difficult decision. Indeed, one of the things we

have discovered in the research is that fact finders hold many myths and misconceptions about eyewitness identifications. It is that area to which I turn next.

4. MYTHS AND MISCONCEPTIONS HELD BY LAY JURORS. Expert psychological testimony on eyewitness identification is sometimes resisted (i.e., ruled inadmissible) by judges on the ground the testimony is an improper subject for expert testimony, since the reliability of an eyewitness and the factors that affect or "common sense" of the average layperson. As Dr. Loftus (see above) has noted, that is equivalent to saying that a psychologist cannot tell the jurors in an identification case anything they do not already know. This, however, is an assertion which is amenable to empirical test.

Dr. Loftus has collected empirical data on just what people do know about eyewitness identification. Some 500 registered voters in the State of Washington (the population from which prospective jurors are drawn, as in Ohio) were asked to fill out a questionnaire testing what they knew about various factors that have been identified by psychologists as affecting eyewitness reliability. The results showed that in most cases, contrary to judge's assumptions about the "common sense" of jurors, there is an appalling amount of misinformation and myth. For example, the subjects were asked the following question:

Suppose that a man and a woman both witness two crimes. One involves violence and the other is nonviolent. Which statement do you believe is true?

- (a) Both the man and the woman will remember the details of the violent crime better.
- (b) Both the man and the woman will remember the details of the nonviolent crime better.
- (c) The man will remember the details of the violent crime better and the woman will remember the details of the nonviolent crime better.
- (d) The woman will remember the details of the violent crime better and the man will remember the details of the nonviolent crime better.

Of Dr. Loftus' subjects, only 18% correctly picked (b). In a study by Drs. Clifford and Scott (1978), both men and women found it harder to recall information about a violent event than a nonviolent event. At a recent Ohio Psychological Association workshop which I conducted, only 41% of the participants, who were primarily Ph.D. clinical psychologists (though without much background in this area), were correct. Other questions covered additional areas of juror misconception, such as cross-racial identification (only 55% of the subjects correctly knew that a white person would have a more difficult time identifying a black person than they would identifying a white person); stress (fully 1/3 felt that stress did not interfere with eyewitness ability, and in fact 18% felt that stress would improve recall, an assertion which has clearly been shown to be incorrect); weapons focus (only 40% indicated that weapons focus would have an impact on an eyewitness), and so forth. All of these factors are addressed in my testimony (see last section of this Affidavit).

Another common misconception, one which is crucial in virtually all cases, is that an eyewitness testifying on the witness stand who expresses a great deal of confidence in his or her identification is more likely to be accurate than an eyewitness who indicates some hesitancy or uncertainty. Contrary to this "common sense" misconception, a large number of studies indicated that in fact the confidence of the eyewitness bears virtually no relationship to the accuracy of the identification--a confident eyewitness is just as likely to be incorrect as a hesitant one. What makes this even more appalling is that the United States Supreme Court, in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 575, 34 L.Ed.2d 401 (1972), has mandated this factor as one of the five factors that judges are instructed to weigh in their assessment of whether or not to allow an eyewitness identification into evidence at a trial.

In summary, the available evidence clearly shows that the sort of information that can be provided to jurors by expert psychological testimony on eyewitness reliability is simply not within the "ken of the average layperson." This matter is discussed at length, along with the research on myths and misconceptions held by laypersons and the ability of expert testimony in this area to assist jurors, in Leippe (1995) and Penrod, Fulero, & Cutler (1995). It is important to note that the testimony of the psychologist is not directed to the question of whether any one eyewitness is or is not correct. That is the province of the jury. The testimony of the psychologist is admitted as evidence probative of the weight of that witness' testimony (or its admissibility, at a motion to suppress hearing).

5. ADMISSIBILITY OF EXPERT TESTIMONY Rule 702 of the Ohio Rules of Evidence states:

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In addition, in *Ragone v. Vitali & Beltrami, Jr., Inc.*, 42 Ohio St. 2D 161 (1975), the Ohio Supreme Court stated:

"In all proceedings involving matters of scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen, expert testimony is admissible to aid the court or the jury in arriving at a correct determination of the litigated issue."

Third, in *United States v. Smith*, 736 F.2d 1103, 35 Crim. Law Rptr. 2224 (1984), the United States Court of Appeals for the Sixth Circuit, in dealing with my testimony, set forth a four-pronged test in deciding the admissibility of this testimony: (1) Is the witness a qualified expert? (2) Is his expertise in a proper subject? (3) Does his testimony conform to a generally accepted explanatory theory? (4) Does its probative value outweigh any possible prejudicial effect? In that case, the Court fairly clearly decided in the affirmative

on counts. Indeed, in a subsequent case, *U.S. v. Armstrong*, Judge Rice (the trial judge in the Smith case) did allow me to testify before the jury on the basis of the *Smith* ruling.

Last, the Ohio Supreme Court has now approved the use of expert testimony on eyewitness identification, in *State v. Buell*, 22 Ohio St. 3d 124 (1986), in which the Court held that:

"...based on our analysis of these cases and Evid. R. 702, the expert testimony of an experimental psychologist concerning the variables or factors that may impair the accuracy of a typical eyewitness identification is admissible under Evid. R. 702." *Buell*, at 131.

In considering the overall state of reported case law on the admissibility of this type of testimony, it is important to keep in mind the fact that the posture of the cases on appeal on this issue is quite deceiving. That is, if the trial judge rules the testimony admissible, the psychologist testifies, and regardless of the outcome of the case, no issue is raised on appeal. If, however, the trial judge rules the testimony inadmissible, and the defendant is convicted, then and only then do appeals courts face the issue. As a result, reported cases show only the cases in which the testimony is not allowed. These cases are, by and in large, prior to 1981. Since then, and even shortly prior to that time, the legal commentators have increasingly approved the use of expert testimony on eyewitness identification (see Kessler, J. ID Experts in Criminal Trials, 30 Dayton Bar Briefs, No. 10, p. 15 (1981); Woocher, Did Your Eyes Deceive You? 29 Stanford Law Review 969 (1977); Salisbury, Eyewitness Identifications: A New Perspective on Old Law, 15 Tulsa Law Journal 38, 64-65 (1979); Tyrell and Cunningham, Eyewitness Credibility: Adjusting the Sights of the Judiciary, 37 Alabama Lawyer 563, 586-588 (1976); Note: Expert Testimony on Eyewitness Perception, 82 Dickinson Law Review 465 (1978); Sobel, *Eyewitness Identification*, Boardman, 1976, supplement, page 87.

In addition to the cases in which I have testified, Dr. Elizabeth Loftus has given expert testimony in over 200 cases in federal and state courts. Dr. Steven Penrod of the University of Wisconsin has given expert testimony in over 100 cases in federal and state courts. The late Dr. Robert Buckhout of Brooklyn College testified before juries in more than 100 state and federal jury trials and suppression hearings even before the end of the 1970s, including the following cases cited in his book *Psychology and Criminal Justice*, published in 1981:

People v. Chavez, (rape-robbery), Sup. Ct., Alameda County, Calif., July 15, 1977; *People v. Richardson and Williams*, (armed robbery), Sup. Ct., Alameda County, Calif., Oct. 29, 1971; *People v. Angela Davis*, (murder), Sup. Ct., Santa Clara County, Calif., May 23, 1972; *People v. Pratt*, (murder), Sup. Ct., Los Angeles, Calif., June 27, 1972; *People v. Castle*, (Armed robbery), Sup. Ct., Contra Costa County, Calif., April 1, 1974; *People v. Kinsey et al.*, (assault with deadly weapon), April 3, 1974; *People v. Boldon*, (attempted murder), No. 3180-74, Queens County S. Ct., New York, April 8, 1975; *Florida v. Campbell*, (armed robbery), No. 74-2777, Cir. Ct., Palm Beach County,

Florida, April 24, 1975; (Wade hearing and trial); *People v. Montgomery, Woods, and Whitehead*, (attempted murder), Bronx County S. Ct., NY; *People v. Duncan*, (murder), No 71-112, County Court, Tompkins County, Ithaca, New York, June 19, 1975; *State v. Chaisson*, (fraud, grand larceny), Douglas County Court, Omaha, NE, June 5, 1975; *People v. Rucker*, (armed robbery), New York County S. Ct., Sept. 19, 1975; *People v. Wilson*, (armed robbery), Queens County Sup. Ct., NY, Oct. 6, 1975; *State v. McGill and Hull*, (murder), Ingham County District Court, Lansing, MI, Oct. 8, 1975; *People v. Moulterie*, (rape), Kings County S. Ct., NY, July 1976; *People v. Stevens*, (rape), Orange County Court, Goshen, NY, March 15, 1976; *U.S. v. Soliah*, (robbery), U.S. District Court, Eastern District of Calif., Sacramento, Ca, April 1976; *U.S. v. Roszoryk*, (extortion), U.S. District Court, Western Michigan, Grand Rapids, MI, June 1, 1976; *U.S. v. Jarvek*, (robbery), U.S. District Ct., Eastern District, Brooklyn, NY, July 19, 1976; and *U.S. v. Richard Coleman Smith*, (armed robbery), Central District of Calif., Case No. 10171-HP-CE, Aug. 30, 1972.

In addition to these cases, both the Arizona Supreme Court, in *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983), and the California Supreme Court, in *People v. McDonald*, 690 P.2d 709 (1984), as well as the United States Court of Appeals for the Third District, in *U.S. v. Downing*, 753 F.2d 1224 (1985), all have reversed convictions of criminal defendants on the ground that trial judges have committed reversible error by not allowing expert psychological testimony on eyewitness identification. Recently, the courts in several other states have approved the use of such expert testimony, for example in *State v. Contreras*, 674 P.2d 1208 (Alaska App. 1983); *Lindberg v. Leatham Bros, Inc.*, 693 P.2d 1234 (Montana, 1985); *State v. Sellars*, 52 N.C. App. 520, 278 S.E. 2d 907 (1981); *State v. Moon*, 45 Wash. App. 692, 726 P. 2d 1263 (1986); *Campbell v. People*, 814 P.2d 1 (Colo. 1991); and *State v. Whaley*, 406 S.E. 2d 369 (S.C. 1991). It is important to note that experts have also testified at the trial court level in other states where no case law is apparent (see listing two paragraphs above), and that a record of that fact is not created simply because the issue was therefore not addressed on appeal.

6. BRIEF OUTLINE OF TESTIMONY.

I. The generally accepted theory of memory in the field of psychology, and the division of the memory process into three stages: acquisition, retention, and retrieval. Factors present at each stage can affect the accuracy of eyewitnesses.

A. Acquisition stage

1. Exposure time (longer, more accurate; but also time overestimation)
2. Detail salience (unusual details grab attention but detract overall)
3. Stress (high stress conditions cause more mistakes (not fewer, as is commonly assumed) and time overestimation)
4. Weapons focus (attention time spent focused on weapons; less time to focus on other stimuli)
5. Cross-racial identification (worse than same-race)

6. Effects of set and expectancy
7. Obvious factors (lighting, eyesight, age, etc.)
8. Police as witnesses (no better than laypersons)

B. Retention stage

1. Length of interval (longer, less accurate)
2. Post-event information (photospreads; Identi-Kit; line-ups, descriptions, composites, hypnosis, mugshots, later views of defendant, etc., may get incorporated into memory of original event; "unconscious transference," especially with multiple procedures; persons who do composites less accurate subsequently)
3. Bias in post-event information elicitation (leading questions; one-on-one confrontations; multiple procedures)
4. Knowledge of the identity of the suspect by the person conducting identification procedure (can be communicated unintentionally; "double-blind" techniques less risky)
5. Conformity effects (multiple witnesses and/or communication about identifications)
6. Suggestivity/bias (one picture/person standing out or different on any basis more likely to be picked regardless of accuracy)
7. Lineup/photospread procedures (should explicitly warn that perpetrator may or may not be present; should not give witness post-identification feedback; use of sequential versus simultaneous presentation; etc.)

C. Retrieval stage

1. Unconscious transference (is the in-court identification that of the perpetrator, or the person picked from the identification procedure or seen at some other time?)
2. Confidence of witness (virtually unrelated to accuracy, contrary to lay view)

Further affiant saith naught.

Dr. Solomon Fulero

Sworn to and subscribed before me this _____ day of _____, 199__.

NOTARY PUBLIC

IN THE CIRCUIT COURT OF PULASKI COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff	)	CASE NO. CR597-325FX
	)	
-vs-	)	AFFIDAVIT
	)	
LLOYD E. SCHLUP	)	
	)	
Defendant	)	

STATE OF MISSOURI) SS:
COUNTY OF PULASKI)

SOLOMON M. FULERO, Ph.D., J.D., being duly sworn, deposes and
states:

EDUCATIONAL BACKGROUND AND QUALIFICATIONS

1. I have a Ph.D. in psychology, as well as a Juris Doctor from the University of Oregon, Eugene, Oregon.
2. I am a licensed psychologist in the State of Ohio and an attorney duly admitted to the practice of law in the state courts of Ohio and in the federal district court for the Southern District of Ohio, Western Division.
3. I presently hold academic positions as a Clinical Assistant Professor of Psychology at the Wright State University Schools of Professional Psychology and at the Wright State University School of Medicine and as Professor and Department Chair of Psychology at Sinclair College in Dayton, Ohio.

4. I am a member of numerous professional organizations, including the American Psychological Association, the Midwestern Psychological Association, the Society for Personality and Social Psychology, the American Bar Association, the Dayton Bar Association, the Greene County Bar Association and the American Psychology-Law Society.

5. My area of specialization is legal psychology, a field that includes the study of memory and eyewitness identification. I have read and familiarized myself with the relevant published literature in this field. I have taught numerous classes and have given numerous seminars, workshops and presentations on law and psychology, including the issue of eyewitness identification. I have recently been a member of the Technical Working Group on Eyewitness Evidence, appointed by Attorney General Janet Reno and working under the auspices of the United States Department of Justice and the National Institute of Justice. This group is preparing national guidelines for the conduct of lineups and photospreads, entitled National Guidelines for the Collection and Preservation of Eyewitness Evidence, which will be published by the National Institute of Justice and disseminated to law enforcement agencies around the United States.

6. I act as a peer reviewer for several scientific journals that publish articles about these topics, including *Law and Human Behavior*, *Behavioral Sciences and the Law*, and *Professional Psychology*. I also review grant proposals submitted to government agencies such as the National Science Foundation.

7. I have designed and conducted numerous experiments of my own on various aspects of memory and eyewitness identification, as well as other areas related to legal psychology. My research has resulted in some 40-50 publications in several major,

peer-reviewed journals in this field, including: *Journal of Experimental Social Psychology*, *Law and Human Behavior*, *Psychology, Public Policy and the Law*, *Behavioral Sciences and the Law*, and *Professional Psychology*.

8. I am on the editorial board of *Law and Human Behavior*, the leading peer-reviewed journal in my field.

9. I am the author of *Ohio Psychology and Law Handbook*, Ohio Psychology Publishing Company (1988).

10. I have testified before the Ohio Senate Judiciary Committee about various issues related to law and psychology. I was appointed by then-Lieutenant Governor Michael DeWine to a seven-member blue-ribbon panel on the issues of competency and sanity.

11. I have consulted with police and sheriff's departments in the State of Ohio about methods for improving their techniques for obtaining eyewitness identifications, including how to develop and conduct line-ups and photo arrays.

12. From February of 1992 through September of 1997, I served as the Clinical Director of the Center for Forensic Psychiatry in Hamilton Ohio, a non-profit agency responsible for conducting court-referred psychological or psychiatric evaluations in a four-county area in Southwest Ohio.

13. From 1989 through 1992, I was a consulting psychologist for the Dayton Forensic Health Center, Forensic Unit, which performs assessments related to competency of defendants in criminal cases to stand trial, sanity and the need for maximum security hospitalization.

14. I have been qualified as an expert on the psychology of eyewitness identification and have testified in over 60 criminal trials in other state courts, including those in Illinois, Virginia, West Virginia, Wisconsin, Indiana, New York, Virginia, Michigan and Texas. I have been qualified as an expert once in the State of Missouri, though the testimony was not admitted at trial (*State of Missouri v. Dailey*, St. Louis City Circuit Court, State of Missouri, Cause No. 971-0611A, Division No. 16 (Baker, J.). It is worth noting in this regard that the appellate record in such cases is deceiving, since if the trial judge allows the eyewitness expert to testify at trial, no record of this would exist. The only cases that rise to appeal are ones in which the trial judge disallows the testimony and the defendant is convicted. Thus, it is impossible for a court considering the issue to determine the precise prevalence and extent of eyewitness expert testimony actually admitted at trials in the State of Missouri.

15. I have been qualified as an expert on the psychology of eyewitness identification and have testified at criminal trials in numerous Federal District Courts, including the Southern District of Ohio, Western Division; the Southern District of Ohio, Eastern Division; the Northern District of Ohio; The Northern District of New York; the Eastern District of Kentucky; the Western District of Pennsylvania, the District of the Virgin Islands, Division of St. Thomas and St. John and the District of New Jersey.

AREAS OF PROPOSED TESTIMONY

17. There is a generally accepted theory in the field of psychology that explains how memory functions, including how memories are acquired, retained and retrieved.

18. It is well documented by a massive body of empirical research, which is over 100 years old and has been published in scientific journals following peer review and appropriate scientific methods and procedures, that certain factors can affect memory and thereby impact on the accuracy of eyewitness identification. *See, e.g.*, the studies listed in the attached 33-page bibliography.

19. Through my education, training and professional experience, by reviewing the relevant literature in the field and by conducting my own independent research, I have become familiar with the factors that influence the accuracy of eyewitness identification and how those factors operate.

20. Based on this specialized knowledge that I have acquired, I could testify to the following issues and findings (summarized here, and NOT discussed at length):

BRIEF OUTLINE OF TESTIMONY.

I. The generally accepted theory of memory in the field of psychology, and the division of the memory process into three stages: acquisition, retention, and retrieval. Factors present at each stage can affect the accuracy of eyewitnesses.

A. Acquisition stage

1. Exposure time (longer, more accurate; but also time overestimation)
2. Detail salience (unusual details grab attention but detract overall)
3. Stress (high stress conditions cause more mistakes (not fewer, as is commonly assumed) and time overestimation)
4. Weapons focus (attention time spent focused on weapons; less time to focus on other stimuli)
5. Cross-racial identification (worse than same-race)
6. Effects of set and expectancy
7. Obvious factors (lighting, eyesight, age, etc.)
8. Law enforcement personnel just as inaccurate as others

B. Retention stage

1. Length of interval (longer, less accurate)
2. Post-event information (photospreads; Identi-Kit; line-ups, descriptions, composites, hypnosis, mugshots, later views of defendant, etc., may get

incorporated into memory of original event; "unconscious transference," especially with multiple procedures)

3. Bias in post-event information (leading questions; one-on-one confrontations; multiple procedures)

4. Knowledge of the identity of the suspect by the person conducting identification procedure (can be communicated unintentionally; "double-blind" techniques less risky)

5. Conformity effects (multiple witnesses and/or communication)

6. Suggestivity/bias (one picture/person standing out or different on any basis - more likely to be picked regardless of accuracy)

7. Sequential vs. simultaneous presentation of pictures and effects on accuracy rates

C. Retrieval stage

1. Unconscious transference (is the in-court identification that of the perpetrator, or the person picked from the identification procedure or seen at some other time?)

2. Confidence of witness (virtually unrelated to accuracy, contrary to lay view)

THE PROPOSED TESTIMONY IS BASED ON SCIENTIFIC KNOWLEDGE

The Methodology Underlying The Proposed Testimony Is Scientifically Valid

21. These principles were derived from specific experimental research conducted by psychologists in social psychology, experimental psychology and cognitive psychology using the methods and procedures of science. Many of the studies relevant to the proposed testimony include the ones listed in the 31-page bibliography attached hereon.

22. The methodologies underlying these experiments are scientifically valid.

23. The methodologies used to conduct these types of experiments are those common to all sciences: the development of hypotheses that are tested using standard controls, including random assignment of subjects, statistical analysis to

determine the significance of results, repetition of studies to determine reliability and external validity.

Test Results Are Published After Rigorous Peer Review

24. Research in the area of memory as it relates to eyewitness identification dates back as far as 1895 and continues until today. This ongoing research generates between 300-400 articles a year. At least ten books have been published in the last fifteen years specifically on the topic of eyewitness identification.

25. Research is published after a rigorous peer-review system that includes a minimum of three anonymous readers. Eighty to ninety percent of the submissions to the top journals are rejected.

The Proposed Testimony Incorporates Theories That Are Generally Accepted In The Field Of The Psychology Of Eyewitness Identification

26. The proposed testimony incorporates theories that are generally accepted in the field of the psychology of eyewitness identification. Many studies, including a study conducted in 1983 by A. D. Yarmey and H. T. P. Jones, document this.¹ (Yarmey, A. D. & Jones, H. P. T. [1983]. Is the psychology of eyewitness identification a matter of common sense? In S. Lloyd-Bostock and B. R. Clifford [eds.], *Evaluating witness evidence: Recent psychological research and new perspectives*, Chichester, England: Wiley.

¹ Yarmey and Jones asked experts in the area of eyewitness identification to rate various theories for reliability. A high percent of the respondent experts agreed that research in certain areas was sufficiently reliable to be admissible in court. Those areas included the effect of suggestive line-up instructions, the lack of correlation between confidence and accuracy in identifications, the effect of exposure time on accuracy, the effect of delay between incident and identification, the effect of stress on eyewitness identification.

27. In 1989, Kassin, Ellsworth and Smith repeated this study with similar results.² (Kassin, S. M., Ellsworth, P. C., & Smith, V. L. (1989). The "general acceptance" of psychological research on eyewitness testimony: A survey of the experts. *American Psychologist*, 44, 1089-1098.

The Proposed Testimony Could Assist the Trier of Fact

28. The available evidence clearly shows that the kind of information that can be provided to jurors by expert psychological testimony on eyewitness reliability is not within the knowledge of the average juror.

29. Research, including research that I personally have conducted, has consistently demonstrated that jurors are not aware of the effect the factors about which I propose to testify to have on eyewitness accuracy. Jurors remain ignorant of the effects that stress, time interval between incident and identification and speed of the incident have on eyewitness identification. Nor do jurors understand that as a statistic matter, police officers or other "trained" witnesses do not make identifications superior to those made by "lay witnesses." Just as significantly, jurors tend to believe that confidence does indicate accuracy -- a misconception that the empirical research debunks. See Deffenbacher, K. A., & Loftus, E. F. (1982). Do jurors share a common understanding concerning eyewitness behavior. *Law and Human Behaviour*, 6, 15-30; Noon, E. &

²Of those experts in the field of eyewitness identification surveyed, 95% agreed that research demonstrating the effect that suggestive line-up instructions have on the accuracy of the subsequent identification was reliable enough to be presented in court. Eighty-seven percent agreed that research related to the weak relationship between confidence and accuracy was sufficiently reliable. Eight-five percent agreed that the effect of the exposure duration on identification had been adequately established. Eighty-three percent of the respondents felt confident as to the reliability of studies demonstrating the effect of the retention interval has on eyewitness accuracy. Seventy-one percent of the experts concluded that research relating to the effect of stress on identification accuracy was reliable.

Hollin, C. R. (1987). Lay knowledge of eyewitness behavior. A British Survey, *Applied Cognitive Psychology*, 1, 143-153.

30. There are a number of common misconceptions about my proposed testimony which have been raised in the past, and which I would like to address.

31. It has been suggested in the past that simply "comparing photographs to one another and to the defendant" is not a difficult task that requires expert testimony to perform. However, this argument does not capture and oversimplifies the task facing triers of fact, and therefore does not address the proposed expert testimony. This assertion is similar to suggesting that jurors presented with DNA evidence are capable of comparing the photographs of markers to one another and to the defendant's blood markers is not a difficult task and therefore does not require (or permit, which is a more appropriate standard) expert testimony. Instead, it is clear that the performance of an eyewitness on a photo-lineup task is subject to a number of well-established psychological influences both at the time of the event, after the event, and as part of the eyewitness evidence-gathering (i.e., the photospread task) itself. The proposed expert testimony does not in itself weigh witness credibility or render any opinion that any eyewitness is correct or incorrect, but instead provides jurors with scientific information that helps them to perform this task, consistent with Evidence Rule 702.

32. It is sometimes suggested that the mere fact that there is more than one eyewitness means that the proposed expert testimony would have "little probative value." According to the United States Department of Justice, many of the cases in which wrongful conviction has been conclusively demonstrated (see Connors, E., Lundregan, T., Miller, N., and McEwen, T. (1996), *Convicted by juries, exonerated by science: Case*

studies in the use of DNA evidence to establish innocence after trial. United States Department of Justice, National Institute of Justice, Washington, D.C.). In the cases in which this has issue has been discussed, so-called "corroborating evidence" that would make the use of expert testimony of the type proposed here consists of evidence *other than* eyewitness identification, such as fingerprints, etc.

33. The concern has sometimes been raised that I have not talked to any of the eyewitnesses in this or any other specific case. Clearly, this does not matter, since as can be seen above, the proposed expert testimony would not include any opinion about the given witness or witnesses in this case. That is, of course, the province of the jury. The expert testimony is designed to help the trier of fact, under Rule 702, to apply relevant scientific research to the case at hand.

Further affiant saith naught.

Dr. Solomon M. Fulero

Sworn to before me this ____ day of _____, 19 ____.

Notary Public

DEPARTMENT OF JUSTICE GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS

January 8, 2001

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I. GENERAL PROVISIONS

A. PURPOSE AND SCOPE

1. The purpose of these Guidelines is to set policy regarding the use of Confidential Informants, as defined below, in criminal investigations and prosecutions by all Department of Justice Law Enforcement Agencies and Federal Prosecuting Offices, as defined below.
2. These Guidelines do not apply to the use of Cooperating Defendants/Witnesses or Sources of Information, as defined below, unless a Department of Justice Law Enforcement Agency, in its discretion, chooses to apply these Guidelines to such persons.
3. These Guidelines are mandatory and supersede the Attorney General's Guidelines on the Use of Informants in Domestic Security, Organized Crime, and Other Criminal Investigations (December 15, 1976); the Attorney General's Guidelines on FBI Use of Informants and Confidential Sources (December 2, 1980); Resolution 18 of the Office of Investigative Agency Policies (August 15, 1996); and any other guidelines or policies that are inconsistent with these Guidelines. These Guidelines do not supersede otherwise applicable ethical obligations of Department of Justice attorneys, which can, in certain circumstances (for example, with respect to contacts with represented persons), have an impact on law enforcement agents' conduct.
4. These Guidelines do not limit the ability of a Department of Justice Law Enforcement Agency to impose additional restrictions on the use of Confidential Informants.
5. These Guidelines apply to the use of a Confidential Informant in a foreign country only to the extent that the Confidential Informant is reasonably likely to be called to testify in a domestic case.
6. These Guidelines do not apply to the use of Confidential Informants in foreign intelligence or foreign counterintelligence investigations.

B. DEFINITIONS

1. "Department of Justice Law Enforcement Agency" or "JLEA" --
 - a. The Drug Enforcement Administration;
 - b. The Federal Bureau of Investigation;
 - c. The Immigration and Naturalization Service;
 - d. The United States Marshals Service; and
 - e. The Department of Justice Office of the Inspector General.
2. "Field Manager" -- a JLEA's first-line supervisor, as defined by the JLEA (typically, GS-14 rank or higher).

3. “Senior Field Manager” -- a JLEA’s second-line supervisor, as defined by the JLEA (typically, GS-15 rank or higher).
4. “Federal Prosecuting Office” or “FPO” -
 - a. The United States Attorneys’ Offices;
 - b. The Criminal Division, Tax Division, Civil Rights Division, Antitrust Division, and Environmental and Natural Resources Division of the Department of Justice; and
 - c. Any other litigating component of the Department of Justice with authority to prosecute federal criminal offenses.
5. “Chief Federal Prosecutor” -- the head of a FPO.
6. “Confidential Informant” or “CI” -- any individual who provides useful and credible information to a JLEA regarding felonious criminal activities, and from whom the JLEA expects or intends to obtain additional useful and credible information regarding such activities in the future.
7. “Cooperating Defendant/Witness” -- any individual who:
 - a. meets the definition of a CI;
 - b. has agreed to testify in a proceeding as a result of having provided information to the JLEA; and
 - c. (i) is a defendant or potential witness who has a written agreement with a FPO, pursuant to which the individual has an expectation of future judicial or prosecutive consideration or assistance as a result of having provided information to the JLEA, or
(ii) is a potential witness who has had a FPO concur in all material aspects of his or her use by the JLEA.
8. Source of Information” -- any individual who:
 - a. meets the definition of a CI;
 - b. provides information to a JLEA solely as a result of legitimate routine access to information or records, such as an employee of the military, a law enforcement agency, or a legitimate business (e.g., phone company, banks, airlines), and not as a result of criminal association with persons of investigative interest to the JLEA; and
 - c. provides such information in a manner consistent with applicable law.
9. “High Level Confidential Informant” -- a CI who is part of the senior leadership of an enterprise that
 - a. has: (i) a national or international sphere of activities, or (ii) high significance to the JLEA’s national objectives, even if the enterprise’s sphere of activities is local or regional; and
 - b. engages in, or uses others to commit, any of the conduct described below in paragraph (I)(B)(10)(b)(i)-(iv).
10. “Tier 1 Otherwise Illegal Activity” -- any activity that:
 - a. would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization; and

b. that involves --

- (i) the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the Confidential Informant;⁽¹⁾
- (ii) corrupt conduct, or the significant risk of corrupt conduct, by senior federal, state, or local public officials;
- (iii) the manufacturing, importing, exporting, possession, or trafficking of controlled substances in a quantity equal to or exceeding those quantities specified in United States Sentencing Guidelines §§ 2D1.1(c)(1);
- (iv) financial loss, or the significant risk of financial loss, in an amount equal to or exceeding those amounts specified in United States Sentencing Guidelines §§ 2F1.1(b)(1)(M);⁽²⁾
- (v) a Confidential Informant providing to any person (other than a JLEA agent) any item, service, or expertise that is necessary for the commission of a federal, state, or local offense, which the person otherwise would have difficulty obtaining; or
- (vi) a Confidential Informant providing to any person (other than a JLEA agent) any quantity of a controlled substance, with little or no expectation of its recovery by the JLEA.

11. “Tier 2 Otherwise Illegal Activity” -- any other activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization.

12. “Fugitive” -- an individual:

- a. for whom a federal, state, or local law enforcement agency has placed a wanted record in the NCIC (other than for a traffic or petty offense);
- b. who is located either within the United States or in a country with which the United States has an extradition treaty; and
- c. whom the law enforcement agency that has placed the wanted record in the NCIC is willing to take into custody upon his or her arrest and, if necessary, seek his or her extradition to its jurisdiction.

13. “Confidential Informant Review Committee” or “CIRC” - a committee, created by a JLEA for purposes of reviewing certain decisions relating to the registration and utilization of CIs, the chair of which is a JLEA official at or above the level of Deputy Assistant Director (or its equivalent) and the membership of which includes the following two representatives designated by the Assistant Attorney General for the Criminal Division of the Department of Justice (each of whom shall be considered a “Criminal Division representative”): (i) a Deputy Assistant Attorney General for the Criminal Division; and (ii) an Assistant United States Attorney.

C. PROHIBITION ON COMMITMENTS OF IMMUNITY BY FEDERAL LAW ENFORCEMENT AGENCIES

A JLEA agent does not have any authority to make any promise or commitment that would prevent the government from prosecuting an individual for criminal activity that is not authorized pursuant to

paragraph (III)(C) below, or that would limit the use of any evidence by the government, without the prior written approval of the FPO that has primary jurisdiction to prosecute the CI for such criminal activity. A JLEA agent must take the utmost care to avoid giving any person the erroneous impression that he or she has any such authority.

D. REVEALING A CONFIDENTIAL INFORMANT'S TRUE IDENTITY

Except in the case of approvals and reviews described below in paragraphs (II)(A)(3) (review of long-term CIs), (III)(B)(8) (coordination concerning payments to CIs), (IV)(D)(1) (notification that CI has obtained privileged information), and (V)(D) (coordination concerning deactivation of CI, but only with respect to a CI whose identity was not previously disclosed), whenever a JLEA is required to make contact of any kind with a FPO pursuant to these Guidelines regarding a CI, the JLEA may not withhold the true identity of the CI from the FPO.

E. DUTY OF CANDOR

Employees of the entities to which these Guidelines apply have a duty of candor in the discharge of their responsibilities pursuant to these Guidelines.

F. MAINTAINING CONFIDENTIALITY

1. A JLEA agent must take the utmost care to avoid conveying any confidential investigative information to a CI (e.g., information relating to electronic surveillance, search warrants, or the identity of other actual or potential informants), other than what is necessary and appropriate for operational reasons.
2. The Chief Federal Prosecutor and his or her designee are required to maintain as confidential the identity of any CI and the information the CI has provided, unless obligated to disclose it by law or Court order. If a JLEA provides the Chief Federal Prosecutor or his or her designee with written material containing such information:
 - a. Such individual is obligated to keep it confidential by placing it into a locked file cabinet when not in his or her direct care and custody;
 - b. Access to the information shall be restricted to the Chief Federal Prosecutor or his or her designee and personnel deemed necessary to carry out the official duties related to the case;
 - c. The Chief Federal Prosecutor or his or her designee is responsible for assuring that each person permitted access to the information is made aware of the need to preserve the security and confidentiality of the information, as provided in this policy;
 - d. Prior to disclosure of the information to defense counsel or in open Court, the Chief Federal Prosecutor or his or her designee must give the JLEA an opportunity to discuss such disclosure and must comply with any other applicable provision of 28 C.F.R. §§§§ 16.21-16.29; and
 - e. At the conclusion of a case or investigation, all written materials containing the information that have not been disclosed shall be forwarded to the JLEA that provided them.⁽⁹⁾

3. Employees of a JLEA and employees of a FPO have a continuing obligation after leaving employment with the Department of Justice and its constituent components to maintain as confidential the identity of any CI and the information he or she provided, unless the employee is obligated to disclose it by law or Court order. See 28 C.F.R. §§§§ 16.21 - 16.29.

G. EXCEPTIONS AND DISPUTE RESOLUTION

1. Whenever any of the entities to which these Guidelines apply believes that an exception to any provision of these Guidelines is justified, or whenever there is a dispute between or among any such entities (other than a dispute with the Criminal Division of the Department of Justice) regarding these Guidelines, an exception must be sought from, or the dispute shall be resolved by, the Assistant Attorney General (AAG) for the Criminal Division or his or her designee. The Deputy Attorney General or his or her designee shall hear appeals, if any, from decisions of the AAG.

2. Whenever there is a dispute between the Criminal Division and any of the other entities to which these Guidelines apply, such dispute shall be resolved by the Deputy Attorney General or his or her designee.

3. Any exception granted or dispute resolved pursuant to this paragraph shall be documented in the JLEA's files.

H. RIGHTS OF THIRD PARTIES

Nothing in these Guidelines is intended to create or does create an enforceable legal right or private right of action by a CI or any other person.

I. COMPLIANCE

1. Within 120 days of the approval of these Guidelines by the Attorney General, each JLEA shall develop agency-specific guidelines that comply with these Guidelines, and submit such agency-specific guidelines to the AAG for the Criminal Division for review. The agency-specific guidelines must ensure, at a minimum, that the JLEA's agents receive sufficient initial and in-service training in the use of CIs consistent with these Guidelines, and that compliance with these Guidelines is considered in the annual performance appraisal of its agents. As part of such compliance the JLEA shall designate a senior official to oversee all aspects of its CI program, including the training of agents; registration, review and termination of CIs; and notifications to outside entities.

2. Within 30 days of the approval of these Guidelines, each JLEA shall establish a Confidential Informant Review Committee (CIRC) for the purpose of conducting the review procedures specified in paragraphs (II)(A)(3), (II)(D)(1), and (II)(D)(2).

II. REGISTERING A CONFIDENTIAL INFORMANT

A. SUITABILITY DETERMINATION

1. Initial Suitability Determination

Prior to utilizing a person as a CI, a case agent of a JLEA shall complete and sign a written Initial Suitability Report and Recommendation, which shall be forwarded to a Field Manager for his or her written approval. In completing the Initial Suitability Report and Recommendation, the case agent must address the following factors (or indicate that a particular factor is not applicable):

- a. the person's age;
- b. the person's alien status;
- c. whether the person is a public official, law enforcement officer, union official, employee of a financial institution or school, member of the military services, a representative or affiliate of the media, or a party to, or in a position to be a party to, privileged communications (e.g., a member of the clergy, a physician, or a lawyer);
- d. the extent to which the person would make use of his or her affiliations with legitimate organizations in order to provide information or assistance to the JLEA, and the ability of the JLEA to ensure that the person's information or assistance is limited to criminal matters;
- e. the extent to which the person's information or assistance would be relevant to a present or potential investigation or prosecution and the importance of such investigation or prosecution;
- f. the nature of any relationship between the CI and the subject or target of an existing or potential investigation or prosecution, including but not limited to a current or former spousal relationship or other family tie, and any current or former employment or financial relationship;
- g. the person's motivation in providing information or assistance, including any consideration sought from the government for this assistance;
- h. the risk that the person might adversely affect a present or potential investigation or prosecution;
- i. the extent to which the person's information or assistance can be corroborated;
- j. the person's reliability and truthfulness;
- k. the person's prior record as a witness in any proceeding;
- l. whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution;
- m. whether the person is reasonably believed to pose a danger to the public or other criminal threat, or is reasonably believed to pose a risk of flight;
- n. whether the person is a substance abuser or has a history of substance abuse;
- o. whether the person is a relative of an employee of any law enforcement agency;
- p. the risk of physical harm that may occur to the person or his or her immediate family or close associates as a result of providing information or assistance to the JLEA; and
- q. the record of the JLEA and the record of any other law enforcement agency (if available to the JLEA) regarding the person's prior or current service as a CI, Cooperating Defendant/Witness, or Source of Information, including, but not limited to, any information regarding whether the person was at any time terminated for cause.

2. Continuing Suitability Review

- a. Each CI's file shall be reviewed by the case agent at least annually. The case agent shall complete and sign a written Continuing Suitability Report and Recommendation, which shall be forwarded to a Field Manager for his or her written approval. In completing the Continuing Suitability Report and Recommendation, the case agent must address the factors set forth above in paragraph (II)(A)(1) (or indicate that a particular factor is not applicable) and, in addition, the length of time that the individual has been registered as a CI and the length of time that the individual has been handled by the same agent or agents.
- b. Each JLEA shall establish systems to ensure that all available information that might materially alter a prior suitability determination, including, but not limited to, information pertaining to unauthorized illegal activity by the CI, is promptly reported to a Field Manager and then recorded and maintained in the CI's file. See (IV)(B)(2) below. Upon receipt of any such information, the Field Manager shall ensure that a new Continuing Suitability Report and Recommendation is promptly prepared in light of such new information.

3. Review of Long-Term Confidential Informants⁽⁴⁾

- a. When a CI has been registered for more than six consecutive years, and, to the extent such a CI remains open, every six years thereafter, the CIRC shall review the CI's completed Initial and Continuing Suitability Reports and Recommendations and decide whether, and under what conditions, the individual should continue to be utilized as a CI. A Criminal Division representative on the CIRC who disagrees with the decision to approve the continued use of such an individual as a Confidential Informant may seek review of that decision pursuant to paragraph (I)(G).
- b. Every three years after a CI's file is reviewed pursuant to the provisions of paragraph (II)(A)(3)(a), if the CI remains registered, the Agency shall conduct an internal review, including review by a designated senior headquarters official, of the CI's completed Initial and Continuing Suitability Reports and Recommendations. If the designated senior headquarters official decides that there are any apparent or potential problems that may warrant any change in the use of the CI, the official shall (i) consult the appropriate Senior Field Manager and (ii) provide the Initial and Continuing Suitability Reports and Recommendations to the CIRC for review in accord with paragraph (II)(A)(3)(a).

B. REGISTRATION

After a Field Manager has approved an individual as suitable to be a CI, the individual shall be registered with that JLEA as a CI. In registering a CI, the JLEA shall, at a minimum, document or include the following in the CI's files:

1. a photograph of the CI;
2. the JLEA's efforts to establish the CI's true identity;
3. the results of a criminal history check for the CI;
4. the Initial Suitability Report and Recommendation;
5. any promises or benefits, and the terms of such promises or benefits, that are given a CI by a JLEA or any other law enforcement agency (if available to the JLEA);

6. any promises or benefits, and the terms of such promises or benefits, that are given a CI by any FPO or any state or local prosecuting office (if available to the JLEA); and
7. all information that is required to be documented in the CI's files pursuant to these Guidelines (e.g., the provision of the instructions set forth in the next paragraph).

C. INSTRUCTIONS

1. In registering a CI, at least one agent of the JLEA, along with one additional agent or other law enforcement official present as a witness, shall read verbatim the following instructions:
 - a. you must provide truthful information to the [JLEA] at all times;
 - b. your assistance and the statements you make to the [JLEA] are entirely voluntary;
 - c. the United States Government will strive to protect your identity, but cannot promise or guarantee either that your identity will not be divulged as a result of legal or other compelling considerations, or that you will not be called to testify in a proceeding as a witness;
 - d. the [JLEA] on its own cannot promise or agree to any consideration by a Federal Prosecutor's Office or a Court in exchange for your cooperation, since the decision to confer any such benefit lies within the exclusive discretion of the Federal Prosecutor's Office and the Court. However, the [JLEA] will consider (but not necessarily act upon) a request by you to advise the appropriate Federal Prosecutor's Office or Court of the nature and extent of your assistance to the [JLEA];
 - e. you have no immunity or protection from investigation, arrest or prosecution for anything you say or do, and the [JLEA] cannot promise or agree to such immunity or protection, unless and until you have been granted such immunity or protection in writing by a United States Attorney or his or her designee; and
 - f. you have not been authorized to engage in any criminal activity and could be prosecuted for any unauthorized criminal activity in which you have engaged or engage in the future.⁽⁵⁾
2. The agent shall also contemporaneously review with the CI written instructions that state, at a minimum, that:
 - a. the CI must abide by the instructions of the JLEA and must not take or seek to take any independent action on behalf of the United States Government;
 - b. the CI is not an employee of the United States Government and may not represent himself or herself as such;
 - c. the CI may not enter into any contract or incur any obligation on behalf of the United States Government, except as specifically instructed and approved by the JLEA;
 - d. the JLEA cannot guarantee any rewards, payments, or other compensation to the CI;
 - e. in the event that the CI receives any rewards, payments, or other compensation from the JLEA, the CI is liable for any taxes that may be owed; and
 - f. no promises or commitments can be made, except by the Immigration and Naturalization Service, regarding the alien status of any person or the right of any person to enter or remain in the United States.

3. Immediately after these instructions have been given, the agent shall ensure that the CI acknowledges and understands them. The agent shall decide whether to require the CI to sign or initial, and date, a written acknowledgment of the instructions.⁽⁶⁾ If, for operational reasons, the agent decides against requiring the CI to sign or initial a written acknowledgment, the agent and the other law enforcement official shall document that the instructions in paragraph 1(a) - (f) above were read verbatim to the CI, and that the remaining instructions were also communicated to the CI, and that the CI orally acknowledged the instructions. In either case, as soon as practicable thereafter, a Field Manager shall review and, if warranted, approve the documentation.
4. These instruction and documentation procedures shall be repeated whenever it appears necessary or prudent to do so, and in any event at least every twelve months.

D. SPECIAL APPROVAL REQUIREMENTS

1. High Level Confidential Informants

- a. Prior to utilizing an individual as a High Level Confidential Informant, a case agent of a JLEA shall first obtain written approval of the CIRC. A Criminal Division representative on the CIRC who disagrees with a decision to approve the use of an individual as a High Level Confidential Informant may seek review of that decision pursuant to paragraph (I)(G).
- b. In deciding whether to approve the use of a High Level Confidential Informant, the CIRC shall have access to any Initial or Completed Suitability Reports and Recommendations for the individual in question.
- c. After a final decision has been made to approve the use of a High Level Confidential Informant, the CIRC shall consider whether to notify the Chief Federal Prosecutor of any FPO that is participating in the conduct of an investigation that is, or would be, utilizing the High Level Confidential Informant, or any FPO that has been, or would be, working with that individual in connection with a prosecution, of the decision to approve that individual as a High Level Confidential Informant. If the CIRC determines that no such notification shall be made, the reason or reasons for the determination shall be provided to the Criminal Division representatives on the CIRC. A Criminal Division representative on the CIRC who disagrees with a decision not to provide such notification may seek review of that decision pursuant to paragraph (I)(G).

2. Individuals Under the Obligation of a Legal Privilege of Confidentiality or Affiliated with the Media

- a. Prior to utilizing as a Confidential Informant an individual who is under the obligation of a legal privilege of confidentiality or affiliated with the media, a case agent of a JLEA shall first obtain the written approval of the CIRC. A Criminal Division representative on the CIRC who disagrees with a decision to approve the use of such an individual as a Confidential Informant may seek review of that decision pursuant to paragraph (I)(G).
- b. In deciding whether to approve the use as a Confidential Informant of an individual who is under the obligation of a legal privilege of confidentiality or affiliated with the media, the CIRC

shall have access to any Initial or Completed Suitability Reports and Recommendations for the individual in question.

c. After a final decision has been made to approve the use of an individual who is under the obligation of a legal privilege of confidentiality or affiliated with the media as a Confidential Informant, the CIRC shall consider whether to notify the Chief Federal Prosecutor of any FPO that is participating in the conduct of an investigation that is, or would be, utilizing the individual, or any FPO that has been, or would be, working with that individual in connection with a prosecution, of the decision to approve that individual as a Confidential Informant. If the CIRC determines that no such notification shall be made, the reason or reasons for the determination shall be provided to the Criminal Division representatives on the CIRC. A Criminal Division representative on the CIRC who disagrees with a decision not to provide such notification may seek review of that decision pursuant to paragraph (I)(G).

3. Federal Prisoners, Probationers, Parolees, Detainees, and Supervised Releasees

a. Consistent with extant Department of Justice requirements, a JLEA must receive the approval of the Criminal Division's Office of Enforcement Operations ("OEO") prior to utilizing as a CI an individual who is in the custody of the United States Marshals Service or the Bureau of Prisons, or who is under Bureau of Prisons supervision. See U.S.A.M. §§ 9-21.050.

b. Prior to utilizing a federal probationer, parolee, or supervised releasee as a CI, a Field Manager of a JLEA shall determine if the use of that person in such a capacity would violate the terms and conditions of the person's probation, parole, or supervised release. If the Field Manager has reason to believe that it would violate such terms and conditions, prior to using the person as a CI, the Field Manager or his or her designee must obtain the permission of a federal probation, parole, or supervised release official with authority to grant such permission, which permission shall be documented in the CI's files. If such permission is denied or it is inappropriate for operational reasons to contact the appropriate federal official, the JLEA may seek to obtain authorization for the use of such individual as a CI from the Court then responsible for the individual's probation, parole, or supervised release, provided that the JLEA first consults with the FPO for that District.

c. In situations where a FPO is either participating in the conduct of an investigation by a JLEA in which a federal probationer, parolee, or supervised releasee would be utilized as a CI, or where a FPO would be working with a federal probationer, parolee, or supervised releasee in connection with a prosecution, the JLEA shall notify the attorney assigned to the matter prior to using the person as a CI.

4. Current or Former Participants in the Witness Security Program

a. Consistent with extant Department of Justice requirements, a JLEA must receive the approval of OEO and the sponsoring prosecutor (or his or her successor) prior to utilizing as a CI a current or former participant in the Federal Witness Security Program, provided further that the OEO will coordinate such matters with the United States Marshals Service. See U.S.A.M. §§ 9-21.800.

b. In situations where a FPO is either participating in the conduct of an investigation by a JLEA in which a current or former participant in the Witness Security Program would be utilized as a

CI, or where a FPO would be working with a current or former participant in the Witness Security Program in connection with a prosecution, the JLEA shall notify the attorney assigned to the matter prior to using the person as a CI.

5. State or Local Prisoners, Probationers, Parolees, or Supervised Releasees

- a. Prior to utilizing a state or local prisoner, probationer, parolee, or supervised releasee as a CI, a Field Manager of a JLEA shall determine if the use of that person in such a capacity would violate the terms and conditions of the person's incarceration, probation, parole, or supervised release. If the Field Manager has reason to believe that it would violate such terms and conditions, prior to using the person as a CI, the Field Manager or his or her designee must obtain the permission of a state or local prison, probation, parole, or supervised release official with authority to grant such permission, which permission shall be documented in the CI's files. If such permission is denied or it is inappropriate for operational reasons to contact the appropriate state or local official, the JLEA may seek to obtain authorization for the use of such individual as a CI from the state or local Court then responsible for the individual's incarceration, probation, parole, or supervised release.
- b. In situations where a FPO is either participating in the conduct of an investigation by a JLEA in which a state or local prisoner, probationer, parolee, or supervised releasee would be utilized as a CI, or where a FPO would be working with a state or local prisoner, probationer, parolee, or supervised releasee in connection with a prosecution, the JLEA shall notify the attorney assigned to the matter prior to using the person as a CI.

6. Fugitives

- a. Except as provided below, a JLEA shall have no communication with a current or former CI who is a fugitive.
- b. A JLEA is permitted to have communication with a current or former CI who is a fugitive:
 - (i) if the communication is part of a legitimate effort by that JLEA to arrest the fugitive; or
 - (ii) if approved, in advance whenever possible, by a Senior Field Manager of any federal, state, or local law enforcement agency that has a wanted record for the individual in the NCIC and, in the case of a federal warrant, by the FPO for the issuing District.
- c. A JLEA that has communication with a fugitive must promptly report such communication to all federal, state, and local law enforcement agencies and other law enforcement agencies having a wanted record for the individual in the NCIC, and document those communications in the CI's files.

III. RESPONSIBILITIES REGARDING REGISTERED CONFIDENTIAL INFORMANTS

A. GENERAL PROVISIONS

1. No Interference With an Investigation of a Confidential Informant

A JLEA agent must take the utmost care to avoid interfering with or impeding any criminal investigation or arrest of a CI. No agent shall reveal to a CI any information relating to an investigation of the CI. An agent shall not confirm or deny the existence of any investigation of the CI, unless authorized to do so by the Chief Federal Prosecutor; nor shall an agent agree to a request from a CI to determine whether the CI is the subject of any investigation.

2. Prohibited Transactions and Relationships

- a. A JLEA agent shall not: (i) exchange gifts with a CI; (ii) provide the CI with any thing of more than nominal value; (iii) receive any thing of more than nominal value from a CI; or (iv) engage in any business or financial transactions with a CI. Except as authorized pursuant to paragraph (III)(B) below, any exception to this provision requires the written approval of a Field Manager, in advance whenever possible, based on a written finding by the Field Manager that the event or transaction in question is necessary and appropriate for operational reasons. This written finding shall be maintained in the CI's files.
- b. A Federal Law Enforcement agent shall not socialize with a CI except to the extent necessary and appropriate for operational reasons.
- c. In situations where a FPO is either participating in the conduct of an investigation by a JLEA that is utilizing a CI, or working with a CI in connection with a prosecution, the JLEA shall notify the attorney assigned to the matter, in advance whenever possible, if the JLEA approves an exception under paragraph (III)(A)(2)(a) or if a Federal Law Enforcement agent socializes with a CI in a manner not permitted under paragraph (III)(A)(2)(b).

B. MONETARY PAYMENTS

1. General

Monies that a JLEA pays to a CI in the form of fees and rewards shall be commensurate with the value, as determined by the JLEA, of the information he or she provided or the assistance he or she rendered to that JLEA. A JLEA's reimbursement of expenses incurred by a CI shall be based upon actual expenses incurred.

2. Prohibition Against Contingent Payments

Under no circumstances shall any payments to a CI be contingent upon the conviction or punishment of any individual.

3. Approval for a Single Payment

A single payment of between \$2,500 and \$25,000 per case to a CI must be authorized, at a minimum, by a JLEA's Senior Field Manager. A single payment in excess of \$25,000 per case shall be made only with the authorization of the Senior Field Manager and the express approval of a designated senior headquarters official.

4. Approval for Annual Payments

Consistent with paragraph (III)(B)(3) above, payments by a JLEA to a CI that exceed an aggregate of \$100,000 within a one-year period, as that period is defined by the JLEA, shall be made only with the

authorization of the Senior Field Manager and the express approval of a designated senior headquarters official. The headquarters official may authorize additional aggregate annual payments in increments of \$50,000 or less.

5. Approval for Aggregate Payments

Consistent with paragraphs (III)(B)(3)-(4), and regardless of the time frame, any payments by a JLEA to a CI that exceed an aggregate of \$200,000 shall be made only with the authorization of the Senior Field Manager and the express approval of a designated senior headquarters official. After the headquarters official has approved payments to a CI that exceed an aggregate of \$200,000, the headquarters official may authorize, subject to paragraph (III)(B)(4) above, additional aggregate payments in increments of \$100,000 or less.

6. Documentation of Payment

The payment of any monies to a CI shall be witnessed by at least two law enforcement representatives. Immediately after receiving a payment, the CI shall be required to sign or initial, and date, a written receipt.⁷ At the time of the payment, the representatives shall advise the CI that the monies may be taxable income that must be reported to appropriate tax authorities. Thereafter, those representatives shall document the payment and the advice of taxability in the JLEA's files. The documentation of payment shall specify whether the payment is for information, services, or expenses.

7. Accounting and Reconciliation Procedures

Each JLEA shall establish accounting and reconciliation procedures to comply with these Guidelines. Among other things, these procedures shall reflect all monies paid to a CI subsequent to the issuance of these Guidelines.

8. Coordination with Prosecution

In situations where a FPO is either participating in the conduct of an investigation by a JLEA that is utilizing a CI, or working with a CI in connection with a prosecution, the JLEA shall coordinate with the attorney assigned to the matter, in advance whenever possible, the payment of monies to the CI pursuant to paragraphs (III)(B)(3)-(5) above.

C. AUTHORIZATION OF OTHERWISE ILLEGAL ACTIVITY

1. General Provisions

- a. A JLEA shall not authorize a CI to engage in any activity that otherwise would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization, except as provided in the authorization provisions in paragraph (III)(C)(2) below.
- b. A JLEA is never permitted to authorize a CI to:
 - (i) participate in an act of violence;
 - (ii) participate in an act that constitutes obstruction of justice (e.g., perjury, witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence);

- (iii) participate in an act designed to obtain information for the JLEA that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search); or
- (iv) initiate or instigate a plan or strategy to commit a federal, state, or local offense.

2. Authorization

- a. Tier 1 Otherwise Illegal Activity must be authorized in advance and in writing for a specified period, not to exceed 90 days, by:
 - (i) a JLEA's Special Agent in Charge (or the equivalent); and
 - (ii) the appropriate Chief Federal Prosecutor.⁽⁸⁾
- b. Tier 2 Otherwise Illegal Activity must be authorized in advance and in writing for a specified period, not to exceed 90 days, by a JLEA's Senior Field Manager.
- c. For purposes of this paragraph, the "appropriate Chief Federal Prosecutor" is the Chief Federal Prosecutor that: (i) is participating in the conduct of an investigation by a JLEA that is utilizing that active CI, or is working with that active CI in connection with a prosecution; (ii) with respect to Otherwise Illegal Activity that would constitute a violation of federal law, would have primary jurisdiction to prosecute the Otherwise Illegal Activity; or (iii) with respect to Otherwise Illegal Activity that would constitute a violation only of state or local law, is located where the otherwise criminal activity is to occur.

3. Findings

- a. The JLEA official who authorizes Tier 1 or 2 Otherwise Illegal Activity must make a finding, which shall be documented in the CI's files, that authorization for the CI to engage in the Tier 1 or 2 Otherwise Illegal Activity is --
 - (i) necessary either to --
 - (A) obtain information or evidence essential for the success of an investigation that is not reasonably available without such authorization, or
 - (B) prevent death, serious bodily injury, or significant damage to property;
 - and
 - (ii) that in either case the benefits to be obtained from the CI's participation in the Tier 1 or 2 Otherwise Illegal Activity outweigh the risks.
- b. In making these findings, the JLEA shall consider, among other things:
 - (i) the importance of the investigation;
 - (ii) the likelihood that the information or evidence sought will be obtained;
 - (iii) the risk that the CI might misunderstand or exceed the scope of his authorization;
 - (iv) the extent of the CI's participation in the Otherwise Illegal Activity;
 - (v) the risk that the JLEA will not be able to supervise closely the CI's participation in the Otherwise Illegal Activity;
 - (vi) the risk of violence, physical injury, property damage, and financial loss to the CI or others; and
 - (vii) the risk that the JLEA will not be able to ensure that the CI does not profit from his or her participation in the authorized Otherwise Illegal Activity.

4. Instructions

a. After a CI is authorized to engage in Tier 1 or 2 Otherwise Illegal Activity, at least one agent of the JLEA, along with one additional agent or other law enforcement official present as a witness, shall review with the CI written instructions that state, at a minimum, that:

- (i) the CI is authorized only to engage in the specific conduct set forth in the written authorization described above and not in any other illegal activity;
- (ii) the CI's authorization is limited to the time period specified in the written authorization;

(iii) under no circumstance may the CI:

- (A) participate in an act of violence;
- (B) participate in an act that constitutes obstruction of justice (e.g., perjury, witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence);
- (C) participate in an act designed to obtain information for the JLEA that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search); or
- (D) initiate or instigate a plan or strategy to commit a federal, state, or local offense;

(iv) if the CI is asked by any person to participate in any such prohibited conduct, or if he or she learns of plans to engage in such conduct, he or she must immediately report the matter to his or her contact agent; and

(v) participation in any prohibited conduct could subject the CI to full criminal prosecution.

b. Immediately after these instructions have been given, the CI shall be required to sign or initial, and date, a written acknowledgment of the instructions.⁽⁹⁾ As soon as practicable thereafter, a Field Manager shall review and, if warranted, approve the written acknowledgment.

5. Precautionary Measures

Whenever a JLEA has authorized a CI to engage in Tier 1 or 2 Otherwise Illegal Activity, it must take all reasonable steps to: (a) supervise closely the illegal activities of the CI; (b) minimize the adverse effect of the authorized Otherwise Illegal Activity on innocent individuals; and (c) ensure that the CI does not profit from his or her participation in the authorized Otherwise Illegal Activity.

6. Suspension of Authorization

Whenever a JLEA cannot, for legitimate reasons unrelated to the CI's conduct (e.g., unavailability of the case agent), comply with the precautionary measures described above, it shall immediately: (a) suspend the CI's authorization to engage in Otherwise Illegal Activity until such time as the precautionary measures can be complied with; (b) inform the CI that his or her authorization to engage in any Otherwise Illegal Activity has been suspended until that time; and (c) document these actions in the CI's files.

7. Revocation of Authorization

- a. If a JLEA has reason to believe that a CI has failed to comply with the specific terms of the authorization of Tier 1 or 2 Otherwise Illegal Activity, it shall immediately: (i) revoke the CI's authorization to engage in Otherwise Illegal Activity; (ii) inform the CI that he or she is no longer authorized to engage in any Otherwise Illegal Activity; (iii) comply with the notification requirement of paragraph (IV)(B) below; (iv) make a determination whether the CI should be deactivated pursuant to paragraph (V); and (v) document these actions in the CI's files.
- b. Immediately after the CI has been informed that he or she is no longer authorized to engage in any Otherwise Illegal Activity, the CI shall be required to sign or initial, and date, a written acknowledgment that he or she has been informed of this fact.⁽¹⁰⁾ As soon as practicable thereafter, a Field Manager shall review and, if warranted, approve the written acknowledgment.

8. Renewal and Expansion of Authorization

- a. A JLEA that seeks to re-authorize any CI to engage in Tier 1 or 2 Otherwise Illegal Activity after the expiration of the authorized time period, or after revocation of authorization, must first comply with the procedures set forth above in paragraphs (III)(C)(2)-(5).
- b. A JLEA that seeks to expand in any material way a CI's authorization to engage in Tier 1 or 2 Otherwise Illegal Activity by the JLEA must first comply with the procedures set forth above in paragraphs (III)(C)(2)-(5).

9. Emergency Authorization

- a. In exceptional circumstances, a JLEA's Special Agent in Charge (or the equivalent) and the appropriate Chief Federal Prosecutor may orally authorize a CI to engage in Tier 1 Otherwise Illegal Activity without complying with the documentation requirements of paragraphs (III)(C)(2)-(4) above when they each determine that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these requirements. In such an event, the documentation requirements, as well as a written justification for the oral authorization, shall be completed within 48 hours of the oral approval and maintained in the CI's files.
- b. In exceptional circumstances, a JLEA's Senior Field Manager may orally authorize a CI to engage in Tier 2 Otherwise Illegal Activity without complying with the documentation requirements of paragraphs (III)(C)(2)-(4) above when he or she determines that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these requirements. In such an event, the documentation requirements, as well as a written justification for the oral authorization, shall be completed within 48 hours of the oral approval and maintained in the CI's files.

10. Designees

A JLEA's Special Agent in Charge (or the equivalent) and the appropriate Chief Federal Prosecutor may, with the concurrence of each other, agree to designate particular individuals in their respective offices to carry out the approval functions assigned to them above in paragraphs (III)(C)(2)-(9).

D. LISTING A CONFIDENTIAL INFORMANT IN AN ELECTRONIC SURVEILLANCE APPLICATION

1. A JLEA shall not name a CI as a named interceptee or a violator in an affidavit in support of an application made pursuant to 18 U.S.C. §§ 2516 for an electronic surveillance order unless the JLEA believes that: (a) omitting the name of the CI from the affidavit would endanger that person's life or otherwise jeopardize an ongoing investigation; or (b) the CI is a bona fide subject of the investigation based on his or her suspected involvement in unauthorized criminal activity.
2. In the event that a CI is named in an electronic surveillance affidavit under paragraph (III)(D)(1) above, the JLEA must inform the Federal prosecutor making the application and the Court to which the application is made of the actual status of the CI.

IV. SPECIAL NOTIFICATION REQUIREMENTS

A. NOTIFICATION OF INVESTIGATION OR PROSECUTION

1. When a JLEA has reasonable grounds to believe that a current or former CI is being prosecuted by, is the target of an investigation by, or is expected to become a target of an investigation by a FPO for engaging in alleged felonious criminal activity, a Special Agent in Charge (or the equivalent) of the JLEA must immediately notify the Chief Federal Prosecutor of that individual's status as a current or former CI.⁽¹¹⁾
2. Whenever such a notification is provided, the Chief Federal Prosecutor and Special Agent in Charge (or the equivalent), with the concurrence of each other, shall notify any other federal, state or local prosecutor's offices or law enforcement agencies that are participating in the investigation or prosecution of the CI.

B. NOTIFICATION OF UNAUTHORIZED ILLEGAL ACTIVITY

1. Whenever a JLEA has reasonable grounds to believe that a CI who is currently authorized to engage in specific Tier 1 or 2 Otherwise Illegal Activity has engaged in unauthorized criminal activity, or whenever a JLEA knows that a CI who has no current authorization to engage in any Tier 1 or 2 Otherwise Illegal Activity has engaged in any criminal activity, a Special Agent in Charge of the JLEA (or the equivalent) shall immediately notify the following Chief Federal Prosecutors of the CI's criminal activity and his or her status as a CI:
 - a. the Chief Federal Prosecutor whose District is located where the criminal activity primarily occurred, unless a state or local prosecuting office in that District has filed charges against the CI for the criminal activity and there clearly is no basis for federal prosecution in that District by the Chief Federal Prosecutor;

- b. the Chief Federal Prosecutor, if any, whose District is participating in the conduct of an investigation that is utilizing that active CI, or is working with that active CI in connection with a prosecution; and
- c. the Chief Federal Prosecutor, if any, who authorized the CI to engage in Tier 1 Otherwise Illegal Activity pursuant to paragraph (III)(C)(2)(a) above.⁽¹²⁾

2. Whenever such notifications are provided, the Chief Federal Prosecutor(s) of the FPOs and the Special Agent in Charge (or the equivalent), with the concurrence of each other, shall notify any state or local prosecutor's office that has jurisdiction over the CI's criminal activity, and that has not already filed charges against the CI for the criminal activity, of the fact that the CI has engaged in such criminal activity. The Chief Federal Prosecutor(s) and the Special Agent in Charge (or the equivalent) are not required, but may with the concurrence of each other, also notify the state and local prosecutor's office of the person's status as a CI.

C. NOTIFICATION REGARDING CERTAIN FEDERAL JUDICIAL PROCEEDINGS

Whenever a JLEA has reasonable grounds to believe that: (1) a current or former CI has been called to testify by the prosecution in any federal grand jury or judicial proceeding; (2) the statements of a current or former CI have been, or will be, utilized by the prosecution in any federal judicial proceeding; or (3) a federal prosecutor intends to represent to a Court or jury that a current or former CI is or was a co-conspirator or other criminally culpable participant in any criminal activity, a Special Agent in Charge (or the equivalent) of the JLEA shall immediately notify the Chief Federal Prosecutor for that proceeding of the individual's status as a current or former CI.

D. PRIVILEGED OR EXCULPATORY INFORMATION

1. In situations where a FPO is either participating in the conduct of an investigation by a JLEA that is utilizing a CI, or working with a CI in connection with a prosecution, the JLEA shall notify the attorney assigned to the matter, in advance whenever possible, if the JLEA has reasonable grounds to believe that a CI will obtain or provide information that is subject to, or arguably subject to, a legal privilege of confidentiality belonging to someone other than the CI.

2. If the JLEA has reasonable grounds to believe that a current or former CI has information that is exculpatory as to a person who is expected to become a target of an investigation, or as to a target of an investigation, or as to a defendant (including a convicted defendant), the JLEA shall notify the Chief Federal Prosecutor responsible for the investigation or prosecution of such exculpatory information.

E. RESPONDING TO REQUESTS FROM CHIEF FEDERAL PROSECUTORS REGARDING A CONFIDENTIAL INFORMANT

If a Chief Federal Prosecutor seeks information from a Special Agent in Charge (or the equivalent) as to whether a particular individual is a current or former CI, and states the specific basis for his or her request, the Special Agent in Charge (or the equivalent) shall provide such information promptly. If the

Special Agent in Charge (or the equivalent) has an objection to providing such information based on specific circumstances of the case, he or she shall explain the objection to the Chief Federal Prosecutor making the request and any remaining disagreement as to whether the information should be provided shall be resolved pursuant to paragraph (I)(G).

F. FILE REVIEWS

Whenever a JLEA discloses any information about a CI to a FPO pursuant to paragraphs (IV)(A)-(E), the Special Agent in Charge (or the equivalent) and the Chief Federal Prosecutor shall consult to facilitate any review and copying of the CI's files by the Chief Federal Prosecutor that might be necessary for the Chief Federal Prosecutor to fulfill his or her office's disclosure obligations.

G. DESIGNEES

A Special Agent in Charge (or the equivalent) and a Chief Federal Prosecutor may, with the concurrence of each other, agree to designate particular individuals in their respective offices to carry out the functions assigned to them in paragraphs (IV)(A)-(F).

V. DEACTIVATION OF CONFIDENTIAL INFORMANTS

A. GENERAL PROVISIONS

A JLEA that determines that a CI should be deactivated for cause or for any other reason shall immediately:

1. deactivate the individual;
2. document the reasons for the decision to deactivate the individual as a CI in the CI's files;
3. if the CI can be located, notify the CI that he or she has been deactivated as a CI and obtain documentation that such notification was provided in the same manner as set forth in paragraph (II)(C)(2); and
4. if the CI was authorized to engage in Tier 1 or Tier 2 Otherwise Illegal Activity pursuant to paragraph (III)(C)(2)(a)-(b), revoke that authorization under the provisions of paragraph (III)(C)(7).

B. DELAYED NOTIFICATION TO A CONFIDENTIAL INFORMANT

A JLEA may delay providing the notification to the CI described above in Paragraph (V)(A)(3) during the time such notification might jeopardize an ongoing investigation or prosecution or might cause the flight from prosecution of any person. Whenever a decision is made to delay providing a notification, that decision, and the reasons supporting it, must be documented in the CI's files.

C. CONTACTS WITH FORMER CONFIDENTIAL INFORMANTS DEACTIVATED FOR CAUSE

Absent exceptional circumstances that are approved by a Senior Field Manager, in advance whenever possible, an agent of a JLEA shall not initiate contacts with, or respond to contacts from, a former CI who has been deactivated for cause. When granted, such approval shall be documented in the CI's files.

D. COORDINATION WITH PROSECUTORS

In situations where a FPO is either participating in the conduct of an investigation by a JLEA that is utilizing a CI, or working with a CI in connection with a prosecution, the JLEA shall coordinate with the attorney assigned to the matter, in advance whenever possible, regarding any of the decisions described in paragraphs (V)(A)-(C).

* * * *

The foregoing guidelines regarding the use of confidential informants are issued under the authority of the Attorney General pursuant to 28 U.S.C. §§§§ 509, 510, and 533.

Date: _____

Janet Reno, Attorney General

1. Bookmaking that is significantly associated with, or substantially controlled by, organized crime ordinarily will be within the scope of paragraph (I)(B)(10)(b)(i). Thus, for example, where bookmakers have a financial relationship with members or associates of organized crime, and/or use members or associates of organized crime to collect their debts, the conduct of those bookmakers would create a significant risk of violence, and would therefore fall within the definition of Tier 1 Otherwise Illegal Activity.

2. The citations to the United States Sentencing Guidelines (USSG) Manual are to the 2000 Edition. The references herein to particular USSG Sections are intended to remain applicable to the most closely corresponding USSG level in subsequent editions of the USSG Manual in the event that the cited USSG provisions are amended. Thus, it is intended that subsection (iii) of this paragraph will remain applicable to the highest offense level in the Drug Quantity Table in future editions of the USSG Manual, and that subsection (iv) of the paragraph will remain applicable to dollar amounts that, in future editions of the USSG Manual, triggers sentencing enhancements similar to that set forth in the current section 2F1.1(b)(1)(M). Any ambiguities in this regard should be resolved by the Assistant Attorney General for the Criminal Division.

3. This requirement shall not prevent the Chief Federal Prosecutor or his or her designee from keeping in the relevant case file materials such as motions, responses, legal memoranda, Court orders, and internal office memoranda and correspondence. If any such materials contain information revealing a CI's true identity, the Chief Federal Prosecutor or his or her designee shall maintain the materials in accordance with the provisions of paragraph I(F)(2)(a)-(d), above.

4. This provision does not apply until one year after the effective date of these Guidelines, when the first set of Continuing Suitability Reports and Recommendations are completed. Further, during the first three years that this provision is in effect, each CIRC may stagger the review of some long-term CIs in order to even out the number of files that must initially be reviewed.

However, no later than four years after the effective date of these Guidelines, all of the CIs who have been registered for more than six consecutive years as of the effective date of these Guidelines must be reviewed pursuant to this provision.

5. This instruction should be provided to any CI who is not authorized to engage in otherwise illegal activity. See paragraph (III)(C)(4) for instructions that must be provided to a CI who is, in fact, authorized to engage in otherwise illegal conduct.

6. The CI may sign or initial the written acknowledgment by using a pseudonym which has been previously approved and documented in the CI's files and designated for use by only one CI.

7. The CI may sign or initial the written receipt by using a pseudonym which has been previously approved and documented in the CI's files and designated for use by only one CI.

8. Even without an express act of Congress authorizing the conduct at issue, it is within the power and the duty of federal prosecutors, as executive branch officers, to take reasonable measures to discharge the duties imposed on them as executive branch officers, and they will be immune from state action if they take such measures under color of federal law and in good faith.

9. The CI may sign or initial the written acknowledgment by using a pseudonym which has been previously approved and documented in the CI's files and designated for use by only one CI.

10. The CI may sign or initial the written acknowledgment by using a pseudonym which has been previously approved and documented in the CI's files and designated for use by only one CI. If the CI refuses to sign or initial the written acknowledgment, the JLEA agent who informed the CI of the revocation of authorization shall document that the CI has orally acknowledged being so informed and the Field Manager shall, as soon as practicable thereafter, review and, if warranted, approve the written documentation.

11. A target is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." United States Attorney's Manual §§ 9-11.151.

12. Whenever such notifications to FPOs are provided, the JLEA must also comply with the Continuing Suitability requirements described above in paragraph (II)(A)(2).