DEFENDING
A
FEDERAL
CRIMINAL CASE

2001 Edition

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INTRODUCTION

Federal Defenders of San Diego, Inc., is a private, nonprofit community defender organization in the Southern District of California with a thirteen-member Board of Directors selected by the County Bar Association. Since its inception in 1966, it has argued ten cases before the United States Supreme Court, the most recent being Ohler v. U.S., 529 U.S. 753, 120 S. Ct. 1852 (2000). The organization is independent from the local federal judiciary and is funded by an annual, renewable sustaining grant awarded by Congress under the Criminal Justice Act.

The organization is dedicated to training new attorneys. Thus, we are one of the few offices that hires attorneys directly out of law school and commits them to an arduous program directed towards making them the best trial attorneys they can be. This consists of eleven consecutive weeks of substantive law training sessions on Saturday mornings. Thereafter, they join the entire office in continuing trial training every other Saturday. In addition to carrying the highest caseload in the nation, our attorneys also put on three seminars for the legal community each year as well as writing this manual on their own time, every other year. It takes approximately one entire year to write, edit and finalize this manual for publication.

This year the book is being provided on CD which was prepared using Adobe’s Portable Document Format (PDF). To view the materials on this CD one must use the Adobe Acrobat Reader. This software is free to use and has been provided on this CD. The CD provides the ability to search the entire CD for words or phrases using Acrobat’s Find capabilities. Additionally, all the chapters and subheadings in the table of contents are linked to the body of the text for quick access.

Members of our Federal Defenders team share a commitment to excellence and a passion for justice in representing indigent people accused of myriad federal criminal offenses. We combine hard work, constant training, and intense dedication. Benjamin F. Rayborn, Chief Legal Research Associate, paralegal Marie Acuna and juror consultant Tiffany Denhardt, provide assistance at both trial and appellate levels. Investigators Cuauhtemoc Leyva, Chief Investigator; Martha Sanchez-Ehams, Melissa Eribez, Jack Kairy, Eduardo Fernandez, Jose Leon, Lidu Miramontes, Liliana Perez, Raul Rolon-Velasco, Veronica Saltiel, Luciano Silva, Rosa Tovar, Lorena Villa, Griselda Vilchis, full-time interpreter Raynal Duguay along with part-time interpreters Marc Banks, Norma Ball, Estrella Cortes, Eva Fernandez, Fabian Hernandez and Ruben Kairy provide fact-finding and translator support. Linda Acosta is our Administrative Officer who along with Louis Soldinger, our Financial Officer, provide administrative and financial support to the organization. Marie Acuna, doubles as the office’s Administrative Assistant and coordinates the work of legal secretaries Sylvia Enrique, Francina Fernandez, Pamela Bishop, Angelica Hernandez, LeeAnn Hudson, Margarita Gonzales, Sylvia Freeman, Maria Din and Minerva Cortes. Our case management coordinator is Vanessa Amedee and our clerical assistants are Gladys Juarez, Adriana Cabrales, Julio Maldonado and receptionist, Monica Laguna. Ben Solis and Tom Mundell, Computer Systems Administrators, are responsible for information systems development and maintenance.

This introduction would not be complete without a heartfelt word about Marie Acuna. Along with her other enormous responsibilities, Marie reviewed this entire manual virtually page by page. The countless hours that she dedicated to this manual are testimony not only to her Federal Defender spirit, but to her unique brand of professionalism. Her commitment to this office is unparalleled.
After editing and printing, Julio Maldonado insures that the thousands of subscribers actually receive the book. He will work diligently for approximately the next year and one-half on this project at the end of which he will begin again on the next issue. His energy and diligence should not go unmentioned.

A local newspaper article quoted a magistrate judge as calling our lawyers "terrorists with brief cases" and concluded that "you either love Federal Defenders or you hate them. It depends which side of the courtroom you're on." This manual is but a testament to their indefatigable and resilient spirit.

This manual is designed to be used as a first step and is not a substitute for thorough research and preparation. Although we have put forth great effort in checking citations, we strongly urge you to Shepardize all cases. Motions included herein have been formatted and paginated for printing purposes, users should refer to their local rules for proper format.

We hope this manual provides you with the continued energy necessary for the vigorous defense of our clients. Our promise to you is that we will continue to strive to improve its quality and we would deeply appreciate your comments and suggestions for its improvement.
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CHAPTER 1

THE BAIL REFORM ACT OF 1984

updated by

Wendy Gerboth and David Zugman

When explaining the purpose of the Bail Reform Act of 1966, Congress stated:

The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Pub.L. 89–465. How times have changed. The Bail Reform Act of 1984\(^1\) (hereinafter “the Act”) gave the executive and judiciary unprecedented power to restrict the liberty of presumptively innocent persons without shouldering the evidentiary burden of proof beyond a reasonable doubt.\(^2\)

This chapter provides an overview of the issues involved in the setting -- or more often denial -- of bail. These issues include: the options for a judge for a judge in setting conditions of release, the procedures for appeal of release orders, temporary detention and detention hearing procedures, release pending sentencing and appeal, and new offenses and penalties for violating conditions of release. The article also addresses several constitutional issues, and contains an addendum setting forth various circuit court procedures. This chapter touches briefly upon areas outside the Act which affect the client's release: sentencing credit for pretrial detention in alternative confinement centers, the Pretrial Services program, INS detention and bail procedures.

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\(^1\) The Act would fit well with George Orwell’s novel “1984.” The Act certainly is consistent of the Orwellian notion that the state would dominate the individual. Ominously, Orwell’s warning about the use of “doublespeak” is present as Congress said “reform” when it meant “eradication.”

\(^2\) These restrictions on a person’s liberty are remedial, not punitive, so the presumptively innocent pretrial detainee cannot claim protection under the double jeopardy clause of the Fifth Amendment. \textit{U.S. v. Warneke}, 199 F.3d 906 (7th Cir. 1999).
1.01 PRETRIAL RELEASE UNDER THE BAIL REFORM ACT: THE FOUR ALTERNATIVES

The bail reform provisions, found in §3142 of the Act, give four options for setting bail. They are:

1. release the defendant on personal recognizance;
2. release the defendant on conditions;
3. temporarily detain the defendant to permit revocation of conditional release, deportation or exclusion; or
4. detain the defendant.

1.02 RELEASE ON PERSONAL RECOGNIZANCE

Title 18 U.S.C. §3142(b) mandates pretrial release ("shall order the pretrial release") on personal recognizance or an unsecured appearance bond unless the court determines that “such release will not reasonably assure” the person's appearance or “will endanger the safety of any other person or the community.” The statute reads in the disjunctive so that the condition that the person not commit a “federal, state, or local crime during the release period” should only be applied to individuals not released on their own recognizance. The Act emphasizes release on personal recognizance or an unsecured appearance bond; however, the court may now also consider the safety of the community. See U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985); U.S. v. Harris, 732 F. Supp. 1027 (N.D. Cal. 1990). Relying on the legislative history, Williams found that concern about safety was intended to be given a broader construction than just physical harm and may include proven continued dealing in narcotics. See 1984 U.S.C.C.A.N. 16.

1.03 FACTORS TO BE CONSIDERED

Section 3142(g) sets forth the factors the judicial officer shall take into account:

1. the nature and circumstances of the offense charged;
2. the weight of the evidence;
3. the history and characteristics of the person including:
   Â the defendant's character;
   Â physical and mental condition;
   Â family ties;
   Â employment;
   Â financial resources;
   Â length of residence in the community;
   Â community ties;
   Â past conduct;
   Â history relating to drug or alcohol abuse;
   Â criminal history;
   Â record of appearance at court proceedings;
whether at the time of the current offense or arrest the defendant was on probation, parole or other release pending trial, sentencing, appeal or completion of a sentence; and

the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.

For discussion see infra section 1.06.04.05.

1.04 RELEASE ON CONDITIONS

If the court determines that a personal recognizance or unsecured release will not reasonably assure appearance or will endanger any other person or the community, 18 U.S.C. §3142(c) still mandates release ("shall order the pretrial release") subject to certain specified conditions. The conditions, which must include that the person not violate any federal, state or local law, must be the least restrictive conditions necessary to reasonably assure the person's appearance and the community's safety. The provision that conditions "reasonably assure" appearance and safety does not require a guarantee of appearance or safety. See U.S. v. O'Brien, 895 F.2d 810 (1st Cir. 1990); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985), cert.denied, 479 U.S. 950 (1986). It requires an "objectively reasonable" assurance of community safety and the defendant's appearance at trial. Id. Imposition of conditions of release must be supported by reasons why they are necessary to reasonably assure appearance or safety. U.S. v. Spilotro, 786 F.2d 808 (8th Cir. 1986). Conditions of release may be appealed immediately upon imposition. U.S. v. Gigante, 85 F.3d 83, 86 (2d Cir. 1996).


While the court enjoys fairly broad discretion in tailoring release conditions to the individual case, the conditions must be related to either assuring appearance or the safety of the community. For example, it is generally "not appropriate to attach the acceptance of a court-appointed counsel as a condition to continued bail" where the magistrate's concern was ensuring a "fair and orderly trial." U.S. v. Brown, 870 F.2d 1354, 1358 n.5 (7th Cir. 1989).

The Act does not authorize a judicial officer to order a psychiatric examination to determine dangerousness as a condition of release. U.S. v. Martin-Trigona, 767 F.2d 35 (2d Cir. 1985), cert.denied, 475 U.S. 1058 (1986). Instead, dangerousness must be decided on the basis of information available at the bail hearing. Id. An examination can be ordered pursuant to 18 U.S.C. §3142(c)(1)(B)(x) and psychiatric treatment can be compelled as a condition of release to ensure appearance. Id. at 38.
A personal surety bond (see 18 U.S.C. §3142(c)(1)(B)(xii)) may be secured by property that is encumbered as long as there is sufficient equity remaining to assure the appearance of the person as required. Facilitating the government's ability to collect on security is not a proper concern for a court setting release conditions. *U.S. v. Frazier*, 772 F.2d 1451 (9th Cir. 1985). One circuit has criticized the routine practice of requiring real property to secure bonds as being in conflict with the admonition in 18 U.S.C. §3142(c) to impose the least restrictive conditions of release. *U.S. v. Price*, 773 F.2d 1526 (11th Cir. 1985).

The court may also require a third party to act as a custodian and to report to the court any violation of the release conditions. The court may inquire into the ability of the custodian to supervise the defendant and to impress upon the custodian the duty owed the court and the public, but can not hold the custodian liable if the defendant absconds or commits a crime while on release. 1984 U.S.C.C.A.N. 17. The 10 percent deposit maximum of old §3146(a)(3) was replaced by a "reasonably necessary" amount of money. 18 U.S.C. §3142(c)(1)(B)(xii).

An important companion statute to the Bail Reform Act is 18 U.S.C. §4285. This provision authorizes a judicial officer of the United States to order the marshal to pay a defendant's transportation costs when the defendant is otherwise eligible for bail, but is unable to afford the cost of transportation to court. The statute also authorizes a per diem subsistence payment for the pendency of the prosecution. However, once proceedings are over, one court has found that the defendant must find his own way home. *U.S. v. Gonzales*, 684 F. Supp. 838 (D. Vt. 1988).

1.04.01 Financial Conditions of Release

Title 18 U.S.C. §3142(c)(2) states in pertinent part that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." This reflects the long-standing precedent that financial conditions of release should be imposed only when non-financial conditions are inadequate to secure appearance. *See U.S. v. Bobrow*, 468 F.2d 124 (D.C. Cir. 1972).

It remains unclear who bears the burden of showing that a financial condition cannot be met. A "bare say-so" by the defendant or the defendant's inability to "readily" post the money bail probably is not enough. *U.S. v. Szott*, 768 F.2d 159 (7th Cir. 1985); *but see U.S. v. Matecon-Zayas*, 949 F.2d 548 (1st Cir. 1991) (counsel's assertion that defendant simply does not have assets to satisfy the financial condition was enough to require an explanation by the court as to why the condition was necessary).

The legislative history indicates that the defendant can meet this burden by stating an inability to satisfy a financial condition. In discussing the procedure to follow if the defendant is detained as a result of inability to meet a financial condition, the legislative history indicates that "the fact that the defendant stated that he was unable to meet this condition" would be language set out in the detention order from which the defendant could then appeal. 1984 U.S.C.C.A.N. 19. *But see Szott*, 768 F.2d at 159, where, in the absence of anything more than the defendant’s word that he could not post $1 million in bail, it could not be concluded that the amount of bail violated the statute.
Regardless of who bears the burden, courts have found that the financial condition prohibition language does not necessarily require the release of a person who proves to be unable to meet a financial condition of release. *U.S. v. McConnell*, 842 F.2d 105 (5th Cir. 1988). From the case law, it appears the court may either reduce the bond if a lower amount would suffice or proceed with a detention hearing if it would not. *U.S. v. Westbrook*, 780 F.2d 1185 (5th Cir. 1986); *U.S. v. Scott*, 768 F.2d 159 (7th Cir. 1985); *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (en banc). The legislative history also indicates that if the court finds a financial condition is the only condition, short of detention, that will reasonably assure appearance and safety and the defendant cannot meet the condition, a detention hearing would follow. 1984 U.S.C.C.A.N. 19.

However, if the defendant cannot meet the conditions of his or her bond and detention results, the court must still satisfy the procedural requirements for a valid detention order and explain, in writing, its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release. *See U.S. v. Mantecon-Zayas*, 949 F.2d 548, 551 (1st Cir. 1991); *U.S. v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988).

A cash appearance bond cannot be automatically retained by the clerk for application against any fine ultimately levied against the defendant, and bond as security against payment of potential fines may not be required as a condition of release. *U.S. v. Rose*, 791 F.2d 1477 (11th Cir. 1986). However, if the money or property posted belongs to the defendant, a lien against the bond may be perfected, subject to a writ of execution of judgment, once the bond is exonerated. In this regard, the defendant's bail money is treated like any other form of property subject to judgment and execution. *U.S. v. Cannistraro*, 871 F.2d 1210, 1212-13 (3d Cir. 1989), *cert. denied*, 500 U.S. 916 (1991).

### 1.04.02 Nebbia Hearings

The statute provides for an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure the bond. This inquiry into the legitimacy of the property (i.e., the source of the funds used to purchase the property) has been referred to as a "Nebbia hearing." *See U.S. v. Nebbia*, 357 F.2d 303 (2d Cir. 1966). The court may decline to accept property that, because of its illegitimate source, will not reasonably assure the appearance of the person as required. According to the legislative history, this provision was included to detect those defendants who would post and forfeit a high money bond as a cost of conducting a criminal business. *See* 1984 U.S.C.C.A.N. 27.

Pursuant to §3142(g)(4), a *Nebbia* hearing may be had only if property, cash, or other security is posted for the bond and is not applicable when the bond is being secured by signatures only. *See* §3142(c)(1)(B)(xi),(xii). However, where property or money is posted, the court *shall* conduct the hearing on the government's motion, and *may* order such a hearing *sua sponte*. The scope of the hearing is limited to the source of the property posted, and whether, in light of that source, it will reasonably assure the defendant's appearance. As described in *Nebbia*, the court has discretion to conduct a hearing under its inherent authority, but the government has no right to such a hearing. *U.S. v. O'Brien*, 895 F.2d 810, 817-18 (1st Cir. 1990).
Nebbia hearings can be abused by prosecutors who use them to intimidate the surety with questioning designed to highlight the unreliability of the defendant or the risk to the property posted. These tactics should be immediately and forcefully opposed. The scope of a hearing under §3142(g)(4) is limited by statute: under Nebbia, the court in its discretion has the right to inquire generally regarding "the ability of the surety to produce the defendant." Nebbia, 357 F.2d at 304. However, neither §3142(g)(4) nor the Nebbia decision vests the prosecutor with the right to question a surety, especially with questions designed to scare the surety, such as "Do you know that your child has a drug problem, and a positive urine test could cost you your life savings?" These types of questions have nothing to do with a limited inquiry into the source of the funds. Usually, the magistrate will have already covered this ground, and counsel can argue that once the court is satisfied with a surety, the hearing should conclude unless the prosecutor can proffer some good faith basis for further questioning. See U.S. v. Lopez, 827 F. Supp. 1107, 1111 (D.N.J. 1993) (prosecution had no evidence supporting its cynical theory that sureties would somehow be indemnified by drug organization and the court gave that idea no weight in setting bail).

1.04.03 Release Orders

Release orders are governed by §3142(h) and must include a written statement setting forth all of the conditions of release (in a manner sufficiently clear and specific to serve as a guide for the person's conduct). See Fed. R. App. P. 9(b). The release order must advise the defendant of:

1. the penalty for violating a condition of release, including the penalties for committing an offense while on pretrial release;
2. the consequences of violating a condition of release including the issuance of a warrant for the defendant's arrest; and
3. provisions of statutes relating to the intimidation of witnesses, jurors and officers of the court, obstruction of criminal investigations, tampering with a witness, victim or informant and retaliating against a witness, victim or informant.

The statement of reasons for release is necessary for appellate review. 18 U.S.C. §3142(i)(1); U.S. v. Clark, 865 F.2d 1433, 1436 (4th Cir. 1989). The appellate court reviews pretrial release determinations by independent review, although particular respect is given to the lower court's factual determinations. See U.S. v. Tortora, 922 F.2d 880 (1st Cir. 1990). According to §3142(c), the court may at any time amend its order to impose additional and different conditions of release.

1.04.04 Review and Appeal of Release Orders

In addition to the amendment of the conditions by the magistrate, the government may move to revoke the magistrate's release order or to amend the magistrate's conditions of release under §3145. The defendant may also file a motion to amend the conditions of release if the court sets release conditions that cannot be met. This motion to amend the conditions of release is to be made in the court having original jurisdiction over the offense. Relief from the district court's action is pursued by filing an appeal pursuant to 28 U.S.C. §1291. Several courts have found that the district judge's order may only be reviewed on appeal and not by another district judge. See U.S. v. Johnson, 858 F. Supp. 119 (N.D. Ind. 1994); U.S. v. Rouleau, 673 F. Supp. 57 (D. Mass. 1987). The procedure for the government is the same, and the
government is given the authority to appeal the district court's ruling under 18 U.S.C. §3731. The district court may review a magistrate judge's release or detention order *sua sponte*, although no authority to do so is provided under §3145(a). *See U.S. v. Gebro*, 948 F.2d 1118, 1120 (9th Cir. 1992). Only the district court where the prosecution is pending may review the detention determination of the magistrate judge. *U.S. v. Evans*, 62 F.3d 1233 (9th Cir. 1995) (where defendant was arrested and ordered detained without bail in Arizona for proceedings commenced in West Virginia, the Arizona district court lacked jurisdiction to review the magistrate judge’s order).


Review/appeal procedure:

- **Release Order (magistrate)**
  - Defendant moves to amend conditions or review detention order; government moves to revoke release order (district court) [§§3145(a)-(b)]
  - Defendant appeals, 28 U.S.C §1291, or government appeals, 18 U.S.C. §3731 [§3145(c)] (court of appeals)

If the district court (court of original jurisdiction) issues the original release or detention order, the remedial procedure appears to be an appeal, not a motion to amend or revoke in the appellate court. The statute limits motions to amend or revoke to orders issued by a magistrate or person other than a judge of a court having original jurisdiction over the offense and other than a federal appellate court. *See 18 U.S.C. §3145(a)-(c).* Of course, the district court may reconsider any release order it issues, 18 U.S.C. §3142(c)(3); however, a detention hearing conducted by the district court judge with original jurisdiction may not be reopened unless the moving party can show it has discovered new information "that has a material bearing on the issue" of detention. 18 U.S.C. §3142(f).
1.04.04.01 Standard of Review in District Court

Although the standard of review is not set forth in the statute, the courts appear in general agreement that the district court should make its own independent conclusions and review the magistrate's findings de novo. See U.S. v. Leon, 766 F.2d 77 (2d Cir. 1985); U.S. v. Daniels, 772 F.2d 382 (7th Cir. 1985), cert. denied, 498 U.S. 981 (1990). Cf. U.S. v. Thibodeaux, 663 F.2d 520 (5th Cir. 1981) (de novo review under 1966 Bail Act). However, the district court need not conduct a de novo hearing, although it may if it wishes. See U.S. v. Henderson, 958 F. Supp. 521 (D. Kan. 1997); U.S. v. Gaviria, 828 F.2d 667, 670 (11th Cir. 1987). But see Mauil, 773 F.2d at 1479. For an extended discussion of district court review under §3145 of a magistrate's determination, see U.S. v. Phillips, 732 F. Supp. 255, 257-59 (D. Mass. 1990) (the distinction between "review" as provided in §3145(a) and (b), and "appeal" as provided in §3145(c), and case law, supports de novo review; however, the court should not ignore the magistrate's findings, and need not conduct a de novo hearing unless necessary).

1.04.04.02 Standard of Review in Circuit Court

As with district court review, the statute does not indicate the standard of review in the circuit courts. Three basic alternatives have been articulated: (1) clearly erroneous (most deferential to findings of court below); (2) independent review of law and mixed questions of law and fact, with deference to purely factual findings (intermediate standard of review); and (3) de novo review (to review anew -- least deferential standard) with some deference for the district court's determination. U.S. v. O'Brien, 895 F.2d 810, 812-13 (1st Cir. 1990).

The circuits favoring the most deferential review, the clearly erroneous standard, are the Second, Fourth and Fifth Circuits. U.S. v. Shakur, 817 F.2d 189 (2d Cir.) (“clearly erroneous” review of facts, flexible review of questions of law, plenary review of application of legal standards), cert. denied, 484 U.S. 840 (1987); see, e.g., U.S. v. Claudio, 806 F.2d 334 (2d Cir. 1986); U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985) (upheld if “supported by proceedings below”).

All other circuits now conduct some form of independent review which, while granting the district court a certain degree of deference, particularly on factual matters, reserves to the appellate courts the power to review the record as a whole on both the law and the facts. The Sixth, Eighth, Ninth, Tenth and Eleventh Circuits treat appeals under §3145 as mixed questions of law and fact, reviewing purely factual questions for clear error, reserving de novo review for purely legal issues, and determining the standard for mixed questions to the degree that legal or factual disputes are implicated. See U.S. v. Cervantes, 951 F.2d 859, 861 (8th Cir. 1992) (this circuit does not defer to district court determination that defendant would appear); U.S. v. Cantu, 935 F.2d 950 (8th Cir. 1991) (clearly erroneous standard to factual findings but independently reviews ultimate conclusion that detention is required); U.S. v. Townsend, 897 F.2d 989 (9th Cir. 1990); U.S. v. Cook, 880 F.2d 1158 (10th Cir. 1989); U.S. v. Hazime, 762 F.2d 34 (6th Cir. 1985).

The First, Third and Seventh Circuits review de novo with some deference to the district court, mostly regarding factual matters. See U.S. v. O'Brien, 895 F.2d 810 (1st Cir. 1990); U.S. v. Traitz, 807
The Bail Reform Act of 1984

1.05 TEMPORARY DETENTION

The temporary detention section of the Bail Reform Act, 18 U.S.C. §3142(d), provides that if the person is, and was at the time of the offense, on another form of conditional release, or is not a citizen of the United States or permanent resident, and the person may flee or pose a danger to any other person or the community, the person shall be ordered detained for not more than 10 working days. See U.S. v. Alatishe, 768 F.2d 364, 370 (D.C. Cir. 1985); U.S. v. Auriemma, 773 F.2d 1520, 1524 n. 7 (11th Cir. 1985); U.S. v. Buck, 609 F. Supp. 713 (S.D.N.Y. 1985). A hearing to determine temporary detention will necessarily differ from a determination of detention pending trial because of the difference in consequences of detention under subsection (d) versus (e). See U.S. v. Alatishe, 768 F.2d at 370. This 10-day period is designed to allow the Immigration Service or other law enforcement agency to take the person into custody during that period of time.

The statute requires the court to "direct the attorney for the government to notify the appropriate" agency or jurisdiction of the defendant's location and pending prosecution in the detaining district. If the other agency or jurisdiction does not take the person into custody within the time period, the person is eligible for release or detention in accordance with the other provisions of the Bail Reform Act. 18 U.S.C. §3142(d). A claim of citizenship or permanent residence is a defense to temporary detention on the basis of immigration status, but the burden of proof is on the defendant. See U.S. v. Moncada-Palaez, 810 F.2d 1008 (11th Cir. 1987); U.S. v. Becerra-Cobo, 790 F.2d 427 (5th Cir. 1986).

Theoretically, if an illegal alien is arrested and the INS elects to take the alien into custody and deport the alien during that 10-day period, the alien could avoid the new criminal charges and not be charged pursuant to the Bail Reform Act. Counsel representing an illegal alien who is not taken into custody by the INS during the 10-day temporary detention period should then argue for the alien's release upon the grounds that the INS has waived its right to exclude or deport the alien pending resolution of the criminal case. The alien's status still remains that of an illegal alien and appropriate parole authorization from the INS must be obtained.

Sometimes the government will seek temporary detention of an alien who has been apprehended by the INS, usually via the Border Patrol. Counsel should argue against the applicability of §3142(d) in such cases because the INS, as the arresting agency, already has notice of the defendant's status and location.

3 Note that the temporary detention order should not be automatically imposed, since the court must determine not only whether the defendant is on conditional release but also whether or not the defendant may flee or pose a danger to any other person or the community. 18 U.S.C. §3142 (d)(2).
A probation violator should not be subject to the temporary detention period solely because of the existence of the probationary term. The statute requires that the person be in court on a new offense which would not include allegations of violation of probation alone.

1.06 DETENTION HEARING

A detention hearing may be held either upon motion of the attorney for the government, or upon the court's own motion. 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; or
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.


There is tension over whether possession of a firearm by an ex-felon is a crime of violence which would allow the government to move for detention. The only circuit court opinion to address the question says that it is not. *U.S. v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999), the court held that felon in possession was not a crime of violence. However, at least one district court declined to follow *Singleton*. *U.S. v. Spry*, 76 F. Supp. 2d 719 (S.D. W.Va. 1999).

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4 Felon in possession is not a crime of violence for purpose of applying career offender guidelines. *U.S.v. Sahakian*, 965 F.2d 740 (9th Cir. 1992), and thus, most likely would not be used as a crime of violence for bail purposes, at least in the Ninth Circuit. See *U.S. v. Spry*, 76 F.Supp 2d 719 (S.D. W.Va. 1999) (district court held that felon in possession is a crime of violence and distinguished cases dealing with crimes of violence at sentencing because of the differences between the purposes of sentencing and bail, e.g. bail determinations have greater discretion than sentencing ones.)
The government should specify the grounds upon which it will rely in seeking detention. Grounds may include flight risk, danger, obstruction of justice, or potential injury to witnesses. Fed. R. Crim. P. 47; Melendez-Carrion v. U.S., 790 F.2d 984 (2d Cir.), cert. dismissed, 479 U.S. 978 (1986). It is not clear whether the court can consider an alternate ground for detention if the order of detention on the initial ground is set aside. U.S. v. Claudio, 806 F.2d 334 (2d Cir. 1986); but see Montalvo-Murillo, 495 U.S. 711, 721 (1990) (a defendant who should be detained ultimately should not be released for technical infirmity of process). The court may move for a detention hearing in a case that involves a serious risk of flight or a serious risk that the defendant may threaten, injure or intimidate a prospective witness or juror.

The purpose of the detention hearing is for the judicial officer to determine whether any condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. It is within the court's discretion whether or not to permit joint detention hearings in multi-defendant cases. Careful balancing of judicial economy as well as considerations of delay must occur. Melendez-Carrion v. U.S., 790 F.2d 984 (2d Cir.), cert. dismissed, 479 U.S. 978 (1986).

For more discussion; see infra section 1.06.04.

1.06.01 Timing of the Detention Hearing

1.06.01.01 First Appearance Requirement

It appears from a literal reading of the statute that the government or the court must make its motion for a detention hearing, if any detention hearing is to be held, upon the defendant's first appearance in court. However, failure to comply with this time requirement does not preclude the government from seeking detention or a court from holding a detention hearing. Instead, the Supreme Court has held that:

once the Government discovers that the time limits have expired, it may ask for a prompt detention hearing and make its case to detain based upon the requirements set forth in the statute.


The Montalvo court placed some emphasis on a "prompt" hearing, sought immediately upon the government's discovery of its delinquency. Id. at 719. The decision expressly reserved the question of whether "other remedies may exist for detention without a timely hearing or for conduct that is aggravated or intentional." Id. at 721. Thus, Montalvo would seem to be limited to a brief, good faith or inadvertent delay that the government seeks to remedy by promptly seeking and moving forward with a hearing at the earliest possible time. The decision may yet leave room for sanctions of some form where the government delay is either inexcusable, intentional or otherwise in bad faith, where the defendant is directly prejudiced by the delay, or where the delay is extreme.

The Montalvo decision rests on three premises. First, the public has a substantial interest in detaining dangerous or flight-prone individuals and that interest should not be forfeited due to negligence
on the part of the public officers; second, the harm of releasing defendants who should be detained outweighs defendants’ right to have §3142(f) strictly enforced; third, when applying harmless error analysis, no real prejudice accrues to the defendant whose detention is otherwise valid, and thus the delay has no "substantial influence" on the outcome of the hearing. *Id.* at 717-20.

The government can be expected to argue for an extension of the logic of *Montalvo* into other, time-sensitive areas of the Bail Reform Act. In distinguishing *Montalvo* it is important to emphasize that: (1) there was some question as to whether the government was in any way responsible for the delay, and certainly there was no allegation of bad faith; if the opposite is true, *Montalvo* would not control; (2) the delay appears to have occurred without any objection from the defendant, and at least some of the delay was consensual; and (3) the government was prepared to proceed and did proceed as promptly as possible.

The helpful language in *Montalvo* is that the Court reaffirmed the importance of the liberty interest at stake, and observed that "the time limitations of the [Bail Reform] Act must be followed with care and precision." *Id.* at 716. Note that at the trial level, error is error and should not be allowed, regardless of whether it is harmless. The Court also noted that the "district court, the court of appeals, and this Court remain open to order immediate release of anyone detained in violation of the statute," *Id.* at 721.

By subjecting the time limitations of the Bail Reform Act to harmless error analysis, *Montalvo* may also indirectly support those cases which have held that the Act’s time limitations are waivable. Counsel should thus be careful to preserve any error by raising it at the earliest possible moment. *See* *U.S. v. Clark*, 865 F.2d 1433 (4th Cir. 1989) (en banc) (counsel’s consent to detention waived time limitations); *U.S. v. Rivera*, 837 F.2d 906, 925 (10th Cir. 1988) (no relief granted in addition to remand for detention hearing to defendant denied detention hearing due to counsel’s failure to schedule), *vacated on other grounds*, 900 F.2d 1462 (10th Cir. 1990).

A request for temporary detention under §3142(d) may legitimately delay the request for pretrial detention. *See* *U.S. v. Becerra-Cobo*, 790 F.2d 427 (5th Cir. 1986); *U.S. v. Lee*, 783 F.2d 92 (7th Cir. 1986); *U.S. v. Alatishe*, 768 F.2d 364 (D.C. Cir. 1985) (preferred course would be to request both at first appearance). *But see* *U.S. v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985) (it may be a violation of the statute when continuance of the key detention hearing is tacked on to a 10-day temporary detention order). *U.S. v. Hurtado*, 779 F.2d 1467, 1476 n. 12 (11th Cir. 1985) does not accept Alatishe’s interpretation of the Act finding judicial power to delay the hearing beyond the first appearance. Any error in the application of timing requirements is subject to the harmless error analysis of *Montalvo-Murillo*.

Arguably, a detention hearing held after a finding that the defendant could not meet a necessary financial condition would violate the "first appearance" language, unless such a finding constituted new evidence. *But see* *U.S. v. Gebro*, 948 F.2d 1118 (9th Cir. 1991) (allowed district court to *sua sponte* order defendant detained after magistrate initially ordered him released); *U.S. v. Maull*, 773 F.2d 1479 (8th Cir. 1985) (district court properly proceeded with detention hearing when defendant argued he could not make $1,000,000 bond).

1.06.01.02 Continuances
Section 3142(f) requires that the hearing be held immediately upon the person's first appearance before the judicial officer unless the defendant or the government seeks a continuance. Except for good cause, a continuance requested by the defendant may not exceed five days and a continuance requested by the government may not exceed three days, not including weekends or legal holidays. See U.S. v. Malekzadeh, 789 F.2d 850 (11th Cir. 1986). Failure to object to a government request for a continuance may be considered an implied request for continuance by the defendant. Id. A specific objection that the continuance is beyond the time period is required. See U.S. v. Rivera, 837 F.2d 906, 925 (10th Cir. 1988) (failure of attorney to schedule hearing or object to delay was waiver of time limits), vacated on other grounds, 900 F.2d 1462 (10th Cir. 1990).

The time requirements of §3142(f) and the detention hearing itself are waivable by the defendant. See U.S. v. Clark, 865 F.2d 1433 (4th Cir. 1989). This waiver of the immediate detention hearing is treated as an indefinite continuance for good cause; once the defendant requests a hearing, it must occur within the time limits of §3142(f). Id. Materiality of the delay may be considered. See U.S. v. King, 818 F.2d 112 (2d Cir. 1987) (harmless error analysis); U.S. v. Madruga, 810 F.2d 1010, 1014-16 (11th Cir. 1987) (24 hour delay is immaterial).

The court should not order a continuance sua sponte. See U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985). A continuance to suit the schedule of counsel is not good cause, at least in the absence of a showing no other lawyer is available, that the time is necessary to prepare, or another "valid reason." Id.

Although a continuance may be necessary, the statute requires that the defendant be detained during any continuance. Such unofficial detention is subject to abuse by the government and counsel may seek to avoid this situation by requesting that the detention hearing begin on the initial appearance date. If either party is not fully prepared to conclude the hearing, the hearing may then be adjourned and concluded at a later date. Because the last sentence of 18 U.S.C. §3142(f) states that "the person may be detained pending the completion of the hearing," an available argument is that once the hearing has begun, the magistrate has discretion to detain or release. The best case scenario for use of this argument is when the Pretrial Services officer has written a report recommending release on bond but the government moves for detention. Beginning the hearing arguably provides the judicial officer with the opportunity to exercise discretion on the issue of pretrial release rather than being forced to detain the individual until the hearing. Note, however, that if the prosecutor presents evidence supporting detention and the hearing is continued before the defense can present any evidence, the magistrate may be more likely to exercise discretion and detain the defendant, because only a one-sided presentation has been made.

1.06.01.03 Removal Hearings

A removal hearing may precede a detention hearing, Melendez-Carrion v. U.S., 790 F.2d 984 (2d Cir.), cert. dismissed, 479 U.S. 978 (1986), and it may be that a request for detention can be made after the Rule 40 transfer. See U.S. v. Valenzuela-Verdigo, 815 F.2d 1011 (5th Cir. 1987); U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986) (request for detention is not required at first appearance in non-charging district and can be made after Rule 40 transfer); U.S. v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc) ("first appearance" before district court satisfies condition; hearing need not be held at first appearance before first judicial officer). One district court found that the charging district is the court with
original jurisdiction and that the district of arrest has no authority to set aside an *ex parte* order delaying the defendant's release pending removal. *U.S. v. Acheson*, 672 F. Supp. 577 (D.N.H. 1987). Where an order is issued in the district of arrest, §3145(a)-(b) arguably confers review authority on magistrates in the district of the offense as the "court having original jurisdiction."

In light of the Supreme Court's endorsement of harmless error analysis in *Montalvo-Murillo* 495 U.S. at 711, detention hearings may be successfully requested in either the district of arrest or the district of the offense. However, once requested, the time limits may run across districts if the hearing is not held before removal. *See U.S. v. Aitken*, 898 F.2d 104 (9th Cir. 1990) (request lodged in one district and honored in another; court did not question practice, and appeared to enforce time limitations across district lines).

1.06.01.04 Reopening the Detention Hearing

The magistrate has the authority to reopen the hearing to take additional evidence at the request of counsel. *U.S. v. Gallo*, 653 F. Supp. 320 (E.D.N.Y. 1986). However, district courts may not, unless the moving party shows new material information. 18 U.S.C. §3142(f). *See supra* section 1.04.04. The First Circuit, in a *per curiam* decision, held that the defendant was not entitled to reopen the pretrial detention hearing on the district court level to present affidavits and letters because the information was known to defendant at the time of the prior hearing. *U.S. v. Dillon*, 938 F.2d 1412 (1st Cir. 1991). One court ordered a previously released defendant detained after denying the defendant's motion to suppress evidence, finding that the ruling substantially increased the likelihood of conviction, thus making the defendant an increased flight risk. *U.S. v. Peralta*, 849 F.2d 625 (D.C. Cir. 1988). The ruling was new and material information. Another district court disallowed new evidence at a reopened hearing, but allowed prior acts evidence at the same hearing. *U.S. v. Flores*, 856 F. Supp. 1400 (E.D. Cal. 1994).

1.06.02 Rights of the Defendant at a Detention Hearing

The statute provides for certain rights at the detention hearing:

1. right to be represented by counsel (retained or appointed);
2. to testify;
3. to present witnesses on his behalf;
4. to cross-examine witnesses who appear at the hearing; and
5. to present information by proffer or otherwise.

The United States Supreme Court was impressed enough with the "number of procedural safeguards" contained in the Bail Reform Act to hold the Act facially valid against a due process attack. *U.S. v. Salerno*, 481 U.S. 739 (1987). Referring to the detention hearing as a "full-blown adversarial hearing" during which the government must convince a "neutral decision maker," the Court found the "extensive safeguards" sufficient to repel the facial challenge. Defense counsel should certainly argue the language of *Salerno* in asserting a client's "rights" at the detention hearing and in urging a liberal construction of these rights.
1.06.02.01 Subpoena Powers

The Department of Justice has taken the position that the rights specified in §3142(f) do not provide the defendant with the power to subpoena witnesses because the language is "to present witnesses on his own behalf" and "to cross-examine witnesses who appear at the hearing." However, one district court rejected this position, at least regarding subpoenaed documents, and conducted an in camera review of the documents to insure that exculpatory material was divulged, while retaining Jencks-material (information that can be used to impeach witnesses on cross-examination). U.S. v. Gatto, 729 F. Supp. 1478 (D.N.J. 1989). The Gatto court determined that discovery regarding exculpatory material for both the indicted offense and for any allegations of misconduct relied upon by the prosecutor to seek detention must be made available to the defense for a detention hearing. Id. at 1481-82.

It may be a violation of due process to require the defendant to carry the burden of rebutting certain presumptions without the ability to subpoena witnesses and documents. In U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985), the court held it was proper to quash a subpoena which attempted merely to rehash probable cause, but found it was error (albeit not reversible in light of the evidence) to deny a subpoena aimed at rebutting a presumption invoked against the defendant. Id. at 1479-80.

In U.S. v. Delker, 757 F.2d 1390 (3d Cir. 1985), the court considered the right to present live witnesses and determined that in the case before it the court did not err in refusing to subpoena a particular witness. The court found that discretion lies with the district court to accept evidence by live testimony or proffer. U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986). However, the court specifically did not address whether a defendant has the right to confront non-appearing "government witnesses" when the defendant can make a proffer of how the testimony will negate the government's contention of dangerousness or one of the presumptions. A defendant’s proffer showing the unreliability of government hearsay evidence may invoke the judicial officer’s duty to require more substantive support for the government’s contention. Id. at 389. See also U.S. v. Ridinger, 623 F. Supp. 1386, 1401 (W.D. Mo. 1985).

Most courts agree that where the statutory presumptions apply, the defendant has the burden of producing some evidence in order to overcome the presumption but that the burden of persuasion does not shift to the accused. See U.S. v. Rueben, 974 F.2d 580 (5th Cir. 1992), cert. denied, 507 U.S. 940 (1993); U.S. v. Cook, 880 F.2d 1158 (10th Cir. 1989); U.S. v. Martin, 782 F.2d 1141 (2d Cir. 1986); U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986); U.S. v. Jessup, 757 F.2d 378 (1st Cir. 1985); U.S. v. Orta, 760 F.2d 887 (8th Cir. 1985) (en banc). Either burden supports the necessity of compulsory process at detention hearings.

Since two of the §3142(g) factors to be considered deal with the case at hand: (1) the nature and circumstances of the offense charged and (2) the weight of the evidence against the person -- the defendant should be allowed to subpoena "government witnesses" as his/her own witnesses in order to reveal to the court the demeanor and credibility of the persons making the allegations against the defendant. Certainly this goes to the weight of the evidence as well as the nature and circumstances of the offense.

In order to properly consider the "weight of the evidence" factor in §3142(g)(2), it may well be necessary to open up the issue of probable cause because that is a question of evidentiary weight. U.S.
An equal protection argument may be available where the defendant is unable to present witnesses due to the cost or the unavailability of the witness due to other commitments. Certainly the poor defendant should not be less able to exercise the statutory right of presenting witnesses because of an inability to pay travel costs or expenses.

1.06.02.02 Confrontation/Use of Hearsay

The statute specifically states that the rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. 18 U.S.C. §3142(f). Furthermore, Fed. R. Evid. 1101(d)(3) exempts bail hearings from the applicability of the Federal Rules of Evidence. Most courts allow reliance on hearsay evidence. For example, in U.S. v. Martir, 782 F.2d 1141 (2d Cir. 1986), the court found that while the Bail Reform Act is silent on how the government is to proceed at a detention hearing, the thrust of the legislation encourages informal methods of proof. This suggests that both the government and the defendant may proceed by proffer. Id. See also U.S. v. Acevedo-Ramos, 755 F.2d 203, 207 (1st Cir. 1985) (court possesses adequate power to reconcile the competing demands of speed and reliability by selectively insisting upon the production of underlying sources where their accuracy is in question); U.S. v. Davis, 845 F.2d 412 (2d Cir. 1988); U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987) (government as well as defense may proceed by proffering evidence, subject to the discretion of the judicial officer); U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986) (Bail Reform Act permits hearsay and it is not an abuse of discretion to refuse to compel government witness to be present for cross-examination; court warned that judicial officer should be sensitive that authorization to use hearsay did not mean that such was always appropriate; reliance on in camera submissions inappropriate unless compelling need shown); U.S. v. Delker, 757 F.2d 1390 (3d Cir. 1985) (hearsay appropriate; however, discretion lies with district court whether to accept live testimony or proffer); U.S. v. Fortna, 769 F.2d 243 (5th Cir. 1985) (hearsay admissible); U.S. v. Lewis, 769 F. Supp. 1189, 1193 (D. Kan. 1991) (hearsay not always appropriate; magistrate has discretion to insist on live testimony and production of exculpatory statements).

There seems to be a "conditional right" to call adverse witnesses, however, that is subject to the court's discretion. U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987); U.S. v. Jeffries, 679 F. Supp. 1114 (M.D. Ga. 1988). The Third Circuit has expressed doubt that probable cause may be based upon proffered or hearsay evidence. U.S. v. Suppa, 799 F.2d 115 (3d Cir. 1986). In Suppa, the court indicated that the opinion in Delker is not authority for the government to proceed by proffer. The court expressed "grave" questions whether the probable cause finding may be based upon proffered evidence. In U.S. v. Ridinger, 623 F. Supp. 1386 (W.D. Mo. 1985), the court found it had the power to insist on live witness testimony or require the government to establish the reliability of hearsay information. The Ninth Circuit ordered withdrawn its opinion that confirmed the government's ability to proceed by proffer. U.S. v. Cardenas, 784 F.2d 937 (9th Cir., vacated, 792 F.2d 906 (9th Cir. 1986). The withdrawal of
Cardenas casts doubt upon the vitality of language in a later Ninth Circuit decision, U.S. v. Winsor, 785 F.2d 755 (9th Cir. 1986), which supported the use of government proffer. Winsor implies that if the defense proffers that the government information is incorrect, the court may be required to allow the defense cross-examination of government witnesses. Id. at 757. See also U.S. v. Perez-Pachari, 691 F. Supp. 241 (D. Haw. 1987).

The primary limitation on the use of hearsay is that courts may give it less weight than direct or non-hearsay evidence. See U.S. v. Bell, 673 F. Supp. 1429 (E.D. Mich. 1987) (because of Salerno and the “clear and convincing” standard, the court constrained itself to exclude DEA reports, and hearsay statements by police officers as repeated by other officers from its evaluation of the evidence). See also U.S. v. Gray, 651 F. Supp. 432 (W.D. Ark. 1987); aff’d 855 F.2d 858 (8th Cir.), cert. denied, 488 U.S. 866 (1988); U.S. v. Fisher, 618 F. Supp. 536 (E.D. Pa. 1985) (disputing finding that the informants’ statements as told by police officers established probable cause, this evidence was not “clear and convincing”), aff’d 782 F.2d 1032 (3d Cir.), cert. denied, 479 U.S. 868 (1986). The argument against the use of hearsay may be stronger where the government’s burden is by “clear and convincing” evidence.

1.06.02.03 In Camera Proceedings

One district court allowed use of hearsay presented in camera in support of detention. See U.S. v. Terrones, 712 F. Supp. 786 (S.D. Cal. 1989). See also U.S. v. Williams, 948 F. Supp. 692 (E.D. Mich. 1996), aff”g Terrones while describing strong reasons court may have for keeping sources confidential. However, the district court emphasized the unusual circumstances of the case, where the in camera material apparently involved testimony of a confidential informant, who in turn established the defendant’s dangerousness. The court offered to summon the witnesses for in camera examination, but the defendant declined. Defense counsel did not participate. The Terrones court observed that in camera evidence should only be used in detention hearings in "rare and unusual cases." Terrones, 712 F. Supp. at 794. Terrones was such a case because (1) the material was "extraordinarily relevant and material on the issues of flight and dangerousness;” (2) the information was not available from any other source but the confidential witnesses; (3) the confidential witnesses would be subject to a real threat of serious bodily harm or death if identified; and (4) this threat would not abate, even if the defendant were detained. Id.

In camera presentation of materials as a general matter, however, "is inconsistent" with the Bail Reform Act's procedural protections." U.S. v. Accetturo, 783 F.2d 382, 390 (3d Cir. 1986) There may be rare occasions when a compelling need if shown would allow in camera; relevant decisions questioning the reliability of informants raise a serious doubt about the legitimacy of any decision allowing in camera reliance on confidential informant testimony. See U.S. v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993).

1.06.02.04 Production of Witness Statements at Detention Hearings (Discovery)

Prior statements of witnesses who testify at a detention hearing must be disclosed pursuant to Fed. R. Crim. P. 26.2(g)(3). That section applies the rule requiring such disclosure "to the extent specified in Rule 46(i) at a detention hearing." Rule 46(i), entitled "Release from Custody," provides for production of witness statements at a "detention hearing held under 18 U.S.C. §3144." It appears that the reference to §3144 and not §3142 is a typographical error. First, in context, a reference to both §§3142 and 3144
makes more sense. Section 3144 addresses the release or detention of material witnesses rather than defendants, yet Rule 46(i) provides rules for release under both §§3142 and 3144. There is no rational reason to afford material witnesses such a protection while denying it to defendants. Second, the Advisory Committee Notes to subdivision (i) make plain that Congress intended that the section would apply to defendants. The Notes provide, for example, that “[t]he need for reliable information is no less crucial in a proceeding to determine whether a defendant should be released from custody. The issues decided at pretrial detention hearings are important to both a defendant and the community.” (emphasis added).

1.06.03 Presumptions

There are two rebuttable presumptions that apply in detention hearings:

(1) In a case described in §3142(f)(1) (crime of violence, case where maximum punishment is life or death, 10-year maximum drug cases, a felony case where defendant has two of the previous type offenses as priors), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if:
   
   (a) the defendant has been convicted of an (f)(1) offense;
   
   (b) the offense described in (a) above was committed while the defendant was on release pending trial; and
   
   (c) not more than five years have elapsed since the date of conviction or release from imprisonment, whichever is later.

This presumption should rarely be confronted because it will be the unusual case where all of criteria will be met.

The second rebuttable presumption is that no condition or combination of conditions will reasonably assure appearance and the safety of the community if the judicial officer finds that there is probable cause to believe that the defendant committed a drug offense punishable by 10 years or more or an offense under 18 U.S.C. §924(c) (carrying or using a firearm in the commission of a felony). The rebuttable presumption should only arise where the defendant is actually charged with either the 10-year drug offense or an offense under 18 U.S.C. §924(c), and only if there is probable cause to believe the defendant actually committed the offense he is charged with. 18 U.S.C. §3142(e). See U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985) (“[t]o hold that the rebuttable presumption comes into play prior to a formal charge would rip the fabric of the statute's carefully sewn procedural safeguards”). But see U.S. v. Bess, 678 F. Supp. 929 (D.D.C. 1988) (defendant need not be charged with offense for court to find probable cause triggering presumption). The 10-year maximum drug offense section is not triggered when the potential 10-year sentence results only from aggregation of multiple charges. U.S. v. Hinote, 789 F.2d 1490 (11th Cir. 1986). The individual drug offense must be punishable by 10 years or more. One district court, however, found that even though the drug offenses charged were punishable by five years because of the date of the alleged offense, the fact that the same offenses now carry 15-20 years can give rise to detention. U.S. v. Gerard, 664 F. Supp. 203 (E.D. Pa. 1987). The maximum statutory penalty will trigger the presumption, regardless of the presumptive sentence under the sentencing guidelines, although the prediction of a lesser
sentence may affect the weight assigned to the presumption. *U.S. v. Moss*, 887 F.2d 333, 336-37 (1st Cir. 1989).

The second presumption goes to the questions of appearance of the person and safety of the community whereas the first presumption goes only to the question of safety. However, it appears that lack of reasonable assurance of either the defendant's appearance or the safety of others is sufficient to detain. *See U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985); *U.S. v. Fortna*, 769 F.2d 243 (5th Cir. 1985); *U.S. v. Daniels*, 772 F.2d 382 (7th Cir. 1985); *U.S. v. Kanahele*, 951 F. Supp. 921 (D. Haw. 1995).

### 1.06.03.01 Constitutional Issues

Some courts have avoided a direct confrontation with the constitutional issues raised by the use of rebuttable presumptions resulting in pretrial detention. *See, e.g.*, *U.S. v. Leon*, 766 F.2d 77 (2d Cir. 1985) (did not reach constitutionality because without presumption, evidence sufficient to detain); *U.S. v. Williams*, 753 F.2d 329 (4th Cir. 1985) (constitutional attack on rebuttable presumption not ripe for review).

The First Circuit rejected a multi-pronged attack on the constitutionality of the 10-year maximum drug offense presumption finding that the conclusions drawn by Congress that drug offenders are a greater flight risk have a substantial basis in fact and are reasonable. *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985). The court also found that the presumption did not significantly increase the risk of an erroneous deprivation of liberty. The *Jessup* decision likewise rejected the analysis of *Leary v. U.S.*, 395 U.S. 6 (1969), which held that for a presumption in a criminal case to be valid, there must be substantial assurance that the presumed fact is more likely than not to flow from the proven fact. The court distinguished *Leary* on the basis that it involved a full-blown criminal trial where the presumption was used to establish an element of the offense, whereas the constitutional protections in preliminary hearings, such as bail, are less protective.

The Third Circuit has likewise rejected a multi-pronged attack on the constitutionality of the provision that a rebuttable presumption of danger results from a finding of probable cause to believe the defendant committed a 10-year maximum drug offense. *U.S. v. Perry*, 788 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986). The court found that Congress has the authority to proscribe gun and drug violations and may resort to civil commitment to prevent their occurrence. *Id*. In addition, the court rejected Eighth Amendment concerns as well as substantive due process arguments, finding that a demonstration of dangerousness justifies deprivation of liberty by civil commitment. *Id*. Finally, while finding that the rebuttable presumption provision of the Bail Reform Act satisfies procedural due process concerns, the court did recognize that the burden-shifting process may cause the defendant to be placed in the position of making self-incriminating statements to rebut a presumption. *Id*. In such circumstances, the court found a judicial grant of use-fruits immunity, similar to *Simmons v. U.S.*, 390 U.S. 377 (1968), would be necessary to save the provision from constitutional problems. *Perry*, 788 F.2d at 115. *But see U.S. v. Ingraham*, 832 F.2d 229 (1st Cir.) (court allowed defendant's bail hearing statements to be used against defendant at trial, declining to approve "blanket exclusion" of *Simmons*), *cert. denied*, 486 U.S. 1087 (1988).
1.06.03.02 Burden of Production


This "burden of production" may require the defendant to produce "some credible evidence" showing reasonable assurance of appearance and/or no danger to the community. U.S. v. Carbone, 793 F.2d 559 (3d Cir. 1986). The factors relevant to this inquiry are the "g" factors listed in the Bail Reform Act. See 18 U.S.C. §3142(g). The evidence produced must be supportive of the point for which it is offered. U.S. v. Trosper, 809 F.2d 1107 (5th Cir. 1987) (defendant's evidence of family ties did not demonstrate that family had some control over his actions and therefore was not evidence that the defendant's appearance could be reasonably assured; likewise defendant's financial condition pointed more toward reason to flee). Id. at 1110. A defendant need not show s/he is not guilty in order to rebut one of the presumptions. U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986). Once the defendant produces some evidence, the presumption does not evaporate, but rather allows the court to give appropriate weight to the presumption without shifting the burden of persuasion to defendant. See U.S. v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991); U.S. v. Stricklin, 932 F.2d 1353, 1354 (10th Cir. 1991) (if the presumption is not rebutted, the court gives it effect but that does not excuse the government from carrying its burden of persuasion); U.S. v. Palmer-Contreras, 835 F.2d 15 (1st Cir. 1987); U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986); U.S. v. Diaz, 777 F.2d 1236 (7th Cir. 1985); U.S. v. Freitas, 602 F. Supp. 1283 (N.D. Cal. 1985). Mere production of evidence does not completely rebut the presumption. The court may still consider drug offenders pose special risks of flight and danger. U.S. v. Rueben, 974 F.2d 580 (5th Cir. 1992) (family ties, home ownership and employment did not rebut the presumption because these factors were connected to drug distribution), cert. denied, 507 U.S. 940 (1993); U.S. v. Lopez, 827 F. Supp. 1107, 1111 (D. N.J. 1993) (sureties' assets demonstrating family ties did rebut presumption because government had no evidence to support its cynical theory that the sureties might be "paid off" by the "drug organization"). Where a defendant was not given the opportunity to rebut the presumption and the government proceeded with its case, the court found the government had waived the requirement that defendant must rebut the presumption. U.S. v. Mastrangelo, 890 F. Supp. 431 (E.D. Pa. 1995).

Once the defendant rebuts the presumption with production of evidence, the burden of proof remains on the government to prove risk of flight and danger to the community. See U.S. v. Quartermaine, 913 F.2d 910, 916 (11th Cir. 1990); U.S. v. Clark, 791 F. Supp. 259 (E.D. Wash. 1992) (government bears burden of proof beyond clear and convincing evidence); U.S. v. Giampa, 755 F. Supp. 665, 668 (W.D. Pa. 1990). The Giampa court found that once the defendant rebuts the presumption with a production of evidence, the government bears the burden of persuasion by clear and
convincing evidence. Mr. Giampa rebutted the presumption by bringing forth the fact that he had no priors, had lived his 27 years in the district and had been steadily employed. Id. at 669. The court found that the defendant did not fit the profile of the "international narcotics trafficker with whom Congress was most concerned [when it enacted the presumption]," in that his only assets were $400 in a checking account and a car valued at $200. One district court has determined that the rebuttable presumption standing alone is not sufficient to show clear and convincing evidence of danger. U.S. v. Cox, 635 F. Supp. 1047 (D. Kan. 1986).

1.06.03.03 Bail While Pending Extradition

Different concerns drive the detention analysis where the defendant is awaiting extradition. "This 'special circumstances' requirement creates a different standard for extradition cases than for federal criminal cases." Kamrin v. U.S., 725 F.2d 1225, 1228 (9th Cir.), cert. denied, 469 U.S. 817 (1984). See also 18 U.S.C. §3146(a). The courts have been hesitant to grant bail pending extradition. Historically, bail has not ordinarily been granted in cases of foreign extradition. See, e.g., Wright v. Henkel, 190 U.S. 40, 63 (1903); Matter of Extradition of Russell, 805 F.2d 1215, 1216 (5th Cir. 1986). The Ninth Circuit has indicated that one who is arrested under an extradition treaty is entitled to the same right to a detention hearing under Salerno as any other criminal detainee. Parretti v. U.S., 112 F.3d 1363 (9th Cir. 1997) (detention of a fugitive without bail violates due process, absent a showing that fugitive poses a flight risk).

The defendant facing an extradition hearing has the burden of establishing special circumstances, beyond the absence of a risk of flight and dangerousness, in order for a court to order pre-hearing conditional release. Salerno v. U.S., 878 F.2d 317 (9th Cir.1989); U.S. v. Leitner, 784 F.2d 159 (2d Cir.1986). In U.S. v. Taitz, the court concluded "special circumstances" existed based on the following:

1. the difficulty and complexity of the case, which involved 434 counts of fraud and a difficult treaty analysis to ascertain if the offenses were extraditable;
2. Taitz's lack of criminal record;
3. Taitz was no danger to the community;
4. Taitz had severe allergies that would be adversely effected by custody;
5. Taitz would be unable to practice his religion while incarcerated; and
6. that diplomatic necessity for denying bail did not exist, as South Africa permitted bail in extradition cases.


Other "special circumstances" may be presented where a defendant raises substantial claims upon which s/he has high probability of success, where the may be grave health effects presented by incarceration, and where there is not a suitable facility available. Release is not be granted absent special circumstances. See Martin v. Warden, Atlanta Pen., 993 F.2d 824, 827 (11th Cir. 1993); Matter of

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5 Clear and convincing evidence is a standard higher than a preponderance of the evidence but less than beyond a reasonable doubt.

1.06.04 Burden on the Government at a Detention Hearing

1.06.04.01 Establishing Probable Cause

The circuits are in general agreement that an indictment alone can establish the probable cause necessary to give rise to the rebuttable presumptions in §3142(e). See U.S. v. Hernandez, 939 F. Supp. 108 (D.P.R. 1996) (indictment for car jacking created rebuttable presumption); U.S. v. Vargas, 804 F.2d 157 (1st Cir. 1986) (neither the statutory language nor legislative history indicates a judicial officer must hold an evidentiary hearing when a defendant has already been indicted); U.S. v. Dominguez, 783 F.2d 702 (7th Cir. 1986) (probable cause finding may be based solely on indictment charging crimes sufficient to trigger presumptions); U.S. v. Contreras, 776 F.2d 51 (2d Cir. 1985) (grand jury indictment conclusively establishes probable cause and is sufficient to trigger the rebuttable presumptions of §3142(e)); U.S. v. Hazime, 762 F.2d 34 (6th Cir. 1985) (indictment is sufficient to establish probable cause and activate second rebuttable presumption); U.S. v. Hurtado, 779 F.2d 1467 (11th Cir. 1985) (indictment sufficient to demonstrate probable cause creating rebuttable presumption of flight). But see U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986) (did not decide whether indictment sufficient; sufficient independent evidence of probable cause existed); U.S. v. Cox, 635 F. Supp. 1047 (D. Kan. 1986) ("when dealing with as fundamental a right as personal liberty . . . a heavier standard for establishing probable cause is required"); U.S. v. Allen, 605 F. Supp. 864 (W.D. Pa. 1985) (indictment alone is not enough to trigger the rebuttable presumption against pretrial release).

An allegation of dangerousness unrelated to the federal charges is not a sufficient basis for detention. See U.S. v. Ploof, 851 F.2d 7 (1st Cir. 1988); U.S. v. Byrd, 969 F.2d 106 (5th Cir. 1992). But see U.S. v. Rodriguez, 950 F.2d 85 (2d Cir. 1991) (domestic dispute unrelated to federal charges are probative of defendant’s dangerousness to the community). The government may not premise the detention hearing on the dangerousness of the defendant alone, but must show that one of the statutorily required grounds exists. 18 U.S.C. §3142(f); U.S. v. Butler, 165 F.R.D. 68, 71 (N.D. Ohio 1996). In Butler, the court explained that the statute was not intended to apply detention where there is a likelihood of recidivism for any crime, but only in limited circumstances of a likelihood of repetition of one of the serious crimes enumerated in the Act. Id. See also U.S. v. Ploof, 851 F.2d 7 (1st Cir. 1988).

Even though the weight of case authority rejects the argument, the clear language of the statute conditions the second rebuttable presumption in §3142(e) upon "the judicial officer finding] that there is probable cause to believe . . . ." An indictment is a grand jury's determination of probable cause, not that of a judicial officer as required by the statute.

1.06.04.02 Danger (Defined)

"[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably
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assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial." 1994 U.S.C.C.A.N. 3189 (emphasis added). Only when there is a "strong probability that a person will commit additional crimes if released" is the community interest in safety sufficiently compelling to overcome the criminal defendant’s right to liberty. Id. The statute requires that the facts the judicial officer uses to support a finding that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. 18 U.S.C. §3142(f); U.S. v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (adopting the language in U.S. v. Motamedi, 767 F.2d 1403, 1406-07 (9th Cir. 1985)); U.S. v. Jackson, 845 F.2d 1262, 1264 n.3 (5th Cir. 1988); U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); U.S. v. Hazine, 762 F.2d 34 (6th Cir. 1985); U.S. v. Orta, 760 F.2d 887 (8th Cir. 1985). The district court decision in U.S. v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), aff’d, 603 F. 2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), quantified clear and convincing evidence as 80 percent proof. The quantification was neither affirmed nor rejected by the circuit’s decision in the same case. U.S. v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), aff’d, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

In U.S. v. Gray, 651 F. Supp. 432 (W.D. Ark. 1987), the court discussed at length the meaning of clear and convincing evidence, concluding that it is not necessary the judge be "plumb sure" that no set of conditions will protect the public, but the judge should be "pretty sure." In U.S. v. Bell, 673 F. Supp. 1429 (E.D. Mich. 1987), the court accepted the following definition of "clear and convincing":

[W]itnesses to a fact must be found to be credible, and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction without hesitancy of the truth of the precise facts in issue.

Id. at 1431, quoting 30 Am. Jur. 2d Evid. §1167.

The preventive detention provisions on dangerousness should not be invoked to safeguard against harms unrelated to the federal prosecution that has given rise to the bail hearing. U.S. v. Ploof, 851 F.2d 7 (1st Cir. 1988) (defendant's threat to kill his girlfriend's husband could not be considered unless it could be connected to the case). But see U.S. v. Rodriguez, 950 F.2d 85 (2d Cir. 1991) (where defendant shot a person not involved in the case, this act could not be considered in assessing dangerousness).

Continued dealing in narcotics has been characterized as a “danger to the community.” U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985). But see U.S. v. Carbone, 793 F.2d 559 (3d Cir. 1986) (community members’ posting of $1 million worth of property as surety indicates that defendant, charged with narcotics offenses punishable by more than ten years prison, was not a danger); U.S. v. Clark, 791 F. Supp. 259 (E.D. Wash. 1992) (defendant arrested in possession of crack cocaine, large amount of cash and scales not a danger); U.S. v. Hall, 651 F. Supp. 13 (N.D.N.Y. 1985) (because defendant is a mere “factory worker” in a large cocaine factory, and not a “kingpin,” he is not a danger).

Threat to the safety of other persons or the community may not justify pretrial detention unless the government establishes that the conduct of the defendant involves one of the six circumstances listed in 18
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U.S.C. §§3142 (f)(1)(A-D) and (f)(2)(A-B); U.S. v. Byrd, 969 F.2d 106 (5th Cir. 1992). For example, Dr. Byrd was charged with receipt of a sexually explicit videotape involving young boys. The government failed to prove that Dr. Byrd was involved in a crime of violence. Young boys and pornography were found at his premises when the warrant was executed, and he may have molested minors not connected with his pending case. Additionally, expert witness testified that he would likely molest children once released. However, the additional information presented did not satisfy the nexus between the charged non-violent offense and the six §3142(f) factors.

1.06.04.03 Danger (Burden of Proof)

The government bears the burden of showing dangerousness by clear and convincing evidence. Clear and convincing evidence of danger may be shown if the defendant was on parole with three prior convictions for violent offenses and in possession of firearms at the time of his arrest, U.S. v. Simpkins, 826 F.2d 94 (D.C. Cir. 1987); if the defendant had made threats to witnesses, U.S. v. Coonan, 826 F.2d 1180 (2d Cir. 1987); if the government proves the existence of large-scale drug trafficking operation that has the ability to continue to function while the defendant awaits trial, U.S. v. Sazenski, 806 F.2d 846 (8th Cir. 1986); and where evidence was presented that the defendant had nine priors, including assaultive behavior and drugs, and was in possession of a partially loaded firearm designed to maim or kill, U.S. v. Bayko, 774 F.2d 516 (1st Cir. 1985); evidence of prior criminal record including use of firearms, U.S. v. Warren, 787 F.2d 1237 (8th Cir. 1986); and where evidence was presented that defendants were veteran drug traffickers with prior felony drug convictions and prior convictions involving dangerous weapons, U.S. v. Williams, 753 F.2d 329 (4th Cir. 1985). The possession of guns alone should not constitute clear and convincing evidence of danger, U.S. v. Jeffries, 679 F. Supp. 1114 (M.D. Ga. 1988), but the crime of possession of unregistered firearms is a crime of violence under the Bail Reform Act and is enough to allow the government to request a detention hearing, U.S. v. Spires, 755 F. Supp. 890 (C.D. Cal. 1991). The danger of recidivism is probably not the type of danger to the community which will support detention. U.S. v. Himler, 797 F.2d 156 (3d Cir. 1986). But see U.S. v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (transient defendant with "drug problem" and drug-related priors detained on both flight and danger to the community).

A drug network’s ability to continue to function while the defendant awaits trial is a significant consideration in determining danger. U.S. v. Ramirez, 843 F.2d 256 (7th Cir. 1988). If continued drug dealing is established, that fact alone can justify detention. U.S. v. Hare, 873 F.2d 796, 799 (5th Cir. 1989); U.S. v. King, 849 F.2d 485, 488 (11th Cir. 1988). The mere fact a defendant is charged with a crime of violence will not meet the clear and convincing evidence standard. U.S. v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); U.S. v. Ridinger, 623 F. Supp. 1386 (W.D. Mo. 1985).

Under post-conviction circumstances, danger to community may encompass economic harms. U.S. v. Reynolds, 956 F.2d 192 (9th Cir. 1992) (defendant denied bail pending appeal after conviction

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6 Section 3142(f)(1) crimes are (A) crimes of violence; (B) crimes where maximum sentence is life custody or death; (C) drug crimes with a maximum of at least 10 years in custody; (D) any other felony if person has at least two convictions for offense equivalent to crimes A-C above. Section 3142(f)(2) crimes are cases where there is a (A) serious risk of flight; or (B) a serious risk of attempts or acts involving obstruction of justice, intimidation of, or threats to a prospective witness or juror.

A defendant cannot be detained as dangerous under §3142(e) even if the presumption is not rebutted unless a finding is made that no release condition "will reasonably assure . . . the safety of the community . . . ." Such finding cannot be based on evidence the defendant has been a danger in the past except insofar as the past suggests future misconduct. *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986); *U.S. v. Leibowitz*, 652 F. Supp. 591 (N.D. Ind. 1987) (defendant took steps toward second attempted murder for hire). Consequently, any evidence favorable to a defendant can affect the operation of the presumptions, including evidence of family and employment status, ties to the community and a clear record.

**1.06.04.04 Flight (Defined)**

Flight risk has been found where the defendant was charged with a 10-year minimum mandatory drug offense, was a leader in drug organization, had money to relocate, and had contacts in Latin Central America, *U.S. v. Alonso*, 832 F. Supp. 503 (D.P.R. 1993); where the defendant has been a fugitive, *U.S. v. Coonan*, 826 F.2d 1180 (2d Cir. 1987); when the case involves a major heroin ring and no real ties to the community, *U.S. v. Jackson*, 823 F.2d 4 (2d Cir. 1987); and where there are strong ties to Mexico, *U.S. v. Valenzuela-Verdigo*, 815 F.2d 1011 (5th Cir. 1987). Congress has determined that drug dealers pose special flight risks because they have money and contacts, and may consider a high bond as a cost of doing business. *U.S. v. Perez-Franco*, 839 F.2d 867 (1st Cir. 1988). Strong evidence of guilt alone, however, should not be sufficient to show risk of flight where there are ties to the community. *See U.S. v. Friedman*, 837 F.2d 48 (2d Cir. 1988); *U.S. v. Gray*, 651 F. Supp. 432 (W.D. Ark. 1987), aff'd by, 855 F.2d 858 (8th Cir.), *cert. denied*, 488 U.S. 866 (1988).

**1.06.04.05 Flight (Burden of Proof)**

The statute does not specifically state the government's burden in regard to risk of flight and the Department of Justice has taken the position that it need only show risk of flight by a preponderance of the evidence. Most courts agree. *See U.S. v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991); *U.S. v. Himler*, 979 F.2d 156 (3d Cir. 1986); *U.S. v. Vortis*, 785 F.2d 327 (D.C. Cir.), *cert. denied*, 479 U.S. 841 (1985); *U.S. v. Chimurenga*, 760 F.2d 400 (2d Cir. 1985); *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1985); *U.S. v. Orta*, 760 F.2d 887 (8th Cir. 1985); *U.S. v. Medina*, 775 F.2d 1398 (11th Cir. 1985). This position should be resisted, and the argument made that clear and convincing evidence is likewise required to show that no condition or combination of conditions will assure the appearance of the person, since appearance is a factor equal to danger to the community under the Bail Reform Act.

While detention hearings provide a potential forum for gleaning information at an early stage, courts are in agreement that they are not to be transformed into "mini trials" or "discovery expeditions" for the defense. *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986); *U.S. v. Acevedo-Ramos*, 755 F.2d 203, 207-
A government proffer need not always spell out in precise detail how the government will prove its case at trial, nor specify exactly what sources it will use. See Martir, 782 F.2d at 1145-46 (citing cf. Acevedo-Ramos, 755 F.2d at 205, 208-09; affirming detention order entered after government refused to provide names of witnesses).

1.06.05 Discovery

The Department of Justice resists defense efforts to obtain witness impeachment information, as required by the Jencks Act, during the pretrial detention hearing. While it appears that the normal rules of discovery may not apply pre-indictment, judges have the discretion to insist on live testimony of officers and production of certain statements, if such evidence is deemed necessary to determining detention. See, e.g., U.S. v. Lewis, 769 F. Supp. 1189 (D. Kan. 1991) (government's motion to quash subpoenas for government witness and government's objection to ordering discovery under Fed. R. Crim. P. 16 were both granted). In light of the substantial intrusion detention places on the liberty interests of the defendant, the defendant's right to cross-examine should be "meaningful" by at least compelled production of evidentiary sources where accuracy is a question. See U.S. v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985); see also U.S. v. Gatto, 729 F. Supp. 1478 (D.N.J. 1989) (Jencks material not disclosed, but subpoenas were enforced for in camera inspection to provide discoverable and exculpatory information). But see U.S. v. Smith, 79 F.3d 1208 (D.C. Cir. 1996), finding the process due at a pretrial detention hearing is only that which is required by and proportionate to the purpose of the proceeding. Note that this does not include a right to confront non-testifying government witnesses. Id.

The defendant may not usually launch a generalized attack on the indictment but s/he may directly attack validity of the information provided by the government for detention. Williams, 798 F. Supp at 36. The defense may put on witnesses to rebut the presumption that arises in certain cases. Williams, 798 F. Supp. at 36. However, the government is not required to divulge confidential sources in detention proceedings. Id. (citing Roviaro v. U.S., 353 U.S. 53 (1957)).

Additionally, it is apparent that in order for the court to adequately consider and weigh the relevant factors for detention, information regarding the nature and circumstances of the case and the weight of the evidence must be disclosed. Lewis, 769 F. Supp. at 1192 (citing Acevedo, 755 F.2d at 207-08). The use of in camera submissions by the government should be discouraged. For example, see U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986), where error was found after the district court used in camera evidence, as well as evidence produced at the co-defendants hearings. To deny access to information adversely impacts the presumption of innocence which the statute specifically states is not an intended result. See supra section 1.06.02.03.

1.06.05.01 Witness Statements Are Discoverable

See supra section 1.06.02.
1.06.05.02 Electronic Surveillance


1.06.05.03 Factors

*See supra* section 1.03.

Again, a lesson learned from *Salerno* is that the detention provisions operate "only on individuals who have been arrested for a specific category of extremely serious offenses." Congress has found these individuals to be far more likely to commit dangerous acts in the community after arrest. The Act, according to the *Salerno* Court, is not "a scattershot attempt to incapacitate those who are merely suspected of these serious crimes." 481 U.S. at 750; *see also* *U.S. v. Shakur*, 817 F.2d 189, 195 (2d Cir.) (court should bear in mind "only a limited group of offenders . . . should be denied bail pending trial"), *cert. denied*, 484 U.S. 840 (1987). The potentially large quantity of drugs involved in a case is not a measure of the propriety of pretrial release or detention; otherwise there would be no release for those defendants alleged to be involved in large-scale narcotics distribution. *U.S. v. Lopez*, 827 F. Supp. 1107, 1110 (D.N.J. 1993).

However, substantial evidence of ongoing narcotics offenses is a danger the courts may consider. *U.S. v. Williams*, 753 F.2d 329 (4th Cir. 1985), *U.S. v. Balano*, 788 F. Supp. 1076, 1077 (W.D. Mo. 1992). *See also* *U.S. v. Dillon*, 938 F.2d 1412, 1415-16, (1st Cir. 1991) (even though defendant may be minimally involved or a "mule," the defendant may be detained if the government has shown that the drug organization for which defendant worked has financial resources for relocating of defendant). There must be at least some evidence presented and unsupported government theories regarding "pay-offs" by drug organizations are not to be given any weight in setting bail. *Lopez*, 827 F. Supp. at 1111. Relying on legislative history, the *Williams* court found that concern about safety includes continued dealing in narcotics. 753 F.2d 329. *See also* *U.S. v. Sazenski*, 806 F.2d 846 (8th Cir. 1986); *U.S. v. Savides*, 658 F. Supp. 1399 (N.D. Ill. 1987), *cert. denied*, 498 U.S. 878 (1990); 1984 U.S.C.C.A.N. 16. *But see* *U.S. v. Dominguez*, 783 F.2d 702 (7th Cir. 1986) (if some favorable evidence presented, fact of drug presumption alone not enough to detain).

Legislative history indicates that the presence of community ties does not necessarily reflect a likelihood of appearance and has no correlation to community safety. Apparently, community ties is one among many factors the court is must weigh in making its determination. *See* 1984 U.S.C.C.A.N. 27. If defendant is an "illegal alien" facing deportation charges, the fact that s/he has family in the United States is not relevant, since s/he will most likely be deported. *U.S. v. Delgado-Rodriguez*, 840 F. Supp. 191, 193 (N.D.N.Y. 1993).

The weight of the evidence against the accused is one factor to be considered at the detention hearing. *U.S. v. Apker*, 964 F.2d 742 (8th Cir. 1992), but it is the least significant factor, *U.S. v. Townsend*, 897 F.2d 989 (9th Cir. 1990). In the words of one district court judge, to presume flight from

### 1.06.06 Detention Orders

A detention order issued pursuant to the statute must be written by a judicial officer and shall include certain items which are set forth in §3142(i):

1. written findings of fact and written statement of reasons for the detention;
2. direction that the defendant be committed to custody and, to the extent practicable, be held separate from persons awaiting or serving sentences;
3. direction that the defendant be afforded reasonable opportunities for private consultation with counsel;
4. direction that upon a court order or a request of the government, the defendant be delivered to a United States Marshal to ensure his/her appearance in connection with court proceedings.

Section 3142(i) requires that the order specify the factual findings supporting the conclusions requiring detention, *U.S. v. Westbrook*, 780 F.2d 1185 (5th Cir. 1986), and the requirement is not met by a conclusory recitation of the language of §3142(f); *U.S. v. Ridinger*, 623 F. Supp. 1386 (W.D. Mo. 1985). In one reported case, failure of magistrate to enter a written detention order resulted in the district court ordering release. *U.S. v. Quinnones*, 610 F. Supp. 74 (S.D.N.Y. 1985). A district court's failure to comply with Fed. R. App. P. 9(a) ("state in writing the reasons for the action taken") will at least require a remand for proper findings. *See U.S. v. Cordero*, 992 F.2d 985 (9th Cir. 1993); *U.S. v. Wong-Alvarez*, 779 F.2d 583, 585 (11th Cir. 1985), *appeal after remand*, 784 F.2d 1530 (2d Cir. 1986). The district court must dispose of every alternative before ordering pretrial detention and its order must reflect that consideration. *See U.S. v. Fernandez-Alfonso*, 816 F.2d 477 (9th Cir. 1987). In addition, any review of the magistrate order must be prompt. *Id.* Since district court did not promptly review detention order (delay of 30 days), defendant ordered released on conditions. *Id.* (Brunetti, J., concurring).

A detention order must provide "that the detainee be afforded reasonable opportunity for private consultation with counsel." *U.S. v. Parker*, 848 F.2d 61, 63 (5th Cir. 1988) (construing 18 U.S.C. §3142(i)), *cert. denied*, 493 U.S. 871 (1989). The court may also permit the temporary release of the person in the custody of the marshal or another person to the extent that the release is necessary to prepare the defense or "for another compelling reason." *Id.* This section may be used to ensure effective trial preparation, including investigation and private consultation, but its potential advantage has to be evaluated in view of the likely presence of a United States Marshal. An appropriate court order ensuring confidentiality should be sought to protect the defendant's Sixth Amendment right to the effective assistance of counsel.
The statute mandates that a judge shall issue the detention order and defense counsel should object if the judge defers the writing of its detention orders to the government. For analogy, see *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964) (adopting verbatim one party's proposed findings of fact is "an abandonment of the duty and trust that has been placed in a judge . . ."). See also "Challenging Unreliable Judicial 'Fact Finding' in State Post-conviction Proceedings," Alabama Capital Reporter, February/March 1991 at p. II. 18-19.

1.06.07 Review and Appeal of Detention Orders

A detention order may be reviewed by the court of original jurisdiction upon a motion for revocation or amendment of the order. 18 U.S.C. §3145(b). The motion shall be determined promptly, without the necessity of briefs. F.R.A.P. 9(a); *U.S. v. Cantu*, 935 F.2d 950, 951 (8th Cir. 1991). A violation of the "prompt" review provision may result in the court ordering the defendant released on conditions. *U.S. v. Fernandez-Alfonso*, 813 F.2d 1571 (9th Cir. 1987). In Fernandez-Alfonso, the court found a 30-day delay between defendant's motion for review and the district court's hearing violated the prompt determination requirement. Because the delay was not caused by any legitimate concerns, but was instead due to inadvertence, the court remanded to the district court with an order to impose appropriate conditions of release. *But see U.S. v. Gonzales*, 852 F.2d 1214 (9th Cir. 1988) (court distinguished holding in Fernandez-Alfonso and declined to extend it to a case involving a finding of danger to the community).

If a legitimate reason exists for the delay, release is not mandated. *See U.S. v. Palmer-Contreras*, 835 F.2d 15 (1st Cir. 1987) (district judge's required attendance at judicial conference good cause for delay). Note also that the Supreme Court's decision in *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990), casts doubt on the availability of release as an automatic remedy whenever the time limits contained within the Bail Reform Act are not followed.

An appeal from a detention order is made in accordance with 28 U.S.C. §1291. The government may also appeal pursuant to 18 U.S.C. §3731. Any appeal must be determined "promptly." At least one circuit has considered a defendant's attempt to obtain review of a detention order via habeas proceedings, and refused to hold that the appeal provisions of the Bail Reform Act are exclusive, *Fassler v. U.S.*, 858 F.2d 1016, 1018 (5th Cir. 1988), *cert. denied*, 490 U.S. 1099 and *reh'g denied*, 492 U.S. 932 (1989). A number of cases have employed the tactic of attacking the detention order after conviction as an impediment to an effective defense, or an improper coercive device. *See U.S. v. Vachon*, 869 F.2d 653 (1st Cir. 1989). Although as yet unsuccessful, those courts presented with the claim have reviewed pretrial detention for its lawfulness before considering a defendant's claim of prejudice at trial. However, absent such prejudice, the legality of pretrial detention is mooted upon conviction. *Id.*

Even though there is no procedure provided for reconsideration of detention orders by the judicial officer who initially ordered detention, the First Circuit has concluded that this procedural omission was inadvertent and that the judicial officer possesses inherent power to reconsider previous detention orders. *U.S. v. Angiulo*, 755 F.2d 969 (1st Cir. 1985).
It is important to preserve issues by raising them before the magistrate. Failure to raise an issue at the initial hearing may result in a finding that the issue was waived. See U.S. v. Dillon, 938 F.2d 1412 (1st Cir. 1991).

The standards of reviewing detention orders are as follows:

1.06.07.01 Standard of Review: District Court over Magistrate

When the district court acts on a motion to revoke or amend a magistrate's pretrial detention order, the district court acts *de novo* and must determine on its own whether or not detention is proper. U.S. v. Rueben, 974 F.2d 580, 585 (5th Cir. 1992) cert. denied, 507 U.S. 940 (1993); U.S. v. Koenig, 912 F.2d 1190 (9th Cir. 1990); U.S. v. Leon, 766 F.2d 77, 80 (2d Cir. 1985); U.S. v. Delker, 757 F.2d 1390, 1394-95 (3d Cir. 1985); U.S. v. Maull, 773 F.2d 1479 (8th Cir. 1985) (en banc); U.S. v. McNeal, 960 F. Supp. 245 (D. Kan. 1997). But see U.S. v. Harris, 732 F. Supp. 1027, 1029 (N.D. Cal. 1990) (court used appellate standard of review, finding *de novo* review precedent was “a house of cards”).

1.06.07.02 Appellate Court over District Court

Appellate courts conduct an independent review which gives some deference to decisions of the district courts. U.S. v. O'Brien, 895 F.2d 810, 814 (1st Cir. 1990). This independent review is in between the "abuse of discretion"/"clear-error" standard and plenary (or *de novo*) review; it is more rigorous than the former and involves less independent examination than the latter. U.S. v. Tortora, 922 F.2d 880, 882-83 (1st Cir. 1990).

Appellate review involves an independent examination of the facts, findings, and record to determine if the district court order regarding bail or detention may be upheld, giving deference to the district court’s factual findings. U.S. v. Portes, 786 F.2d 758, 762-63 (7th Cir. 1985); U.S. v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985); U.S. v. Hurtado, 779 F.2d 1467, 1472-73 (11th Cir. 1985); U.S. v. Provenzano, 605 F.2d 85, 92 (3d Cir. 1979). In the Tenth Circuit, appellate review of district court detention or release orders is *de novo* as to mixed questions of law and fact, but is independent with due deference to purely factual findings. U.S. v. Stricklin, 932 F.2d 1353, 1355 (10th Cir. 1991).

Absent error of law, the court of appeal must uphold a district court order either granting or denying bail, as long as an order is supported by the proceedings below. U.S. v. Rueben, 974 F.2d at 586 (allowed district court release of defendant to stand); U.S. v. Weissberger, 951 F.2d 392, 398 (D.C. Cir. 1991) (allowed district court’s detention of defendant to stand). See supra section 1.04.03.

1.07 OTHER CONSTITUTIONAL ISSUES

Several constitutional issues are addressed within this article. Some arguments have been addressed and resolved, others remain open.
1.07.01 *Ex Post Facto*

The circuits have uniformly held that the various provisions of the Bail Reform Act of 1984 do not violate the Ex Post Facto Clause of the U.S. Const. art. I, §9, Cl. 3. *U.S. v. Angiulo*, 755 F.2d 969 (1st Cir. 1985) (new detention provisions apply to those already incarcerated); *U.S. v. Miller*, 753 F.2d 19 (3d Cir. 1985) (application of bail pending appeal provisions not *ex post facto*); *U.S. v. Crabtree*, 754 F.2d 1200 (5th Cir.), *cert. denied*, 473 U.S. 905 (1985); *U.S. v. Molt*, 758 F.2d 1198 (7th Cir.), *cert. denied*, 475 U.S. 1081 (1985); *U.S. v. Powell*, 761 F.2d 1227 (8th Cir. 1985) (same); *U.S. v. McCahill*, 765 F.2d 849 (9th Cir. 1985); *U.S. v. Affleck*, 765 F.2d 944 (10th Cir. 1985); *U.S. v. Ballone*, 762 F.2d 1381 (11th Cir. 1985). *But see U.S. v. Fernandez-Toledo*, 749 F.2d 703 (11th Cir. 1985) (court refused to give retrospective application to Bail Reform Act when reviewing prosecution's authority to appeal bail decision).
1.07.02 Eighth Amendment Arguments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The United States Supreme Court rejected a facial Eighth Amendment challenge insofar as detention based on danger is concerned. U.S. v. Salerno, 481 U.S. 739 (1987). It agreed that a primary function of bail is to safeguard the integrity of the judicial process, but rejected the proposition that the Eighth Amendment prohibits the government from pursuing other compelling interests through pretrial detention. Id. The Court referred to language in Stack v. Boyle, 342 U.S. 1 (1951), that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment" as dicta that is "far too slender a reed on which to rest" an Eighth Amendment attack. Salerno, 481 U.S. at 752. The Court did not decide whether the Excessive Bail Clause restricts the power of Congress to define the classes of criminal arrestees who may be admitted to bail, concluding that even if the Eighth Amendment imposed some substantive limitation on Congress, the Bail Reform Act would still be valid. Id. at 753. An interesting question, previously raised, is whether the Eighth Amendment would preclude pretrial detention based on flight. According to Salerno, "[t]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." Id. To determine whether the government's response is excessive, it must be compared to the interest sought to be protected.

Several courts have rejected Eighth Amendment attacks. See U.S. v. Perry, 788 F.2d 100 (3d Cir.) (detention on dangerousness grounds not Eighth Amendment violation), cert. denied, 479 U.S. 864 (1986); U.S. v. Winsor, 785 F.2d 755 (9th Cir. 1986) (detention based on risk of flight does not violate the Eighth Amendment); U.S. v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985); U.S. v. Giangrosso, 763 F.2d 849 (7th Cir. 1985) (release pending appeal provisions), cert. denied, 475 U.S. 1031 (1986). But see Melendez-Carrion v. U.S., 790 F.2d 984 (2d Cir.) (framers of the Eighth Amendment did not regard bail as absolute right in all cases but they also did not contemplate the denial of bail on grounds of dangerousness), cert. dismissed, 479 U.S. 978 (1986).

1.07.03 Due Process/Fifth Amendment

Salerno also rejected a facial due process challenge finding that the Bail Reform Act was regulatory and not punitive. The Court found the incidents of pretrial detention were not excessive in relation to the regulatory goals Congress sought to achieve. Because the Bail Reform Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes," Salerno, 481 U.S. at 747, there are several procedural safeguards and the conditions of confinement "appear to reflect the regulatory purposes relied upon by the government." Id. Citing Schall v. Martin, 467 U.S. 253 (1984), the Court concluded that the detention contemplated by the Act did not constitute punishment before trial in violation of the Due Process Clause. In rejecting the due process claim, the Court relied upon other instances where the government's interest in community safety outweighed the individual liberty interests. See Schall v. Martin, 467 U.S. 253 (1984) (in limited circumstances, a juvenile’s liberty interest may be
subordinated to the state’s parens patriae interest in preserving and promoting child welfare); Addington v. Texas, 441 U.S. 418 (1979) (indefinite commitment case where the defendant was found mentally ill and in need of hospitalization for the protection of himself and others).

A Fifth Amendment issue not addressed by Salerno is the potential burden placed on the defendant to rebut the presumptions contained in the Act. Some circuits have found explicitly that the Bail Reform Act does not violate the Fifth Amendment right to due process. U.S. v. Perry, 788 F.2d 100 (3d Cir.), cert. denied, 479 U.S. 864 (1986); U.S. v. Zannino, 798 F.2d 544, 546-47 (1st Cir. 1986); U.S. v. Portes, 786 F.2d 758, 767 (7th Cir. 1986). The Third Circuit recognized that the rebuttable presumption provisions may create a problem with self-incrimination because of the burden placed on the defendant to come forward with evidence. U.S. v. Perry, 788 F.2d 100. The court suggested that the provisions could remain constitutional if the court granted judicial use-fruit immunity similar to that provided in Simmons v. U.S., 390 U.S. 377, 393-94 (1968) (defendant's testimony in support of Fourth Amendment suppression claim may not be used at trial). Presented with a similar challenge, the Fifth Circuit observed that a defendant may avoid Fifth Amendment problems by proceeding via hearsay or proffer, U.S. v. Parker, 848 F.2d 61 (5th Cir. 1988), cert. denied, 493 U.S. 871 (1989). The Parker court did not, however, reach the Fifth Amendment implications presented by the presumptions.

1.07.04 Due Process/Length of Detention

The prolonged incarceration of a person presumed innocent, absent a set bail, may violate due process. Each situation is evaluated on a case-by-case basis. In order to determine if the incarceration violates due process, the court must analyze three prongs which are: (1) the duration of custody; (2) the government's or court's responsibility for the delay; and (3) the strength of the evidence on which detention was based. U.S. v. Orena, 986 F.2d 628 (2d Cir. 1993); U.S. v. Infelise, 934 F.2d 103 (7th Cir. 1991) (one-and-one-half year delay for defense trial preparation not a violation of due process); U.S. v. Gelfuso, 838 F.2d 358 (9th Cir. 1988).

The Supreme Court did not decide at what point detention in a particular case might become excessive and therefore punitive in relation to the regulatory goal of Congress. Salerno, 481 U.S. at 759. Other courts, however, have recognized prolonged pretrial detention on any of the statutory grounds may violate due process. U.S. v. Ojeda-Rios (Ojeda-Rios I), 846 F.2d 167, 169 (2d Cir. 1988) (32-month detention with trial delayed several more months violates due process because some responsibility for delay lay with government); U.S. v. Jackson, 823 F.2d 4 (2d Cir. 1987) (eight-month delay was not yet a due process violation); U.S. v. Melendez-Carrion, 820 F.2d 56 (2d Cir. 1987) (19-month pretrial plus four-month anticipated detention on grounds of risk of flight did not violate due process where the prosecutor lacked responsibility for the delay and the defendant was a strong flight risk); U.S. v. Zannino, 798 F.2d 544 (1st Cir. 1986) (16-month detention resulting from defendant’s medical problems not due process violation); U.S. v. Accetturo, 783 F.2d 382 (3d Cir. 1986) (at some point due process may

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7 The Simmons protection, however, has been found by two courts not to protect statements made at a bail hearing. See U.S. v. Parker, 848 F.2d 61, 63 n.1 (5th Cir. 1988) (no need to decide if necessary to grant Simmons immunity because no presumption); U.S. v. Ingraham, 832 F.2d 229, 237 (1st Cir. 1987) (remarks at bail hearing admissible at trial), cert. denied, 486 U.S. 1009 (1988).
require release); \textit{U.S. v. Theron}, 782 F.2d 1510 (10th Cir. 1986) (four months too long where co-defendants at fault; court guided by reasonableness).

At least one court to consider the issue permitted a second detention order following a due process release even where the second detention order was for a crime that had been considered in the initial detention order. \textit{Ojeda v. Wigen (Ojeda-Rios II)}, 863 F.2d 196 (2d Cir. 1989). In this decision the court found that Ojeda's release in his Connecticut case after a 32-month detention did not preclude at least limited pretrial detention for new charges filed in Puerto Rico. The fact that the Puerto Rico conduct had been considered in the initial detention order, found to violate due process after 32 months, did not change this analysis. The Second Circuit found the District Court in Puerto Rico is entitled to assess many considerations, including the nature of the charges, the currently available evidence of dangerousness and flight, and the reasons why the government is contributing to the aggregate length of pretrial detention.

Courts also focus on the length of time a defendant is likely to spend in detention in the \textbf{future}, as well as the length of detention which has already occurred. \textit{See U.S. v. Hare}, 873 F.2d 796 (5th Cir. 1989) (case remanded for failure to consider, in addition to length of detention at time of ruling, the non-speculative nature of future detention and the complexity of the case); \textit{U.S. v. Khashoggi}, 717 F. Supp. 1048 (S.D.N.Y. 1989) (prospect of protracted pretrial proceedings weighs against detention); \textit{U.S. v. Ojeda (Ojeda-Rios I)}, 846 F.2d 167, 169 (2d Cir. 1988) (32-month detention in case was long enough to violate due process; court ordered defendant released on conditions). However, the defendant was allowed to be detained on new charges filed in \textit{Ojeda-Rios II}.

\textbf{1.07.04.01 Standard of Review:}

The factors used by a district court to determine if pretrial detention has been excessive are normally reviewed for clear error. However, the Court of Appeals reviews due process violations \textit{de novo} and applies a "broader standard of review" to the district court's determination of what violates due process. \textit{See U.S. v. Millan}, 4 F.3d 1038, 1045 (2d Cir. 1993) (overturned district court release of defendants on ground that government responsibility for delay was significantly less than district court had concluded), \textit{cert. denied}, 511 U.S. 1006 (1994).

In \textit{Orena}, the appellate court reversed the district court's decision to release the defendant on bail, finding that the "strength of evidence" prong weighed more heavily in favor of detention due to the finding that defendant controlled a crime "crew." \textit{U.S. v. Orena}, 986 F.2d 628 (2d Cir. 1993).

\textbf{1.07.05 Equal Protection}

One equal protection analysis, in regard to the Bail Reform Act of 1984, depends not upon the finding of a suspect classification but upon the fact that the challenged statute affects the fundamental interest of freedom. These attacks have been rejected. \textit{U.S. v. Perry}, 788 F.2d 100 (3d Cir.), \textit{cert. denied}, 479 U.S. 864 (1986); \textit{U.S. v. Moore}, 607 F. Supp. 489 (N.D. Cal. 1985).

\textbf{1.07.06 Sixth Amendment}
The court in *U.S. v. Perry*, 788 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986), likewise rejected Sixth Amendment constitutional attacks on pretrial detention, finding no right to a jury trial on the issue of detention, that confrontation rights are adequately insured, and that the Speedy Trial Clause deals with criminal prosecutions, not civil commitment proceedings. The Fifth Circuit rejected an attack based on denial of counsel as a result of detention, based on §3142(i)(3), which requires private access to counsel for all detainees. *U.S. v. Parker*, 848 F.2d 61 (5th Cir.), *cert. denied*, 493 U.S. 871 (1989). Counsel who have trouble securing private access should be able to use *Parker* and the text of §3142(i)(3) to obtain temporary release, or other appropriate relief.

The right to effective assistance of counsel may be implicated at a detention hearing. *U.S. v. Frappier*, 615 F. Supp. 51 (D. Mass. 1985) (counsel's conduct at detention hearing in putting defendant on witness stand in regard to a very serious charge after only two 10-minute interviews and subjecting her to cross-examination fell short of reasonable professional standards and violated Sixth Amendment; court found prejudice and ordered defendant's statements suppressed), *cert. denied*, 481 U.S. 1006 (1987).

### 1.07.07 Void for Vagueness

In order to survive a vagueness challenge, a penal statute must define an offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary enforcement.\(^8\) *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Vagueness challenges exist because people ought to be able to plan their behavior based on laws which afford a reasonable opportunity to know what is and is not permitted. Assuming that the punitive versus regulatory issue could be resolved favorably, a detention hearing based upon a "crime of violence" should be open to a vagueness challenge due to the vagueness of the phrase "substantial risk of physical force" and the "safety of any other person or the community." These arguably vague and overbroad terms are used repeatedly throughout the Act. The lower court decision in *U.S. v. Payden*, 598 F. Supp. 1388 (S.D.N.Y. 1984), *rev'd on other grounds*, 759 F.2d 202 (2d Cir. 1985), rejected a vagueness argument on the basis that the defendant was charged with three drug offenses (punishable by 10 years or more), all of which provided clear notice of what gave rise to the detention hearing.

The Act is not void for vagueness just because different procedural sections of the statute must be construed by a court to fit together into a coherent whole. *U.S. v. Moore*, 607 F. Supp. 489, 494 (N.D. Cal. 1985). The following grounds for detention could be attacked as vague: "crimes of violence," allegations of "serious risk of flight," and "serious risk of obstruction of justice."

### 1.07.08 Insufficiency of Hearing Requirement

Though *Salerno* upheld the Act as generally constitutional, the decision did not immunize the Act from all possible constitutional attacks. *U.S. v. Salerno*, 481 U.S. 739, 745 n. 3 (1987). Indeed, the Court has stated that a detention process sufficiently flawed by procedural irregularities may fail to fulfill the Act’s requirement for a hearing before detention may be imposed, *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990), and thus fail to satisfy due process.

\(^8\) A problem is that the Bail Reform Act has been viewed almost uniformly as procedural, not penal.
1.08 POST-TRIAL RELEASE

The Act at 18 U.S.C. §3143 substantially revised the standards for release pending sentence and appeal. Under the old law, release pending sentence or appeal was presumed in accordance with pretrial release procedures, absent a reason to believe that no condition would assure the appearance of the defendant or the safety of the community, or that the appeal was frivolous.

1.08.01 Release Pending Sentencing

Under 18 U.S.C. §3143(a), a person who has been found guilty of an offense under §§3142(f)(1)(A-C) and is awaiting imposition or execution of sentence shall be detained unless, under (A)(i), the court finds there is substantial likelihood that a motion for acquittal or new trial will be granted, or under (ii), the government recommends no custody, and under (B), the court finds by clear and convincing evidence that:

1. the person is not likely to flee; or
2. the person poses a danger to the safety of any other person or the community.

18 U.S.C. §3143(a). Thus, rather than the presumption of release language of old §3148, the Bail Reform Act of 1984 presumes detention pending sentencing for certain offenses unless both (1) and (2) above are satisfied. The burden is on the defendant to show that (s)he is deserving of release. See U.S. v. Manso-Portes, 838 F.2d 889 (7th Cir. 1988); U.S. v. Colon-Berrios, 791 F.2d 211 (1st Cir. 1986); U.S. v. Strong, 775 F.2d 504 (3d Cir. 1985).

The trial court is not required to predict whether the defense will prevail in its motion for new trial. Rather the defendant must only demonstrate a substantial question that is integral to the merits of the case. "Substantial" means a question that could go either way. U.S. v. Haney, 800 F. Supp. 782 (E.D. Ark. 1992) (defendant passed both prongs (1) and (2) and was entitled to bail; defendant showed his motion for acquittal was a "close question" (i.e. could go either way) and he demonstrated he was unlikely to flee or pose a danger).

The defendant must additionally demonstrate by clear and convincing evidence that (s)he is not a risk of flight or danger. In Strong, the defendant, convicted of drug trafficking offenses, did not introduce affidavits, other evidence, or file the trial record to reflect evidence of good character, and, thus failed to meet his burden. Strong, 775 F.2d at 508. In Manso-Portes, the court of appeals reversed the continued release because the district judge did not consider the post-conviction presumption of danger. Manso-Portes, 838 F.2d at 890. Even where a defendant has made an extensive showing that persuades the district court, an appellate court will reverse if it finds that the defendant has failed to meet the high burden imposed by the statute. In U.S. v. Londono-Villa, 898 F.2d 328 (2d Cir. 1990), the district court released the defendant pending sentencing after observing the defendant's and his family's demeanor at trial, taking testimony from character witnesses, requiring a million dollar bond secured by the home of the defendant's sister, surrender of the defendant's passports, execution of a waiver of extradition, and travel restrictions. The district court was also influenced by the substantial issues it believed would be raised on
appeal. The Second Circuit reversed, finding that the subjective nature of demeanor and character testimony, coupled with the conditions imposed, was insufficient to rebut the presumption against bail by clear and convincing evidence. The court was concerned with the following facts: (1) the defendant faced a long sentence (292-365 months) and potential downward adjustments were not certain; (2) the defendant, who had experience as a clandestine pilot and had the financial means to pay back the bond, had a demonstrated ability to flee; and (3) substantial appellate issues had no bearing on the presumption that the defendant would flee. *Londono-Villa*, 898 F.2d at 329-30.

The perjury of the defendant and failure to testify truthfully regarding the extent of his narcotics dealings compelled the Eastern District of New York to find that the defendant's proclamations that he would appear for sentencing and remain law-abiding were insufficient to constitute clear and convincing evidence he would not flee or pose a danger. *U.S. v. Light*, 770 F.2d 158 (2d Cir.), cert. denied, 474 U.S. 1034 (1985). Canadian citizenship alone should not be a sufficient basis to find risk of flight. *U.S. v. Paterson*, 780 F.2d 883 (10th Cir. 1986). Another district court denied release pending sentencing where the trial evidence demonstrated that the defendant possessed various firearms and narcotics, a witness testified to threat of physical violence by the defendant, and the defendant had two other felony cases set for trial in the district. *U.S. v. Bonavia*, 671 F. Supp. 752 (S.D. Fla. 1987).

1.08.02 Release Pending Appeal

Section 3143(b) requires a finding that the appeal is not taken for purposes of delay and that it raises a substantial question of law or fact likely to result in reversal or an order for a new trial. This changes the old "not frivolous" criteria. There must also be clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released. This is exactly the same burden a defendant must meet for bail pending sentencing. *U.S. v. Giannetta*, 725 F. Supp. 60, 62 (D. Me. 1989). The trial court does not have to predict the probability of its own reversal. The burden is on the defendant to show: (1) a substantial question of fact or law exists, see infra section 1.08.03; and (2) that it would be likely to result in reversal, see infra section 1.8.4. Congress intended to create mandatory detention under the Bail Reform Act. Under §3143(b)(2) the court must detain defendants who are convicted of a crime listed in §3142(f)(1)(A-C) unless the defendant can show "exceptional reasons" why she should be treated differently. 18 U.S.C. §3143(b)(2); *U.S. v. Koon*, 6 F.3d 561 (9th Cir. 1993) (Rymer, J., concurring) (defendants ordered detained pending appeal because the reasons for granting bail were not exceptional). Congress intended to reverse the presumption in favor of bail, but did not deny bail entirely to persons who appeal their convictions. The legislative history indicates that "[t]he basic distinction between the existing provision and §3143 is one of presumption . . . . It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail even after conviction. It is the presumption that the committee wishes to eliminate in §3143." 1984 U.S.C.C.A.N. 1, 29. The Senate Judiciary Committee also made it clear that bail pending appeal was available by stating that §3143 "statutorily permits release of a person while he is awaiting sentence or while he is appealing or filing for a writ of *certiorari.*" *Id.* A defendant

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9 Note that the "not frivolous" standard is still applicable to those seeking bail pending appeal under the recalcitrant witness statute (28 U.S.C. §1826(b)) or to those individuals not seeking bail under a direct criminal appeal. *In re Grand Jury Procedures (TRIMIEW) v. U.S.*, 9 F.3d 1388 (9th Cir. 1993).
who seeks release pending sentencing under §3142(f) is not also required to meet the requirements of §3143 simply because he is also appealing his conviction. *U.S. v. Kinslow*, 105 F.3d 555 (10th Cir. 1997).

Courts of Appeal have generally rejected the idea that district courts have to find error likely to result in a reversal or a new trial order to release an individual pending appeal. District courts need only find a substantial question is raised and that the appeal could go either way. *U.S. v. Randell*, 761 F.2d 122 (2d Cir.), cert. denied, 474 U.S. 1008 (1985); *U.S. v. Miller*, 753 F.2d 19 (3d Cir. 1985); *U.S. v. Steinhorn*, 927 F.2d 195 (4th Cir. 1991); *U.S. v. Bilanzich*, 771 F.2d 292 (7th Cir. 1985); *U.S. v. Powell*, 761 F.2d 1227 (8th Cir.), cert. denied, 479 U.S. 1018 (1985); *U.S. v. Handy*, 761 F.2d 1279 (9th Cir. 1985); *U.S. v. Giancola*, 754 F.2d 898 (11th Cir. 1985) cert. denied, 479 U.S. 1018 (1986).

There is a split in authority regarding what position a defendant is in when an appellate court remands a case for resentencing. Should 3143(a) govern, release pending sentencing, or 3143(b), release pending sentencing, govern? In *U.S. v. Holzer*, 848 F.2d 822 (7th Cir. 1988), the Court held that 3143(a) only applies to defendants who are being sentenced for the first time. With his typical clarity, Judge Weinstein arrived at the opposite conclusion in *U.S. v. Pfeiffer*, 886 F.Supp. 303 (E.D.N.Y.1995) reasoning that the law has long recognized that a person whose sentence has been vacated is in the same position as someone who has never been sentenced. The Seventh Circuit reaffirmed its rule in *U.S. v. Krilich*, 178 F.3d 859 (7th Cir. 1999) reasoning that, though the statute is vague, there are practical differences between sentencing and resentencing that justify the application of 3143(b) over 3143(a).


1.08.02.01 Sentencing Appeals

Section 3143(b)(2)(iii) provides for release in situations where the appellate issue is the sentence that was imposed. A defendant may be released pending appeal where the sentencing appeal is (1) "not for the purpose of delay," and (2) raises a substantial question of law or fact likely to result in a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. In such situations, the judicial officer "shall order the detention terminated at the expiration of the likely reduced sentence." 18 U.S.C. §3143(b)(2).

1.08.03 Substantial Question of Fact or Law

The courts have developed three basic, although closely related, refinements on the meaning of the term "substantial question": (1) novel, not decided by controlling precedent, *U.S. v. Miller*, 753 F.2d 19 (3d Cir. 1985); (2) fairly debatable, *U.S. v. Handy*, 761 F.2d 1279 (9th Cir. 1985); or (3) close question or one that could well be decided either way, *U.S. v. Giancola*, 754 F.2d 898 (11th Cir. 1985), cert. denied, 479 U.S. 1018 (1986). *See also U.S. v. Pulley*, 730 F. Supp. 55 (W.D. Ky. 1990), cert.
denied, 502 U.S. 815 (1991) (substantial question is not illusory, may be novel, fairly debatable or close question); U.S. v. Hamrick, 720 F. Supp. 66 (W.D.N.C. 1989) (defendant denied bail where issues recited in two paragraphs and novel issue probably insufficient); U.S. v. Eaken, 995 F.2d 740 (7th Cir. 1993) (district court's finding that it was possible that two circuit judges might disagree was not sufficient basis for release on appeal; defendant was released because he raised substantial question that went to the sufficiency of the evidence).

U.S. v. Miller, 753 F.2d 19 (3d Cir. 1985), the pioneer decision in the area, has been refined by the courts following it. Miller defined a substantial question as "one which is either novel, which has not been decided by controlling precedent or which is fairly debatable." Id. at 23. Some courts agree with Miller but focus on the definition that a substantial question is one that is "fairly debatable." U.S. v. Smith, 793 F.2d 85 (3d Cir.), cert. denied, 479 U.S. 1031 (1987); U.S. v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985). The majority of circuits, however, find that a substantial question "is one of more substance than would be necessary to a finding that it was not frivolous. It is a `close' question or one that very well could be decided the other way." U.S. v. Giancola, 754 F.2d at 901. See also U.S. v. Perholtz, 836 F.2d 554 (D.C. Cir. 1988); U.S. v. Shoffner, 791 F.2d 586 (7th Cir. 1986); U.S. v. Randell, 761 F.2d 122 (2d Cir.), cert. denied, 474 U.S. 1008 (1985); U.S. v. Valera-Elizondo, 761 F.2d 1020 (5th Cir. 1985); U.S. v. Pollard, 778 F.2d 1177 (6th Cir. 1985); U.S. v. Bilanzich, 771 F.2d 292 (7th Cir. 1985); U.S. v. Powell, 761 F.2d 1227 (8th Cir. 1985); U.S. v. Affleck, 765 F.2d 944 (10th Cir. 1985).

The trial court may find exceptional reasons making detention pending appeal inappropriate. U.S. v. DiSomma, 951 F.2d 494 (2d Cir. 1991) ("exceptional reason" was that the defense questioned the factual sufficiency of a key element of the case on appeal); U.S. v. Jones, 979 F.2d 804 (10th Cir. 1992) (district court has authority to consider whether "exceptional reasons" exist to release defendant pending appeal). A court cannot avoid finding a "substantial question" by suspending execution of the sentence pending appeal. U.S. v. Thompson, 787 F.2d 1084 (7th Cir. 1986).

1.08.04 Likely to Result in a Reversal

Whether a question is "substantial" defines the level of merit required in the question presented while the phrase "likely to result in reversal or an order for a new trial" defines the type of question that must be presented. Handy, 761 F.2d at 1280; Bilanzich, 771 F.2d at 299; Valera-Elizondo, 761 F.2d at 1024; U.S. v. Pulley, 730 F. Supp. 55 (W.D. Ky. 1990); U.S. v. Hamrick, 720 F. Supp. 66 (W.D.N.C. 1989).

The circuits generally agree that a reversal or a new trial order is "likely" within the meaning of the statute if the question is so integral to the merits of the conviction on which the defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial. See U.S. v. Giancola, 754 F.2d 898 (11th Cir.), cert. denied, 479 U.S. 1018 (1986); U.S. v. Randell, 761 F.2d 122 (2d Cir.), cert. denied, 474 U.S. 1008 (1985); U.S. v. Miller, 753 F.2d 19 (3d Cir. 1985); U.S. v. Pollard, 778 F.2d 1177 (6th Cir. 1985); U.S. v. Bilanzich, 771 F.2d 292 (7th Cir. 1985); U.S. v. Powell, 761 F.2d 1227 (8th Cir. 1985); U.S. v. Affleck, 765 F.2d 944 (10th Cir. 1985). In sum, the issue must be critical to the case. Harmless errors or insufficiently preserved errors will not suffice. Miller, 753 F.2d at 23.
One court has determined that "any meaningful review or independent reconsideration" by an appellate court of a district court's determination that no substantial issue exists requires presentation of a transcript or stipulated factual record. *U.S. v. Crabtree*, 754 F.2d 1200 (5th Cir.), *cert. denied*, 473 U.S. 905 (1985). In *U.S. v. Blasini-Lluberas*, 144 F.3d 881 (1sr Cir. 1998) the Court remanded the case back to the district court because of that court’s failure to comply with Fed. R. App. 9(b)’s requirement that the district court make a reasoned statement so that the appellate court may conduct the appropriate review. *See also U.S. v. Swanquist*, 125 F.3d 573 (7th Cir. 1997).

### 1.08.05 Release Pending Appeal by the Government

Title 18 U.S.C. §3143(c) provides that release pending appeal by the government is to be handled in accordance with the pretrial release provisions contained in 18 U.S.C. §3142 unless the defendant is already subject to a release or detention order. Counsel must remember that 18 U.S.C. §3142 applies to persons "charged with an offense." Therefore, if the government appeals an order of dismissal, arguably the defendant must be released. Constitutional problems with detention orders where the government appeals an order of the district court should also be considered.

### 1.08.06 Release Pending Revocation Hearings for Supervised Release or Probation

In a case of first impression for the Ninth Circuit, the court held that §3143 of the Bail Reform Act governs persons seeking release pending their revocation hearings as provided in Fed. R. Crim. P. 32.1 and 46(c). *See U.S. v. Loya*, 23 F.3d 1529, 1531 (9th Cir. 1994); *U.S. v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988). This means that the burden is on the defendant to establish that s/he will not flee or pose a danger and the standards are the same as for a defendant seeking release pending sentencing or appeal. *Loya*, 23 F.3d at 1530. However, for those defendants who have had their supervised release or probation revoked and who are seeking release pending an appeal of the revocation, they must demonstrate that "exceptional circumstances" exist. *U.S. v. Bell*, 820 F.2d 980 (9th Cir. 1987). That test is substantially stricter than the provisions of §3143, as *Bell* held §3143 did not govern bail pending appeal of revocation orders. *Id.* at 981.

### 1.09 NEW SANCTIONS FOR OFFENSES UNDER THE BAIL REFORM ACT

#### 1.09.01 Penalties for Failure to Appear

There is an increasing scale of penalties dependent upon the severity of the underlying offense. 18 U.S.C. §3146. The new penalties are a fine under Title 18 and/or:

1. 10 years for failing to appear in connection with offenses punishable by death, life imprisonment, or 15 years or more in custody;
2. five years for failing to appear in connection with offenses punishable by imprisonment for a term of five or more years;
3. two years for failing to appear in connection with any other felony case;
4. one year for failing to appear in connection with any misdemeanor case; and
5. one year for failing to appear when released for appearance as a material witness.
In addition to the enhanced penalty in the Act, any term of imprisonment imposed for failing to appear is required to be consecutive to the sentence imposed in the underlying offense. 18 U.S.C. §3146(b)(2).

Because the maximum penalty for failure to appear is conditional upon the maximum penalty for the underlying offense, it is important to determine the maximum punishment for the underlying offenses. Whether the court considers the total time available in a multi-count indictment or only the punishment in a single count is an open question. The Fifth Circuit considers the basic offense, not the cumulative possible penalty. U.S. v. Iddeen, 854 F.2d 52 (5th Cir. 1988).

With the growth of statutory schemes where the statutory maximum is unknown until sentencing, e.g. violations of Controlled Substances Act where the maximum is dependent upon the drug type and quantity determined at sentencing, sometimes it is difficult to determine what the statutory maximum existed when the defendant failed to appear. In U.S. v. Muhammad, 146 F.3d 161 (3d Cir. 1998), the defendant absconded while facing a charge that he was a felon in possession of a firearm. Depending upon his criminal history, he faced either a ten year maximum under 18 U.S.C. §924(a)(2) or a minimum of fifteen years under §924(e). Mr. Muhammad hung two juries on the gun counts, but was convicted of the bail jump. The Muhammad Court found that the higher statutory maximum of §924(e) applied because the government had noticed Mr. Muhammad of its intent to seek the penalty provision of §924(e). Absent that action by the government, the lower statutory maximum of §924(a)(2), and an offense level increase of six rather than nine, would have applied.

According to the legislative history, the enhanced grading provision is designed to eliminate the temptation to go into hiding until the government's case grows stale or a witness becomes unavailable, "often a problem with the passage of time in narcotics offenses . . ." 1984 U.S.C.C.A.N. 34.

There was also a change in the mens rea from a "willful" failure to a "knowing" failure to allow conviction of a defendant for bail jumping upon a showing that he or she was aware that an appearance date would be set but did not appear. Thus, a failure to keep in contact with the case amounts to a conscious disregard that an appearance date may come and pass, even where the release order does not contain specific information about the time and place the defendant was to appear. U.S. v. Stewart, 104 F.3d 1377 (D.C. Cir. 1997). A person released on bail can be charged with a gross deviation from the standard of conduct applicable to the ordinary person. 1984 U.S.C.C.A.N. 35. Technical inaccuracies in the release order do not prevent the application of the appropriate penalties where the defendant has notice of the true penalties and is not prejudiced by the error. Id. However, in order for a conviction to be sustained under §3146, a defendant must fail to appear at a date he for which he is required to appear. In U.S. v. Fisher, 137 F.3d 1158 (9th Cir. 1998), the Court reversed the conviction for a lack of sufficiency of the evidence because the date that the defendant was required to appear was vacated once he became a fugitive. Thus, to support liability under §3146, the defendant must be ordered to appear for that court date.

Section 3146(c) provides an affirmative defense that "uncontrollable circumstances" prevented the appearance or surrender for service of sentence and that the individual did not contribute to the circumstances and appeared as soon as the circumstances were over. According to the legislative history,
the requirement of appearance or surrender as soon as circumstances permit was included in order to give a break to individuals who had no bad intent in failing to appear or self-surrender. The goal was to encourage defendants to appear or surrender even after missing their scheduled appearances. 1984 U.S.C.C.A.N at 35.

The defense is affirmative, but whether the defendant bears the burden of production or persuasion is not clear. There is no provision in the statute which imposes the burden of persuasion on the defendant, which would ordinarily suggest that the defendant bears only the burden of production. However, the legislative history seems to assume that an affirmative defense imposes the burden of proof by a preponderance upon the defendant. 1984 U.S.C.C.A.N. 35. Other statutory affirmative defenses that impose the burden of proof upon the defendant, see 18 U.S.C. §§2320(c) (counterfeiting), §17(b) (insanity); and §373(b) (solicitation of violent crime), do so by specific provision. Section 3146(c), on the other hand, is silent on the subject. 1984 U.S.C.C.A.N. 35. Patterson v. New York, 432 U.S. 197 (1977), can fairly be read for the proposition that, absent a statutory directive to the contrary, only the burden of production falls to the defendant who would assert an affirmative defense. The case law is silent on the subject, although the Ninth Circuit Manual of Model Criminal Jury Instructions §8.165 (2000 ed.) places the burden of proof upon the defendant, without citation.

The offense of "bail jumping" is intended to apply to actual court appearances or a surrender to serve a sentence and not to failure to appear before other court personnel such as probation officers, marshals, and bail agency personnel.

The bail agreement is a contract between the government, the defendant and the sureties, and is governed by general contract principles. U.S. v. Figuerola, 58 F.3d 502 (9th Cir. 1995) (trial court erred in barring testimony of sureties as to their misunderstanding of obligations under bail agreement). A technical deficiency in the preparation of the bail application will not release the surety from liability if the defendant fails to appear. U.S. v. Noriega-Sarabia, 116 F.3d 417 (9th Cir. 1997) (insufficiency of surety’s net worth to cover bail amount did not void liability). However, conditions added after the surety’s signing of the bond which substantially increase the risk to the surety may release the surety from liability. See U.S. v. LePicard, 723 F.2d 663 (9th Cir. 1984) (condition that defendant not break laws was added); U.S. v. Galvez-Uriarte, 709 F.2d 1323 (9th Cir. 1983) (after surety signed bond government advised defendant to return to Mexico until trial).

1.09.02 Penalty for an Offense Committed While on Release

The Bail Reform Act of 1984 added §3147 providing for a consecutive sentence enhancement of up to 10 years to be served consecutive to the penalty imposed for an offense committed while on release if it is a felony, or up to one year if the offense committed while on release is a misdemeanor. Any
imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment. 18 U.S.C. §3147; U.S. v. Lewis, 991 F.2d 322, 323 (6th Cir. 1993). 11

A strong argument exists that the enhancement factors ("while released pursuant to this chapter") must be pled and proven, not merely alleged in the sentencing process. See Huffman v. Ricketts, 750 F.2d 798 (9th Cir. 1984); Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970). But see Oyler v. Boles, 368 U.S. 448 (1962). The one court to consider the issue found that the government must prove that the defendant was on release pursuant to the statute during the commission of the crimes for which he or she was convicted. U.S. v. Mesa, 641 F. Supp. 796 (S.D. Fla. 1986). The court did not find whether the allegation must be part of the charge or simply the sentencing process. Several circuits have found that §3147 does not create a separate offense but is a sentence enhancement statute which mandates an enhanced sentence for someone who commits a crime while on bail. U.S. v. Di Pasquale, 864 F.2d 271 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989); see U.S. v. Lara, 975 F.2d 1120 (5th Cir. 1992) (enhancement should be applied to the new crime committed while on release and not to the original crime charged); U.S. v. Sink, 851 F.2d 1120 (8th Cir. 1988), cert. denied, 488 U.S. 1012 (1989); U.S. v. Feldhacker, 849 F.2d 293 (8th Cir. 1988); U.S. v. Patterson, 820 F.2d 1524 (9th Cir. 1987). Two judges on the Sink panel wrote separately to set forth strong disagreement with the decision in Feldhacker and to state that, absent the restriction of that case, they would require the government to separately charge the §3147 violation and present it to the grand jury.

A split in the circuits has developed over whether notice by the judicial officer to the defendant of the §3147 "enhancement" is a pre-condition to a valid prosecution. The Fourth Circuit requires notice, U.S. v. Cooper, 827 F.2d 991 (4th Cir. 1987); as does the Fifth, U.S. v. Garcia, 954 F.2d 273 (5th Cir. 1992) (court's citation of wrong statute number provided valid notice because substantially complied with statutory provisions); U.S. v. Onick, 889 F.2d 1425 (5th Cir. 1989); the Seventh, U.S. v. DiCaro, 852 F.2d 259 (7th Cir. 1988); and the Ninth, U.S. v. Night, 29 F.3d 479 (9th Cir. 1994) (notice adequate even though not oral; it was on written release order). A district court in the Second Circuit has reached the same conclusion, U.S. v. Fredericks, 725 F. Supp. 699 (W.D.N.Y. 1989). On the other hand, neither the Third Circuit, U.S. v. Di Pasquale, 864 F.2d 271 (3d Cir. 1988), nor the Eighth require notice. U.S. v. Feldhacker, 849 F.2d 293 (8th Cir. 1988).

The §3147 enhancement should not apply to offenses committed while on release under pre-1984 law. U.S. v. Dicaro, 852 F.2d 259 (7th Cir. 1988); U.S. v. Cooper, 827 F.2d 991 (4th Cir. 1987). The enhancement can be applied even where subsequent offenses committed a district other than the district where defendant was released on bond. U.S. v. McCary, 14 F.3d 1502, 1506 (10th Cir. 1994).

1.09.02.01 Sentences

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11 There is a split in authority regarding whether the offense committed on release can be bail jumping. See U.S. v. Lanier, 201 F.3d 842 (6th Cir. 2000)(acceptable to apply U.S.S.G. §2J1.7 and enhance defendant’s offense level by three for committing crime of failure to appear while on pretrial release); U.S. v. Bahlur, 200 F.3d 917 (6th Cir. 2000)(same); but see U.S. v. Lofton, 716 F.Supp. 483 (W.D. Wash.1989) (holding that U.S.S.G. §2J1.7 should not apply because Congress could not have intended for both 18 U.S.C. §3146 and 18 U.S.C. §3147 to apply, 18 U.S.C. §3146 is the more "specific" statute and the relationship between the two sections is ambiguous, and the rule of lenity foreclosed the imposition of an enhancement.).
The district court must apportion the sentence between the sentence attributable to the underlying offense and the sentence attributable to enhancement, and run the enhancement portion consecutive to any other sentence. \textit{U.S. v. Stevens}, 985 F.2d 1175, 1189 (2d Cir. 1993); \textit{U.S. v. Wilson}, 966 F.2d 243, 248 (7th Cir. 1992). "Any other sentence" is not vague or ambiguous. \textit{See U.S. v. Patterson}, 820 F.2d 1524, 1526 (9th Cir. 1987). In some circuits, the term of enhancement can run consecutively to any other term of imprisonment, even if term was not imposed for an offense committed while on pretrial release. \textit{U.S. v. Wilson}, 966 F.2d 243, 248-49 (7th Cir. 1992); \textit{U.S. v. Lincoln}, 956 F.2d 1465, 1472-74 (8th Cir.); \textit{cert. denied}, 506 U.S. 891 (1992); \textit{U.S. v. Galliano}, 977 F.2d 1350, 1352 (9th Cir. 1992); \textit{but see U.S. v. Lana}, 975 F.2d 1120, 1128 (5th Cir. 1992) (the enhancement should be applied to the new crime committed while on release and not to the original crime for which defendant is on release).

\textbf{1.09.03 Sanctions for Violations of Release Conditions}

Section 3148 creates sanctions for violation of release conditions which allow for revocation of release and an order of detention as well as prosecution for contempt of court. Since all persons who are released under the Bail Reform Act must comply with the mandatory condition that they not commit a federal, state or local crime during the period of release, a showing of probable cause that a new crime has been committed is sufficient to trigger revocation under §3148. \textit{U.S. v. Gotti}, 794 F.2d 773 (2d Cir. 1986). It may be that "danger" may be proved by a preponderance of the evidence (as opposed to clear and convincing evidence) at a revocation proceeding. \textit{Id}. A defendant's courtroom threats to witnesses may be sufficient to warrant revocation of release. \textit{See U.S. v. Ruggiero}, 796 F.2d 35 (2d Cir. 1986). A probable cause showing that defendant is going to flee (conspiracy to violate §3146) is sufficient for district court to hold a revocation hearing. \textit{See U.S. v. Davis}, 826 F. Supp. 404 (D. Utah 1993); \textit{but see U.S. v. Pierce}, 5 F.3d 791, 792 (5th Cir. 1993) (failure to advise defendant he was subject to enhanced penalties was harmless error).

Revocation is triggered by a motion made by the attorney for the government followed by an arrest warrant issued by the judicial officer. If, after a hearing, the court finds that there is:

1. probable cause to believe that the person committed a federal, state or local crime while on release, or
2. clear and convincing evidence that the person has violated any other condition of release, and
3. there is no condition or combination of conditions of release that will assure appearance and safety, or
4. the person is unlikely to abide by any condition or combinations of conditions of release,

the court shall enter an order of revocation and detention. 18 U.S.C. §3148. If there is probable cause that the person committed a new crime, a rebuttable presumption arises that no condition will assure safety of the community or any other person. \textit{Id.}; \textit{see also U.S. v. Cook}, 880 F.2d 1158 (10th Cir. 1989) (the rebuttable presumption operates like the one in §3142(f)(1). If there are conditions that will assure appearance and safety, the court shall return to the provisions of §3142 and amend the conditions of release. If revocation of the release order is caused by the commission of a second offense and results in a detention order in the first case, the defendant still may not be ordered detained in the second case.
without compliance with the terms of §§3142(e), (f), (g) and (i). *U.S. v. McKethan*, 602 F. Supp. 719 (D. Colo. 1985).


1.10 SENTENCING CREDIT FOR PRETRIAL DETENTION IN ALTERNATIVE CUSTODY SITUATIONS

A defendant does not receive sentencing credit for the duration of time she spends on pretrial release unless she is confined to a penal or correctional facility and is subject to the control of the Bureau of Prisons. *Reno v. Koray*, 515 U.S. 50 (1995).

1.11 PRETRIAL SERVICES

Title 18 U.S.C. §§3152-3156 provides for the ultimate establishment of Pretrial Services in each district (other than the District of Columbia). 18 U.S.C. §3152. These statutes were enacted two years prior to the Bail Reform Act. As the volume of criminal cases and pretrial detention in those cases continues to rise, it puts pressure on the courts and the Federal Prison System causing more and more districts to establish Pretrial Services programs.

Pretrial Services presents defendants with something of a Hobbesian choice. On the one hand, Pretrial Service officers may secure the release of defendants who might otherwise languish in jail pending trial. However, pretrial release under supervision presents many of the same problems and potential risks that supervised probation presents. Moreover, while information gathered by Pretrial Services is generally confidential, the pretrial services report will be disclosed to the government at bail hearings (the government may or may not be allowed to retain it), and the information may or may not be made available to probation for use in the presentence report, depending on the practice of a particular district. Of course, false statements made to secure pretrial release may result in prosecution.

1.11.01 Confidentiality

The confidentiality of information disclosed by the client for pretrial services is, at best, limited. Title 18 U.S.C. §3153(c)(1) provides that information obtained for the purpose of securing bail will be used for that purpose only, except as provided in §3153(c)(2). Section 3153(c)(2), in turn, allows disclosure for "research related to the administration of criminal justice," (c)(2)(A); release to contractors operating halfway houses, rehabilitation and counseling centers, (c)(2)(B); release to "probation officers for the purpose of compiling presentence reports," (c)(2)(C); release to defense and government counsel if the report is a pretrial diversion report, (c)(2)(D); and, in certain limited cases, to law enforcement agencies for law enforcement purposes, (c)(2)(E).
Section 3153(c)(3) provides that information made confidential under §3153(c)(1) is not admissible on the issue of guilt or innocence -- but note that §3153(c)(2) material is not confidential under §3153(c)(1) and that sentencing hearings are arguably not directed to issues of guilt or innocence. These loopholes in the statute's confidentiality shield are more than enough to give counsel pause.

Section 3153(c)(1) does not allow random and arbitrary disclosure under §3153(c)(2). Instead, the Director of the Administrative Office of the United States Courts is to establish regulations controlling the release of (c)(2) material. Obviously, the greatest concern revolves around disclosure of information to the probation office for use in compiling the presentence report. Rather than resolve the issue of whether, in light of the guidelines, disclosure to probation officers for use in the presentence report continues to be proper, the Judicial Conference has thrown the issue back to each district's chief Pretrial Services officer. Thus, the best way to determine exactly what, if any, sentencing use will be made of information gathered by Pretrial Services is to ask the chief Pretrial Services officer in your district.

1.11.02 Services Available

Pretrial Services can aid a defendant in two ways. First, Pretrial Services can investigate and verify addresses, employment, and the like, and make recommendations to the court. Because Pretrial Services is a neutral arm of the court itself, judges may give more weight to these recommendations than to those of counsel. Second, and more significant, Pretrial Services can provide supervising services, such as home detention, drug testing, placement in halfway houses and the like, to which counsel may not otherwise have access. See generally 18 U.S.C. §3154. Presumably a Pretrial Services officer can become involved with supervision or monitoring in conjunction with any condition otherwise available on a condition of bail. 18 U.S.C. §§3142(c) and 3154(3). Counsel should note, however, that Pretrial Services officers are also required to inform the court and the United States attorney of "all apparent violations of pretrial release conditions." 18 U.S.C. §3254(4).

1.12 IMMIGRATION BONDS

All defendants who are not United States citizens may have two bonds; one in Federal Court on their criminal matter, and a second in Immigration Court for a removal proceeding that will follow their criminal case. Thus, it is necessary to secure the release of a defendant subject to removal from immigration custody. The Immigration and Naturalization Service (INS) will file detainers against aliens who are either removable or against those who will be rendered removable upon proof of the conduct charged against the defendant.

1.13 LEGISLATIVE HISTORY REFERENCES/OTHER SOURCES OF INFORMATION

1.13.01 Legislative History

1.13.02 Department of Justice Information

The Department of Justice has published a "Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress." The handbook sets forth an analysis of the entire Crime Control Act as well as the Department of Justice "official position" in regard to each of the sections. The handbook also contains the names of persons in the DOJ to contact in regard to each particular portion of the legislation.

1.13.03 Other Materials


1.13.04 Handbooks


1.13.05 Law Journals


Miller and Guggenheim, "Pretrial Detention and Punishment," 75 Minn. L. Rev. 335 (1990)


Shapiro, "Section 3142(e) of the 1984 Bail Reform Act: Rebuttable Presumption or Mandatory Detention?," 35 Buffalo L. Rev. 693-734 (1986)


1.13.06 Miscellaneous


1.14 PROCEDURES IN THE COURTS OF APPEAL UNDER THE BAIL REFORM ACT OF 1984

District of Columbia Circuit

Contact: John Haley
(202) 216-7310

Pre-conviction--Appeals from pretrial release or detention orders will be expedited. Appellant must make immediate arrangements for preparation of all necessary transcripts and notify the court in writing of these arrangements. Within five days of filing the transcript of record, appellant must file a memorandum of law and fact (original and nine copies). This must be accompanied by a copy of the order under review and the statement of reasons entered by the trial court. Appellee may file a responsive memorandum within five days of appellant's memorandum. Appellant may file a memorandum or reply within three days of appellee's response. See Circuit Rule 9 and Fed. R. App. P. 9.

Post-conviction--The appellant shall file an application pertaining to release pending appeal (original and four copies) which should not exceed fifteen pages. Circuit Rule 9 details the required contents of the application. It will be ruled on by a panel of the court.
Pre-conviction--A notice of appeal must be filed with the district court. Pursuant to Fed. R. App. P. 9(a), the appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such paper, affidavits and portions of the record as the parties shall present. The case is assigned to a three-judge panel (the same as an appeals panel). The review is treated as an appeal. Labeling of the pleadings as an "emergency" motion will not necessarily achieve more expedited treatment--there is a case-by-case treatment. The clerk and some of the deputy clerks are attorneys and handle the initial screening of the paperwork.

Post-conviction--The same procedures apply except that Fed. R. App. P. 9(b) must be cited.

Pre-conviction--A notice of appeal must be filed with the district court. Appellant must then file a motion (original and three copies) in the circuit court pursuant to Fed. R. App. P. 9(a), and attach a copy of the written detention order of the judge. If a transcript has been prepared, a copy should be attached; however, the transcript alone is not sufficient to show the district judge's finding. The matter is treated as an emergency motion and if necessary, the court may require the same-day filing of both appellant's motion and appellee's response. It is also possible that the decision may be reached in the same day. Several of the clerk's office staff are attorneys who review the request to see that it is on a special motions form. The panel may request further paperwork (e.g., the probation officer's report on which the district judge relied). The matter is submitted to the calendaring section which assigns it to a three-judge motions panel, with an extra copy simultaneously submitted to the motions panel law clerks. A single applications judge or even the clerk of the court can sometimes grant a stay, such as in the surrender of the defendant, but this is usually only resorted to during the summer months when the panels are not regularly sitting. The court accommodates oral argument, if desired. The court's policy is to avoid a single judge decision of the appeal.

Post-conviction-The appeal is handled as a routine motion. It is reviewed and set for a hearing. If the court needs more time, the court's staff attorney may tell the U.S. attorney that a response is needed in less time than provided by the rule.

Pre-conviction--An appeal from an order granting or denying release from custody with or without bail shall be by motion filed concurrently with or promptly after filing a notice of appeal. A memorandum of facts and law and a copy of the district court's reasons must be filed with the motion or within five days.
Appellee may file a responsive memorandum within three days of appellant's memorandum. Motions will be considered and decided based on the motion papers and briefs, and no oral arguments will be heard unless ordered by the judge. Motions will be decided upon by a single judge. See Local Rule 11-3.

Post-conviction--Requests for release of defendant after sentencing and pending the disposition of the appeal shall be by motion filed expeditiously in the case of appeal, without filing a separate notice of appeal related to the release or detention. The same time schedules set for the above apply.

FOURTH CIRCUIT
Contact: Debra Daniels
(804) 771-2626

Pre- and Post-conviction--A notice of appeal is filed in the district court. Bail motions can also be within a direct criminal appeal, following the same procedure. Both require either: 1) a comprehensive order of the judge's findings, or 2) a transcript of the hearing. The appellant's motion is due in the circuit seven days from the filing of the notice of appeal, and the response is due four days later. The case is then sent to a three-judge panel. There are no guidelines as to turnaround time for decision.

FIFTH CIRCUIT
Contact: Earl Higgins or Tina Geisler, Staff Attorneys Office
(504) 589-6554

Pre- and Post-conviction--This circuit follows its internal operating procedures and Local Rule 9 when processing "bail" matters. A notice of appeal must be filed with the district court pre-conviction. Once the motion and the response are filed, the case is submitted to staff attorneys for preparation of a bench memorandum. It is possible the bench memo may be prepared prior to the filing of the opposition. Expected turnaround time is 24 to 48 hours, and it is possible the panel could rule within a day. Pre-conviction appeals require a three-judge panel. Post-conviction appeals may be done on motion and may be decided by a single judge. The panel has the ability to confer over the telephone and then expeditiously send the decision down via electronic mail.

SIXTH CIRCUIT
Contact: Clerk's Office / Motions Attorney
(513) 684-7000

Pre-conviction--When the circuit court receives a notice of appeal from an order denying bail, it is given expedited treatment. All documents are presented to the motions panel. The time frame depends upon the trial date. The case is given to a three-judge panel to review. They may decide the case based on these papers, or may request oral arguments, if necessary, as soon as possible.

Post-conviction--Post-conviction appeals are filed strictly as motions. No briefs are required. An expedited procedure is employed, but the expediency of the court’s decision depends upon the court’s sitting schedule.
SEVENTH CIRCUIT
Contact: Clerk's Office
(312) 435-5803

Pre-conviction--Once the district court has decided the pre-conviction release, the appellant files a notice of appeal in the district court. Pleadings in the court of appeals are in the motion format, and must include a copy of the district court's order re pre-conviction release. The circuit will remand the case if reasons for the court's order are not in writing. Once appellant's motion papers are received, the circuit court's office may order appellee to respond. Cases are decided by a three-judge motions panel that rotates weekly. While the court treats these matters on an expedited basis, decision turnaround time varies from within a day after appellee's response is received, to approximately one month if published decision is rendered.

Post-conviction--The court prefers the appellant to seek review by way of motion to the court of appeals, under Fed. R. App. P. 9(b), after the notice of appeal of conviction has been filed in the district court. No additional notice of appeal is required. As above, appellant must include a copy of the district court's order regarding post-conviction release.

EIGHTH CIRCUIT
Contact: Case Manager
(314) 539-3600

Pre-conviction--A notice of appeal is required. The "appeal" is docketed upon receipt of appellant's motion (original and three copies). The response is due within seven days from appellant's motion. The filing of a reply is discretionary with the panel. A copy of the district judge's order is required and a transcript is strongly recommended. If a party is aware of any sort of deadline, such should be stated within the pleading. Decisions have been reached within five to seven days, or up to 14 days. It should be noted that the Eighth Circuit has a policy of treating appeals involving incarcerated criminal appellants on an expedited basis--if bail on appeal has been denied by the circuit, the appellate panel is expected to speedily reach a decision on the criminal appeal.

All "bail" appeals are handled by a three-judge regular motions panel.

Post-conviction--The same procedures apply except that the parties should present the "substantial issues of fact or law" required by the statute.

NINTH CIRCUIT
Contact: Song Hill, Senior Attorney, Criminal Motions Unit
(415)566-9800

Pre-conviction--The procedures are governed by Fed. R. App. P. 9 and Circuit Rule 9-1.1.

A notice of appeal must be filed in the district court. Within 14 days of filing the notice of appeal, appellant must file a memorandum of law and facts in support of the appeal. The memorandum (original
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and three copies) must be accompanied by the district court's detention order or release order and if there is a factual issue, the transcript or an affidavit of why there is not transcript. On receipt of the response, the case is submitted to the three-judge motions panel and is to be decided "promptly." The decision of the panel may be reached within 10 to 14 days of receipt of the response. If the case involves a request for a stay, the motion can be decided by the lead judge of the motions panel. Local Rule 9-1 deals with bail pending appeal but also affects a pre-conviction motion. This circuit follows Fed. R. App. P. 9(a).

Post-conviction--The treatment of post-conviction bail appeals is as a motion within the criminal appeal. A notice of appeal must be filed within 10 days. Motions for bail on appeal must also contain a statement as to the ordering and arrangements for payment of the transcript on appeal as well as the court reporter's verification that the transcript has been ordered and the estimated date of completion of the transcript. The response to the motion for bail on appeal is also due within seven days. The circuit follows Fed. R. App. P. 9(b) and Circuit Rule 9-1.2. See U.S. v. Perdomo, 765 F.2d 942 (9th Cir. 1985).

TENTH CIRCUIT
Contact: Elizabeth A. Schumaker, Chief Deputy
(303) 844-5074

Pre-conviction-Post-conviction appeals are filed strictly as motions. No briefs are required. An expedited procedure is employed, but the expediency of the court’s decision depends upon the court’s sitting schedule.

Post-conviction--There are two ways one may seek review of a district court order denying release pending appeal: one is by new (separate) appeal, and the other is by motion within the criminal appeal under Fed. R. App. P. 9(b). The latter is preferred. In some cases, the rule permits the court to decide the bail appeal and the merits of the appeal at the same time. Under Fed. R. App. P. 9(b), the procedure is identical to the above.

ELEVENTH CIRCUIT
Contact: Warren Godfrey, Chief Deputy Clerk
(404) 331-5327

Pre-conviction--Review of pre-conviction release is treated as an emergency matter and assigned to a three-judge panel from the emergency duty log. The three-judge panel is distinct from the regular motions panel. Counsel first files, in district court, a notice of appeal of district court's denial of pre-conviction release. Appellant is given about five days to submit further pleadings, if appellant so desires. Appellee is allowed a few days to respond to written pleadings. Decisions are generally rendered within two weeks or less.

Post-conviction--A notice of appeal is not required. The motion is not considered an emergency unless parties state reasons (imminent surrender/release of defendant). Appellant's motion must include a copy of the district court's denial of post-conviction release. A reply is optional. Decisions generally are rendered within a few days and by the one-judge motions panel. Counsel's attention is directed to Fed. R. App. P. 9(b).
CHAPTER 2

REPRESENTING THE FEDERAL GRAND JURY WITNESS

updated by

Steven F. Hubachek

2.01 FUNCTION OF THE FEDERAL GRAND JURY

In a San Diego County Superior Court trial, the judge, while conducting voir dire, came upon a juror who had previously served on a federal Grand Jury in the Southern District of California. Smiling, the judge asked, did you serve for eighteen months? The answer came back, “Yes.” Did you hear hundreds of cases? “Oh, yes.” Did you vote to indicted in every single one of them? “Yes, I did.” In light of the experience of this former Grand Juror, the old joke about the federal prosecutor’s ability to secure an indictment of a ham sandwich seems to possess more than a kernel of truth.

The framers of the United States Constitution intended the grand jury to stand between the prosecutor and the ordinary citizen; it was regarded as the primary security against hasty, malicious and oppressive persecution. *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The Fifth Amendment's requirement that no person be held to answer for an "infamous" crime unless charged by a grand jury established a body independent from the courts and prosecutor to scrutinize evidence against a potential defendant. *See U.S. v. Calandra*, 414 U.S. 338, 343 (1974) (stating that grand jury functions include the determination of probable cause and protection of citizens against unfounded criminal prosecution); *U.S. v. Dionisio*, 410 U.S. 1, 17 (1973) (intended to serve as a “protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor”); *Costello v. U.S.*, 350 U.S. 359, 362 (1956) (basic purpose of the English grand jury which was later adopted by our Constitution was “to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes”).

The grand jury has not been faithful to its original purpose. A common criticism of the modern day grand jury is that it has become the rubber stamp of the prosecutor. As stated by Senior District Judge William Campbell of the Northern District of Illinois, quoted in *U.S. v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting):

This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the
prosecutor--too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury. Despite these criticisms of the grand jury, it is here to stay. All felony cases must be prosecuted by way of indictment, unless indictment is waived. See Fed. R. Crim. P. 7; Stirone v. U.S., 361 U.S. 212, 215-19 (1960). Since there is potential for prosecutorial abuse of the grand jury, counsel must be familiar with grand jury procedures. This article is intended only as a basic road map.

2.02 AUTHORITY AND POWER OF THE FEDERAL GRAND JURY

Federal grand juries are created by the Fifth Amendment to the United States Constitution and are regulated under Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. §§3321-34. Rule 6 and sections 3321, 3331, and 3334 authorize the district courts to summon regular and special grand juries. A regular grand jury serves until it is discharged by the court, but may not serve more than 18 months unless extended upon a court's determination that extension is in the public interest. An extension may not be for more than an additional six months. Fed. R. Crim. P. 6(g). A special grand jury serves for a term of 18 months, unless discharged or extended. 18 U.S.C. §3331(a).

Rule 6(a) provides that a federal grand jury must consist of at least 16 but not more than 23 persons. Fed. R. Crim. P. 6(a). Rule 6(f) provides that an indictment may be found upon the concurrence of 12 or more jurors. However, not all grand jurors who vote to indict need hear all the evidence presented to the grand jury. U.S. v. Cronic, 675 F.2d 1126, 1130 (10th Cir. 1982), rev'd on other grounds, 466 U.S. 648 (1984); U.S. v. Leverage Funding Systems, Inc., 637 F.2d 645, 649 (9th Cir. 1980); U.S. v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971). An indictment does not have to be dismissed where only 11 grand jurors heard all of the evidence. U.S. v. Lang, 644 F.2d 1232, 1234 (7th Cir. 1981). Fed. R. Crim. P. 6(d) provides that only one witness may testify at a time. Noncompliance with this rule, however, may be deemed harmless error after a jury verdict of guilty. U.S. v. Mechanik, 475 U.S. 66 (1986). The types of grand jury error that may be mooted by a conviction are discussed in section 2.11.

The grand jury's investigative power is very broad. "Unlike [a court], whose jurisdiction is predicated upon a specific case or controversy, the grand jury `can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" U.S. v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991) (quoting U.S. v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).

There is no limit to the questions that may be asked of the witness, other than the objections and privileges previously sustained by the court. In fact, there is no relevancy requirement nor is the witness entitled to know the purpose of the questioning. A witness may not challenge the scope of the grand jury investigation. See U.S. v. Williams, 504 U.S. 36, 49 (1992); Dionisio, 410 U.S. 1, 17-18 (1973). In sum, a grand jury “may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.” R. Enterprises, Inc., 498 U.S. at 298 (quoting U.S. v. Calandra, 414 U.S. at 343).

While the grand jury need not give a reason for issuing a subpoena, see In re Grand Jury Proceeding, 115 F.3d 1240 (5th Cir. 1997), there are minimal relevancy requirements. See U.S. v. R.
Representing the Federal Grand Jury Witness

Enterprises, Inc., 498 U.S. 292 (1991); In re Grand Jury Proceeding (Schofield) 486 F.2d 85 (3d Cir. 1973). Under the current Supreme Court analysis outlined in R. Enterprises, a district court can require the government to reveal the general subject of a grand jury investigation before requiring the party opposing the subpoena to prove lack of relevance. R. Enterprises, 498 U.S. at 301. Also, more burdensome subpoenas should be justified by a higher degree of relevance. Id. at 303 (Stevens, J., concurring). In addition, when the attorney for the target of a grand jury investigation is subpoenaed, the nature and scope of the investigation and the relevance of the questions may have to be disclosed. U.S. v. Edgar, 82 F.3d 499, 507 (1st Cir. 1996); Whitehouse v. U.S., 53 F.3d 1349, 1363 (1st Cir. 1995). In general, the government may have to show the reasonableness and relevance of a grand jury subpoena and of any questioning when a witness or target challenges the subpoena by raising Fifth Amendment, contempt, or abuse of the grand jury issues.

In addition to the authority to summon witnesses to testify before it, the grand jury has the use of subpoenas duces tecum. Fed. R.Crim. P. 17(c). A grand jury can subpoena business records, Braswell v. U.S., 487 U.S. 99 (1988); U.S. v. Doe, 465 U.S. 605 (1984); handwriting samples, U.S. v. Mara, 410 U.S. 19 (1973); U.S. v. Richardson, 755 F.2d 685 (8th Cir. 1985); voice exemplars; U.S. v. Dionisio, 410 U.S. 1 (1973); and samples of a witness' hair, In re Grand Jury Proceedings (Mills), 686 F.2d 135, 139 (3d Cir. 1982). It can even summon a witness to appear in a lineup. In re Melvin, 550 F.2d 674, 677 (1st Cir. 1977). It can compel an individual to execute a consent form directing the disclosure of foreign bank records. Doe v. U.S., 487 U.S. 201 (1988). Grand jury requests for witness testimony, physical evidence and documentary evidence are all achieved through the subpoena power. Legitimate need and relevance are presumed, with the burden being on the defendant to show privilege. In re Grand Jury Proceeding (Schofield), 721 F.2d 1221 (9th Cir. 1983).

2.03 COUNSEL’S INITIAL ROLE

There is no constitutional right to counsel in a grand jury proceeding. U.S. v. Mandujano, 425 U.S. 564 (1976). In fact, the Supreme Court has not recognized the right of a grand jury witness to have her attorney present outside the jury room during a grand jury proceeding. Conn v. Gabbert, 526 U.S. 286 (1999). See also In re Grand Jury Investigation (Molus) 182 F.3d 668, 671 (9th Cir. 1999) (“Whatever due process right a grand jury witness may have to the advice of counsel, it is not so broad as to encompass the right to counsel of first choice.”). Nonetheless, counsel may be approached by a person who has been served with a subpoena either to testify or to bring evidence or documents to the grand jury. At this point counsel serves two important functions. First, counsel should learn as much as possible about the intentions of the grand jury so that the client can make an informed decision about how to respond to the grand jury's subpoena. Second, counsel will want to let the prosecution, the judge, and the grand jury know that the witness will not be bullied. To accomplish this, counsel should seek a continuance of the scheduled appearance date. Procrastination is often the best way to handle a grand jury subpoena since the longer one waits, the better chance one has to learn about what the grand jury is really after. With this knowledge a witness can make a better decision about whether to testify.

A continuance can be sought by simply calling the prosecutor handling the investigation. If the request for a continuance is denied, have the witness inform the grand jury that she has had an inadequate opportunity to consult with a lawyer and have her seek a continuance for a reasonable amount of time. A
motion for a continuance may also be made before the district judge supervising the grand jury. However, no court has found it was error to deny a witness a continuance prior to the initial appearance before the grand jury. Judges are concerned about inconveniencing either the government or the grand jurors and therefore are hesitant to grant motions to continue. The judge must be educated that grand jury proceedings are analogous to other legal proceedings. Remember that even if the continuance is not granted, moving for it has the additional effect of putting the court on notice that the witness opposes any "railroading" in the proceedings. Since many judges view grand jury matters as routine, the motion is an opportunity for them to be told that the witness has substantial legal rights. The request for a continuance is the first opportunity to show the judge and the prosecutor that the witness will be asserting legal defenses to the proceeding.

The other important initial role of the attorney is to ask the prosecutor about the nature of the grand jury's inquiry. In other words, the attorney must try to find out whether the client is a target, a subject, or just a witness. The prosecutor may reveal anticipated questions, as well as persons who could be implicated by the client's testimony. If the prosecutor reveals other witnesses who will be presented to the grand jury, and if they are not represented by counsel, the attorney may want to contact them in order to encourage them to reveal all the helpful information about his client to the grand jurors. They might not be asked questions that reveal exculpatory evidence. The most important issue to resolve at the first contact with the prosecutor is the client's exposure to prosecution. Without such a determination, counsel cannot properly advise the client about the areas in which the Fifth Amendment privilege against self-incrimination, or other privileges, should be invoked. It is at this juncture that negotiations for immunity should be established. See infra section 2.10 for discussion on immunity. Counsel should also determine the legality, timeliness, and propriety of the subpoena. Counsel may also negotiate the terms and scope of the subpoena.

If a witness does decide to testify, counsel should prepare her for the type of questioning likely to occur inside the grand jury room. Despite the Sixth Amendment, the United States Supreme Court and all federal courts of appeal have consistently held that a witness has no right to counsel inside the grand jury room. In a recent case, the Supreme Court declined to reach the question of whether a grand jury witness has the right to the presence of her counsel outside the jury room during grand jury proceedings. See Gabbert, 526 U.S. at 292 (issue not addressed because Gabbert had no standing to raise the alleged infringement of his client's rights). See also Molus, 182 F.3d at 670 (no due process right to counsel of first choice at a grand jury proceeding; being declared a "target" of a grand jury investigation does not constitute the "initiation of adversary judicial proceedings" for Sixth Amendment purposes). If not permitted inside the grand jury room, counsel should wait outside the room and have the client come out to consult after each question. Counsel should explain to the witness which areas are suitable for questioning and which are not, so that the client recognizes when to ask for leave to confer with counsel. The witness should bring a pad and pen into the grand jury room and write down the question that he wishes to discuss with counsel. Explain to the client that to confer with counsel, he need only tell the jurors, "I respectfully request an opportunity to discuss this question with my lawyer." The witness should also be advised not to answer any question that he or she does not understand. The witness should ask that the question be repeated if he is unsure as to what was asked and then pause and think before answering. Courts have recognized the practice of conferring with counsel after questions are posed, and some even recognize it as a right. See U.S. v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968); see also In re Grand Jury
Subpoena (Samuelson), 739 F.2d 1354, 1357 (8th Cir. 1984) (allowing witnesses to have counsel outside room but not recognizing right). But see Gabbert, 526 U.S. at 292 (holding that an attorney's Fourteenth Amendment right to practice one's calling is not violated by the execution of a search warrant, "whether calculated to annoy or even to prevent consultation with a grand jury witness). When the witness has been granted immunity, the right to leave the room after every question may be limited. See e.g., In re Tierney, 465 F.2d 806 (5th Cir. 1972) (referring to consultation with attorney during grand jury session as a privilege). Because there is no constitutional right to have counsel present during the grand jury proceeding, any change will have to come through legislative action.

2.04 WHETHER TO TESTIFY

In deciding whether to testify, the client must consider his general perspective on cooperating with the investigation. More specifically, the client's political, moral and legal obligations should be weighed against the consequences of not testifying. Also consider the scope of the investigation. Is the investigation narrowly tailored or does it seem that the grand jury or the prosecution is on a fishing expedition? For example, the grand jury could be concerned with obtaining indictments for a particular crime or it may be collecting evidence of a broader conspiracy. A witness should be counseled that once in the room, he may encounter a seemingly narrow set of questions that may include some broader ones infringing on protected areas. The client's decision may affect other people. Therefore, the client must weigh what the client knows against the potential harm of the testimony (to himself, friends, family members, and business associates). The attorney must also consider his client's need for immunity and must determine whether ultimately the client is prepared to deal with legal consequences such as contempt. The client should eventually decide whether to cooperate totally, partially, or not at all.

2.04.01 Targets, Subjects and Witnesses

The subpoenaed individual may be characterized by the prosecutor as a target, subject, or witness. A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. A "target" need not be given Miranda warnings. U.S. v. Wong, 431 U.S. 174 (1977); U.S. v. Long, 706 F.2d 1044, 1051 (9th Cir. 1983). A "subject" is defined as “a person whose conduct is within the scope of the grand jury's investigation.” U.S. Attorney's Manual, §§9-11.150 (1990).

A grand jury may subpoena a subject or target of the investigation and question him about his involvement in the crime under investigation. However, as noted in the U.S. Attorney's Manual, in some cases such a subpoena may appear unfair. Thus, a known target should be asked to appear before the grand jury voluntarily and should be subpoenaed only after the grand jury and the prosecutor have approved a subpoena. Section 9-11.151 sets forth some guidelines restricting the use of a subpoena to compel the target to testify. Counsel should hold the prosecutor to these guidelines.

A subpoenaed individual will not always know whether he is a "target," "subject," or simply a witness. In U.S. v. Washington, 431 U.S. 181 (1977), the Supreme Court held that testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense even though the witness was not informed in advance of his testimony that he
was a potential defendant in danger of indictment. *See also U.S. v. Myers*, 123 F.3d 350, 354-55 (6th Cir. 1997) (holding that defendant did not have right to letter informing him of target status prior to grand jury testimony). Therefore, it is important for counsel to find out as much as possible about the nature and scope of the investigation before the witness testifies.
2.05 MOTIONS TO QUASH THE GRAND JURY SUBPOENA

A motion to quash a grand jury subpoena may be made where there are either technical or substantive errors. Substantive defects may include:

1. expiration of the grand jury's term;
2. improper composition of the grand jury or systematic exclusion of a particular group of the community;
3. biased or tainted grand jury because of publicity;
4. taint because of an illegal search or seizure or electronic surveillance;
5. prosecutor's abuse of the grand jury subpoena power;
6. witness not competent to testify;
7. lack of jurisdiction -- venue.

Motions to quash on the basis of substantive errors may first require a witness to appear before the grand jury and assert a constitutional limitation or privilege in response to the grand jury's questions. Courts reason that the error is raised only after the witness has been asked questions by the grand jury. Substantive defects are addressed below. Technical defects are addressed in section 2.05.08.

2.05.01 Grand Jury's Term Expired

Fed. R. Crim. P. 6(g) provides that "no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest." When a grand jury has been discharged, a subpoena may be quashed where it requires the appearance of a witness before a different grand jury. A witness cannot be in contempt once the grand jury has been discharged, since the witness has no opportunity to purge himself of contempt. See 28 U.S.C. §1826(a)(2); Shillitani v. U.S., 384 U.S. 364 (1966); In re Grand Jury Proceedings (Klayman), 760 F.2d 1490 (9th Cir. 1985). Civil contempt fines for failure to produce documents cannot be imposed after the expiration of grand jury's term, even if requested by a second grand jury, in the absence of new contempt proceedings. In re Grand Jury Proceedings (No. 87-1026), 871 F.2d 156 (1st Cir. 1989). But see In re Grand Jury Proceedings, Thursday Special Grand Jury September Term, 1991, 33 F.3d 342, 347 (4th Cir.1994) (even though grand jury was expired following jury’s return of two indictments, witnesses were compelled to comply with subpoenas where there was more than reasonable expectation that party would be subjected to same action again where life of subpoena, measured by duration of grand jury session, was too short to be fully litigated prior to its expiration).

2.05.02 Composition of the Grand Jury

Under 28 U.S.C. §1861, "all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." Where counsel is able to make a prima facie showing of discrimination in the selection and composition of the grand jury, a motion to quash the grand jury's subpoena might succeed. See Campbell v. Louisiana, 523 U.S. 392 (1998)(violation of due process
where court selected foreman prior to selection of other grand jurors, and process of selecting foreman was shown to be discriminatory; *Hobby v. U.S.*, 468 U.S. 339 (1984) (finding no violation of due process in discriminatory selection of federal grand jury foreman from among previously selected grand jury members); *see also U.S. v. Esquivel*, 88 F.3d 722 (9th Cir. 1996) (holding that in order to show that an equal protection violation has occurred in the context of the grand jury foreman selection, the defendant must show that the procedure employed resulted in substantial under-representation of his race or of the identifiable group to which he belongs); *Castaneda v. Partida*, 430 U.S. 482 (1977) (holding that *prima facie* showing of intentional discrimination in grand jury selection violated equal protection). Moreover, in the recent case of *Campbell v. Louisiana*, 523 U.S. 392 (1998), the Supreme Court held that a white defendant has standing to raise an equal protection challenge to the discriminatory selection of his grand jury. In so finding, the Court extended the ruling in *Powers v. Ohio*, 499 U.S. 400, 415 (1991), which held a white defendant has standing to raise an equal protection challenge to discrimination against African-Americans in the selection of a petit jury.

The Fifth and Sixth Amendments require fair representation of the community in the grand jury. *See U.S. v. Grisham*, 63 F.3d 1074 (11th Cir. 1995); *see also Hobby v. U.S.*, 468 U.S. at 344-45; *U.S. v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982); *U.S. v. Maskeny*, 609 F.2d 183 (5th Cir. 1980); *U.S. v. Tranakos*, 690 F. Supp. 971 (D. Wyo. 1988) (successful challenge to exclusion of Shoshone and Arapaho tribes). Failure to object to grand jury array by pretrial motion constitutes a waiver. *U.S. v. Ballard*, 779 F.2d 287, 295 (5th Cir. 1986). Counsel may consider filing motions to voir dire the grand jurors in order to obtain an impartial grand jury. If granted voir dire, questions concerning bias, the effect of publicity, the jurors' knowledge of people involved in the prosecution case, and influences due to the already-indicted co-defendant, are just a few examples of possible voir dire areas.

Systematic exclusion of minorities from a grand jury violates a defendant's right to equal protection. In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court held that because jury bias invariably contributes to the conviction, application of the harmless error rule to a finding of jury bias is unjustified. *See also Campbell*, 523 U.S. at 402 (holding that discriminatory selection of foreperson prior to selection of grand jury members affected composition of grand jury); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)(refusing to tolerate the deliberate exclusion of blacks from grand juries because discrimination on basis of race in selection of grand jurors “strikes at the fundamental values of our judicial system and our society as a whole.”).

In *U.S. v. Artero*, 121 F.3d 1256 (9th Cir. 1997), the court held that picking grand jurors from voter registration lists in counties bordering Mexico does not deny right to a jury randomly selected from a representative cross-section of the community. One claiming underrepresentation of a distinctive group must present data showing that the percentage of persons in the jury wheel group is significantly lower than the percentage eligible in the general population. *Id.* In a subsequent case, *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999), the Ninth Circuit held that "the exclusion of a group [Native Americans] constituting 7.7% or less of the total population is, standing alone, generally insufficient to establish a prima facie case of systematic exclusion.

### 2.05.03 Grand Jury Biased by Publicity
Where counsel can show that publicity has tainted the community in which the grand jury sits, a motion to quash based on the Due Process Clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment right to a fair trial might yield favorable results. The burden is on counsel to prove the widespread publicity, and it will be a difficult burden to bear. In fact, to date, there are no reported federal cases where a witness was able to resist a subpoena on the grounds of bias or prejudice. At the state level, in the O.J. Simpson case, a grand jury was ordered to cease deliberations when the judge found that the jurors had been tainted by sensational publicity. This ruling was unusual, if not unprecedented. Although a new grand jury could have been empaneled to begin its own investigation, the prosecutor chose to go forward with the preliminary hearing, omitting the grand jury indictment altogether. However, because the federal system requires a case to be prosecuted by way of a grand jury indictment (unless waived), it is clear that if this had occurred in a federal case, a new grand jury would have been empaneled.

2.05.04 Fourth Amendment Grounds/Wiretaps

The Fourth Amendment Exclusionary Rule does not apply to grand jury proceedings. *U.S. v. Calandra*, 414 U.S. 338 (1974). However, a court's supervisory powers over the grand jury are available to require a showing that the request is justified. *See id.* at 346; *In re Grand Jury Proceedings (Schofield)*, 507 F.2d 963 (3d Cir. 1975).

A witness may refuse to answer questions based upon materials secured from an illegal wiretap or other illegal electronic surveillance. 18 U.S.C. §2515; *Gelbard v. U.S.*, 408 U.S. 41 (1972). Where a witness files an affidavit detailing particularized incidents of alleged illegal surveillance, the prosecution must either affirm or deny the illegal surveillance. 18 U.S.C. §3504; *U.S. v. See*, 505 F.2d 845, 855-56 (9th Cir. 1974); *see also In re Weir*, 495 F.2d 879 (9th Cir. 1974). Where the grand jury witness makes only a generalized or unsupported claim of improper surveillance, the government need not make a particularized response. *In re Grand Jury Proceedings (Garrett)*, 773 F.2d 1071 (9th Cir. 1985). A witness is not entitled to a full adversarial hearing to challenge the surveillance but is entitled to limited access to specified documents and a limited hearing. *In re McElhinney*, 698 F.2d 384 (9th Cir. 1983). The First Circuit has found *ex parte in camera* affidavits from the FBI agent and the Assistant United States attorney sufficient to overcome a witness' challenge and found that such documents did not violate her right of confrontation. *In re Grand Jury Proceedings (Hill)*, 786 F.2d 3 (1st Cir. 1986). *But see In re Grand Jury*, 111 F.3d 1066 (3d Cir. 1997) (holding that compliance with subpoena would violate statutory sections prohibiting introduction to grand jury of unlawfully intercepted communications, despite claims of unarticulated “clean hands” exception).

The victim of a privately executed wiretap may move to quash a subpoena duces tecum directing the perpetrator of the wiretap to convey recordings of unlawfully intercepted communications to a grand jury. *See Id.* at 1068.

2.05.05 Prosecutorial Abuse of the Grand Jury

As mentioned in section 2.02, *supra*, the investigatory powers of the grand jury are broad. However, subpoenas may not be issued to collect additional evidence for a pending criminal case, or simply
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to harass a witness. *U.S. v. Leung*, 40 F.3d 577 (2d Cir. 1994). Where a subpoena has been issued for these improper purposes, a grand jury witness may move to quash the subpoena. Other remedies also exist such as making the transcripts from the later grand jury proceedings available to the trial court in the case already indicted to allow for appropriate motions to suppress. *In re Grand Jury Proceedings (Fernandez-Diamante)*, 814 F.2d 61, 72 (1st Cir. 1987); *U.S. v. Doe*, 455 F.2d 1270 (1st Cir. 1972).

A court will not enforce a subpoena if its purpose is to gather evidence for a pending criminal charge. *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, 91 (3d Cir. 1973). Once a defendant has been indicted, both sides should pursue ordinary avenues of discovery. Using the grand jury to help the government prepare its case "would pervert [the grand jury's] constitutional and historic function." *U.S. v. Doss*, 563 F.2d 265, 276 (6th Cir. 1977) (en banc); see also *U.S. v. (Under Seal)*, 714 F.2d 347, 349 (4th Cir. 1987); *Beverly v. U.S.* , 468 F.2d 732, 743 (5th Cir. 1972). The burden is on the defendant to show that the sole or dominant purpose of the subpoena is to prepare for trial. *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033, 1041 (3d Cir. 1980); see also 25 Moore's Federal Practice §617.08[3][c] (3d ed. 1997).

A grand jury subpoena in an ongoing criminal investigation will also be quashed when the sole purpose of the subpoena is to obtain discovery for a parallel civil qui tam proceeding. See *In re Grand Jury Subpoena (Under Seal)*, 175 F.3d 332, 334 (4th Cir. 1999).

A grand jury subpoena may also be quashed where the government's conduct is egregious and the motion to quash is the most appropriate sanction. *In re Grand Jury Subpoenas (Kiefaber)*, 774 F.2d 969, 971 (9th Cir. 1985) (quashing subpoena where government disclosed grand jury materials to local authorities, concealed this violation, and attempted to block witnesses' objections to the disclosure), vacated as moot, 823 F.2d 383 (9th Cir. 1987). The "relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability." *U.S. v. De Rosa*, 783 F.2d 1401, 1405 (9th Cir. 1986).

The grand jury subpoena may not be used to restrict a witness' movements or to require a witness to meet with the United States attorney. *Durbin v. U.S.*, 221 F.2d 520, 522 (D.C. Cir. 1954). While it is not improper for agents and the United States attorney to interview subpoenaed witnesses before they testify, the government may not exert undue influence over the witness. *U.S. v. McClintock*, 748 F.2d 1278, 1286 (9th Cir. 1984).

In addition, a subpoena cannot be used to disrupt a reporter's relationship with his news source; however, news reporters have the same obligation as other citizens to respond to grand jury subpoenas and to answer questions relevant to an investigation into the commission of a crime. *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972).

Despite government abuse, a district court may not dismiss an indictment unless the abuse prejudices the defendant. *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 254 (1988); see also *U.S. v. Derrick*, 163 F. 3d 799, 808 (4th Cir. 1998)(holding that an indictment may not be dismissed based on prosecutorial misconduct, absent a showing of prejudice to the defendant). “[D]ismissal of the indictment
is appropriate only ‘if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is a ‘grave doubt' that the decision to indict was free from the substantial influence of such violations.” *Bank of Nova Scotia*, 487 U.S. at 256 (quoting *U.S. v. Mechanik*, 475 U.S. 66, 78 (1986)). Noting the absence of a history of “prosecutorial misconduct spanning several cases that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process,” the Court upheld the reinstatement of the indictment. *Id.* at 259. In *Bank of Nova Scotia* the alleged acts of misconduct were: (1) calling witnesses solely to assert their Fifth Amendment privilege; (2) gathering evidence for civil suits; (3) giving unauthorized oaths to IRS agents; (4) producing misleading, inaccurate summaries; (5) granting of pocket immunity; and (6) permitting two agents to read in tandem before the grand jury. *Id.* at 260. These acts were determined to be “isolated episodes” in the course of a 20-month investigation and did not affect the charging decision. *Id.* at 263. One note of hope -- the Court did indicate that threatening to withdraw a grant of immunity to manipulate the witness' testimony might give rise to a finding of prejudice. *Id.* at 262.

In a Ninth Circuit case, *U.S. v. Eric B.*, 86 F.3d 869 (9th Cir. 1996) the court held that even if there was an improper use of a grand jury to investigate a juvenile, subpoena of juvenile’s school records was not plain error. The court reasoned that the juvenile failed to demonstrate prejudice since he could not be criminally prosecuted. *See id.*

However, courts have dismissed indictments for the prosecutor’s failure to inform the courts that the witness has lied during grand jury testimony. In *U.S. v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974), the court held that permitting a defendant to proceed to trial on an indictment based upon perjured testimony violates the Due Process Clause of the Fifth Amendment. In *Basurto*, a grand jury witness admitted to the prosecutor that a portion of his testimony before the grand jury was untrue. *Id.* at 784. After learning this information, the prosecutor informed opposing counsel but not the court or the grand jury. *See id.* The Ninth Circuit condemned this conduct in the strongest possible terms:

> At the point at which he learned of the perjury before the grand jury, the prosecuting attorney was under a duty to notify the court and the grand jury, to correct the cancer of justice that had become apparent to him. To permit the appellants to stand trial when the prosecutor knew of the perjury before the grand jury only allowed the cancer to grow.

*Id.* at 785. Thus, the appropriate remedy "when the government allows a defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony" is dismissal. *Id.* at 786.

In general, however, dismissals based on misconduct before the grand jury are few and far between. In *U.S. v. Claiborne*, 765 F.2d 784 (9th Cir. 1985), the government presented evidence to three separate grand juries, presented perjured testimony and employed FBI and IRS agents as "agents of the grand jury." The Ninth Circuit found no evidence that perjured testimony was knowingly presented. *See id.* at 796. The court also ruled that the use of agents did not override the independence of the grand jury. In *U.S. v. Benjamin*, 852 F.2d 413, 419 (9th Cir. 1988), *cert. granted, vacated and remanded*, 490 U.S. 1043 (1989) (mem.), the court did not find misconduct requiring dismissal where the prosecutor failed to reveal to the Grand Jury that a witness was involved in a multi-million dollar lawsuit against the same defendants as those targeted by the proceedings, since the prosecutor had no duty to present to the grand
jury all matters bearing on a witness' credibility. The disclosure of tape recordings to this same witness also
did not require dismissal, since the district court has discretion to order disclosure of grand jury materials
to private parties under Fed. R. Crim. P. 6(e)(3)(C)(i). The only restrictions on disclosure are that parties
must be aiding the government's investigation and there must be a strong showing of “particularized need.”
Id. Further, the court held that causing witnesses repeatedly to assert the Fifth Amendment privilege did
not require dismissal. Id. at 420. In U.S. v. Mangual-Corchado, 139 F. 3d 34, 41 (1st Cir. 1998), the
court found that the government’s use of testimony by an agent who related to the Grand Jury two perjured
versions of events by a government witness was not “sufficiently material” to require dismissal of an
indictment.

There is no requirement that exculpatory evidence be presented to the grand jury. U.S. v.
Williams, 504 U.S. 36 (1992); U.S. v. Regan, 103 F.3d 1072, 1081 (2d Cir. 1997); U.S. v. Fritz, 852
F.2d 1175, 1178 (9th Cir. 1988). Indeed, there is no requirement that the prosecutor correctly instruct
the grand jury as to the elements of the crime absent a showing that "the conduct of the prosecutor was so
`flagrant' it deceived the grand jury in a significant way infringing on their ability to exercise independent
judgment." U.S. v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir. 1989) (citing U.S. v. Wright, 667 F.2d
793, 796 (9th Cir. 1989)).

In U.S. v. Smith, 687 F.2d 147 (6th Cir. 1982), the court upheld a case where the prosecutor
obtained a subpoena without knowledge of grand jurors, encountered witnesses outside the grand jury
room, obtained handwriting exemplars from the witnesses in exchange for waiver of their appearance
before the grand jury, and subsequently indicted the witnesses. The witnesses were later convicted of
substantive offenses. Id. at 149.

In U.S. v. (Under Seal), 714 F.2d 347 (4th Cir. 1983), the court upheld a conviction where the prosecutor
informed a grand jury witness that he would be excused from testifying if a corporation under
investigation and a relative of the witness would plead guilty to a felony chosen by the government. The
evidence possessed by the witness was held to be relevant to the grand jury's proper investigation even
though the prosecutor could have used the information for a different improper purpose. See also U.S. v.
Al Mudarris, 695 F.2d 1182 (9th Cir. 1983) (upholding conviction despite prosecutor's comments
bolstering credibility of witness).

In U.S. v. Wiseman, 172 F.3d 1196, 1205 (10th Cir.), cert. denied, 120 S. Ct. 211 (1999), the
Tenth Circuit upheld a district court's denial of a defendant’s motion to dismiss where the prosecutor
improperly “testified” as to the effect of robberies on interstate commerce, and improperly relied on a ruling
of the Chief Judge of the District of New Mexico in her attempt to meet required elements of a crime.

2.05.06 Witness Not Competent to Testify

Emotional instability or mental incapacity may be sufficient grounds for a witness to refuse to testify.
See In re Loughran, 276 F. Supp. 393 (C.D. Cal. 1967) (holding that witness was competent to testify
before grand jury even though her physical and mental health was delicate, provided the examination would
be for a short period of time and under continuing supervision of psychiatrists). In U.S. v. Schoefield, 465
F.2d 560, 562 (D.C. Cir. 1972), the court stated a general test to determine the competency of a young
child was “whether [the child] has the requisite intelligence and mental capacity to understand, recall and narrate his impressions of an occurrence.” A claim of incapacity is often subject to a full evidentiary hearing. In addition to a court’s concern for a witness’ capacity to testify, courts may be concerned with the effect that testifying before the grand jury has on the witness. The *Loughran* court noted that a witness' physical and mental health should not be harmed because of testimony requested by a grand jury. *Id.* at 393.

### 2.05.07 Lack of Jurisdiction -- Venue

Venue is proper as long as there is some relationship between the district of the grand jury and the offense being investigated. *See* *Brown v. U.S.*, 245 F.2d 549, 554 (8th Cir. 1957) (court found no relationship between Nebraska grand jury and offense committed in Missouri). A subpoena requiring a witness to appear in a place other than the district where the subpoena is issued may be quashed. *Cf. U.S. v. Polizzi*, 323 F. Supp. 222 (C.D. Cal.) (dictum), *rev’d on other grounds*, 450 F.2d 880 (9th Cir. 1971) (holding that court cannot by subpoena require witness to appear outside court’s jurisdiction, and may only subpoena witness to proceeding before issuing court). Although a grand jury in one federal district has no authority to direct its investigation solely into offenses committed in another district, a witness has no standing to challenge the grand jury’s “jurisdiction” to investigate. *Blair v. U.S.*, 250 U.S. 273, 282-83 (1919); *U.S. v. Neff*, 212 F.2d 297 (3d Cir. 1954). However, if it is clear that the grand jury is exceeding its authority and serious abuses can be shown, the witness should request that the court, *sua sponte*, examine the purpose of issuing a subpoena. *See* *In re Grand Jury Investigation (Jackson)*, 696 F.2d 449, 450 (6th Cir. 1982); *In the Matter of Grand Jury Investigation of Targets*, 918 F. Supp 1374, 1377 n.8 (S.D. Cal. 1996).

### 2.05.08 Technical Defects in the Subpoena

Technical defects in the subpoena stem from the following requirements:

1. The subpoena must include the name of the court, the title of the proceeding, the name of the person subpoenaed, and the place and time for appearance. The signature and seal of the clerk of the district court also must be included. *See* *Fed. R. Crim. P. 17(a)*;

2. *Fed. R. Crim. P. 17(d)* requires that the witness be served personally with the subpoena. *U.S. v. Davenport*, 312 F.2d 303, 307 (7th Cir. 1963); and

3. A subpoena duces tecum must describe the items to be produced with sufficient particularity and specificity to permit identification by the party subpoenaed. *In re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575, 578 (S.D. N.Y. 1961).

Since in the grand jury context, the decision as to what offense will be charged is routinely not made until after the grand jury investigation, the courts generally deny a motion to quash a subpoena challenged on relevancy grounds. However, if the district court determines there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation, the motion to quash may be granted. *U.S. v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). In *R. Enterprises, Inc.*, Justice O’Connor indicated that district courts should sometimes disclose the topic of the investigation to permit the defense meaningfully to litigate the motion to quash. *Id.* The Court
also implied that a more effective challenge to a subpoena duces tecum issued by a grand jury is based on a subpoena's indefiniteness or that compliance is overly burdensome, rather than irrelevance. *Id. But see In re Grand Jury Proceedings*, 115 F.3d 1240 (5th Cir. 1997) (movants failed to show that compliance with subpoenas was “unreasonable or oppressive” where subpoenas required subject to produce items already seized pursuant to search warrant and subject was hampered from confirming this by the sealing of the warrant affidavit).

While a technical defect in a subpoena may result in an order to quash, the error can be rectified simply by service of a correct subpoena.
2.06 CONSTITUTIONAL GROUNDS TO REFUSE TO TESTIFY OR TO QUASH A GRAND JURY SUBPOENA

There are at least three constitutional provisions which may help a potential grand jury witness: the Fifth Amendment protection against self-incrimination, the freedom of the press guarantee of the First Amendment, and the Speech and Debate Clause of Art. I, §6. Each provision is discussed below.

2.06.01 Fifth Amendment

The Fifth Amendment is generally an unsuccessful means to quash a subpoena. See, e.g., U.S. v. Winter, 348 F.2d 204 (2d Cir. 1965); U.S. v. Cleary, 265 F.2d 459, 462 (2d Cir. 1959). A witness may assert the privilege against specific questions that are posed or may assert the privilege in an attempt to avoid testifying entirely. See U.S. v. Torcasio, 959 F.2d 503 (4th Cir.), amended by U.S. v. Torcasio, 993 F.2d 368 (1992). Counsel the witness to say, "I respectfully wish to rely on my Fifth Amendment right and decline to answer this question." The witness may be granted immunity and in such case, the witness must testify or risk contempt. See infra §§2.08, 2.10. Immunity is granted often enough that it is advantageous for the grand jury witness to assert the privilege after each question (rather than all at once beforehand) so the witness will have some idea of what the grand jury is after and can prepare accordingly. However, once the witness invokes the Fifth Amendment privilege, the government may cease its questioning until after it offers the witness immunity, thereby eliminating the witness' ability to become more prepared for the next grand jury session.

Where the answer to a question may incriminate a witness, the Fifth Amendment should be invoked. A grand jury witness' incriminating testimony will be admissible against that person in a subsequent prosecution, even absent a warning that the witness was a potential defendant. U.S. v. Washington, 431 U.S. 181 (1977); accord U.S. v. Wong, 431 U.S. 174 (1977) (upholding indictment against grand jury witness for perjury despite lack of warning of Fifth Amendment privilege); U.S. v. Mandujano, 425 U.S. 564 (1976) (the Fifth Amendment privilege against self-incrimination did not require suppression in perjury prosecution of false statements made to grand jury by defendant who was not given Miranda warnings when called before grand jury even if defendant was a "putative" or "virtual" defendant when called before the grand jury); U.S. v. Myers, 123 F. 3d 350 (6th Cir. 1997) (affirming district court's denial of motion to suppress grand jury testimony on Fifth Amendment Self-Incrimination Clause grounds where defendant was warned on the record just prior to testimony that he had the right to refuse to answer any questions that would incriminate him, a right to consult with an attorney, and that anything he said could be used against him).

The Fifth Amendment privilege against self-incrimination is available throughout the defendant's sentencing procedures. U.S. v. Watt, 910 F.2d 587 (9th Cir. 1990). Counsel who represents a defendant in a criminal case may find that the client, generally after a guilty plea, has been subpoenaed before a grand jury to give evidence related to the underlying facts in the pending or completed case. U.S. v. Valencia, 656 F.2d 412, 416 (9th Cir. 1981). Under such circumstances, counsel should explore possible additional criminal liability despite the plea.
The privilege against self-incrimination must be claimed, or it will be deemed waived. *U.S. v. Jenkins*, 785 F.2d 1387 (9th Cir. 1986). Disclosure of a fact waives the privilege as to details. *Rogers v. U.S.*, 340 U.S. 367, reh’g denied, 341 U.S. 912 (1951). Because even a well prepared client is likely to be nervous when called before a grand jury, counsel should carefully instruct the client on the language necessary to assert the Fifth Amendment privilege. Again, the privilege is asserted by saying “I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.”


The Supreme Court held that fear of prosecution by a foreign nation is beyond the scope of the Fifth Amendment Self-Incrimation Clause. *See U.S. v. Balsys*, 524 U.S. 666, 669 (1998); *see also infra* 2.10.

### 2.06.02 Subpoena Duces Tecum

A Fifth Amendment problem also arises when documents or other materials are the subject of a grand jury subpoena duces tecum. In the latter instance, counsel must resolve two questions: are the materials themselves privileged, and is the act of producing the materials privileged?

### 2.06.03 Non-business Personal Papers

The Supreme Court in *Fisher v. U.S.*, 425 U.S. 391, 396 (1976), watered down the Fifth Amendment by creating a new test to determine government violations of the Fifth Amendment. This test requires that the accused be compelled to make a testimonial communication that is incriminating. In *Doe v. U.S.*, 465 U.S. 605 (1984), the Court held that the contents of the business records of a sole proprietorship are not privileged under the Fifth Amendment. The Court reasoned that the Fifth
Amendment only protects the person asserting the privilege from *compelled* self-incrimination. Where the preparation of business records is voluntary, no compulsion is present. *Id.*

Nonetheless, personal diaries and non-business personal letters may, under certain circumstances, be protected. *See Fisher*, 425 U.S. at 401 n.7 (holding that special problems of privacy involved in subpoena of personal documents such as diaries not involved here); *In re Grand Jury Proceedings* (Martinez), 626 F.2d 1051, 1054 n.2 (1st Cir. 1980) (leaving open question of whether non-business, intimate personal papers such as private diaries or drafts of letters or essays may be privileged); *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006 (E.D. Wash. 1984) (holding that petitioner could claim privilege as to contents of only those nonbusiness documents authored by him which contained thoughts so personal that disclosure would infringe on right to privacy). *But see U.S. v. Doe*, 465 U.S. 605, 612 n.10 (1984) (“If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.”); *U.S. v. Ripinsky*, 109 F.3d 1436 (9th Cir. 1997) (holding that admission of “inextricably intertwined” evidence did not violate defendant’s Fifth Amendment grand jury rights); *U.S. v. MacKey*, 647 F.2d 898, 901 (9th Cir. 1981) (holding that diary and appointment calendar used in the day-to-day management of a corporation, but containing non-business personal notations, are unprivileged business records subject to subpoena).

In determining whether the documents are personal or business, the issue is whether by requiring their production, the witness is being compelled to testify against himself. The following list of criteria is relevant to this determination: who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the business required its preparation, and whether its existence was necessary to the conduct of the business. *See In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981 Witness*, 657 F. 2d 5, 7 (1981) (remanding on question of personal or business nature of documents, lower court to use above criteria).

**2.06.04 Act of Production Doctrine**

Although the contents of business records are not testimonial, the act of production can be found testimonial, “if it can be used by the government to show the existence, possession, or authentication of the documents requested.” *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418, 1421 (9th Cir. 1985) (citing *Doe*, 465 U.S. at 614 n. 11). The act of producing business records is subject to the Fifth Amendment privilege, if it can be proved the act is compelled, communicative and incriminating. *See Id.*

Although a subpoena duces tecum does not ordinarily compel the creation of the items described in it, such a subpoena does compel the act of production of the items. “The act of producing evidence in response to a subpoena . . . has communicative aspects of its own . . .” *Fisher*, 425 U.S. at 410 n.11. These communicative aspects arise because a government subpoena compels the holder of the documents to perform an act that may have testimonial aspects and an incriminating effect. *See U.S. v. Doe*, 465 U.S. 605, 612 (1984) (*Doe I*). In short, “the Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact.” *Doe v. U.S.*, 487 U.S. 201, 209 (1987) (*Doe II*).
The testimonial aspects of the act of production may take several forms. "The Fifth Amendment's protection may . . . be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced." *Baltimore City Dept. Of Social Services v Bouknight*, 493 U.S. 549, 555 (1990) (citations omitted); accord, *In re Grand Jury Proc. On February 4, 1982*, 759 F.2d 1418, 1421 (9th Cir. 1985) (citation omitted). In addition to the questions of the existence, possession, and authenticity of the items to be produced, see id., the act of production may also indicate the witness' view as to whether or not a particular item is responsive to the subpoena: the act of production "also would indicate the [individual's] belief that the [items produced] are those described in the subpoena." *Fisher*, 425 U.S. at 410 (citing *Curcio v U.S.*, 354 U.S. 118, 125 (1957)). Further, even the act of non-production or partial-compliance may be testimonial, and subject to protection under the Self-Incrimination clause. *U.S. v. McLaughlin*, 126 F.3d 130, 134 (3d Cir. 1997) (finding that failure to produce records of particular account in response to IRS summons may be as communicative as complete production; therefore subject to Fifth Amendment).

The Ninth Circuit has applied the act of production analysis in the context of a subpoena demanding the production of certain business and personal documents from the attorneys and accountant of the object of a grand jury investigation. *See Grand Jury Proc. On February 4, 1982*, 759 F.2d 1418 (9th Cir. 1985). Although the contents of the documents were not protected by the Fifth Amendment, id. at 1420, the Ninth Circuit held that the subpoena must nonetheless be quashed as production of the defendant's documents would "relieve the government of proving the existence, possession, or authenticity of the records, and, thus could be incriminating." *Id.* at 1421. The same analysis is applicable to subpoenas for physical, as opposed to documentary, evidence. *See* *Fisher*, 425 U.S. at 410 n.11 (holding that act of producing self-authored document same as that of producing chattel or document authored by another); *Goldsmith v Superior Court*, 152 Cal. App. 3d 76, 199 Cal. Rptr. 366 (1984) (holding that defendant not required to produce firearm allegedly used in offense); *Commonwealth v Hughes*, 380 Mass. 583, 404 N.E.2d 1239 (Mass. 1980).

"Where the testimonial value of document production is high, and the government obtains a large quantum of information directly from the witness’ mental faculties, the government labors under ‘a heavy burden of proving that all the evidence it seeks to introduce is untainted by the immunized act of production.’" *U.S. v. Hubbell*, 167 F.3d 552, 585 (10th Cir. 1999) (quoting *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir. 1986)).

The courts are split on whether Doe’s “act of production doctrine” extends to corporations. The Second Circuit has held that individuals can assert “act of production” doctrine when corporate documents are involved. *See In re Katz*, 623 F. 2d 122, 125 (2d Cir.1980) (attorney asserted “act of production” doctrine for a grand jury subpoena duces tecum that called for all documents in his possession relating to “any company owned, operated, or controlled ” by his client); *In re Grand Jury Subpoena Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981 (2d Cir.1983) (corporate president asserted the privilege for subpoena requesting all corporate documents). But see *In re Grand Jury Subpoena Dated..."
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Other circuits have reached a contrary conclusion. Relying on Bellis v. U.S., 417 U.S. 85 (1974) (holding that partner was subject to subpoena of partnership records), the Tenth Circuit refused to apply the act of production doctrine to an attorney because he was holding the subject files “in a representative capacity for the client.” In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 944-45 (10th Cir. 1984). But see Motley v. Marathon Oil Company, 71 F.3d 1547 (10th Cir. 1995) (upholding district court decision not to compel production of documents not timely listed as privileged). Similarly, the Sixth Circuit in In re Grand Jury Proceedings, 771 F.2d 143 (6th Cir. 1985), held that where the individual holds records in a representative capacity, no Fifth Amendment act of production privilege existed.

Although the Ninth Circuit has not expressly ruled on the question of whether the “act of production” doctrine is applicable when a corporation’s records are at issue, most of the cases strongly imply the privilege does not exist. See U.S. v. Alderson, 646 F.2d 421 (9th Cir. 1981) (holding that, despite partnership being small family partnership, not entitled to assert privilege against self-incrimination to avoid production of partnership records); U.S. v. MacKey, 647 F.2d 898 (9th Cir. 1981) (Brooks Brothers diary and a desk-type calendar were corporate documents not subject to the Fifth Amendment privilege). In each of these cases the opinion emphasizes that the Fifth Amendment privilege is inapplicable because the individual is holding records as a representative of the entity.


Where a witness has been immunized, the Fifth Amendment privilege is no longer grounds for refusing to answer questions. For discussion of immunity, see infra section 2.10.

Nontestimonial evidence is not protected by the Fifth Amendment, even without a grant of immunity. Hence, the government can compel production of this evidence. See, e.g., Doe v. U.S., 487 U.S. 201 (1988) (holding that compelled signing of authorization to foreign banks to disclose records of accounts not testimonial); South Dakota v. Neville, 459 U.S. 553 (1983) (holding that admission of defendant’s refusal to take blood alcohol test does not offend privilege against self-incrimination); U.S. v. Dionisio, 410 U.S. 1, 5-7 (1973) (voice exemplars); Gilbert v. California, 388 U.S. 263 (1967) (taking of handwriting exemplars without counsel present did not violate Fifth or Sixth Amendment rights); Schmerber v. California, 384 U.S. 757 (1966) (blood alcohol test); Holt v. U.S., 218 U.S. 245 (1910) (compelling defendant to wear clothes to demonstrate that they fit).

2.06.05 First Amendment Grounds
The Supreme Court has held that the First Amendment can be invoked at a grand jury proceeding. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). If a grand jury subpoena implicates the First Amendment, the district court is more willing to enforce the traditional rule that grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets for investigation out of malice or intent to harass. See *In re Grand Jury Proceedings 87-3 Subpoena Duces Tecum*, 955 F.2d 229 (4th Cir. 1992).

For example, while reporters have no general privilege to refuse to answer questions about crime, a motion to quash will lie if an investigation into a reporter's sources is not in good faith. *Id.* at 707-08. In other words, the grand jury questioning cannot be for the purpose of disrupting a reporter's relationship with his news source. *Branzburg*, 408 U.S. at 708. See also *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 399 (9th Cir. 1993) (relying on *Branzburg*, the court held Ph.D. witness was not entitled to a "scholar's privilege" under the First Amendment or federal common law regarding conversations which concerned vandalism at university animal research facility, despite student's claim that information was received in confidence and incident to his scholarship). The First Amendment may also be invoked if questions infringe on the witness' right to free association. See *Bursey v. U.S.*, 466 F.2d 1059, 1068 (9th Cir. 1972) (Black Panthers); *In re Grand Jury Proceedings No. 418*, 776 F.2d 1099, 1102-03 (2d Cir. 1985) (Hell's Angels). But see *In re Grand Jury Subpoena Duces Tecum*, 78 F.3d 1307, 1313 (8th Cir.1996) (enforcing grand jury subpoena despite First Amendment challenge, if government can demonstrate compelling interest in and sufficient nexus between information sought and subject matter of investigation).

The Supreme Court, in *R. Enterprises, Inc.*, left open the question of whether a subpoena that seeks records relating to First Amendment activities requires the government to demonstrate the particular relevance of the records. 498 U.S. at 292, 303.

In *Butterworth v. Smith*, 494 U.S. 624 (1990), the Court held that a grand jury witness may disclose his own testimony after the term has ended. The interests advanced by the state were not sufficient to overcome a reporter's First Amendment right to make a truthful statement of information he acquired on his own.

As an issue of first impression, the Third Circuit recently rejected a claim to quash a subpoena under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§2000bb to 2000bb-4, as a "burden on [the witnesses''] exercise of religion." See *In Re: Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999). The witnesses contended that their religion, Orthodox Judaism, prohibited them from providing testimony against their father. See *id.* at 829. The court did not reach the issue of whether the government’s interest in investigating and prosecuting crime is always compelling under the RFRA, but held that the government’s interest in “securing the evidence needed to punish the criminal activity alleged here is compelling.” *Id.* at 832.

**2.06.06 Speech and Debate Clause**

Article I, §6 of the United States Constitution provides in part that "for any Speech or Debate in either House, they shall not be questioned in any other Place." The United States Supreme Court has held that the Speech and Debate Clause provides protection against grand jury questioning. In *U.S. v.*
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_Helstoski_, 442 U.S. 477, _aff’d_, 442 U.S. 500 (1979), the Court ruled that the clause was designed to preclude prosecution of members of Congress for legislative acts. Thus, the “Constitution mandates that legislative acts shall not be questioned.” _Id._ at 498. Any waiver of the Speech and Debate Clause protection must be explicit and unequivocal. _See id._ at 492. The privilege created by the Speech and Debate Clause extends to congressional aides. _See Gravel v. U.S._, 408 U.S. 606, 630, _reh’g denied_, 409 U.S. 902 (1972). It is also worth noting that a member of Congress, who receives primary protection of the Speech and Debate Clause, may intervene to challenge a subpoena directed against one of his aides. _See id._ at 608 n.1.

The Speech and Debate Clause does not grant immunity for legislator’s improper conduct. For example, in _U.S. v. Rostenkowski_, 59 F.3d 1291 (D.C. Cir. 1995), the court held that the Speech or Debate Clause did not require dismissal of an indictment alleging that a congressman misappropriated congressional funds to pay for personal services.

2.07 THE FEDERAL RULES OF EVIDENCE AND PRIVILEGES TO REFUSE TO TESTIFY

Except with respect to privileges, the Federal Rules of Evidence do not apply to grand jury proceedings. Fed. R. Evid. 1101(d)(2). The only portion of the Federal Rules of Evidence which deals with privileges is Rule 501. Rule 501 states that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. Hence, privileges recognized by common law and the courts are available to a grand jury witness.

Rule 501 was adopted in place of 13 proposed rules governing the scope and use of particular privileges. Proposed Rules 502 to 510 established privileges for attorney-client, penitent-clergymen, psychotherapist-patient, and husband-wife communications, together with privileges for "required reports," political votes, trade secrets, secrets of state, and identities of informers. House Comm. on Judiciary, Fed. R. Evid., H.R. Rep. No. 650, 93d Cong., 1st Sess. 8, _reprinted in_ 1973 U.S.C.C.A.N. 7075, 7082. Even though those specific rules were not enacted, in favor of developing the law of privilege on a case-by-case basis, counsel should not hesitate to push for application of one of these privileges. At least one court has relied upon the proposed Rule 503 (attorney-client privilege) as an accurate expression of the principles of the common law. _In re Grand Jury Proceedings, Detroit, Michigan, August 1977_, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), _aff’d per curiam_, 570 F.2d 562 (6th Cir. 1978). _But see In re Grand Jury Proceedings (No. 88-2893)_ 867 F.2d 562, 564-65 (9th Cir. 1989) (holding that decision whether to adopt a psychotherapist-patient privilege is more appropriately made by Congress). Counsel may also consider application of several other privileges, particularly the accountant-client privilege. _See In re Grand Jury Proceedings (Under Seal) v. U.S._, 947 F.2d 1188, 1191 (4th Cir. 1991) (holding that communications to attorney by client’s agent - an accountant - are privileged but no privilege exists where accounting rather than legal advice sought).

2.07.01 Attorney-Client Privilege
The attorney-client privilege belongs to the client alone. The privilege protects confidential communications between the client and the attorney. The classic formulation of the privilege is contained in 8 J. Wigmore Evidence §2292, at 554 (McNaughton rev. 1961):

(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

See Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (adopting this formulation). The purpose of the privilege is to encourage full and frank communication between attorneys and their clients. “[T]he privilege exists to protect not only the giving of professional advice to those who can act upon it but also the giving of information to the lawyer to enable him to give sound and informed advice.” Upjohn Co. v. U.S., 449 U.S. 383, 390 (1981). A subpoena or particular questions by the grand jury must request "the disclosure of confidential communications made for the purpose of rendering professional legal services" for an attorney to make a successful assertion of attorney-client privilege. In re Grand Jury Proceedings (Chesnoff), 13 F.3d 1293, 1296 (9th Cir. 1994). For example, an attorney's time records, bills, statements, and related client correspondence are protected by the attorney-client privilege, at least to the extent that they reveal the client's motives in retaining the lawyer and possible litigation strategy. In re Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982). But see Chesnoff, 13 F.3d at 1296 (finding that an attorney's observation and knowledge of his client's non-legal expenditures during a cruise trip, income-producing activities and lifestyle were not protected by attorney-client privilege); U.S. v. Edgar, 82 F.3d 499, 508 (1st Cir. 1996) (defendant not prejudiced by grand jury testimony of attorney who had represented him in civil suit). Even the "rudimentary" task of conducting an investigation may constitute legal work, protected by the privilege. See In re Allen v. McGrav, 106 F. 3d 582, 601 (4th Cir. 1997).

In a recent case, the Supreme Court held that the attorney-client privilege survives even the death of the client. See Swidler & Berlin v. U.S., 524 U.S. 399 (1998). In Swidler, attorney James Hamilton was subpoenaed by a federal grand jury to provide, among other things, handwritten notes taken during a meeting with his client, former Deputy White House Counsel Vincent Foster, which occurred nine days prior to Foster's suicide. See id. at 402. The notes were subpoenaed at the request of the Office of Independent Counsel as part of an investigation into whether crimes had been committed during previous investigations into the 1993 dismissal of White House Travel Office employees. Id. The Court found that the independent counsel failed to meet it's burden of showing that "reason and experience" require a departure from the common-law rule. See id. at 410-11. The Court noted that there are "weighty reasons" which counseled in favor of posthumous application of the privilege. Id. at 407. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. . . . Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime." Id.

Extensions of the privilege to cover materials in the possession of persons other than the attorney or the client, or to cover communications other than those made directly between attorney and client, must relate to the purpose that underlies the privilege — encouraging communications between attorney and
client. Thus, of necessity, the privilege normally extends to communications to, as well as from, the client. This is because the attorney's advice to the client will ordinarily reveal the substance of the client's confidential communications to the attorney. *Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977); see also *U.S. v. Chen*, 99 F.3d 1495 (9th Cir. 1996) (holding that communication with corporation was within attorney-client privilege).

Furthermore, courts have recognized the attorney-client privilege in circumstances where communications have been disclosed to agents of either the client or the attorney. Extension of the privilege to agents is “necessary to preserve the effectiveness of counsel in our legal system.” *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); accord *In re: Allen v. McGraw*, 106 F.3d 582 (4th Cir. 1997) (holding that privilege includes attorney interviews with former employees of client); *In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251 (6th Cir. 1996) (extending privilege to information revealed to attorney’s investigator); *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (privilege includes communications made at attorney’s direction to accountant); *Eglin Federal Credit Union v. Cantor, Fitzgerald Securities Corp.*, 91 F.R.D. 414 (N.D. Ga. 1981) (documents turned over to accountant for legal purposes).

However, part four of the Wigmore formulation requires that the communication be made in confidence. Thus, the presence of an unnecessary third party to the communication may mean that the communication was not made in confidence and will not be protected. *Matter of Fischel* 557 F.2d at 211; *U.S. v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978) (holding that presence of unnecessary third party not acting as attorney’s agent destroyed privilege where third party was not acting as an agent of the client).

Multiple defendants pose a particular difficulty since joint meetings can result in waiver of the privilege. Some protection from waiver is afforded by the "joint defense privilege." Under this principle, the privilege will not be waived for communications between defendants/grand jury witnesses and their attorneys about matters of common concern. *U.S. v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *Continental Oil Co. v. U.S.*, 330 F.2d 347, 350 (9th Cir. 1964). When considering the application of this rule to joint consultation, counsel should ensure that the communications in fact relate to the joint interests of the clients, and not to the defense strategy of one individual. *U.S. v. Cariello*, 536 F. Supp. 698, 702 (D.N.J. 1982).

In a recent case, the Ninth Circuit permitted the government to assert the *Riggs* “trustee-beneficiary” exception (*Riggs v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) to the attorney-client privilege in a federal grand jury investigation seeking to vindicate the rights of ERISA beneficiaries against trustees. *See In re Grand Jury Proceedings (No. 97-11-8)*, 162 F.3d 554, 557 (9th Cir. 1998). Under this doctrine, the participants and beneficiaries of an ERISA pension fund are considered the ultimate client of an attorney who advises an ERISA trustee regarding the management of the fund. See id.

### 2.07.02 Materials and Communications Outside the Scope of the Privilege

Fee arrangements usually fall outside the scope of the attorney-client privilege because the information ordinarily does not reveal any confidential communication between the attorney and client. *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493 (9th Cir. 1986), modified, 817 F.2d 64 (9th Cir.
1987); \textit{In re Grand Jury Subpoena (Osterhoudt)}, 722 F.2d 591 (9th Cir. 1983); \textit{In the Matter of Witness Before the Special March 1980 Grand Jury}, 729 F.2d 489, 494 (7th Cir. 1984) (holding that the fee arrangement may be privileged only in exceptional circumstances; for example, if disclosure would reveal confidential communications between attorney and client). Likewise, the identity of a client is generally not a confidential communication within the attorney-client privilege. \textit{U.S. v. Hodge and Zweig}, 548 F.2d 1347 (9th Cir. 1977); \textit{Tillotson v. Boughner}, 350 F.2d 663, 664 (7th Cir. 1965). However, where there is a strong probability that disclosure of the fee arrangement or identity of the client would implicate the client in the very criminal activity for which advice is sought, the Third Circuit has found attorney-client privilege may still apply. \textit{In re Grand Jury Investigation (Tinari)}, 631 F.2d 17 (3d Cir. 1980).

The Ninth Circuit, however, has repeatedly held that the attorney-client privilege does not apply where disclosure of the identity of a fee payer or client would be incriminating but would not be “tantamount to a confidential communication.” \textit{U.S. v. Blackman}, 72 F.3d 1418, 1424 (9th Cir. 1995). \textit{See also In re Grand Jury Subpoenas (Hirsch)}, 803 F.2d 493, 498 (9th Cir. 1986), modified, 817 F.2d 64 (9th Cir. 1987) (“The attorney-client privilege protects a client's identity only in limited circumstances where disclosure would convey the substance of a confidential professional communication between the attorney and the client.”). \textit{But see Ralls v. U.S.}, 52 F.3d 223 (9th Cir. 1995) (finding that privilege applies where identity of fee payer “inextricably intertwined” with privileged communications).

At least two circuits, the Fifth and Eleventh, protect identity and fee only if disclosure would supply the “last link” in an existing chain of incriminating evidence likely to lead to the client's indictment. \textit{In re Grand Jury Proceedings (Pavlick)}, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc); \textit{In re Grand Jury Proceedings (Damore)}, 689 F.2d 1351, 1352-53 (11th Cir. 1982) (per curiam). \textit{But see In re Grand Jury Investigation (Harvey)}, 769 F.2d 1485, 1487 (11th Cir. 1985) (holding that where identity of client and existence of fee are known, amount of fee not privileged even if it supplies "last link").

In \textit{In re Grand Jury Subpoena Duces Tecum}, 112 F.3d 910 (8th Cir.1997), cert. denied sub nom., \textit{Office of President v. Office of Independent Counsel}, 521 U.S. 1105 (1997), the Supreme Court held, as a matter of first impression, that the White House could not invoke any form of governmental attorney-client privilege to withhold potentially relevant information from a grand jury. The court reasoned that a general attorney-client privilege was too broad to be applied to a claim of privilege by one federal governmental agency with respect to a demand for information by another; the government’s need for confidentiality was subordinate to the needs of the criminal justice process. \textit{See Id.} In a subsequent case, the D.C. Circuit held that neither the Deputy White House Counsel nor other government attorneys could assert government attorney-client privilege to avoid responding to the grand jury if he possessed information relating to possible criminal violations. \textit{See In re Bruce Lindsey (Grand Jury Testimony)}, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam). However, the D.C. Circuit also held that information that the Deputy White House Counsel learned while acting as “intermediary” between the President and his private counsel was protected by the president’s personal attorney-client privilege, but that the “intermediary doctrine did not apply to instances in which the Deputy White House Counsel consulted with the President’s private counsel on litigation strategy. \textit{See id. at 1280.
Lastly, beware—simply placing materials in the possession of an attorney will not shield them. Where the client could be compelled to produce documents, because no privilege is applicable, the attorney may be compelled to turn them over. *See Fisher v. U.S.*, 425 U.S. 391 (1976).

**2.07.03 “Crime Fraud” Exception to Attorney Client Privilege**

The attorney-client privilege is not applicable where advice is sought to assist, further, or induce a crime. *See Clark v. U.S.*, 289 U.S. 1, 15 (1933); *In re Grand Jury Proceedings (No. 96-55344)*, 87 F.3d 377 (9th Cir. 1996); *U.S. v. Dyer*, 722 F.2d 174, 177 (5th Cir. 1983); *In re John Doe Corp.*., 675 F.2d 482, 491 (2d Cir. 1982). As the court explained in *Hodge & Zweig*, 548 F.2d at 1354:

> Because the attorney-client privilege is not to be used as a cloak for illegal or fraudulent behavior, it is well established that the privilege does not apply where legal representation was secured in furtherance of intended, or present, continuing illegality... The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought in furtherance of such an improper purpose.

In a recent case involving former white house intern Monica Lewinsky, the court held that the crime/fraud exception applied to the crimes of perjury and obstruction of justice before a grand jury. *See In re Carter*, No. 98-068(NHI) 1998 U.S. Dist. LEXIS 19497 (D.C. 1998).

In at least three circuits, the district court’s determination of whether the government satisfied the standard for invoking the crime-fraud exception to the attorney client privilege will not be reversed absent a clear showing of abuse of discretion. *In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342 (4th Cir. 1994); *In re Berkley and Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *In re September 1975 Grand Jury Term (Thompson)*, 532 F.2d 734, 737 (10th Cir. 1976). In the Ninth Circuit, however, whether the standard of review is de novo or abuse of discretion remains an open question. *In re Grand Jury Proceedings*, 87 F.3d 377, 380 (9th Cir. 1996); *see also U.S. v. Laurins*, 857 F.2d 529, 541 (9th Cir. 1988) (stating that rulings on scope of privilege are mixed questions of law and fact, reviewable de novo, unless scope of privilege clear and district court decision essentially factual).

**2.07.04 In Camera Review**

The government's interest in maintaining the secrecy of its investigation will "typically" justify an *in camera* review of the materials submitted in support of the application of this exception. *In re Grand Jury Proceedings*, 867 F.2d 539, 540-41 (9th Cir. 1989); *see also In re Grand Jury Investigation*, 974 F.2d 1068, 1075 (9th Cir. 1992) (holding that standard for *in camera* review of document sought to be withheld from the grand jury based on the attorney-client privilege, is a reasonable, good faith belief that *in camera* inspection may reveal evidence that information and material are not privileged).

When the district court considers whether to exercise its discretion to conduct in-camera review it may consider evidence presented by the party seeking review and other available evidence; but review
should be limited to documents generated during the course of the alleged criminal scheme. *In re Grand Jury Subpoena 92-1*, 31 F.3d 826 (9th Cir. 1994).

### 2.07.05 The Attorney Work Product Rule

The attorney work product rule is not a privilege recognized at common law. Rather, it was formulated by the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), for reasons of public policy. Although *Hickman v. Taylor* was a civil case, the Supreme Court has held that the work product doctrine is applicable in criminal cases as well. See *U.S. v. Nobles*, 422 U.S. 225 (1975). Some courts have held that the work product doctrine is even more important in criminal cases, since it helps “ensure the proper functioning of the criminal justice system.” *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 61 (7th Cir. 1980) (quoting *U.S. v. Nobles*, 422 U.S. 225, 238 (1974)). The work product rule has been extended to documents sought in a grand jury proceeding. *In re Special September 1978 Grand Jury*, 640 F.2d 49, 61 (7th Cir. 1980); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 946 (E.D. Pa. 1976).

While the work product rule applies in criminal cases, it is not codified in the Federal Rules of Criminal Procedure. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides both a definition of work product in civil cases, and the circumstances in which production of attorney work product can be compelled.

Different types of attorney work product are accorded different levels of protection. At the core of the attorney work product rule is work that reveals the attorney's mental processes in evaluating the case. This is strongly protected. While Fed. R. Civ. P. 26(b)(3) provides a standard upon which attorney work product may be disclosed, some courts have held that opinion work product may never be discovered in a civil case. See, e.g., *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir.1974). In *Upjohn Co. v. U.S.*, 449 U.S. 383, 401 (1981), the Supreme Court recognized that material that reveals an attorney's mental processes requires an even stronger showing than that set forth in Fed. R. Civ. P. 26(b)(3) before it can be revealed.

The attorney-client privilege belongs to the client alone. The work product doctrine belongs to the client and the attorney. *See In re Grand Jury Proceedings (No. 79-1481)*, 604 F.2d 798, 801 (3d Cir. 1979). It may be waived. *See Nobles*, 422 U.S. at 239 (1975). In *Nobles*, the work product rule was held to apply to the notes of an attorney's investigator, since the doctrine protects materials prepared by agents for the attorney as well as those prepared by the attorney himself. *Id.* at 238-39. However, because the investigator was presented as a witness, the prosecution was entitled to the investigator's notes for cross-examination. *See Id.* at 249. *See also Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (holding that work product doctrine did not shield documents generated by attorneys for the White House during conversations at issue from requirement that such documents be produced in response to subpoena).

*In re Sealed Case*, 29 F.3d 715 (D.C. Cir. 1994), held that the fact that a grand jury investigation had not begun at the time the individual met with their attorney did not preclude a finding that the files prepared at that time were subject to the work product privilege. “To qualify for protection under the work
product doctrine, a lawyer must create the document in anticipation of litigation.” In re Allen, 106 F. 3d 582, 607 (4th Cir. 1997).

2.07.06 Marital Privileges

A witness may not be compelled to testify, or be foreclosed from testifying, against a spouse. See Trammel v. U.S., 445 U.S. 40 (1980). This privilege is applicable in grand jury proceedings. See In re Grand Jury Investigation of Hugle, 754 F.2d 863, 864 (9th Cir. 1985); In re Grand Jury Matter (No. 81-1402), 673 F.2d 688, 689 (3d Cir. 1982). The spousal privilege may be invoked by the witness-spouse alone. See Trammel, 445 U.S. at 53. A separate rule protects confidential communications between spouses. Id. at 51. Marital communications are "presumptively confidential." Blau v. U.S., 340 U.S. 332, 333 (1951).

The marital privilege may not be asserted if the marriage is a "sham" or if the couple is separated during the time of the communication. See In re Grand Jury (No. 95-1548), 67 F.3d 146 (8th Cir. 1995). However, mere “suspicious timing of a marriage does not support a finding of a sham marriage.” In re Grand Jury Proceedings (Emo), 777 F.2d 508, 509 (9th Cir. 1985).

In In re Grand Jury (No. 97-7018), 111 F.3d 1083 (3d Cir. 1997), the government’s grant of use and derivative use immunity, promising not to use a grand jury witness’ testimony in any criminal proceedings against her husband, was sufficient to defeat the privilege against adverse spousal testimony. In U.S. v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), overruled on other grounds by U.S. v. Nordby, 225 F.3d 1053 (9th Cir. 2000), the defendant’s wife’s assertion of the privilege against adverse spousal testimony made her an unavailable witness under Rule 804(a)(1) and therefore allowed the prosecution to bring in the transcript of the wife’s separate trial under the statement against interest exception to the hearsay rule. Fed. R. Evid. 804(b)(3). See Ramos-Oseguera, 120 F.3d. at 1034.

2.07.07 Family Privileges

At least one court has held that a privilege protects confidential communications between a parent and child. In In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983), the district court quashed a grand jury subpoena directed at the son of a grand jury target. The opinion is exhaustively researched and well-written; it should be the cornerstone of any motion to quash. See also In re Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996) (recognizing parent-child privilege, but finding insufficient factual showing to assert privilege).

Unfortunately, almost every other court to consider the issue has rejected any generalized "family" or "parent-child" privilege. See In re Grand Jury (No. 95-7354), 103 F.3d 1140, 1153 (3d Cir. 1997) (refusing to recognize, as a matter of first impression, new parent-child privilege); In re Grand Jury Subpoena (Matthews), 714 F.2d 223, 224-25 (2d Cir. 1983) (holding that witness before grand jury not entitled to assert a family privilege to avoid answering questions on the ground that it might incriminate in-laws); U.S. v. Jones, 683 F.2d 817 (4th Cir. 1982); In re Grand Jury Proceedings (Starr), 647 F.2d 511, 512-13 (5th Cir. 1981) (finding no parent-child privilege for witness’s refusal to testify regarding a homicide of which her mother and stepfather were accused); U.S. v. Penn, 647 F.2d 876, 885 (9th Cir.)
(en banc) (finding no general “family” privilege compelling suppression of evidence obtained from police offering five-year-old son of defendant $5 for location of heroin), cert. denied, 449 U.S. 903 (1980). In Agosto, 553 F. Supp. at 1329, the court distinguished Penn because Penn involved a child informing on his parent, not testifying. The act was voluntary and not the result of any coercion or threat. The existence of privilege is thus, arguably, still open in the Ninth Circuit.

2.07.08 Executive Privilege

The most frequent form of executive privilege raised in the judicial arena is the “deliberative process” privilege, which allows the government to withhold documents and other materials that would reveal “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. See In re Sealed Case (No. 96-3124), 121 F.3d 729, 737 (D.C. Cir. 1997) (grand jury investigation of former Secretary of Agriculture, Mike Espy). The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. See id. Another form of executive privilege is the presidential communication privilege, which applies specifically to decision making by the President. See id. at 745. Unlike the deliberative process privilege, the presidential communications privilege has been held to apply to “documents in their entirety, and covers final and post-decision making materials as well as pre-deliberative ones. Id. at 745. While the presidential communication privilege is also qualified, it is more difficult to surmount than the executive process privilege. See id. at 746. The Presidential communications privilege has recently been held to cover communications made by presidential advisers in the course of preparing advice for the President, even when these communications are not made directly to the President. See id. at 751-52. The privilege has also been extended to communications authored or received in response to solicitation by members of a Presidential advisor’s staff. See id.
2.08 CONTEMPT PROCEDURES

Once the motion to quash has been denied, and the court has ruled that the assertion of a privilege is without merit and has directed the witness to answer, the witness then faces a difficult choice.

In general, an order denying a motion to quash and compelling testimony is not appealable. A witness seeking to contest the validity of the order must ordinarily refuse to comply and thereby invite a contempt citation, which is an appealable order. U.S. v. Ryan, 402 U.S. 530 (1971). There is an exception to this rule where the subpoenaed party cannot be expected to risk a contempt citation to protect a powerless third party. See Perlman v. U.S., 247 U.S. 7, 15 (1918); In re Grand Jury Proceedings (Manges), 745 F.2d 1250 (9th Cir. 1984). The exception is applied most often when the subpoena is directed to a third party's attorney. See generally, In re Grand Jury Proceedings (Goodman), 33 F.3d 1060 (9th Cir. 1994); In re Grand Jury Subpoena Served Upon Swami Prem Niren, Esq., 784 F.2d 939 (9th Cir. 1986) (per curiam).

There is good news and bad news for a witness who decides to stand on the assertion of the privilege and risk contempt. First the good news: it is unlikely that counsel can be held in contempt for advising a witness to stand on the privilege and refuse to testify. In Maness v. Meyers, 419 U.S. 449 (1975), the Supreme Court held that an attorney is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment and refuse to answer questions. Now the bad news: the witness' good faith reliance upon the attorney's advice to disobey the court's order is not a defense to a contempt charge. U.S. v. Armstrong, 781 F.2d 700 (9th Cir. 1986).

The law of civil contempt is codified in 28 U.S.C. §1826(a). See Matter of Battaglia, 653 F.2d 419 (9th Cir. 1981). Under 28 U.S.C. §1826(a), a grand jury witness who refuses, without just cause, to comply with an order to testify or provide information may be deemed a "recalcitrant witness." Because the statute requires the witness to have refused to testify "without just cause," the government first files a motion for an order to show cause why the witness should not be held in contempt. A hearing is then held where the grounds for the witness' refusal are examined. Only then may the witness be deemed recalcitrant. The witness can be confined without bail until he is willing to give the testimony or information. 28 U.S.C. §1826(b). The period of confinement may not exceed the term of the grand jury, or eighteen months, although a term can be extended for "good cause." 28 U.S.C. §1826(a) Appellate courts review a district court's adjudication of civil contempt for abuse of discretion. In re Grand Jury Proceedings (Lahey), 914 F.2d 1372, 1373 (9th Cir. 1990).

Criminal contempt actions are governed by 18 U.S.C. §401 and Fed. R. Crim. P. 42. Rule 42(a) provides for summary punishment if the contempt is committed within the presence of the court. Summary adjudication under Rule 42(a) is "an extraordinary exercise to be undertaken only after careful consideration and good reason." U.S. v. Flynt, 756 F.2d 1352, 1363 (9th Cir.), amended, 764 F.2d 675 (9th Cir. 1985) (citing In re Gustafson, 650 F.2d 1017, 1022 (9th Cir. 1988) (en banc)). Criminal contempt committed out of the presence of the court is governed by Rule 42(b), which entitles the defendant to notice, an order to show cause, a jury trial in certain cases, and bail.
When a witness has not flatly refused to answer but claims a loss of memory or gives evasive responses, the prosecutor must demonstrate the witness’ ability to answer the given question. *In Matter of Kitchen*, 706 F.2d 1266, 1273 (2d Cir. 1983); *Matter of Battaglia*, 653 F.2d 419 (9th Cir. 1981).

The procedures to be followed in contempt proceedings are outlined in *U.S. v. Alter*, 482 F.2d 1016 (9th Cir. 1973). The person cited with contempt is entitled to the full panoply of rights guaranteed by due process. *See id.* at 1024. The procedures set forth in Fed. R. Crim. P. 42(b) are followed in both civil and criminal contempt cases. *Harris v. U.S.*, 382 U.S. 162, 167 (1965); *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982). Fed. R. Crim. P. 42(b) includes the right to adequate notice and sufficient time to prepare. In *Alter*, 45 minutes was held to be insufficient, and since the defendant made a showing that the legal issues were not simple, and the government gave no reason for haste, the district court was found to have abused its discretion by not giving the defendant at least five days to prepare a defense. *Alter*, 482 F.2d at 1024. *See also In re Weeks*, 570 F.2d 244, 247 (8th Cir. 1978) (allowing “only a few minutes” to prepare is insufficient). Twenty days, on the other hand, suffices. *U.S. v. Marthaler*, 571 F.2d 1104, 1105 (9th Cir. 1978).

The contempt hearing must be public. Holding a civil or criminal contempt trial in secret, over the objection of the defendant, violates the defendant’s Fifth Amendment due process rights. *In re Oliver*, 333 U.S. 257 (1948); *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982).

A civil contempt sanction is a coercive device, imposed to secure compliance. *Simkin v. U.S.*, 715 F.2d 34, 36 (2d Cir. 1983) (citing *Shillitani v. U.S.*, 384 U.S. 364 (1966)). Due process requires that the nature and duration of commitment bear some reasonable relation to its purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *U.S. v. Marquardo*, 149 F.3d 36, 40 (1st Cir. 1998) (holding that 17 month detention for civil contempt was not criminal in nature and did not give rise to double jeopardy claim, because detention sought “curative result” of compliance with court order). Where it appears that there is no longer a "substantial likelihood" that confinement will compel testimony, a civil contemnor must be released from custody. *Lambert v. Montana*, 545 F.2d 87, 90 (9th Cir. 1976); *see also Shillitani v. U.S.*, 384 U.S. 364 (1966). The court must make an individualized decision regarding the incarceration’s coercive effect on a particular witness. "If a judge orders continued confinement without regard to its coercive effect upon the contemnor . . . [the judge] has converted the civil penalty into a criminal penalty." *Simkin v. U.S.*, 715 F.2d 34, 38 (2d Cir. 1983). At that point, counsel should file a motion to vacate the civil contempt order.

On the other hand, a contempt order may rise to the level of a prosecution pursuant to 18 U.S.C. §1503 for obstruction of justice. In this case the contempt order is punitive rather than coercive. However, a person charged with obstruction of justice may be acquitted if his or her refusal to testify is based solely upon a “realistic and reasonable perception” that giving testimony would result in “imminent harm” to the safety of the witness or members of his or her family. *U.S. v. Banks*, 942 F.2d 1576, 1579 (11th Cir. 1991).

### 2.09 APPEAL OF MOTIONS TO QUASH
Normally, if a motion to quash a subpoena duces tecum is denied, the witness has no interlocutory appeal because there is no jurisdiction over that appeal. See Cobbledick v. U.S., 309 U.S. 323 (1940). In order to obtain appellate jurisdiction, the party resisting the subpoena must first refuse to comply and be held in contempt. U.S. v. Ryan, 402 U.S. 530, 532 (1971). If, however, the subpoena duces tecum is directed to a third party who moves to quash the subpoena, and then that motion is denied, that party can file an interlocutory appeal. In re Grand Jury Subpoena Dated December 10, 1987, 926 F.2d 847, 853 (9th Cir. 1991) (citing Perlman v. U.S., 247 U.S. 7, 13 (1918)). In that situation, the target of the investigation may also move to quash the subpoena; the denial of that motion is immediately appealable by the target of the investigation. In re Grand Jury Subpoenas Duces Tecum (Lahodny), 695 F.2d 363, 365 (9th Cir. 1982).

The exception for third party subpoenas is somewhat more complicated when the third party is an attorney with an ongoing relationship with the person whose papers were seized. The Ninth Circuit in In re Grand Jury Subpoena, 926 F.2d 847, 853 (9th Cir. 1991), discussed the cases involving attorney subpoenas. The Ninth Circuit rule, as discussed in In re Grand Jury Subpoenas, is that if the attorney is no longer an active participant in the litigation or no longer has an ongoing relationship with the person whose papers were seized, the third party appeal exception applies. Id. The District of Columbia Circuit has ruled that an interlocutory appeal of such an order is available when “circumstances make it unlikely that an attorney would risk a contempt citation in order to allow immediate review of a claim of privilege.” In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985) (citing U.S. v. Perlman, 247 U.S. 7 (1918)). The Tenth Circuit only allows interlocutory appeals of an order compelling the testimony of an attorney who claims privilege unless the attorney has accepted a contempt citation or the owner of the records can prove “that the attorney will produce the records rather than risk contempt.” In re Grand Jury Proceedings, Subpoena to Vargas, 723 F.2d 1461, 1464-66 (10th Cir. 1983). However, nine other circuits allow a Perlman exception even when the subpoena is directed at an attorney who is currently representing the party moving to quash the subpoena. See In re Grand Jury Subpoenas, 123 F.3d 695, 698 (1st Cir. 1997).

2.10 IMMUNITY PROCEDURES

Under 18 U.S.C. §§6002-03, prosecutors can overcome a Fifth Amendment privilege assertion by requesting an order from the district judge providing for immunity and requiring testimony. Once immunity has been granted to a witness, the witness’ Fifth Amendment assertion will no longer serve as a basis to refuse to testify or to quash a subpoena. See In re Grand Jury Subpoena v. McDougal, 97 F.3d 1090 (8th Cir. 1996). However, a grant of immunity only protects against Fifth Amendment incrimination and does not overcome other objections or privileges. Additionally, a grant of immunity does not protect against prosecution for perjury, civil liability, loss of employment or other consequences.

There are basically two types of immunity. One is called transactional immunity; the other, use plus fruits immunity. Transactional immunity was formerly given pursuant to 18 U.S.C. §2514. However, in 1970, Congress repealed the transactional immunity statute and enacted another immunity provision, 18 U.S.C. §§6001-6005. Immunity granted under §6002 is called "use plus fruits" immunity (and sometimes referred to as use and derivative use immunity) because, under this statute, a witness is protected from the
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government's use of the witness' testimony and leads or fruits that may be derived from it. 18 U.S.C. §6002 states in pertinent part:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify . . . before or ancillary to--a court or grand jury of the United States, . . . no testimony or other information compelled under the order . . . may be used against the witness in any criminal case . . . (emphasis added).

Although the statute governing transactional immunity has been repealed, prosecutors sometimes tender a letter issued by the local United States attorney giving transactional immunity. Such a letter cannot overcome a Fifth Amendment privilege. A witness cannot be compelled to testify without formal statutory immunity. See U.S. v. Doe, 465 U.S. 605, 616 (1984).

The procedure to obtain a statutory immunity order is cumbersome. As set forth in §6003, immunity is given to a witness by the Attorney General upon application of a United States attorney. The government attorney requesting the immunity order must show that the testimony sought "may be necessary to the public interest," and that the witness has asserted or is likely to assert his Fifth Amendment rights. 18 U.S.C. §6003(b). The government attorney may obtain an immunity order if a witness is "likely" to assert his rights; hence, an order may be obtained prospectively, before the witness actually refuses to testify. U.S. v. Braasch, 505 F.2d 139, 146 (7th Cir. 1974). This prospective grant of immunity and the concomitant court-ordered compulsion order may be obtained ex parte, without notice or the opportunity for a hearing. U.S. v. Pacella, 622 F.2d 640, 643-44 (2d Cir. 1980); Ryan v. C.I.R., 568 F.2d 531, 539-40 (7th Cir. 1977); U.S. v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975).

Section 6003(b) requires that the request for immunity be made by a "United States attorney" with the approval of the "Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General." The request may be made by an Assistant United States attorney in the name of the United States attorney in the ordering district. Ryan v. C.I.R., 568 F.2d 531, 540 (7th Cir. 1977); see In re DiBella, 499 F.2d 1175, 1178 (2d Cir. 1974) (stating that wiser course is to involve the United States Attorney directly). The Assistant Attorney General who is in charge of the tax division is empowered to approve an immunity request. U.S. v. Silkman, 543 F.2d 1218 (8th Cir. 1976).

The scope of use immunity is frequently litigated. The immunity statute was held constitutional in Kastigar v. U.S., 406 U.S. 441, reh'g denied, 408 U.S. 931 (1972). The Kastigar Court ruled that the statute is "coextensive with the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." Id. at 453. The Court explained that the United States can compel testimony from an unwilling witness who invokes the Fifth Amendment by conferring use immunity, as provided by 18 U.S.C. §6002. See id. A Kastigar hearing should be held if a witness is indicted after testifying before the grand jury with use immunity to determine whether the evidence the government proposed to use was derived from a source wholly independent of the compelled testimony. See id. at 441; U.S. v. Zielczinski, 740 F.2d 727 (9th Cir. 1984); see also U.S. v. Hubbell, 167 F.3d 552, 582-85 (D.C. Cir. 1999) (per curiam) (holding that the government must establish its knowledge of the existence and possession of documents sought in subpoena with detail and particularity, or the contents of the
Fear of prosecution by a foreign nation is beyond the scope of the Self-Incrimination Clause. See U.S. v. Balsys, 524 U.S. 666, 669 (1998). In U.S. v. Balsys, the Supreme Court rejected a witness' attempt to invoke the Fifth Amendment privilege against self-incrimination in response to questions concerning his activities during World War II. Id. at 669. The witness in Balsys was an 84-year-old Lithuanian who had lived in the United States for 36 years. He was issued a subpoena to appear before the Office of Special Investigations of the Criminal Division of the United States Department of Justice (OSI), which was investigating his activities during the war years, and he attempted to invoke the Fifth Amendment privilege against self-incrimination on the basis that the information he was to provide would subject him to prosecution in Lithuania and Israel. Id. at 670. The Balsys court rejected arguments that the phrase "any criminal case" in the self-incrimination clause should be read to include cases involving prosecution by a foreign nation. Id. at 672. "Because the Fifth Amendment opens by requiring a grand jury indictment or presentment 'for a capital, or otherwise infamous crime,' the phrase beginning with 'any' in the subsequent Self-Incrimination clause may sensibly be read as making it clear that the privilege it protects is not so categorically limited." Id. at 573 Instead, the Balsys court adopted the "same sovereign" interpretation, reading "the Clause contextually as . . . providing a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits, but not otherwise." Id. at 673-74. The Supreme Court had granted certiorari twice before in cases raising the question of whether fear of foreign prosecution was within the scope of the self-incrimination clause, but did not reach the merits in either case. See Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478-81 (1972) (constitutional question not reached because witness failed to show "real and substantial" fear of foreign prosecution); Parker v. U.S., 397 U.S. 96 (1970)(per curium) (vacating and remanding with instructions to dismiss as moot). But see Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 71-72 (1964) (concluding that English rule, upon which Fifth Amendment privilege against self-incrimination rests, "did protect witnesses against disclosing offenses in violation of the laws of another country"). The only pronouncement of a Supreme Court Justice on this issue in the last 25 years prior to Balsys had been that of Justice Berger in staying an order of contempt in Araneta v. U.S., 478 U.S. 1301 (1986). The Chief Justice determined that "there is a fair prospect that a majority of this court will decide the issue in favor of the applicants [the Aranetas]. Murphy v. Waterfront Commissioner, 378 U.S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome." Id. at 1304. However, certiorari was ultimately denied and the stay vacated. Araneta, 479 U.S. at 924. The Balsys Court specifically addressed the above-mentioned dictum in Murphy, stating that "to the extent that the Murphy majority went beyond its response to Malloy and undercut Murdock's rationale on historical grounds, its reasoning cannot be accepted now." Balsys, 524 U.S. at 688.
Balsys resolved a recent split among the circuits in this issue. Compare U.S. v. Balsys, 119 F.3d 122 (2d Cir. 1997) (concluding that the defendant had a real and substantial fear of foreign prosecution, and as a legal resident of the United States had the right to invoke the Fifth Amendment privilege against self-incrimination, regardless of the United States foreign policy objectives involved), with U.S. v. Gecas, 120 F.3d 1419 (11th Cir. 1997) (en banc) (reasoning that foreign tribunals are outside jurisdiction of Fifth Amendment, that proceeding only becomes “criminal case” when in jurisdiction subject to the Fifth Amendment, and that therefore privilege against self-incrimination does not apply to possibility of foreign convictions, regardless of their certainty).

The Balsys decision left open the possibility of whether cooperative conduct between the United States and a particular foreign nation could develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause. 524 U.S. at 697-98. "If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly 'foreign.'" Id. at 698. The Third Circuit recently rejected a claim under this language in Balsys, stating that this language is conditional and speculative, and does not establish an actual test for lower courts to apply. See In re Impounded, 178 F.3d 150, 155 (3d Cir. 1999) (holding that evidence of cooperative international antitrust enforcement was insufficient to uphold self-incrimination claim).

2.11 THE MECHANIKS OF APPEALING GRAND JURY ERROR

In U.S. v. Mechanik, 475 U.S. 66 (1986), the Supreme Court applied harmless error analysis to review a Grand Jury violation of Fed. R. Crim. P. 6(d), which requires that only one witness testify at a time before a grand jury. The Court concluded that, where the defendant is subsequently convicted, any 6(d) error is by definition harmless. The reasoning behind this decision was that the grand jury's task is to find probable cause to indict; hence, where the defendant has been found guilty beyond a reasonable doubt, this renders "any error in the grand jury proceeding connected with the charging decision . . . harmless beyond a reasonable doubt." Id. at 70.

Predictably, the Mechanik ruling has made a successful attack on an indictment extremely unlikely. At the same time it has not paved the way for interlocutory appeal. In Midland Asphalt Corp. v. U.S., 489 U.S. 794 (1989), the petitioners moved to dismiss the indictment, arguing a government memorandum disclosed matters occurring before the grand jury and thus violated Rule 6(e). The Court held that denial of a motion to dismiss under Rule 6(e) is not immediately appealable in that it is not a “final decision” under §1291 (collateral order doctrine), and Mechanik did not render such decisions “effectively unreviewable” after trial. Id. at 1498.

In U.S. v. Taylor, 798 F.2d 1337 (10th Cir. 1986), the court held interlocutory relief impermissible where the issue could be raised on appeal after trial. In Taylor, the defendants alleged prosecutorial
misconduct before the grand jury and the court held this issue would not be mooted by a conviction, notwithstanding *Mechanik*. *Id.* at 800.

Finally, the First Circuit held that even where the court finds an alleged grand jury error would fall within the *Mechanik* harmless error rule:

it would be the rare alleged abuse of the grand jury process which, while not important enough to warrant relief on direct appeal from a judgment of conviction, would be important enough to warrant the extraordinary step of an interlocutory appeal in a criminal case.

*U.S. v. Larouche Campaign*, 829 F.2d 250, 254 (1st Cir. 1987).

### 2.12 Remedy for Retaliation Against Grand Jury Witness

In the recent case of *Haddle v. Garison*, 525 U.S. 121, 126 (1998), the Supreme Court held that interference with the employment of a grand jury witness by an employer, in retaliation for that witness' participation in grand jury proceedings, may give rise to a claim for damages under the Civil Rights Act of 1871, Rev. Stat §1980, 42 U.S.C. §1985(2).
2.13 FAILURE OF INDICTMENT TO RECITE AN ESSENTIAL ELEMENT
OF THE CHARGED OFFENSE

The Fifth Amendment requires that a defendant be convicted only on charges considered by a
grand jury. See U.S. v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (holding that indictment’s failure to
specify mens rea necessary for Hobbs Act conviction required dismissal). This requirement ensures that
a defendant is prosecuted only “on the basis of the facts presented to the grand jury . . . .” Id. (citing U.S.
v. Rosi, 27 F.3d 409, 414 (9th Cir. 1994)). Refusing to reverse a conviction based on such an indictment
would impermissibly allow conviction on a charge never considered by the grand jury. See Du Bo, 186
F.3d at 1180 (citing Stirone v. U.S., 361 U.S. 212, 219 (1960)). Therefore, failure to include the mens
rea element of a crime in the indictment “renders the indictment constitutionally defective.” Id.

Challenges to minor or technical deficiencies, even where the errors are related to an element of
the offense charged, are subject to harmless error review. See U.S. v. Neill, 166 F.3d 943, 947-48 (9th
crime, however, ‘is by no means a mere technicality.’” Du Bo, 186 F.3d at 1180 (citing U.S. v. King, 587
F.2d 956, 963 (9th Cir. 1978)). The omission of the mens rea from an indictment “on its face is deficient”
and “[not] amenable to harmless error review.” Du Bo, 186 F. 3d at 1179; accord U.S. v. Prentiss, 206
F.3d 960 (10th Cir. 2000) (holding that an indictment failing to specify elements is a fundamental defect
that is not subject to harmless error review, even if challenged after the verdict). But see U.S. v. Mojica-
Baez, 229 F.3d 292 (1st Cir. 2000) (holding that there is “no reason why harmless error review should not
apply to the failure to include an element in an indictment that otherwise provided the defendants with fair
notice of the charges against them”).

2.14 SUGGESTED READING


Bushyeager and Nikiforos, Twenty-Sixth Annual Review of Criminal Procedure: Grand Jury. 85 Geo.


CHAPTER 3

DISCOVERY

updated by

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3.01 INTRODUCTION

Timely and efficient discovery of the nature, scope, and strength of the government's case could be the single most important function of a criminal defense attorney. Without accurate information at each stage of the decision-making process, counsel cannot adequately advise a client and intelligently determine the direction of the case. Information obtained from the government cannot replace a thorough independent investigation, but it does provide the defense with a preview of what they can expect at trial. Creative litigation of discovery contributes to the trial practitioner's arsenal of discovery techniques in the "search for truth." See, e.g., U.S. v. Pollock, 417 F. Supp. 1332, 1344 (D. Mass. 1976). The principal concern is that the prosecutor not have sole access to evidence. See Dennis v. U.S., 384 U.S. 855, 873 (1966). The great bulk of discovery will be available to a defendant from three sources: (1) Fed. R. Crim. P. 16; (2) 18 U.S.C. §3500 (the Jencks Act); and (3) Brady v. Maryland, 373 U.S. 83 (1963). From a practical aspect, the federal advocate must rely not only on the Constitution and applicable statutes and rules, but also, to a substantial extent, on his or her wits and creativity. Informal disclosure from the prosecutor often provides not only facts relevant to the case, but also the way in which the prosecutor interprets those facts and ties them into a theory of the case. Courts can encourage early and liberal disclosure if the defense points out the manner in which such disclosure promotes dispositions and smoothly flowing trials and promotes a more level playing field by emphasizing the "quest for the truth" rather than a "sporting theory of justice." See William J. Brennan, Jr., "The Criminal Prosecution: Sporting Event or Quest for the Truth?,” 1963 Wash. U.L.Q. 279 (1963).

3.02 RULE 16

Federal Rule of Criminal Procedure 16 is the primary resource for the defense to receive discovery from the government. To trigger its obligations, counsel must specifically request all information available to it as enumerated in sections (a)(1)(A-E). See Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). Motions for discovery must be filed prior to trial and can be filed in the district court along with other Fed. R. Crim. P. 12(b) pretrial motions. Additionally, discovery can be requested by letter to the Assistant
United States Attorney, and the court can be brought in, if necessary, if any disputes arise between defense counsel and the prosecutor. *See infra* section 3.18 for sample discovery letter. The entire discovery process should be memorialized in writing, and counsel should ensure that informal and oral disclosures are properly recorded in order to preserve any issues of non-disclosure that could arise on appeal. In *U.S. v. Bagley*, 473 U.S. 667 (1985), a divided Court held that a single “materiality” standard should apply to all cases where the prosecutor fails to disclose discoverable information, eliminating the distinction between “general” and “specific” requests for purposes of appellate review. The *Bagley* Court held that reversal is required where, had the information been disclosed, there is a reasonable probability that the result of the trial would have been different. As noted by Justice Blackmun, special problems arise in specific request cases:

[An] incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist . . . the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.

*Id.* at 682.

The Court later provided guidance for the application of the *Bagley* “materiality” analysis in *Kyles v. Whitley*, 514 U.S. 419 (1995). Specifically, it noted four areas that should be emphasized. First, a showing of materiality does not require the defendant to show that the disclosure of suppressed evidence would have resulted in an acquittal. Rather, the inquiry is one of fairness. As the Court noted:

a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal . . . Bagley’s touchstone of materiality is a "reasonable probability" of a different result . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

*Id.* at 434. Next, it noted that the “materiality” test “is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Id.* at 434-35. Third, “once a reviewing court applying *Bagley* has found Constitutional error there is no need for further harmless-error review.” *Id.* at 435. Lastly, the Court noted that *Bagley* materiality is to be judged by reference to the suppressed evidence considered collectively, not item-by-item, with the focus on the cumulative effect of suppression. *Id.* at 437.

It is, therefore, critical to make all discovery requests as specific as possible without unnecessarily revealing information about your client’s defense. Discovery should be treated as an on-going process, starting with broad “general” requests at the early stages, culminating with requests that increase in specificity as more is learned about the case and a theory of defense is developed.
3.02.01 Statements of the Defendant

Federal Rule of Criminal Procedure 16(a)(1)(A) provides that, upon request of the defendant, the government shall make available to the defendant any of four types of statements in the government’s possession. These are: (1) any relevant written or recorded statements made by the defendant; (2) the portion of any written record which contains the substance of any relevant oral statements of the defendant made in response to questioning by one known at the time to be a government agent; (3) Grand Jury testimony of the defendant relating to the offense charged; and (4) the substance of any other relevant oral statement made by the defendant before or after arrest in response to interrogation by any person then known by the defendant to be a government agent which the government intends to use at trial. The prosecutor must exercise due diligence to ascertain whether any statements are contained in the files of the agency that conducted the investigation. *U.S. v. Jensen*, 608 F.2d 1349, 1357 (10th Cir. 1979); *U.S. v. James*, 495 F.2d 434 (5th Cir. 1974); *but see U.S. v. Matthews*, 20 F.3d 538, 550 (2d Cir. 1994) (Rule 16 imposes no disclosure obligation when evidence is in the hands of a person who is not a government agent, and government has no reason to suspect that evidence exists). Additionally, statements which are the fruit of Title III surveillance must be produced.

For the purposes of Fed. R. Crim. P. 16 disclosure, “statements” has been interpreted broadly to include recorded telephone conversations, letters written by the defendant in the possession of the government, recordings of face-to-face meetings between a defendant and a government informant, statements made during the commission of a crime, and recordings of conversations between a defendant and a third person. *See U.S. v. Noe*, 821 F.2d 604, 609 (11th Cir. 1987) (failure to disclose tape recording of phone call between undercover agent and defendant violated Rule 16 and warranted reversal); *U.S. v. Pascual*, 606 F.2d 561 (5th Cir. 1979) (failure to disclose letter written by one co-defendant incriminating other co-defendants resulted in prejudice requiring reversal of convictions and remand for a new trial); *U.S. v. Crisona*, 416 F.2d 107, 114-15 (2d Cir. 1969) (pre-arrest statements made by defendant during course of crime are discoverable as "statements" under Rule 16); *U.S. v. Caldwell*, 543 F.2d 1333, 1352-53 (D.C. Cir. 1974) (defendant entitled to discovery of his correspondence in possession of government even though his correspondence was addressed to third party and not government agent). Reports summarizing interviews and memoranda containing the substance of oral statements are also within the scope of Fed. R. Crim. P. 16. *U.S. v. Johnson*, 525 F.2d 999 (2d Cir. 1975); *see also U.S. v. Walk*, 533 F.2d 417, 418 (9th Cir. 1975) (transcription of a government interviewer’s contemporaneous writings may be considered written statements of the defendant). A defendant’s responses to any *Miranda* warnings given prior to an inculpatory admission must be disclosed pursuant to Fed. R. Crim. P. 16. *U.S. v. McElroy*, 697 F.2d 459, 464 (2d Cir. 1982).

Rough notes of agent interviews often provide fertile ground for impeachment of the agent’s version of the defendant’s post-arrest statements and corroboration of the defendant’s version of the facts. These notes are discoverable and must be preserved. *U.S. v. Harris*, 543 F.2d 1247, 1251-53 (9th Cir. 1976); *U.S. v. Harrison*, 524 F.2d 421, 431-32 (D.C. Cir. 1975). Counsel should make a *Brady* request for all rough notes of the government agents involved in the case. The trial court should strike the testimony of an agent who has destroyed his rough notes. *Harris*, 543 F.2d at 1253; *see also U.S. v. Griffin*, 659 F.2d 932, 939-41 (9th Cir. 1981) (destruction of rough notes did not support dismissal where agents'
rough notes were incorporated into 17-page statement which was reviewed, corrected, and adopted); *but see* U.S. *v. Ramos*, 27 F.3d 65 (3d Cir. 1994) (good faith destruction of rough notes by municipal police officers does not warrant suppression).

Pre-arrest statements made to a government agent whose status was not known at the time of the statements are not discoverable under Rule 16. *U.S. v. Vitale*, 728 F.2d 1090, 1093-94 (8th Cir. 1984); *see also* U.S. *v. Bailey*, 123 F.3d 1381, 1399 (11th Cir. 1997). Nor are statements made to third parties discoverable under Rule 16. *U.S. v. Hoffman*, 794 F.2d 1429 (9th Cir. 1986); *see also* U.S. *v. Bailey*, 123 F.3d 1381, 1399 (11th Cir. 1997).

The government may try to evade its duty of disclosure under Rule 16 by stating that it does not intend to use the defendant’s statements in its case-in-chief. Several circuits have rejected such a restrictive interpretation. *See U.S. v. Lanoue*, 71 F.3d 966, 975 (1st Cir. 1995), *overruled on other grounds, U.S. v. Watts*, 519 U.S. 148 (1997); *U.S. v. Brodie*, 871 F.2d 125, 129 (D.C. Cir. 1989); *U.S. v. Scafe*, 822 F.2d 928, 935 (10th Cir. 1987); *U.S. v. Bailleaux*, 685 F.2d 1105, 1113-14 (9th Cir. 1982); *but see U.S. v. Panas*, 738 F.2d 278, 285 (8th Cir. 1984).

### 3.02.02 Defendant’s Prior Record

Federal Rule of Criminal Procedure 16(a)(1)(B) requires that upon request of the defendant, the prosecutor must provide a defendant with his prior criminal record known by the government to exist, or which becomes known to the government through the exercise of due diligence. Defense counsel should seek early discovery of this record and any prior similar acts or prior bad acts which the government intends to introduce into evidence in order to file a motion *in limine* and challenge, pretrial, the government’s use of this evidence. *See* Fed. R. Evid. 404(b) (government "shall provide reasonable notice in advance of trial" of the intent to use evidence under 404(b)); *U.S. v. Vega*, 188 F.3d 1150, 1155 (9th Cir. 1999); *U.S. v. Perez-Tosta*, 36 F.3d 1552, 1561 (11th Cir. 1994). The admissibility of 404(b) evidence will often be the determinative factor as to whether to take a case to trial or whether a defendant will testify. Counsel should attempt to get as much information about prior cases and bad acts, including case jackets, transcripts, and police reports through their own investigation. The underlying facts of an offense contained in these documents may prove helpful to a court in determining its admissibility, and may reveal information that the prosecution may try to use in its case-in-chief or for impeachment. *See U.S. v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996) (plea agreements, like statements made in violation of *Miranda*, may be received in evidence for impeachment purposes, even if taken in violation of Rule 11). Such information may also be used by the government for sentencing enhancement purposes. *See U.S. v. Jackson*, 177 F.3d 628, 632-33 (7th Cir. 1999); *U.S. v. Hill*, 131 F.3d 1056, 1061-65 (D.C. Cir. 1997); *U.S. v. Bonat*, 106 F.3d 1472 (9th Cir. 1997). Additionally, many clients are unaware of the specifics of their criminal histories and are not reliable sources for this information.

Discovery of a defendant's criminal record is essential to effectively counsel a client regarding the sentencing guidelines. However, the government need only produce a rap sheet which may not be a complete picture of a defendant's prior record. *U.S. v. Hourihan*, 66 F.3d 458, 463 (2d Cir. 1995); *U.S. v. Trejo-Zambrano*, 582 F.2d 460, 465 & n.3 (9th Cir.1978). The government rarely produces a record
which shows traffic matters such as DUI’s or failures to appear for traffic matters. *U.S. v. Audelo-Sanchez*, 923 F.2d 129 (9th Cir. 1991) (government’s failure to produce prior traffic ticket which is later used in rebuttal to client’s testimony that he had never before driven the car in which he was arrested, not a violation of Rule 16(a)(1)(B)). Such offenses can affect the defendant’s criminal history for guideline purposes, and should be explored with one’s client.¹

### 3.02.03 Physical Evidence

Federal Rule of Criminal Procedure 16(a)(1)(C) allows discovery of documents and tangible objects within the possession, custody, or control of the government which fall into three categories. It encompasses all evidence which: (1) the government intends to use in its case-in-chief; (2) is material to the preparation of the defense; or (3) was obtained from or belonged to the defendant. The government’s “custody or control” has been broadly construed by courts. See *U.S. v. Santiago*, 46 F.3d 885 (9th Cir. 1995) (U.S. Attorney’s Office had knowledge of, and access to, inmate files held by the Bureau of Prisons); *U.S. v. Bryan*, 868 F.2d 1032 (9th Cir. 1989) (Rule 16(a)(1)(C) includes out-of-district documents in the possession, custody, or control of any federal agency participating in the investigation of the defendant which prosecutor had knowledge of and to which prosecutor had access); *but see U.S. v. Pinto*, 905 F.2d 47, 50 (4th Cir. 1990) (bail bond documents that government had no actual knowledge of, nor possession or control, did not have to be disclosed prior to trial); *U.S. v. Gatto*, 763 F.2d 1040 (9th Cir. 1985) (there is no due diligence requirement under Rule 16(a)(1)(C) meaning that disclosure is required only with respect to documents within the federal government's actual possession, custody, or control). Rule 16(a)(1)(C) has been interpreted broadly to allow discovery of drugs, *U.S. v. Butler*, 988 F.2d 537 (5th Cir. 1993); weapons, *U.S. v. Gaddis*, 418 F. Supp. 869, 873 (W.D. Okla. 1976); tax returns, *U.S. v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995); and handwriting exemplars, *U.S. v. Buchanan*, 585 F.2d 100, 101 (5th Cir. 1978). Under the Sentencing Guidelines, the weight and purity of a drug impacts sentencing. Therefore, the government must allow the defense to weigh the drugs. See U.S.S.G. §2D1.1(c). Once the government complies with counsel’s request, the government may inspect, copy or photograph those items which the defendant intends to introduce in its case-in-chief. Rule 16(b)(1)(A).

Rule 16(a)(1)(C) also allows broad discovery of documents in complex cases. Courts may overlook the "materiality" requirement in a complex case in the interests of "fundamental fairness." In non-complex cases, the defense should be prepared to make a showing of materiality or risk denial of the motion for discovery. *U.S. v. Ross*, 511 F.2d 757, 762-63 (5th Cir. 1975); *see also U.S. v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998); *U.S. v. Marshall*, 132 F.3d 63 (D.C. Cir. 1998); *U.S. v. Stevens*, 985 F.2d 1175 (2d Cir. 1993), *rev’d on other grounds*, 66 F.3d 431 (2d Cir. 1995), *rev’d on other grounds*, 192 F.3d 263 (2d Cir. 1999); *U.S. v. Marshall*, 532 F.2d 1279 (9th Cir. 1976). In *U.S. v. Clegg*, 846 F.2d 1221 (9th Cir. 1988), the court allowed discovery of classified documents because they were relevant to a mistake of law defense.

If the government provides illegible copies of documents, counsel must demand the right to inspect the originals. Failure to inspect available originals may result in affirmance of a conviction based on

¹ *See infra* section 3.17 for a discussion of discovery for sentencing hearings.
documents, the material part of which have been poorly reproduced. *U.S. v. LaCoste*, 721 F.2d 984, 988 (5th Cir. 1983) (conviction affirmed where blurred copy of postmark was provided to defendant under Rule 16, but original postmark was used at trial to impeach defendant, because original was available for inspection); see also *U.S. v. Terry*, 702 F.2d 299 (2d Cir. 1983) (government need not provide original tape recordings to defendant when copies were provided to defense counsel and the court found the copies to be authentic and accurate).

3.02.04 Reports of Examinations and Tests

Federal Rule of Criminal Procedure 16(a)(1)(D) allows discovery, upon request of counsel, of results or reports of any scientific tests or experiments and results or reports of physical or mental examinations of the defendant within the custody or control of the government which are either: (1) material to the defense; or (2) to be used as evidence in the government's case-in-chief. Typically, reports of tests performed on crime scene evidence and examinations of the victim are discoverable under this provision. *See, e.g., U.S. v. Gordon*, 580 F.2d 827, 836-37 (5th Cir. 1978) (results of tests performed on drugs discoverable); *U.S. v. Buchanan*, 585 F.2d 100, 101-02 (5th Cir. 1978) (handwriting and fingerprint reports discoverable). Defense counsel should request samples for independent testing. *U.S. v. Noel*, 708 F. Supp. 177 (W.D. Tenn. 1989). Additionally, counsel should request discovery of the underlying data used in government tests to aid in cross-examination and independent testing. *U.S. v. Yee*, 129 F.R.D. 629, 635-36 (N.D. Ohio 1990). However, where the government does not intend to introduce the evidence in its case-in-chief, counsel must be prepared to demonstrate why the information is material to the defendant’s case, and thus, discoverable.

3.02.05 Expert Witnesses

The prosecutor must give notice to defense counsel of its intention to use results of scientific tests or expert witnesses with enough time for counsel to obtain an expert to assist him in attacking the findings of the government's expert. The advisory committee notes contemplate that requests and disclosures will be made in a “timely” fashion. *U.S. v. VonWillie*, 59 F.3d 922, n.4 (9th Cir. 1995). If the prosecutor fails to give adequate notice to the defense, counsel should ask the court to either exclude the testimony of the government’s expert or to grant a continuance which will allow the defense to consult with and possibly retain an expert. *See People of Territory of Guam v. Cruz*, 70 F.3d 1090, 1092 (9th Cir. 1995); *U.S. v. Soldevila-Lopez*, 17 F.3d 480, 487-88 (1st Cir. 1994); *U.S. v. Barrett*, 703 F.2d 1076, 1081 (9th Cir. 1983); *U.S. v. Kelly*, 420 F.2d 26, 28-29 (2d Cir. 1969). Additionally, Rule 16(a)(1)(E) provides that, upon request, counsel is entitled to a written summary of the testimony of any expert witness that the government intends to use during its case-in-chief, along with the witness’ qualifications, the witness’ opinion, and the bases underlying the opinions. *See generally, U.S. v. Jackson*, 51 F.3d 646, 651 (7th Cir. 1995) (government’s summary barely satisfied Rule 16(a)(1)(E)). An expert is anyone offered under Fed. R. Evid. 702, 703, or 704. Counsel should be aware that making a request under this provision triggers a reciprocal obligation upon the defendant.

The Court has held that the right to present a defense sometimes involves the right to expert services. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that when a defendant demonstrates to the
trial judge that his sanity at the time of the offense is to be a significant factor at trial, due process requires the state to assure him access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense; see also 18 U.S.C. §3006(A)(e); but see Chaney v. Stewart, 156 F.3d 921, 924 (9th Cir. 1998) (error resulting from denial of request for appointment of expert at trial is subject to harmless error review).

3.02.06 Organizational Defendants

When a defendant is a corporation, labor union, or other organization, it is entitled to the discovery of any statements which the government contends were made by a person who, at the time the statements were made, was in a position to legally bind the defendant by their statements. These statements may truly be deemed “statements of the defendant” for purposes of Rule 16. See Fed. R. Crim. P. 16 (a) advisory committee’s note (amended 1994): “[b]ecause an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant.” In this sense, an organizational defendant may be afforded a somewhat broader scope of discovery than an individual defendant. In the case of an individual defendant, co-conspirator’s statements made during the course of the conspiracy and in furtherance of it, are admissible at trial but are generally not discoverable under Rule 16(a)(1)(A), although they might be discoverable as Brady material. However, these same types of statements are discoverable for an organizational defendant. ²

3.03 SECTION 3500 PRIOR RECORDED STATEMENTS

The only federal statute dealing specifically with discovery is the Jencks Act, 18 U.S.C. §3500. Congress enacted the statute in response to Jencks v. U.S., 353 U.S. 657 (1957), which held that a defendant is entitled to pretrial discovery of government witnesses’ statements for purposes of impeachment. Since the purpose of the Jencks Act is to aid in the impeachment of a witness, only that particular witness’ prior statements are discoverable under Jencks. The statute restricted the broad rule of Jencks and also provided the model for government discovery of defense witnesses’ statements under Fed. R. Crim. P. 26.2. Under the Jencks Act, any recorded statement or report of a government witness must be provided to a defendant, but only after the witness has testified on direct examination in the trial of the case. But see U.S. v. Bobadilla-Lopez, 954 F.2d 519 (9th Cir. 1992); accord U.S. v. Alvarez, 86 F.3d 901 (9th Cir. 1996). However, if a witness testifies at a pretrial proceeding, the witness’ credibility then becomes an issue. Fairness and the right to cross-examine require disclosure of the witness’ prior statements. See Fed. R. Crim. P. 12(i) & 26.2. Jencks material is required to be disclosed at detention hearings, Fed. R. Crim. P. 46(i), and also at sentencing hearings, Fed. R. Crim. P. 32(c)(2).

² See infra section 3.08 for a discussion of co-conspirator and co-defendant statements.

³ This decision holds that recorded radio transmissions of Border Patrol agents observing defendant prior to his arrest were not Jencks material because they were equivalent to surveillance notes, as opposed to more complete statements made in preparation for litigation. Bobadilla-Lopez, 954 F.2d at 522. The dissenting opinion provides a much more rational discussion of the Jencks Act. The majority opinion does allow for the possibility that such recorded statements are discoverable under Rule 16.
The first question to consider is whether a "statement" falls within the rather restrictive definition of the Jencks Act. Any written statement made, signed, adopted, or approved by the witness, any "substantially verbatim" transcription, and any grand jury transcript falls within the Jencks Act. Government reports relating the substance of witness interviews, however, are troublesome. When a government agent interviews a prospective government witness, there are usually rough notes taken and, usually, a report prepared by the interviewing agent. The rough notes taken by a government agent are not discoverable as the witness' "statement" unless: (1) the witness reviewed or approved the notes, 18 U.S.C. §3500(e)(1); Goldberg v. U.S., 425 U.S. 94 (1976) (notes taken during a witness interview qualified as Jencks material where the information contained in them was read back to the witness for corrections); U.S. v. Ogbuehi, 18 F.3d 807 (9th Cir. 1994) (in camera review of interview notes taken by prosecutor proper when prosecutor read back notes to the witness for accuracy, although notes were not verbatim or ever shown to witness); or (2) the notes were "a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously . . .," 18 U.S.C. §3500(e)(2); U.S. v. Smith, 984 F.2d 1084 (10th Cir. 1993) (agent's interview notes of government witness are Jencks "statements" if substantially verbatim); U.S. v. Rewald, 889 F.2d 836 (9th Cir. 1989) (court's failure to review FBI reports of witness interviews for Jencks material required remand).

Rough notes of an interviewing agent will not usually be discoverable under the Jencks Act if they include the agent's own thoughts and interpretations. U.S. v. Griffin, 659 F.2d 932, 937-38 (9th Cir. 1981); U.S. v. Hinton, 719 F.2d 711, 720-21 (4th Cir. 1983). Surveillance notes, likewise, are not considered discoverable under the Jencks Act. Bobadilla-Lopez, 954 F.2d at 522-23. However, if the notes contain material that is arguably exculpatory, they should be preserved for a determination by the court of whether they must be disclosed as Brady material. U.S. v. Harris, 543 F.2d 1247, 1252 (9th Cir. 1976); but see U.S. v. Marashi, 913 F.2d 724, 732 (9th Cir. 1990) (nondisclosure of interview notes that are cumulative is not a Brady violation). While the rough notes may be difficult to obtain, the agent's reports, which usually incorporate those notes, are discoverable. The report of the interviewing agent is discoverable under the Jencks Act after that agent testifies at a motion hearing or on direct examination. Defense counsel should, therefore, move for preservation and disclosure of Jencks material early in the case. The request need not be extremely particular, and a request for "all Jencks material" should be sufficient. U.S. v. Johnson, 200 F.3d 529, 534 (7th Cir. 2000); see also U.S. v. Allen, 798 F.2d 985, 997 (7th Cir. 1986).

The destruction of Jencks material is subject to a harmless error review. See U.S. v. Riley, 189 F.3d 802, 805-06 (9th Cir. 1999); U.S. v. Ammar, 714 F.2d 236, 260 (3d Cir. 1983); U.S. v. Soto, 711 F.2d 1558 (11th Cir. 1983); U.S. v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976). No showing of prejudice is required. U.S. v. Well, 572 F.2d 1383, 1384 (9th Cir. 1978). The remedy for destruction of Jencks material is to strike the witness' testimony. 18 U.S.C. §3500(b) and 3500(d); but see U.S. v. Echeverry, 759 F.2d 1451, 1456 (9th Cir. 1985) (testimony not stricken because Jencks material duplicative of other testimony). Some courts have ruled that a mistrial is appropriate. U.S. v. McKoy, 78 F.3d 446 (9th Cir. 1996); U.S. v. Mannarino, 850 F. Supp. 57, 62 (D. Mass. 1994). The Ninth Circuit recently held that the destruction of an agent’s notes, albeit in good faith, was not harmless, and ordered the case reversed. U.S. v. Riley, 189 F.3d 802, 807-08 (9th Cir. 1999); but see U.S. v. Ramos, 27 F.3d
The government's failure to provide discovery of all relevant Jencks Act material is error and may require reversal. In *U.S. v. Bibbero*, 749 F.2d 581 (9th Cir. 1984), a cooperating accomplice testified for the government regarding the defendant's activities. The government censored a government report based upon interviews with the witness, excising portions regarding "on-going investigations" in which the witness was involved. *Id.* at 585. The Ninth Circuit reversed the convictions, holding that "[t]here are no exceptions to the Jencks rule . . . ; the statement need relate only generally to the events and activities testified to by the witness to come within its sweep." *Id.* The trial court can, however, review the statement *in camera*, and excise parts which do not relate to the witness' testimony under 18 U.S.C. §3500(c). See *U.S. v. Rivera-Pedin*, 861 F.2d 1522, 1527 (11th Cir. 1988). It is error for the court to refuse such an inspection. See *U.S. v. Alvarez*, 86 F.3d 901, 907 (9th Cir. 1996) (when district court does not conduct in camera review, remand is appropriate to determine whether the statement was Jencks material and whether any error was harmless); *U.S. v. Smith*, 31 F.3d 1294, 1302-03 (4th Cir. 1994); *U.S. v. Smith*, 984 F.2d 1084, 1086 (10th Cir. 1993); *U.S. v. Wallace*, 848 F.2d 1464, 1471 (9th Cir. 1988); *U.S. v. Washington*, 797 F.2d 1461, 1475 (9th Cir. 1986).

The court cannot force the government to produce Jencks Act statements before the witness testifies. *U.S. v. Lewis*, 35 F.3d 148, 151 (4th Cir. 1994) (while district court may not order advance production of Jencks, nothing prevents government from voluntarily disclosing it prior to trial); *U.S. v. Minsky*, 963 F.2d 870, 876 (6th Cir. 1992) (although technically not a violation for government to produce Jencks material until after witness' testimony, it is the better practice for the government to produce Jencks material well in advance of trial); *U.S. v. Algie*, 667 F.2d 569, 571 (6th Cir. 1982) (requirement by district court that Jencks material be provided five days prior to trial not authorized by §3500). However, counsel must be given adequate time to review the material and prepare cross-examination. The trial court's refusal to grant a reasonable continuance is reversible error. See *U.S. v. Holmes*, 722 F.2d 37 (4th Cir. 1983) (conviction reversed where continuance denied after Jencks material, which was a stack of paper at least eight inches thick, was provided on the day before trial). Untimely disclosure of Jencks material requires a showing of prejudice from the delay. See *U.S. v. Johnson*, 200 F.3d 529, 535 (7th Cir. 2000) (where government allegedly does not produce Jencks material, defendant should not be held responsible for failing to allege prejudice because he does not know what is contained in the unproduced documents); *but see U.S. v. Dupuy*, 760 F.2d 1492, 1497 (9th Cir. 1985) (conviction affirmed where defense had opportunity to recall informant for recross after edited version of report was furnished late).

### 3.04 EXCULPATORY EVIDENCE

#### 3.04.01 Brady Material

The prosecutor has a duty to disclose, at least upon request, all evidence favorable to the defendant which is "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Additionally, standards of professional responsibility independently require a prosecutor to disclose exculpatory evidence. The materiality standard announced in *Brady* is not a heavy burden. Evidence is
material as long as there is a strong indication that it will "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." U.S. v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation marks and citations omitted); see also U.S. v. NYNEX Corp., 781 F. Supp. 19 (D.D.C. 1991) (government should interpret materiality requirement broadly to ensure fairness to the defendant). The Supreme Court, in 1985, refined the materiality standard to “a reasonable probability that, had the evidence been disclosed, the result would have been different.” U.S. v. Bagley, 473 U.S. 667, 682 (1985); see also supra section 3.02. Joseph R. Weeks’ “No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence,” 22 Okla. City U. L. Rev. 833 (1997) has a good discussion of the duty to disclose exculpatory evidence.

Categories of evidence generally considered to be Brady material include: a witness' prior record, U.S. v. Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988) (entitled to material in a witness' probation file that bears on his or her credibility); but see U.S. v. Trevino, 89 F.3d 187 (4th Cir. 1996) (denial of disclosure of probation report affirmed); witness statements favorable to the defendant, Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); the existence of witnesses favorable to the defense, U.S. v. Wilkins, 326 F.2d 135 (2d Cir. 1964); psychiatric reports showing the defendant's legal insanity, Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963); U.S. v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992); promises of immunity to a government witness, Giles v. Maryland, 386 U.S. 66 (1967); U.S. v. Hanna, 55 F.3d 1456 (9th Cir. 1995) (failure to produce prior inconsistent statements of arresting officer is reversible error); and may sometimes include "negative inculpatory" statements (those which do not implicate the defendant), Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978). However, in U.S. v. Zuno-Arce, 44 F.3d 1420 (9th Cir. 1995), the Ninth Circuit held that not every witness statement which fails to inculpate the defendant should be treated as exculpatory. But see U.S. v. Breit, 767 F.2d 1084, 1090 n.4 (4th Cir. 1985) (the government’s duty under Brady is not satisfied without an indication the witness’ testimony may be helpful to the defense, or, at a minimum, is being tendered pursuant to the Brady obligation).

Any evidence which would affect the credibility of a government witness could be construed as Brady material. This would include any information which shows bias of the witness, motive for the witness to lie or exaggerate testimony, and any credibility concerns of a government witness (i.e. prior bad acts of dishonesty, felony convictions). See generally, U.S. v. Abel, 469 U.S. 45 (1984). Impeachment evidence of government witnesses is also discoverable under Brady. See U.S. v. Bernal-Obeso, 989 F.2d 331, 336 (9th Cir. 1993) (“a material lie by a critical informant-witness about his prior record would be exculpatory and thus discoverable Brady information”); U.S. v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1992) (failure to turn over evidence that government snitch was running the investigation and manipulating the DEA constitutes Brady violation). A lack of memory by the witness or evidence regarding the witness’ capacity to observe also falls within the ambit of Brady. See Ballinger v. Kerby, 3 F.3d 1371, 1376 (10th Cir. 1993) (failure to produce photo that cast doubt on statements of state’s primary witness violated Brady); Jean v. Rice, 945 F.2d 82, 87 (4th Cir. 1991) (failure to disclose evidence relating to hypnosis of state’s key witnesses was error under Brady). Additionally, several courts have found Brady violations where the government did not reveal the extent of its “favors” to its key witnesses. See Singh v. Prunty, 142 F.3d 1157, 1161-63 (9th Cir. 1998) (non-disclosure of state’s agreement to provide benefits to witness
in exchange for his testimony violated due process); *U.S. v. Boyd*, 55 F.3d 239, 243-44 (7th Cir. 1995) (*Brady* violation to fail to reveal drug use, drug dealing, and the granting of unusual favors to witnesses).

A divided Supreme Court held that no *Brady* violation occurred where a critical witness for the state failed a polygraph exam with respect to certain vital facts. The prosecutor disclosed neither the fact that a polygraph test was administered nor the negative results of the test. *Wood v. Bartholomew*, 516 U.S. 1 (1995). However, the Ninth Circuit has held that polygraph evidence is not *per se* inadmissible. See *U.S. v. Cordoba*, 104 F.3d 225 (9th Cir. 1997); *but see U.S. v. Scheffer*, 523 U.S. 303 (1998) (*per se* rule against polygraph evidence in court martial proceedings does not violate Fifth or Sixth Amendments). Thus, counsel should argue that such evidence must now be disclosed. See also *U.S. v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *U.S. v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995).

Personnel files of government witnesses and informants are often fertile ground for *Brady* material. Information regarding the criminal records of government informants and their prior dealings with law enforcement is typically well hidden and defense counsel must make every effort to flush out this crucial evidence. The Ninth Circuit has ruled that it is error for the prosecution to refuse to review government witness personnel files for exculpatory material. *U.S. v. Henthorn*, 931 F.2d 29, 30-31 (9th Cir. 1991); see also *U.S. v. Jennings*, 960 F.2d 1488 (9th Cir. 1992). Not all circuits agree on this issue. See *U.S. v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998); *People v. Shakur*, 648 N.Y.S.2d 200, 208 (N.Y. Sup. 1996). A prosecutor may not be required to personally review personnel files of testifying agents. *U.S. v. Herring*, 83 F.3d 1120 (9th Cir. 1996).

The prosecutor must disclose exculpatory evidence upon request. The general rule regarding the production of *Brady* material is that it occur at a time when disclosure would be of value to the accused. *U.S. v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985); *U.S. v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970). Unfortunately, this rule does not mandate that disclosure occur prior to trial. *U.S. v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988); *U.S. v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983); *U.S. v. Allain*, 671 F.2d 248, 255 (7th Cir. 1982). The trial court may be able to preclude disclosure even up until the witness testifies, if the government can show a need, for example, to protect the witness. *U.S. v. Higgs*, 713 F.2d 39 (3d Cir. 1983). If the prosecutor fails to produce *Brady* material, defense counsel should move for a new trial. *U.S. v. Steinberg*, 99 F.3d 1486 (9th Cir. 1996), *disapproved of on other grounds by U.S. v. Foster*, 165 F.3d 689 (9th Cir.1999); *but see U.S. v. Alvarez*, 86 F.3d 901 (9th Cir. 1996) (defendant not prejudiced by government’s discovery errors under *Jencks* and *Brady*).

Advocates seeking *Brady* evidence regarding government sources by filing Freedom of Information Act (FOIA) requests are often presented with a particularly difficult problem. See 5 U.S.C. §552. Typically, government agencies will seek protection from disclosure under Exemption 7(D) which exempts records compiled for law enforcement purposes by law enforcement authorities in the course of a criminal investigation if the records' release "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source." 5 U.S.C §552(b)(7)(D) However, the government is not entitled to a *per se* presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to a law enforcement agency in the course of a criminal investigation. *U.S. Dept. of Justice v. Landano*, 508 U.S. 165, 181 (1993). The Court has instead consistently construed
FOIA exemptions in favor of disclosure, requiring in most cases that the government provide detailed explanations relating to each alleged confidential source. *Id.*

The government must disclose even "classified" documents in possession of the Department of State, Department of Defense, or the C.I.A. if such documents are relevant to development of a valid defense. *U.S. v. Clegg*, 740 F.2d 16 (9th Cir. 1984) (disclosure order following *in camera* inspection affirmed); *but see U.S. v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (at an *in camera* review, court may balance defendant’s need for documents against national security concerns).

Willful prosecutorial suppression or concealment of exculpatory evidence requires reversal under *Brady*. *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (prosecutor argued robbery was motive for murder while withholding information that the alleged stolen items were in fact turned over to the decedent's family by hospital personnel); *Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979), (detective’s concealment of existence of favorable witness required reversal); *but see U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 865 (1982) (sanctions warranted for deportation of witnesses only if there is a reasonable likelihood that testimony could have affected judgment of trier of fact). The government must make a "reasonable effort" in aiding the defense to obtain favorable evidence and witnesses. *U.S. v. Hernandez-Gonzalez*, 608 F.2d 1240, 1246 (9th Cir. 1979); *U.S. v. Henao*, 652 F.2d 591, 592 (5th Cir. 1981). Furthermore, the prosecutor may not allow unsolicited false evidence to remain uncorrected at trial. *Napue v. Illinois*, 360 U.S. 264 (1959).

Knowledge or possession of exculpatory evidence is imputed to the prosecutor as the acting agent of the government, or "arm of the prosecution." “Possession” includes documents or information which are in the control of investigative agencies closely connected to the prosecution, even if outside the district, so long as the prosecutor has knowledge of and access to it. *See U.S. v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (for *Brady* purposes, FDA and the prosecutor were one, and exculpatory information in FDA’s possession should have been produced); *U.S. v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999); *but see U.S. v. Gomez-Lopez*, 62 F.3d 304 (9th Cir. 1995) (court abused its discretion in ordering circuit-wide discovery). Most courts have ruled that Bureau of Prisons files are within the possession and control of the U.S. Attorney. *See U.S. v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995). Some courts, however, have held that there is no duty to acquire documents that are in the possession of state authorities. *See U.S. v. Escobar*, 674 F.2d 469, 478-79 (5th Cir. 1982); *U.S. v. Edgewood Health Care Center, Inc.*, 608 F.2d 13, 14-15 (1st Cir. 1979). Issues arise when the information sought by the defense is in a witness’ probation file. *U.S. v. Zavala*, 839 F.2d 523 (9th Cir. 1988) (statements of government witnesses contained in probation reports not discoverable under *Jencks, Brady*, or Federal Rules); *U.S. v. Guardino*, 972 F.2d 682, 689 (6th Cir. 1992); *but see U.S. v. Strifler*, 851 F.2d 1197 (9th Cir. 1988) (information in government witness’ probation file which was relevant to the witness’ credibility could not be unavailable just by being part of probation file).

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4 Requests that involve the disclosure of classified information are covered by the Classified Information Procedures Act (CIPA), 18 U.S.C. Appendix IV. *See infra* section 3.14.07 for requirements of, and sanctions for, failure to follow CIPA.
If there is room for doubt as to whether or not evidence is exculpatory, it is generally improper for the prosecutor to decide what is useful to the defense. *Dennis v. U.S.*, 384 U.S. 855, 875 (1966) (determination of what may be useful to the defense can properly and effectively be made only by an advocate); *but see Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final). Concealment of evidence to circumvent disclosure requirements was condemned in *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), and substantial damages were rewarded in that 42 U.S.C. §1983 case.

If the exculpatory nature of the evidence is doubtful, the prosecutor should turn over his or her file to the court for a *Brady* inspection. *U.S. v. Dupuy*, 760 F.2d 1492, 1501 (9th Cir. 1985) (prosecutor satisfies duty to disclose exculpatory evidence by submitting it to the trial judge); *U.S. v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988); *Application of Storer Communications, Inc. v. Presser*, 828 F.2d 330, 335 (6th Cir. 1987); *Anderson v. U.S.*, 788 F.2d 517, 519 (8th Cir. 1986); *U.S. v. Griggs*, 713 F.2d 672 (11th Cir. 1983). If the court orders such an *in camera* inspection, defense counsel should seek limited participation under a protective order. If this request is denied, a demand should be made to compel the prosecutor to submit for inspection any material related to the subject of inquiry and that the material be sealed for appellate review of the trial judge's decision. *But see U.S. v. Gardner*, 611 F.2d 770 (9th Cir. 1980) (with trial court's permission, the prosecutor may submit for *in camera* inspection only materials it deems discoverable under *Brady*). The court is not required, however, to conduct an exploratory search of the government's files to ensure compliance with *Brady*. *U.S. v. McKinney*, 758 F.2d 1036 (5th Cir. 1985).

A *Brady* claim may be asserted even after a plea of guilty has been entered. Several circuits have accepted the argument that a plea was not voluntary and intelligent because it was made in the absence of withheld *Brady* material. See *U.S. v. Sanchez*, 50 F.3d 1448, 1453 (9th Cir. 1995); *White v. U.S.*, 858 F.2d 416, 422 (8th Cir. 1988); *Miller v. Angliker*, 848 F.2d 1312, 1319-20 (2d Cir. 1988); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985).

**3.04.02 Destruction of Exculpatory Evidence**

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51 (1988). Defense counsel should ask for dismissal of the indictment when bad faith can be established. *See U.S. v. Cooper*, 983 F.2d 928 (9th Cir. 1993) (indictment dismissed where government acted in bad faith when it destroyed the defendants' chemical laboratory equipment); *U.S. v. Bohl*, 25 F.3d 904 (10th Cir. 1994) (indictment dismissed when government found to have acted in bad faith by destroying allegedly defective goods produced by defendants under contract for government). If "good faith" can be shown by the government in its destruction of evidence, there usually is no remedy. *California v. Trombetta*, 467 U.S. 479 (1984) ("good faith" destruction of drunk driver's breath samples upheld because exculpatory value unlikely and not immediately apparent); *U.S. v. Valenzuela-Bernal*, 458 U.S. 858 (1982) (sanctions warranted for deportation of alien witnesses only if reasonable likelihood that testimony would have affected the judgment of the trier of fact); *U.S. v. Alderdyce*, 787 F.2d 1365 (9th Cir. 1986) (failure to preserve
clothing of rape victim in manner that would allow further scientific testing not reversible error); *U.S. v. Kennedy*, 714 F.2d 968 (9th Cir. 1983) (government’s destruction of semen stains through testing not bad faith where defense expert was provided with additional stains for independent testing).

### 3.05 OTHER

Other methods may also be used to effect discovery. *See* Fed. R. Crim. P. 6(e) (grand jury transcripts); Rule 7(f) (bill of particulars); Rule 12(i) (production of statements at suppression hearing); Rule 15 (depositions); Rule 17 (subpoenas); Rule 17.1 (pretrial conference); and Rule 26.2 (production of witness statements). The rules also require disclosure of certain defenses and set traps for the unwary defense attorney which may allow the government to demand discovery of defense evidence. *See* Fed. R. Crim. P. 12.1 (notice of alibi); Rule 12.2 (notice of insanity defense or expert testimony of defendant’s mental condition); Rule 12.3 (notice of defense based on public authority); Rule 16(b) (reciprocal discovery of documents, tangible objects, and reports of examinations and tests); and Rule 26.2 (production of defense witness statements).

An advocate must be familiar with the rules listed above and understand the logic behind the rules in order to effectively argue for discovery, either informally or formally. Some decisions restrict the discretion of the trial judge to order discovery. *U.S. v. Spagnuolo*, 515 F.2d 818, 821 (9th Cir. 1975) (government cannot be ordered to disclose Jencks material before statutorily required to do so); *U.S. v. Hearst*, 412 F. Supp. 863, 866 (N.D. Cal. 1975) (Federal Rules of Criminal Procedure neither require nor encourage unfettered pretrial discovery). Court supervision of the discovery process allows courts to take some liberties with the rules defining discovery rights. Some districts systematically enforce their district’s discovery policy by use of an “omnibus” hearing for discovery. *See*, e.g., *U.S. v. Phillips*, 585 F.2d 745 (5th Cir. 1978). Such procedures require the defendant to provide more discovery than the government could ordinarily obtain in exchange for the government providing more discovery than that to which the defendant would normally be entitled. *Id.* at 747. If the “omnibus” proceeding is available, counsel must decide whether the benefit outweighs the cost. *See* Weninger, "Criminal Discovery and Omnibus Procedure in a Federal Court: A Defense View," 49 S. Cal. L. Rev. 514 (1975-76).

#### 3.05.01 Bill of Particulars (Fed. R. Crim. P. 7)

Federal Rule of Criminal Procedure 7(f) provides that the court may, in its discretion, direct the government to file a bill of particulars. Discretion is very broad and a refusal will be upheld unless the defendant can show a gross abuse of discretion which prejudiced the defendant's rights. *See generally, Will v. U.S.*, 389 U.S. 90 (1967); *U.S. v. Bearden*, 423 F.2d 805, 809 (5th Cir.1970). A bill of particulars should be used only to protect a defendant from double jeopardy, to enable adequate preparation of a defense, and to avoid surprise at trial. *U.S. v. Giese*, 597 F.2d 1170, 1180 (9th Cir.1979); *U.S. v. Birnley*, 529 F.2d 103, 108 (6th Cir. 1976); *U.S. v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993). Rule 7(f) cannot be used to bring about a result prohibited by Rule 16. *See Cooper v. U.S.*, 282 F.2d 527, 532 (9th Cir. 1960).
A bill of particulars can be especially useful when granted in a conspiracy case or other complicated litigation. The motion for a bill of particulars should request that the government identify others who may be involved in the crime, the nature of uncharged overt acts, the circumstances of a particular defendant's participation, and any unclear allegations contained in the indictment. See *U.S. v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir. 1979).

**3.05.02 Depositions (Fed. R. Crim. P. 15)**

Federal Rule of Criminal Procedure 15 allows the trial court to order the deposition of a witness for “exceptional circumstances.” Depositions are extremely disfavored because of the preference for live testimony and the traditional concerns for the constitutional right to confrontation and cross-examination. A deposition will be ordered only if it appears that a witness will not be available at trial due to impending death, serious illness, or absence from the jurisdiction of the United States. In addition to Rule 15, 18 U.S.C. §3503(a) allows the government to depose an informant in certain situations. *U.S. v. Singleton*, 460 F.2d 1148 (2d Cir. 1972) (deposition allowed when witness is unavailable and reason for absence is not attributable to the government). The government can also, under “exceptional circumstances,” require an immunized witness to submit to a deposition to obtain evidence against the witness' criminal cohorts. *U.S. v. Johnson*, 752 F.2d 206, 210 (6th Cir. 1985). The Ninth Circuit allowed the admission of a videotaped deposition taken at the government's request in Thailand because of the witness’ “exceptional circumstances” of being incarcerated. *U.S. v. Sines*, 761 F.2d 1434, 1438 (9th Cir. 1985); see also *U.S. v. Dragoul*, 1 F.3d 1546, 1553 (11th Cir. 1993).

When defense counsel seeks to depose a witness, care must be taken to meet the rigorous procedural requirements under Rule 15, specifically the requirements of materiality and unavailability. If these procedural requirements are met, the court's refusal to order the deposition of a foreign witness, unwilling or unable to travel to the United States to testify, may amount to reversible error. See *U.S. v. Sensi*, 879 F.2d 888, 899 (D.C. Cir. 1989); *U.S. v. Sun Myung Moon*, 93 F.R.D. 558, 559-60 (S.D.N.Y. 1982); *U.S. v. Wilson*, 601 F.2d 95, 97-99 (3d Cir. 1979). However, some courts disallow a deposition of a witness who is a fugitive co-conspirator. See *U.S. v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978); *U.S. v. Murray*, 492 F.2d 178, 195 (9th Cir. 1973).

If a deposition is ordered and the witness is unavailable at trial, the deposition will probably be admissible under Fed. R. Evid. 804. See *U.S. v. Johnpoll*, 739 F.2d 702, 708-710 (2d Cir. 1984). Videotaped testimony helps preserve demeanor evidence for the jury. See *U.S. v. King*, 552 F.2d 833, 841 (9th Cir. 1976). The Ninth Circuit has held that the refusal to admit sworn videotaped depositions can prevent a defendant from exercising his Sixth Amendment right to present a defense. *U.S. v. Sanchez-Lima*, 161 F.3d 545, 548 (9th Cir. 1998).

**3.05.03 Subpoenas (Fed. R. Crim. P. 17)**

however, can be an extremely effective and useful device for reviewing documents in the hands of a witness because of a defendant’s right to evidence that bears on guilt or punishment and the Sixth Amendment right to process. See *U.S. v. Tomison*, 969 F. Supp. 587, 593 (E. D. Cal. 1997) (citations omitted). Rule 17(c) allows the trial judge to order pretrial production of documents in order to determine whether they should be turned over to the defendant. *U.S. v. Nixon*, 418 U.S. 683, 698 (1974). Even documents in the hands of government agents are subject to subpoena. *Bowman Dairy Co.*, 341 U.S. at 221; but see *U.S. v. Domínguez-Villa*, 954 F.2d 562, 565-66 (9th Cir. 1992). Care must be taken to comply with administrative procedures for subpoenaing documents from government agents. See 28 C.F.R. §§16.21 through 16.26. Counsel should check local rules and practices before serving subpoenas duces tecum for pretrial production without the court's approval. E.g. S.D. Cal. Rule 17.1.

Because a subpoena duces tecum is not intended to provide a means of discovery for criminal cases, counsel must be prepared to show:

1. that the 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
4. that the application is made in good faith and is not intended as a general "fishing expedition."

*U.S. v. Nixon*, 418 U.S. at 699-700. A defendant may request a Rule 17(c) subpoena *ex parte* when he cannot make the necessary showing of relevancy, admissibility and specificity without revealing trial strategy. *Tomison*, 969 F. Supp. at 589. Counsel should subpoena dispatch tapes after an arrest involving federal or state agencies where a high-speed chase or surveillance has occurred. These materials are often quite relevant, but are routinely destroyed. The failure of the government to preserve them, even though they may be verbatim statements of officer/witnesses, is not a *Jencks* or *Youngblood* violation. *U.S. v. Bobadilla-Lopez*, 954 F.2d 519, 522 (9th Cir. 1992). However, once served with a subpoena, the party is on notice, and the subpoenaed materials should be preserved until the court determines whether or not production should occur or the subpoena should be quashed. Failure to preserve evidence after being served might result in an obstruction of justice charge.

### 3.05.04 Transcripts

The state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). Under *Britt*, the defendant must show: (1) the value of the transcript to the defense in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same function as a transcript. *Id.* The court must order the government to provide indigent defendants with free copies of the transcript from a prior trial which was reversed on appeal or resulted in a mistrial or for transcripts of pretrial proceedings. *U.S. v. Talbert*, 706 F.2d 464, 469-470 (4th Cir. 1983); *U.S. v. Johnson*, 584 F.2d 148, 157 (6th Cir. 1978); *U.S. v. Jonas*, 540 F.2d 566 (7th Cir. 1976); *Peterson v. U.S.*, 351 F.2d 606, 608 (9th Cir. 1965). However, a denial will be subject to a harmless error analysis on review. *U.S. v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980).
3.06 GRAND JURY

3.06.01 Transcripts (Fed. R. Crim. P. 6)

All grand jury proceedings must be recorded pursuant to Fed. R. Crim. P. 6(e)(1). Rule 6(e)(2) generally precludes discovery of grand jury transcripts, but two exceptions listed in Rule 6(e)(3)(C) provide the defense attorney access to them: (i) when "so directed by a court" in regard to a judicial proceeding, or (ii) when "permitted by a court" because of a motion to dismiss the indictment for misconduct before the grand jury. Thus, a defense attorney can obtain pretrial discovery of grand jury transcripts in only three situations: (1) when the defense raises a colorable claim of grand jury misconduct; (2) when the defense establishes a "particularized need" for the transcript which outweighs the grand jury policy of secrecy; and (3) where a grand jury witness testifies at a pretrial motion hearing. See Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395, 400 (1959).5

Additionally, the grand jury testimony of an “unavailable” witness (within the meaning of Fed. R. Evid. 804) may have to be produced upon motion of the defendant, and may be admissible at trial since the government has already had the opportunity to examine the witness. See U.S. v. Driscoll, 445 F. Supp. 864, 866 (D.N.J. 1978) (grand jury testimony discoverable on motion of defense counsel under prior testimony exception to hearsay rule). Generally, however, an independent basis must exist for obtaining the grand jury testimony of an unavailable witness; i.e., the testimony is alleged to contain Brady material, or some other information to which the defendant is entitled. U.S. v. Klauber, 611 F.2d 512, 515 (4th Cir. 1979).

3.06.02 Grand Jury Misconduct

Where the defendant makes a showing that grounds may exist for a motion to dismiss the indictment because of grand jury misconduct, the court should order disclosure of grand jury transcripts. Fed. R. Crim. P. 6(e)(3)(C)(ii). The defendant may not merely assert that he has no way of knowing whether prosecutorial misconduct occurred before the grand jury; some showing of misconduct is required. U.S. v. Bennett, 702 F.2d 833, 836 (9th Cir. 1983); see also U.S. v. DeTar, 832 F.2d 1110, 1113 (9th Cir. 1987).

Criminal defendants, and even grand jury targets, can move the district court to order disclosure of "ministerial records" by which the grand jury came to life and conducted its affairs. In re Special Grand Jury, 674 F.2d 778 (9th Cir. 1982); see also In re Grand Jury Investigation, 903 F.2d 180, 182 (3d Cir. 1990). A defense attorney can obtain information regarding misconduct in the grand jury session only from the witnesses who testified at the hearing because Rule 6(e)(2) precludes discussion with grand jurors, prosecutors, and those who record the grand jury proceedings. If witness interviews reveal misconduct, counsel should support the motion to disclose a grand jury transcript with affidavits setting forth the nature of the alleged misconduct. See U.S. v. Hubbard, 474 F. Supp. 64, 78 (D.D.C. 1979) (ordering government to produce grand jury transcripts for in camera review, and acknowledging defendant’s

5 See infra section 3.06.03.
submission of numerous supporting affidavits). These affidavits must set forth facts which support a colorable claim that the grand jury was overreached or deceived, or that the prosecutor introduced illegally obtained wiretap evidence before the grand jury. See U.S. v. Samango, 607 F.2d 877, 881-82 (9th Cir. 1979); 18 U.S.C. §2515 (illegal wiretap evidence inadmissible before grand jury). Note that evidence obtained in violation of Title III is inadmissible in any judicial proceeding, whereas evidence obtained in violation of the Fourth Amendment may be admissible before a grand jury. See U.S. v. Calandra, 414 US 338, 349 (1974) (extension of the Exclusionary Rule would seriously impede the grand jury). A prima facie showing of irregularity before the grand jury will rarely result in a dismissal of the indictment, but serves as a useful vehicle for discovering grand jury transcripts. U.S. v. Mechanik, 475 U.S. 66 (1986) (discovery, during trial, of misconduct before grand jury was harmless error as finding of guilt by petit jury established probable cause); see also U.S. v. Kahan and Lessin Co., 695 F.2d 1122, 1124 (9th Cir. 1982) (inadvertent intrusion of unauthorized person into grand jury not grounds for dismissal because proceedings halted during intruder's presence).

Grand jury witnesses can also seek access to specified documents to challenge the illegal use of evidence by a grand jury before which the witness is called to testify. A witness may raise unauthorized electronic surveillance as a defense to charges of civil contempt for refusing to testify before the grand jury. Gelbard v. U.S., 408 U.S. 41 (1972). In In re McElhinney, 698 F.2d 384 (9th Cir. 1983), an immunized witness refused to testify, contending that the government had illegally monitored his telephone. The Ninth Circuit held that the witness was entitled to "limited access to specified documents," such as the wiretap application and supporting affidavits, the wiretap order and the affidavit describing the duration of the surveillance, in order to make a prima facie showing of the illegality of the wiretap order. Id. at 385. The district court must determine in camera whether sensitive material contained in these documents can be excised without destroying their use to the witness challenging their sufficiency. Id. The witness must challenge the surveillance on these documents alone; he is not entitled to a plenary hearing. Id. at 385-86; but see In re DeMonte, 667 F.2d 590, 594 (7th Cir. 1981); In re Gordon, 534 F.2d 197, 199 (9th Cir. 1976). Keep in mind that circuits differ in their procedure for litigating this issue. See In re Harkins, 624 F.2d 1160, 1167 (3d Cir. 1980); In re Grand Jury Proceedings (Katsouros), 613 F.2d 1171, 1175 (D.C. Cir. 1979); Melickian v. U.S., 547 F.2d 416, 420 (8th Cir. 1977); In re Lochiatto, 497 F.2d 803, 807 (1st Cir. 1974).

Additionally, counsel can move to suppress testimony of grand jury witnesses who were “targets” or “subjects” of the grand jury and were not orally given Miranda warnings before testifying. The Supreme Court has held that no warning is required, and, in some situations, the testimony may be admissible. See U.S. v. Washington, 431 U.S. 181, 186 (1977); U.S. v. Mandujano, 425 U.S. 564, 581 (1976). Department of Justice guidelines require that an “Advise of Rights” form be appended to all grand jury subpoenas to be served on any “target” or “subject.” Department of Justice Manual, §9-11.150 (1990). Counsel should request that the court use its supervisory powers to suppress any unwarned testimony, although at least one court has refused to do so. See U.S. v. Williams, 504 U.S. 36, 46-47 (1992) (Court rejected district court’s use of supervisory powers to prescribe ethical rules of conduct for prosecutors rather than enforcing an already existing one). The Williams Court also questioned whether a district court had the authority to supervise the grand jury process. Id.
3.06.03 Disclosure Based on “Particularized Need”

Court decisions construing a defendant's right to grand jury transcripts are generally not favorable to the defense. The burden is on the defense to show that disclosure is appropriate. *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 400 (1959). Defendant must show that "a particularized need" for the transcripts outweighs the policy of secrecy. *Id.; see also Dennis v. U.S.*, 384 U.S. 855, 868-75 (1966); *U.S. v. Procter & Gamble*, 356 U.S. 677, 681-83 (1958).

Defense counsel must be creative and specific in formulating motions to obtain a transcript of the grand jury testimony of a government witness before trial. Even when the trial judge errs in denying access to the transcript, the error will usually be ruled harmless if the testimony is found to be immaterial. *U.S. v. Thompson*, 493 F.2d 305, 309 (9th Cir. 1974) (absent showing of particularized need for grand jury testimony, providing copies of transcript at trial in time for effective cross-examination is sufficient); *U.S. v. Watts*, 502 F.2d 726, 728 (9th Cir. 1974) (district court error harmless in not providing testimony from grand jury proceedings because testimony was not material).

3.06.04 Disclosure Following Testimony

The defendant is entitled to a transcript of grand jury testimony of a witness after the witness' direct examination at trial or at a pretrial motion upon a showing of particularized need. *Dennis v. U.S.*, 384 U.S. 855 (1966); Fed. R. Crim. P. 12(i). Grand jury testimony is a "statement" of a witness under the Jencks Act, 18 U.S.C. §3500 (e)(3), and Fed. R. Crim. P.26.2(f)(3). Defense counsel should move for production of grand jury testimony of witnesses who testify at trial and also at any pretrial motion hearing. Fed. R. Crim. P. 12(i) & 26.2. However, pretrial disclosure of grand jury testimony is not a Jencks Act statement and is discoverable independently only by the above “particularized need” standard. *See supra* section 3.06.03; *see also U.S. v. Short*, 671 F.2d 178, 186 (6th Cir. 1982); *U.S. v. Budzanoski*, 462 F.2d 443, 454 (3d Cir. 1972) (court properly denied defendant’s motion for grand jury transcripts of four unindicted co-conspirators).

3.07 DISCOVERY AT VARIOUS PROCEEDINGS

3.07.01 Presentment/Bail Hearing

When counsel appears before the magistrate for an appearance pursuant to Fed. R. Crim. P. 5, they are generally armed only with a complaint and, perhaps, a copy of an affidavit in support of a search warrant. The prosecutor will almost always recite the facts of the case in explicit detail in order to seek a higher bail. Defense counsel should listen carefully to this preview of the government's case, but should be careful not to reveal facts of the case learned from the defendant in an effort to present mitigating circumstances to reduce the bail. Finally, defense counsel should move the court at this proceeding, or as soon as possible, to order the government to preserve rough notes taken by its agents which may be discoverable under the Jencks Act or Fed. R. Crim. P. 26.2, 16, or 12(i).
Under the Bail Reform Act of 1984, the court may order a detention hearing for a variety of reasons. See 18 U.S.C. §3142(f). Under this provision, the defendant has a right to "cross-examine witnesses" for the government. One appellate court has ruled that this right is limited to cross-examination of any witness the government elects to call. The court can rely on hearsay evidence when denying release under the Bail Reform Act. See U.S. v. Acevedo-Ramos, 755 F.2d 203, 208 (1st Cir. 1985); U.S. v. Fortna, 769 F.2d 243, 251 (5th Cir. 1985). While a bail hearing is not intended to be a discovery “expedition,” counsel should stress to the magistrate that the hearing is a discovery “expedition” for the court. The magistrate will have to decide whether or not to detain someone pretrial and should be aware of the strength of the government's case before making such a decision. For example, if the government proffers a statement of the client, counsel should request an evidentiary hearing to determine the circumstances surrounding the interrogation in order to determine the reliability of that evidence.

3.07.02 Preliminary Examination

A preliminary examination is an excellent vehicle for pretrial discovery. However, most federal practitioners will never encounter a preliminary examination, as it is just as easy for the government to obtain an indictment. If a preliminary examination is held, counsel should consider calling every government witness available in order to discover their testimony and preserve it for later impeachment at trial. A court reporter should be present at the preliminary examination. An indigent defendant is entitled to a transcript of a preliminary hearing at which important government witnesses have testified. Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Additionally, if the government calls witnesses, Jencks material should be requested for that witness.

3.07.03 Pretrial Motions

Creativity in raising issues involving facts important to trial preparation will determine success in using pretrial motions for the purpose of discovery. First and foremost, however, is Fed. R. Crim. P. 12(d)(2). Under this rule, the government must provide the defense (upon request only) with the evidence it intends to introduce at trial, so that the defense can move to suppress the evidence pretrial. A request under Rule 12(d)(2) should be made as early as possible. A letter to the prosecutor or a statement on the record at the arraignment on the indictment should suffice to invoke Rule 12(d)(2). If the government does not fulfill its obligation under Rule 12(d)(2), a continuance should be requested to allow the defense to move to suppress the evidence. See U.S. v. de la Cruz-Paulino, 61 F.3d 986, 994 n. 5 (1st Cir. 1995) (government violations of Rule 12(d)(2) should excuse a defendant’s failure to move to suppress evidence prior to trial); U.S. v. Johnson, 713 F.2d 633, 649 (11th Cir. 1983).

The defendant is entitled to discovery of facts which will provide the basis for many pretrial motions. In U.S. v. McElroy, 697 F.2d 459 (2d Cir. 1982), the court reversed the defendant's conviction because the government did not inform the defense that the defendant invoked his right to remain silent and his right to counsel when read his Miranda rights. The most obvious vehicles for discovery are motions to suppress statements or evidence. Under Rule 12(i), the defendant is entitled to Jencks Act statements

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6 See the sample discovery letter at the end of this chapter.
after direct testimony at the suppression hearing. Counsel should always ask if the testifying witness made notes or testified before the grand jury and demand production of those materials. See U.S. v. Wallace, 848 F.2d 1464, 1470-71 (9th Cir. 1988). Defense counsel should remember, however, that this rule applies to defense witnesses as well. See Fed. R. Crim. P. 26.2. Apart from the rough notes and other reports, most judges allow the witness to testify about the substance of statements made. A transcript of this testimony may prove to be a very useful impeachment tool at trial.

Other motions can also raise issues, the exploration of which can lead to disclosure of government evidence. For example, if the motion challenges probable cause, counsel at the evidentiary hearing should explore all facts relied upon by the government agent before action was taken. In any motion hearing, records or notes used to refresh the witness’ recollection may be subject to production. Fed. R. Evid. 612.

3.07.04 Pretrial Conference

Federal Rule of Criminal Procedure 17.1 allows for pretrial conferences. Defense counsel generally use these conferences to raise motions in limine to suppress evidence. At a pretrial conference, the judge is usually interested in knowing how long the trial will last, how many witnesses the prosecutor intends to call, and sometimes even the substance of the case. This may be fertile ground for discovery.

3.07.05 Trial

In many districts, prosecutors prepare a trial memorandum listing the nature of their case, the evidence they intend to put on, and the witnesses they intend to call. Defense counsel should obtain and examine this memorandum promptly, interview any previously unknown government witnesses, and tie up loose ends made visible by the government in its memorandum. Counsel should also request that the prosecutor provide a witness list and exhibit list in order to facilitate a smooth trial. In the event of a complicated trial and a recalcitrant prosecutor, defense counsel should turn to the judge with the argument that discovery of this information will facilitate an efficient trial and prevent continuances.
3.07.06 Habeas Proceedings

A habeas petitioner is not entitled to the same discovery as a traditional litigant. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). Instead, discovery is available only at the court’s discretion and only for good cause shown. Petitioner must present evidence in support of claims that colorably entitle them to relief. *See Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999).

3.08 CO-CONSPIRATOR AND CO-DEFENDANT STATEMENTS

A co-defendant's statement that exculpates the defendant must be produced under *Brady*. Defense counsel should attempt to obtain non-exculpatory co-defendant statements from co-counsel, or seek disclosure by court order. Defense counsel specifically should make a motion for the disclosure of co-defendant statements because the court’s order of such disclosure is discretionary. *U.S. v. Rivera*, 6 F.3d 431 (7th Cir. 1993) (without specific motion, court’s refusal to order disclosure of co-defendant statements not error because court’s decision to do so is discretionary). The court may order the production of the co-defendant's statements under Rule 16(a) where the Jencks Act does not apply. *See U.S. v. Walker*, 922 F. Supp. 732, 742-43 (N.D.N.Y. 1996) (requiring disclosure of co-conspirator statements under Rule 16 for all persons the government does not intend to call at trial because the Jencks Act’s limits on discovery apply only to those witnesses that will be called at trial); *see also U.S. v. Williams-Davis*, 90 F.3d 490, 512-13 (D.C. Cir. 1996) (rejecting defense argument that Jencks Act applies to persons whose statements are introduced as co-conspirator statements). The Jencks Act applies only if the government intends to call the co-defendant as a witness. *See id.; U.S. v. Disston*, 612 F.2d 1035, 1037-38 (7th Cir. 1980); *U.S. v. McMillen*, 489 F.3d 229, 231 (7th Cir. 1972).

Co-conspirator statements that the government intends to introduce at trial are generally not discoverable pretrial under Rule 16(a)(1)(A) although those statements will be attributed to the defendant under Fed. R. Evid. 801(d)(2)(E). *Williams-Davis*, 90 F.3d at 512; *U.S. v. Orr*, 825 F.2d 1537, 1541 (11th Cir. 1987); *U.S. v. Roberts*, 811 F.2d 257, 258 (4th Cir. 1987) (en banc); *U.S. v. Percevault*, 490 F.2d 126, 131 (2d Cir. 1974); *U.S. v. Tarantino*, 846 F.2d 1384,1418 (D.C. Cir. 1988). Additionally, co-conspirator statements made after the termination of the alleged conspiracy are not discoverable under the co-conspirator rationale. Moreover, the Jencks Act appears to override a defendant's right to discover co-conspirator statements if the co-conspirator whose statements are sought will be a government witness at trial. Fed. R. Crim. P. 16(a)(2); *see U.S. v. Mills*, 641 F.2d 785, 789-90 (9th Cir. 1981) (reasoning that protection of prospective government witness statements is necessary to shield witnesses from threats, bribery, and perjury); *Percevault*, 490 F.2d at 129-30.

Another effective way to discover co-conspirator statements is to demand production for purposes of pretrial rulings on the admissibility of the statements against your client. Besides exculpatory statements, which are discoverable under *Brady*, the statements may be outside the scope of the alleged conspiracy or may be so unduly prejudicial as to overcome their probative value. In *Bruton v. U.S.*, 391 U.S. 123 (1968), the Court recognized that juries cannot be expected to compartmentalize damning evidence of a confession by a co-defendant, in determining the guilt or innocence of the non-confessing defendant. Additionally, use of such statements violates the Confrontation Clause, since the defendant would not be
able to cross-examine the co-defendant about the statements unless the co-defendant testifies, which cannot be compelled. *Bruton*, 391 U.S. at 136.

Defense counsel should request a pretrial hearing outside the presence of the jury under Fed. R. Evid. 104 to determine whether the government can make a sufficient showing that a conspiracy exists and that the statements to be introduced are admissible under the co-conspirator hearsay exception. For a statement to be admitted under Rule 801(d)(2)(E), a court must find, by a preponderance of the evidence, that a conspiracy existed between the declarant and the non-offering party, and that the statement was made during the course of the conspiracy and in furtherance of the conspiracy. *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987). The threat of trial delay and the specter of mistrial are effective means to conscript the judge's assistance in discovering relevant co-conspirator statements.

### 3.09 WITNESS LISTS

In a capital case, 18 U.S.C. §3432 mandates that a list of witnesses be furnished to the defendant at least three days before trial, unless the court finds, by a preponderance of the evidence, that furnishing the list would jeopardize the life or safety of any person. *See U.S. v. Walker*, 910 F. Supp. 837, 860 (N.D.N.Y. 1995). This discovery mandate is only applicable where the government seeks the death penalty -- not in cases where the statute authorizes a death sentence but the government does not seek the death penalty or could not because the statutory scheme is unconstitutional. *U.S. v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *Hall v. U.S.*, 410 F.2d 653, 660 (4th Cir. 1969); *U.S. v. Shakur*, 623 F. Supp. 1, 2 (S.D.N.Y. 1983).

In noncapital cases, the trial court has discretion to order the prosecutor to furnish the defense a witness list. *U.S. v. Richter*, 488 F.2d 170 (9th Cir. 1973); *see also U.S. v. Price*, 448 F. Supp. 503, 508-18 (D. Colo. 1978) (compilation of various circuit rules); *but see U.S. v. Hearst*, 412 F. Supp. 863, 867 (N.D. Cal. 1975) (questioning validity of *Richter*); *U.S. v. Addonizio*, 451 F.2d 49, 64 (3d Cir. 1972) (defense not entitled to list of government’s prospective witnesses). The court also has the discretion to order the government to provide the names and addresses of all witnesses to the crime whom the government does not intend to call at trial. *U.S. v. Cadet*, 727 F.2d 1453, 1469 (9th Cir. 1984). Further, the trial court may, in its discretion, exclude a government witness that the government was delayed in naming. The trial court, however, cannot order the government and defendant to exchange witness lists and summaries of anticipated witness testimony before trial. *U.S. v. Hicks*, 103 F.3d 837, 841 (9th Cir. 1996); *but see U.S. v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996) (no abuse of discretion to order exchange of witness lists). Defense counsel should bring a formal motion for a prosecution witness list and set forth a showing of need and materiality to situations where there are many witnesses. The motion should be based on surprise avoidance and the defendant’s rights of confrontation and cross-examination.

### 3.10 WITNESS STATEMENT AND IMPEACHMENT

#### 3.10.01 Witness Statements
Counsel has the right to interview an adverse party’s witness (if the witness is willing) without opposing counsel’s presence. Wharton v. Calderon, 127 F.3d 1201 (9th Cir. 1997). Instructing a witness not to talk to the opposing side is improper for a prosecutor or a defense attorney. Gregory v. U.S., 369 F.2d 185, 187-89 (D.C. Cir. 1966) (holding defendant denied fair trial where prosecutor told eyewitnesses not to speak with defense unless he was present). The witness may, however, simply refuse to talk. See Callahan v. U.S., 371 F.2d 658, 660 (9th Cir. 1967). If a witness refuses to talk to a defense investigator, the refusal should be documented in some manner to show the witness’ bias.

Under the Jencks Act, 18 U.S.C. §3500, witness statements, including reports prepared by testifying officers, must be turned over to the defense after the witness testifies on direct. Although an officer’s incomplete “rough notes” need not be disclosed, U.S. v. Andersson, 813 F.2d 1450, 1459 (9th Cir. 1987), they must be disclosed under Brady if they contain exculpatory information. To be discoverable under Jencks, the statement must be written or adopted by the witness, or acknowledged by the witness to be an accurate account of a prior interview. U.S. v. Bosell, 952 F.2d 1101, 1104 (9th Cir. 1991); Campbell v. U.S., 373 U.S. 487, 490-92 (1963). The prosecutor’s notes of the witness interview may be Jencks if read back to the witness for corrections. See Goldberg v. U.S., 425 U.S. 94, 101 (1976). A witness’ diary may be Jencks material. U.S. v. Rivera-Pedin, 861 F.2d 1522, 1526 (11th Cir. 1988) (district court erred by refusing to inspect in camera witness’ diary for dates during period of witness involvement in the offense). Failure to disclose Jencks material may warrant reversal. U.S. v. Kasouris, 474 F.2d 689 (5th Cir. 1973).

At trial, the defense has an absolute right to discover relevant written witness statements under the Jencks Act. 18 U.S.C. §3500; Fed. R. Crim. P. 26.2. Defense counsel should also make motions for Jencks material at suppression hearings, Fed. R. Crim. P. 12 (i); detention hearings, Fed. R. Crim. P. 46 (i); sentencing hearings, Fed. R. Crim. P. 32 (e); and section 2255 hearings, Fed. R. Crim. P. 26.2 (g). Defense counsel’s failure to request Jencks Act statements waives issue on appeal. U.S. v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995).

The government must, of course, produce exculpatory witness statements under Brady. Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997) (Brady violation where government failed to disclose memo written by key prosecution witness accusing third party of committing crime). Equally important, a prosecutor is required to disclose material exculpatory evidence even without a request. See Kyles v. Whitley, 514 U.S. 419, 432-34 (1995). Besides exculpatory evidence/statements, defense counsel should also request "negative exculpatory" statements -- statements of informed witnesses that do not mention the defendant. Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir.1978). If the government wrongfully withholds possibly exculpatory information, defense counsel should request that the case be dismissed. U.S. v. Chen, 605 F.2d 433, 435 (9th Cir. 1979) (noting that federal agents intentional destruction of currency form was "unjustified and inexcusable.").

3.10.02 Impeachment Evidence

The government violates Brady when it fails to turn over impeachment evidence. Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998); U.S. v. Fisher, 106 F.3d 622, 634 (5th Cir. 1997), abrogated on other
Brady violation where government belatedly disclosed report containing impeachment of government’s key witness; U.S. v. Pelullo, 105 F.3d 117 (3d Cir. 1997) (Brady violation where cumulative effect of nondisclosure of impeaching evidence created verdict unworthy of confidence). A prosecutor’s handwritten notes of his interview with the government expert witness that would have impeached the witness constituted Brady material and should have been turned over to the defense. Paradis v. Arave, 130 F.3d 385 (9th Cir. 1997); U.S. v. Service Deli Inc., 151 F.3d 938 (9th Cir. 1998) (handwritten notes taken during interview that contained exculpatory evidence violated Brady). The intentional destruction of Jencks Act notes of witness interview results in a conviction’s reversal. U.S. v. Riley, 189 F.3d 802 (9th Cir. 1999).


These files should be produced or reviewed for impeachment material when they are material to defendant’s case. U.S. v. Cadet, 727 F.2d 1453, 1468 (9th Cir. 1984) (the government need only turn over those portions of the agents’ personnel file that may contain evidence "[m]aterial to the preparation of [a] defense pursuant to Rule 16(a)(1)(C) or exculpatory under Brady . . ."). The burden is not on the defense to make an initial showing of materiality. The demand for production of the files is sufficient. U.S. v. Henthorn, 931 F.2d 29 (9th Cir. 1991); U.S. v. Gross, 603 F.2d 757, 759 (9th Cir. 1979); U.S. v. Garrett, 542 F.2d 23, 27 (6th Cir. 1976) (defendant entitled to personnel file of police officer who sold defendant drugs and was later suspended for suspected drug use); U.S. v. Deutsch, 475 F.2d 55, 57-58 (5th Cir. 1973) (remanded for determination of whether personnel record of postal employee contained information useful in cross-examination; if so, defendant entitled to a new trial), overruled on other grounds by U.S. v. Henry, 749 F.2d 203 (5th Cir. 1984); see also U.S. v. Austin, 492 F. Supp. 502, 505-06 (N.D. Ill. 1980).

The assistant United States attorney assigned to the case need not personally review the personnel file of law enforcement officers to comply with Henthorn. U.S. v. Jennings, 960 F.2d 1488, 1491-92 (9th Cir. 1992). Also, the court may not be empowered to order a specific agency to review the files nor may a court order the prosecution to review files that are not in federal possession, custody, or control. U.S. v. Dominguez-Villa, 954 F.2d 562, 565-66 (9th Cir. 1992); U.S. v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) (documents under the control of state officials need not be produced by federal prosecutor). The government, however, cannot evade its responsibility to produce personnel files by claiming lack of control over the files or procedures of other executive branch agencies. Jennings, 960 F.2d at 1490-91. The prosecutor is responsible for production of victim’s “rap sheet” even if in possession of other government agency. Martinez v. Wainwright, 621 F.2d 184, 186 (5th Cir. 1980). Prosecution
must exercise some efforts to obtain exculpatory material, at least from other government investigative agencies. *U.S. v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980).

In general, the test to determine what is in the “prosecution’s possession” is whether or not the agency is considered “an arm of the prosecution.” Police are an arm of the prosecution for *Brady* purposes. *U.S. v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) (defense may make showing requiring government search of police files); *U.S. 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 backgrounds); *U.S. v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (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 or should have known that others had previously been arrested for crime did not relieve prosecution of obligation of disclosing information). *But see U.S. v. Moore*, 25 F.3d 563, 569 (7th Cir. 1994) (prosecution not required to seek out witness' prior conviction where prosecution had no knowledge of conviction); *Morgan v. Salamack*, 735 F.2d 1330 (5th Cir. 1980) (prosecutor not required to obtain police records that were not in files to give defense impeachment evidence against government witness); *U.S. v. Young*, 20 F.3d 758 (7th Cir. 1994) (where government diligently searched records known to it, it was not required to seek out witness' unknown criminal history in another state); *U.S. v. Dominguez-Villa*, 954 F.2d 562, 565 (9th Cir. 1992) (analogizes to duty under Rule 16(a)(1)(C) - no due diligence requirement).

The following are examples of agencies whose evidence was determined to be within the arms of the prosecution: DEA agent, *U.S. v. Morell*, 524 F.2d 550 (2d Cir. 1975) (suppression of a confidential file on informant); medical examiner, *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (murder victim's FBI rap sheet); U.S. Post Office, *U.S. v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (personnel files), *overruled on other grounds by U.S. v. Henry*, 749 F.2d 203 (5th Cir. 1984); FBI records generally are treated as if in the constructive possession of the prosecution, *Briggs v. Raines*, 652 F.2d 862, 865 (9th Cir. 1981) (homicide victim's rap sheet); and CIA affidavit containing exculpatory material, *U.S. v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980). A parole officer, however, may not be regarded as an arm of the prosecution for *Brady* purposes. *Pina v. Henderson*, 752 F.2d 47, 49 (2d Cir. 1985).

Some disagreement exists regarding prosecution's duty to disclose information contained in public records. *Anderson v. South Carolina*, 709 F.2d 887, 888 (4th Cir. 1983) (noting that there is no general public record exception to *Brady*); *but see U.S. v. Isgro*, 974 F.2d 1091 (9th Cir. 1992) (Jencks Act does not apply to trial transcripts in public domain).

Defense counsel should also seek to discover the criminal records of government witnesses to explore the issue of bias. *See U.S. v. Abel*, 469 U.S. 45 (1984).

1. The criminal records of government witnesses should be discoverable. *U.S. v. Strifler*, 851 F.2d 1197 (9th Cir. 1988); *see U.S. v. Alvarez-Lopez*, 559 F.2d 1155, 1157-58 (9th Cir. 1977); *but see U.S. v. Taylor*, 542 F.2d 1023, 1026 (8th Cir. 1976) (defendant not entitled to criminal records of all government witnesses). Even if the witness is shown to be biased, a conviction will not be reversed for failure to order full access to all criminal
files if the defense was allowed to explore the witness' record during cross-examination at trial. *Taylor*, 542 F.2d at 1026; *Camitsch v. Risley*, 705 F.2d 351 (9th Cir. 1983) (denial of habeas corpus petition affirmed on Confrontation Clause analysis). Counsel should argue that if cross-examination discloses a record, a continuance is required to obtain a certified copy of the judgment and conviction.

2. The witness’ character. *U.S. v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (reversible error not to disclose government memorandum written to government agent highly critical of a key government informant); *U.S. 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. Pecuniary or other interest. *U.S. 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, his tendency to overcompensate for problems, and to lie); *Singh v. Prunty*, 142 F.3d 1157 (9th Cir. 1998) (nondisclosure of state’s agreement to provide benefits to witness in exchange for his testimony violated due process).


6. The witness’ capacity to observe:

   a) Logistics. *Ballinger v. Kerby*, 3 F.3d 1371 (10th Cir. 1993) (failure to produce photo tending to impeach witness’ 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 two 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).


### 3.11 INFORMANTS
By 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. . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. . . . Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by Giglio to turn over to the defense in discovery all material information casting a shadow on a government witness' credibility.


Defense counsel should be concerned with obtaining the identity of the informant, securing an interview of the informant, and discovering impeachment and bias evidence. Under Roviaro v. U.S., 353 U.S. 53, 62 (1957), the trial court should balance the public interest in protecting the identity of the informant against the need for disclosure to prepare an adequate defense. The defense is entitled to the informant's identity if the informant was a percipient witness to or directly participated in the criminal transaction. Id. at 61-62; U.S. v. Ordonez, 737 F.2d 793, 808 (9th Cir. 1984). If the informant merely conveyed information to the government, but did not deal with the defendant or see anything related to the crime, most courts deny access. U.S. v. Bender, 5 F.3d 267 (7th Cir. 1993) (defendant not entitled to discover confidential informant’s identity where defendant’s girlfriend and three other witnesses caught with informant could have easily verified informant’s story); U.S. v. Fixen, 780 F.2d 1434, 1439 (9th Cir. 1986) (informant identity need not be disclosed to determine probable cause); U.S. v. Alexander, 761 F.2d 1294 (9th Cir. 1985) (no showing informant helpful to defense); U.S. v. Kelly, 449 F.2d 329, 330-31 (9th Cir. 1971) (no disclosure when witness has not dealt with accused nor witnessed the crime); see also U.S. v. Gonzales, 606 F.2d 70, 74-75 (5th Cir. 1979). If the prosecution refuses to disclose the informant's identity, defense counsel should seek an in camera hearing to evaluate the competing interests in the balancing exercise. U.S. v. Rawlinson, 487 F.2d 5 (9th Cir. 1973). Denial of an in camera review is reviewed on appeal for abuse of discretion. Fixen, 780 F.2d at 1439.

If disclosure of the informant is ordered, defense counsel should seek additional information to find or contact the informant. The government must make "reasonable efforts" to keep track of the informant, U.S. v. Leon, 487 F.2d 389, 392 (9th Cir. 1973); produce the informant, see U.S. v. Williams, 496 F.2d 378, 382 (1st Cir. 1974); Velarde-Villarreal v. U.S., 354 F.2d 9, 13 (9th Cir. 1965); and, upon the defendant's request, produce the informant at trial, U.S. v. Tornabene, 687 F.2d 312, 315-16 (9th Cir. 1982). But the defense must show actual prejudice to obtain a dismissal for the government’s failure to produce the informant. U.S. v. Valenzuela-Bernal, 458 U.S. 858, 868 (1982).

Defense counsel should also seek to discover the informant's record, promised immunities, and any other evidence affecting the issues of bias or credibility. The request should include criminal records, U.S. v. Auten, 632 F.2d 478 (5th Cir. 1980); U.S. v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977); all promises of consideration given to the witness, Giglio v. U.S., 405 U.S. 150 (1972); U.S. v. Smith, 77
F.3d 511 (D.C. Cir. 1996); U.S. v. Shaffer, 789 F.2d 682 (9th Cir. 1986); U.S. v. Mayer, 556 F.2d 245 (5th Cir. 1977); the proffer statements during communications with the government, U.S. v. Sudikoff, 36 F. Supp. 2d 1196, 1203 (C.D. Ca. 1999) (“information that illuminates the process leading up to the agreement may ‘cast a shadow’ on an accomplice witness’s credibility in a manner that disclosure of only the agreement itself would not accomplish”); identification of the informant's prior testimony, Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); evidence of psychiatric treatment, Smith, 77 F.3d at 512; U.S. v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); U.S. v. Partin, 493 F.2d 750, 762-64 (5th Cir. 1974); tax returns, see 26 U.S.C. §6103 (i); U.S. v. Wigoda, 521 F.2d 1221 (7th Cir. 1975) (in camera inspection); 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, 559 F.2d 1204 (2d Cir. 1977); and evidence of the informant's narcotic habit, U.S. v. Fowler, 465 F.2d 664 (D.C. Cir. 1972).

The inherent unreliability of the testimony of an accomplice or government informant underscores the need for complete disclosure of information relating to credibility. See U.S. v. Caldwell, 466 F.2d 611 (9th Cir. 1972). Failure to disclose impeachment evidence requires a new trial, but only if undisclosed evidence was "material" such that disclosure would, within "reasonable probability," affect the result of the proceeding. Delaware v. Van Arsdall, 475 U.S. 673 (1986) (harmless error analysis applied to denial of cross-examination of informant for bias); U.S. v. Bagley, 473 U.S. 667 (1985); Smith, 77 F.3d at 517 (government’s failure to disclose its witness’ psychiatric history and plea agreement was material under Brady and Kyles; remanded for new trial); Perkins v. LeFevre, 642 F.2d 37 (2d Cir. 1981). In U.S. v. McClintock, 748 F.2d 1278, 1286 (9th Cir. 1984), the Ninth Circuit was unconvinced that the witness' reliability was “determinative of guilt or innocence.” Disclosure of specific details of a prior investigation involving the informant is subject to a balancing test between the security interests of the government and the defendant's need for the information. U.S. v. Cutler, 806 F.2d 933, 935 (9th Cir. 1986).

### 3.12 ELECTRONIC SURVEILLANCE

The Omnibus Crime Control Act of 1968, 18 U.S.C. §§2510-2520, governs the use of electronic surveillance. The government must disclose the existence of electronic surveillance under 18 U.S.C. §3504 if the defendant or a grand jury witness asserts that he or she was unlawfully surveilled or presents a colorable claim that others were unlawfully surveilled to his or her detriment. See U.S. v. Bowers, 534 F.2d 186, 193 (9th Cir.1976); U.S. v. Vielguth, 502 F.2d 1257, 1260 (9th Cir. 1974). The witness or defendant must make a preliminary showing of the surveillance; such a showing "must be sufficiently concrete and specific before the government is required to make a like response, however." In re Gand Jury Proceedings (Garrett), 773 F.2d 1071, 1072 (9th Cir. 1985) (citing U.S. v. See, 505 F.2d 845, 856 (9th Cir. 1974)). Motions to discover electronic surveillance logs and transcripts must be made pretrial. Alderman v. U.S., 394 U.S. 165 (1969); U.S. v. Yanagita, 552 F.2d 940, 943 (2d Cir. 1977). But see U.S. v. D'Andrea, 495 F.2d 1170, 1173 n.9 (3d Cir. 1974) (motion made during trial). The use of electronic surveillance should be discovered as early as possible to attack grand jury testimony based on that surveillance. See 18 U.S.C. §2515.
If the surveillance tapes exist, counsel should: (1) move for production of the tapes – requesting their enhancement if inaudible; (2) review to determine if surveillance was properly minimized; (3) review court order authorizing the surveillance and supporting affidavit, *U.S. v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982); and (4) review for compliance with all technical aspects of the Omnibus Crime Control and Safe Streets Act, *U.S. v. Ojeda-Rios*, 495 U.S. 257 (1990) (failure to comply with tape sealing requirement required reasonable explanation by government).

### 3.13 THE FREEDOM OF INFORMATION ACT (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. §552, may provide arguments to expand criminal discovery, or to support subpoenas duces tecum. However, the Act itself is generally rendered useless as an independent discovery tool in a non-complex criminal case because of the substantial periods required to obtain agency responses. Moreover, disclosure could be delayed due to separate civil litigation to force disclosure by recalcitrant agencies.

Courts have rejected the use of FOIA as a substitute for criminal discovery. *John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 153 (1989); *U.S. v. Murdock*, 548 F.2d 599, 602 (5th Cir. 1977); *Fruehauf Corp. v. Thornton*, 507 F.2d 1253, 1254 (6th Cir. 1974). In *U.S. v. U.S. Dist. Court (DeLorean)*, 717 F.2d 478, 480 (9th Cir. 1983), the court held that FOIA "does not extend the scope of discovery permitted under Rule 16." Note that under *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1 (1988), defendants serving prison terms may obtain their pre-sentence reports under FOIA.

In some circuits, FOIA plaintiffs may gain access to government manuals on training and techniques for search and seizure or interrogation of criminal suspects. *See Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir. 1993); *Jordan v. U. S. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (en banc), overruled in part, *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981); *Cox v. U.S. Department of Justice*, 576 F.2d 1302, 1306-09 (8th Cir. 1978). Other circuits prevent access to these materials because public access may interfere with law enforcement functions. *See Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980); *Caplan v. Bureau of Alcohol, Tobacco and Firearms*, 587 F.2d 547 (2d Cir. 1978). In a jurisdiction where the public has access to agency training or practice manuals, defense counsel should attempt to obtain these documents by means of a subpoena duces tecum to the custodian of records for the agency in question. These manuals provide powerful impeachment tools if the policies were not followed.

### 3.14 DISCOVERY BY THE GOVERNMENT

Several rules of criminal procedure pertain to the defense providing discovery to the government. Counsel must be aware that once certain demands are made of the government, a reciprocal obligation may be triggered, and this should be considered in one’s stance toward discovery. These include: Fed. R. Crim. P. 12.1 (notice of alibi), 12.2 (notice of insanity), 12.3 (notice of public authority defense), 16(b)(1) (documents, examinations, and tests), and 26.2 (witness statements) and 18 U.S.C. Appendix IV (Classified Information Procedures Act). Each rule or act provides sanctions for failure to comply.

Additionally, where the government seeks discovery of documents that contain potentially incriminating statements of your client, (as defined broadly by the Court in *Hoffman v. U.S.*, 341 U.S. 479, 486-88 (1951)), or other evidence that is incriminating but must be turned over as reciprocal discovery, counsel can seek a protective order from the court anytime that restricts, delays, or denies discovery to the other party. Fed. R. Crim. P. 16(d)(1). The issuance of a protective order may depend on a determination by the court whether the incriminating evidence is truly “testimonial” in nature. See *U.S. v. Dionisio*, 410 U.S. 1 (1973) (voice exemplars are not testimonial, thus they are not protected under Fifth Amendment); *Fisher v. U.S.*, 425 U.S. 391, 409 (1976) (testimonial communications compelled by subpoena are protected by the Fifth Amendment). See also *U.S. v. Nobles*, 422 U.S. 225 (1975) (privilege against self-incrimination is personal to defendant and does not extend to testimony or statements of third party witnesses at trial). But see *In Re Grand Jury Proceedings (Marsoner)*, 40 F.3d 959 (9th Cir. 1994) (grand jury witness’ compelled signature on form authorizing release of bank records not testimonial or communicative and not protected by Fifth Amendment). Additionally, the “act of production” of documents or objects in response to a grand jury subpoena may also be an incriminating communication protected by the Fifth Amendment. *U.S. v. Doe*, 465 U.S. 605 (1984). Counsel should request an in camera hearing where the court can consider the defendant’s claim of privilege. The court’s ruling on a motion for a protective order will be reviewed on an abuse of discretion standard and is not easily disturbed. See *U.S. v. Coiro*, 785 F. Supp. 326, 330 (E.D.N.Y. 1992).

Similarly, the government may also seek a protective order, where a showing of necessity can be met. Typically, the government will allege that a witness’ safety will be jeopardized if materials are released.

### 3.14.01 Alibi

Federal Rule of Criminal Procedure 12.1 requires that defense counsel disclose an alibi defense within 10 days of a written demand by the prosecutor. The government’s failure to comply with the demand requirement does not trigger the defendant’s need to respond. *U.S. 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); *U.S. v. Saa*, 859 F.2d 1067 (2d Cir. 1989) (government letter requesting written notice of alibi did not trigger notice requirement where letter did not specify time, date, or place of alleged offense). The defense’s notice must include names and addresses of alibi witnesses. Failure to disclose this information may result in exclusion of the testimony of undisclosed witnesses. Fed. R. Crim. P. 12.1(d).

Under Rule 12.1(b), after the defendant serves notice of intent to raise an alibi defense, the government must provide a list of its rebuttal witnesses (including names and addresses of the witnesses upon whom the government intends to rely to establish the defendant’s presence at the scene of the alleged offense). The exclusion of surprise government alibi rebuttal witnesses will not be justified unless the trial court denies defense counsel's request for a continuance. See *U.S. v. Quesada-Bonilla*, 952 F.2d 597,

Even without notice, the defendant can take the stand and assert an alibi defense with no supporting witnesses. *See Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983) (concluding that a defendant’s willful violation of discovery rules is outweighed by Sixth Amendment right to present a defense, thus error for court to deny critical defense testimony as punitive sanction). Beware of *Taylor v. Illinois*, 484 U.S. 400 (1988), which held that preclusion of testimony was an appropriate sanction for defense counsel’s failure to disclose the names of alibi witnesses until the 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. Further, counsel should be aware that this no-notice tactic could conceivably “open the door” for the government to put on undisclosed witnesses to rebut this testimony. Additionally, Rule 12.1(f) prohibits the use of any of the information provided by the defendant pursuant to Rule 12.1 in any proceeding if the defense of alibi is later withdrawn.

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7 See section 3.16 for discussion of sanctions.
3.14.02 Insanity or Mental Condition

Federal Rule of Criminal Procedure 12.2 requires that defense counsel file a notice of the defense of insanity at the time pretrial motions are filed or when the court may direct. The defense must always give notice of expert testimony that will be used when the defendant’s mental condition is at issue. Counsel should note that under the plain language of Rule 12.2(b), a defense based upon diminished capacity or any mental defect that does not rely upon the testimony of experts does not trigger the Rule’s notice obligation. Refusal to allow a defendant to present expert psychiatric testimony regarding his alleged bipolar mental disorder, unless testimony was accompanied by insanity defense instruction, may not be an abuse of discretion. See U.S. v. Westcott, 83 F.3d 1354 (11th Cir. 1996). Failure to give adequate notice bars the use of any expert testimony as to the defendant’s mental condition. Fed. R. Crim. P. 12.2(d).

Once notice is filed, the government may seek an order requiring the defendant to submit to examination by a psychiatrist. Fed. R. Crim. P. 12.2(c); but see U.S. v. Davis, 93 F.3d 1286 (6th Cir. 1996) (the government is not entitled to have defendant examined for competency by a government expert simply because defendant gave notice of intent to call an expert to testify to his mental state under Rule 12.2 (b)). Refusal to submit to the government examination results in exclusion of defense expert testimony, but not lay testimony, as to the insanity defense. Fed. R. Crim. P. 12.2(d); U.S. v. Veatch, 674 F.2d 1217, 1224-25 (9th Cir. 1981); U.S. v. Buchbinder, 796 F.2d 910, 913-14 (7th Cir. 1986). The government must give defense counsel notice of the intent to seek a psychiatric examination and of the intent to interview the defendant. U.S. v. Garcia, 739 F.2d 440 (9th Cir. 1984); see also Estelle v. Smith, 451 U.S. 454, 470-71 (1981); Schantz v. Eyman, 418 F.2d 11 (9th Cir. 1969); U.S. v. Driscoll, 399 F.2d 135, 137-38 (2d Cir. 1968). The results of a psychiatric exam cannot be used against the defendant, even for impeachment, if the insanity defense is not used. U.S. v. Leonard, 609 F.2d 1163, 1166 (5th Cir. 1980).

3.14.03 Public Authority

Federal Rule of Criminal Procedure 12.3 was passed as part of the Anti-Drug Abuse Act of 1988, Pub L. No. 100-690, §6483, 102 Stat. 4382 (1988). A defendant intending to claim a defense of "actual or believed exercise of public authority on behalf of a law enforcement or federal intelligence agency" must serve upon the attorney for the government written notice of such intention. The notice is to be served within the time provided for filing pretrial motions or such later time as the court may direct. The government must then admit or deny the legitimacy of the defense. The defense’s failure to comply with Rule 12.3 may result in exclusion of witnesses. U.S. v. Seeright, 978 F.2d 842 (4th Cir. 1992).

3.14.04 General Reciprocal Discovery - Rule 16(b)

A defendant’s reciprocal discovery obligations under Fed. R. Crim. P. 16(b) allowing the government to demand discovery of physical evidence and scientific tests or examinations do not arise until after the government has complied with the defendant’s request for the same items under Rule 16(a)(1)(C), (D) or (E). Fed. R. Crim. P. 16(b); U.S. v. Kraselnick, 702 F. Supp. 480 (D.N.J. 1988). Brady requests alone, however, do not trigger the defense’s reciprocal discovery obligations. U.S. v. Marenghi,
893 F. Supp. 85 (D. Maine 1995). Failure to comply with the reciprocal discovery requirement may result in exclusion of defense evidence. See U.S. 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); U.S. v. Aceves-Rosales, 832 F.2d 1155 (9th Cir. 1987) (defense medical record excluded because it was not timely revealed when it had been subpoenaed and thus was in the control of the defense); U.S. v. Ryan, 448 F. Supp. 810 (S.D.N.Y. 1978). But see U.S. v. Davis, 639 F.2d 239, 243 (5th Cir. 1981) (exclusion of defense evidence not justified solely as a sanction for the failure of a criminal defendant to comply with a discovery rule order and should be used only when justified by overriding policy consideration).

Federal Rule of Criminal Procedure 16(b)(1)(B), regarding disclosure of defense expert examination reports and tests, does not include the disclosure of the defendant’s statements. Fed. R. Crim. P. 16(b)(2); U.S. v. Dennison, 937 F.2d 559, 566 (10th Cir. 1991) (Rule does not cover expert’s verbatim notes of defendant’s answers to expert’s questions). Additionally, Fed. R. Crim. P. 16(b), only requires disclosure of information that is recorded in some tangible form. U.S. v. Peters, 937 F.2d 1422, 1425 (9th Cir. 1991) (defense’s failure to inform the government of expert’s opinion did not violate discovery rules).

Attorney work product other than scientific tests or reports remains protected from reciprocal discovery by Fed. R. Crim. P. 16(b)(2). However, defense presentation of witnesses may trigger Jencks and make up a limited waiver of the work product privilege. See U.S. v. Nobles, 422 U.S. 225, 233-34 (1975).

If defense counsel anticipates a problem with reciprocal discovery, she should file a motion to be relieved from the burden of reciprocal discovery on the ground that compliance would constitute waiver of the defendant's right against self-incrimination. In U.S. v. Fratello, 44 F.R.D. 444 (S.D.N.Y. 1968), the court ordered the prosecutor to disclose information crucial to the defense and relieved the defendant of his reciprocal discovery obligation because the defendant would have been forced to waive his privilege against self-incrimination. See generally U.S. v. Wright, 489 F.2d 1181 (D.C. Cir. 1973).

3.14.05 Foreign Law

Federal Rule of Criminal Procedure 26.1 requires either party to give reasonable written notice of the intent to raise an issue concerning a foreign law. See U.S. v. Kearney, 560 F.2d 1358, 1365 (9th Cir. 1977).

3.14.06 Witness Statements

Federal Rule of Criminal Procedure 26.2 applies the provisions of the Jencks Act to defense witnesses, i.e., the disclosure of witness statements after the witness’ direct examination. This rule is consistent with the reasoning of the Supreme Court in U.S. v. Nobles, 422 U.S. 225 (1975). The key issues again are determining what a statement is and whether the statement has been "adopted or approved" by the speaker. See Goldberg v. U.S., 425 U.S. 94, 98 (1976); Campbell v. U.S., 373 U.S. 487, 490-
3.14.07 Classified Information

The defense will confront the issue of classified information when it requires the production of material that is classified, presents evidence that may be classified, or reveals information that is classified. If such a case arises, counsel should be familiar with the requirements of the Classified Information Procedures Act (CIPA), 18 U.S.C. Appendix IV. In brief, under Section 3 of the Act, the district court may enter a protective order prohibiting the disclosure of classified information. Under Section 4, the district court may order that the government provide redacted reports deleting classified information, or provide summaries in lieu of classified information. If a defendant intends to disclose classified information, the defense must, at least 30 days before trial under Section 5(a), disclose its intention to reveal classified information and "include a brief description of the classified information." Specificity is sometimes difficult. Generally, the Act was intended to prevent the use of "greymail" by defendants who would threaten to reveal classified information if prosecuted without saying what the information was or allowing the court to determine its relevance. U.S. v. Collins, 720 F.2d 1195, 1196-97 (11th Cir. 1983). In some cases, the information that may be revealed is specifically described, but not relevant. U.S. v. Miller, 874 F.2d 1255, 1275-77 (9th Cir. 1989). If the defense does not comply with Section 5(a), the district court may preclude the disclosure of classified information and may prohibit the examination of any witness with respect to classified information, under Section 5(b).

However, if the request for, or notice of intent to disclose, classified information is timely made by the defense, the court shall conduct a hearing under Section 6(a) to determine the use, relevance, and admissibility of classified information that would be revealed during trial or pretrial proceedings. The court may, under Section 6(c), allow the government to substitute disclosure of the classified information with summaries or admissions of relevant facts contained in the classified information. If the court denies a motion by the government under Section 6(c) to provide summaries or redactions, the government may still move to prohibit disclosure of classified information under Section 6(e). In such a case, the district court must either dismiss the indictment or information, dismiss parts of the indictment or information, find against the government on any issue to which the classified information relates, or strike or preclude all or part of the testimony of a witness. If the district court rules under Section 6(a) that classified information may be disclosed, it shall also order the government, under Section 6(f), to give the defense all information the government intends to use to rebut the classified information.

3.14.08 Attorney’s Notes After Client’s Death

In Swidler & Berlin v. U.S., 524 U.S. 399, 403, 118 S. Ct. 2081 (1998), the Supreme Court further defined the scope of "one of the oldest recognized privileges for confidential communications," the attorney-client privilege. Writing for the majority, Chief Justice Rehnquist stated that "there are weighty reasons that counsel in favor of posthumous application" of the attorney-client privilege. Id. at 407. Among the "weighty reasons" cited by the Court include the encouragement of full and frank communication with counsel. Id. The Court found that the need to encourage full and frank communication with counsel applied to both the criminal and civil contexts. The Court stated that:
While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

Id. For these reasons, along with support provided by a "great body of . . . caselaw," the Supreme Court held that the attorney-client privilege survives even after a client's death. Id. at 405.

3.15 PROTECTIVE ORDERS

Federal Rule of Criminal Procedure 16(d)(1) gives the trial judge considerable discretion to regulate discovery requests. A protective order generally limits the distribution of information where a witness or party may be subject to physical or economic harm if his identity or the information contained in the disclosure is revealed. See Fed. R. Crim. P. 16(d)(1) advisory committee's note (amendment 1974).

The government, as well as the defense, may seek a protective order ex parte. All such requests must be sealed and preserved for appellate review. Fed. R. Crim. P. 16(d)(1). Defense counsel can use this ex parte application to protect the defendant's Fifth Amendment right against self-incrimination from the rigors of reciprocal discovery.

3.16 SANCTIONS

Federal Rule of Criminal Procedure 16(d)(2) gives the trial court substantial discretion to impose sanctions for failure to comply with discovery orders. It states that, "the court may order [the violating party] to permit 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." Fed. R. Crim. P. 16(d)(2). A trial court's order imposing sanctions for a violation of this rule is reviewed under the abuse of discretion standard. U.S. v. Gee, 695 F.2d 1165, 1168-69 (9th Cir. 1983).

A continuance is clearly the least intrusive remedy to a discovery violation, allowing for review of undiscovered information and further investigation. See U.S. v. Olson, 697 F.2d 273 (8th Cir. 1983). The judge may also exclude the evidence or strike it from the record and instruct the jury to disregard it. U.S. v. Cruz-Velasco, 224 F.3d 654, 665 (7th Cir. 2000). Additionally, as a remedy to defendant's refusal to provide reciprocal discovery pursuant to a discovery order, a district court may choose simply to remove the government from its production obligation. See U.S. v. Driver, 462 F.2d 808, 810-11 (5th Cir. 1972) (not abuse of discretion for court to relieve government from its discovery obligation to turn over scientific tests or experiments analyzing defendant's handwriting when defendant refused to turn over samples of his handwriting).

The Sixth Amendment right to present witnesses does not preclude exclusion of testimony where the defense fails to follow applicable discovery rules. In Taylor v. Illinois, 484 U.S. 400 (1988), the Supreme Court held that exclusion of defense witness' testimony was the appropriate sanction when defense counsel moved to amend its witness list during trial to include two surprise witnesses. Refusal to
provide discovery, or even deliberate attempts to impede discovery by instructing witnesses not to reduce facts to writing, may result in a valid contempt citation. *In re Serra*, 484 F.2d 947 (9th Cir. 1973) (contempt citation upheld where defense counsel told psychiatrist not to prepare report of psychiatric interview to prevent reciprocal discovery of report). Further, a court may exclude the introduction of physical evidence offered by the defendant as a sanction for discovery abuse. *U.S. v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999) (no abuse of discretion in district court's exclusion of cashier's checks upon finding that defendants failure to disclose checks until after the jury was sworn was a strategic decision to withhold the evidence until the government would be unable to fully investigate).

The most drastic remedy for the prosecution's failure to comply with discovery is dismissal of the indictment. The court may have authority to do so under Rule 16(d)(2), but not under the court's supervisory powers. *U.S. v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985); *see also U.S. ex rel. Merritt v. Hicks*, 492 F. Supp. 99 (D. N.J. 1980). The dismissal will not withstand an appeal by the government if the discovery order was invalid or if less severe sanctions, including citing the government attorney for civil contempt, could have been imposed. *U.S. v. Cadet*, 727 F.2d 1453, 1467-70 (9th Cir. 1984) (dismissal reversed because broad discovery order partially invalid).

### 3.17 SENTENCING HEARINGS

Under the guideline system of sentencing, information not crucial to the guilt/innocence phase still may be very important for sentencing purposes. Early discovery of relevant sentencing guideline information is essential for advising a defendant regarding whether or not to accept a plea offer. Defense counsel should know what adjustments the government will seek and what evidence they have to support these adjustments before advising a client regarding any plea offer. Two recent cases can be used to lend support to a defendant's request for sentencing guideline information.

First, *U.S. v. Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990), places the burden of proof on the party seeking an adjustment under the sentencing guidelines. The defendant is therefore required to rebut any government evidence supporting an upward adjustment. Due process would appear to mandate government disclosure of sentencing information to allow the defense to prepare. In *Burns v. U.S.*., 501 U.S. 129, 138-39 (1991), the Supreme Court held that before a district court can depart from the guidelines, it must give the parties reasonable notice that it contemplates doing so. This ruling supports the right for the defense to be informed of all factors that would rebut aggravating factors or provide mitigating factors at the time of sentencing.

Moreover, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny require the government to disclose all favorable evidence that is material either to "guilt or to punishment." *Id.* at 87 (emphasis added). Guideline sentencing information will often include favorable factors that mitigate the defendant's exposure. These factors include, but are not limited to, the following:

(1) whether the defendant has accepted responsibility for his offense;
(2) whether the counts of a multi-count indictment should be "grouped";
(3) whether the defendant has provided "substantial assistance" to the authorities;
whether the defendant was a minor or minimal participant in the offense activity;  
(5) whether the victim contributed to provoking the offense behavior;  
(6) whether the defendant acted under duress or coercion not rising to a complete defense; and  
(7) whether the defendant suffered from diminished capacity at the time of the offense.

All Brady material relevant to guideline sentencing factors should be requested.


### 3.18 DISCOVERY LETTER

**DATE**  
Ms. Prosecutor  
Assistant United States Attorney  
Street  
City, State, Zip  

**RE:** *U.S. v. Defendant*  
Case No. 0000000

Dear _______:  

Pursuant to Fed. R. Crim. P. 12(d)(2), 16(a), and 26.2, *Brady v. Maryland*, 373 U.S. 83 (1963), and all other applicable rules and statutes, I am writing to request discovery in the above-captioned case. To date, I have received ____ pages of discovery.

I request discovery as follows:

1. **The Defendant's Statements** Under Fed. R. Crim. P. 16(a)(1)(A), the defendant is entitled to disclosure of all copies of any written or recorded statements made by the defendant; the substance of any statements made by the defendant that the government intends to offer in evidence at trial; any response by the defendant to interrogation; the substance of any oral statements that the government intends to introduce at trial, and any written summaries of the defendant's oral statements contained in the handwritten notes of any government agent; any response to any *Miranda* warnings that may have been given to the defendant, *(see U.S. v. McElroy*, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant that are discoverable under Fed. R. Crim. P. 16(a)(1)(A).

2. **Arrest Reports, Notes and Dispatch Tapes** The defendant also specifically requests that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding her arrest or any questioning, be turned over. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of the defendant or any other discoverable material is contained. This is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and *Brady v. Maryland*,

Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports about the defendant are available under Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(i). Preservation of rough notes is specifically requested, whether or not the government deems them discoverable at this time;

(3) Reports of Scientific Tests or Examinations Pursuant to Fed. R. Crim. P. 16(a)(1)(D), defendant requests the reports of all tests and examinations conducted upon the evidence in this case, including but not limited to any fingerprint analysis, that is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, which are material to the preparation of the defense or which are intended for use by the government as evidence-in-chief at trial;

(4) The Defendant’s Prior Record The defendant requests, under Fed. R. Crim. P. 16(a)(1)(B), that the government provide a copy of the defendant’s prior criminal record, if any, as within possession, custody or control of the government;

(5) Brady Material The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Impeachment as well as exculpatory evidence falls within Brady's definition of evidence favorable to the accused. U.S. v. Bagley, 473 U.S. 667 (1985); U.S. v. Agurs, 427 U.S. 97 (1976);

(6) Evidence Seized Evidence seized because of any search, either warrantless or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(C) and is now requested;

(7) Request for Preservation of Evidence The defendant specifically requests that all videotapes, dispatch tapes, or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case be preserved;

(8) Tangible Objects The defendant requests, under Fed. R. Crim. P. 16(a)(2)(C), the opportunity to inspect and copy as well as test, if necessary, all other documents and tangible objects, including alleged contraband, photographs, books, papers, documents, buildings, automobiles, or places, or copies, depictions, or portions thereof which are material to the defense or intended for use in the government’s case-in-chief, or were obtained for or belong to the defendant;

(9) Information Regarding Informants and Cooperating Witnesses The defendant requests that the government provide all relevant information concerning any informants or cooperating witnesses involved in this case. At a minimum, the government is obligated to disclose the identification and location of any informants or cooperating witnesses, as well as the identity and location of any other percipient witnesses unknown to the defendant. Roviaro v. U.S., 353 U.S. 53 (1957);

(10) Evidence of Bias or Motive to Lie The defendant requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or

(11) **Impeachment Evidence** The defendant requests any evidence that any prospective government witness has engaged in any criminal act, whether or not resulting in a conviction, and whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and 613. Such evidence is discoverable under *Brady*, 373 U.S. at 83. See *U.S. v. Strifler*, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record), *Thomas v. U.S.*, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility);

(12) **Evidence of Criminal Investigation of Any Government Witness** The defendant requests any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct. *U.S. v. Chitty*, 760 F.2d 425 (2d Cir. 1985);

(13) **Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling** The defense requests any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness' ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. *U.S. v. Strifler*, 851 F.2d 1197 (9th Cir. 1988); *Chavis v. North Carolina*, 637 F.2d 213, 224 (4th Cir. 1980);

(14) **Names of Witnesses Favorable to the Defendant** The defendant requests the name of any witness who has made an arguably favorable statement concerning the defendant. *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); *Hudson v. Blackburn*, 601 F.2d 785 (5th Cir. 1979);

(15) **Statements Relevant to the Defense** The defendant requests disclosure of any statement that may be "relevant to any possible defense or contention" that he might assert. *U.S. v. Bailleaux*, 685 F.2d 1105 (9th Cir. 1982). This includes in particular any statements by percipient witnesses;

(16) **Jencks Act Material** The defense requests all material to which defendant is entitled pursuant to the *Jencks*, 18 U.S.C. §3500, and Fed. R. Crim. P. 26.2. The defendant specifically requests pretrial production of these statements so that the court may avoid unnecessary recesses and delays for defense counsel to properly use any *Jencks* statements and prepare for cross-examination;

(17) **Giglio Information** Pursuant to *Giglio v. U.S.*, 405 U.S. 150 (1972), the defendant requests all statements and/or promises, express or implied, made to any government witnesses, in exchange for their testimony in this case, and all other information that could arguably be used for the impeachment of any government witnesses;

(18) **Government Examination of Law Enforcement Personnel Files** The defendant requests that the government examine the personnel files and any other files within its custody, care or control, or which could be obtained by the government, for all testifying witnesses, including testifying officers and agents who may have been controlling or contacting the confidential informant in this case. The defendant requests that these files be reviewed by the government attorney for evidence of perjurious conduct or other like dishonesty, or any other material relevant to impeachment, or any information that is exculpatory, pursuant to its duty under *U.S. v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). See *U.S. v. Jennings*, 960 F.2d 1488, 1492 (9th Cir. 1992).

(19) Pursuant to Fed. R. Crim. P. 16(a)(1)(E), the defendant requests disclosure of the identities, qualifications, and testimony of any expert witnesses the government intends to call at trial.
Thank you for your assistance in this matter.

Very Truly Yours,
CHAPTER 4

THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

updated by

Matthew C. Winter

4.01 INTRODUCTION

This chapter provides an overview of Fourth Amendment law. The chapter is organized in an attempt to follow the issues as they unfold when one is confronted with a Fourth Amendment question. The chapter begins with the scope of the protections and exceptions, afforded by the Fourth Amendment. This section is followed by a discussion of the proper standing needed to raise a Fourth Amendment claim. The chapter then progresses into the issues of Fourth Amendment law as it applies to individuals as well as property. The first half of the chapter deals with the Fourth Amendment as applied to individuals, progressing through the issues involved in seizures, stops, and arrests. The second half of the chapter involves the search of homes and personal property.

4.02 CONSTITUTIONAL BASIS

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

4.02.01 Reasonableness

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is “reasonableness.” Vernonia School District 47 v. Acton, 515 U.S. 646 (1995). Whether a particular search meets the reasonableness standard “is judged by balancing its intrusion against its promotion of legitimate governmental interests.” Skinner v. Railway Labor Executives’ Assn., 489 U.S. 602, 619 (1989) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)). The individual’s legitimate expectations of privacy and personal security are placed on one side of the balance. The

In addition, although a search generally requires a search warrant, a warrant is not required to establish the reasonableness of all governmental searches. In *New Jersey v. T.L.O.*, the Court concluded that the preference for a search warrant was not without exceptions. It made clear that probable cause is not, at least in certain limited circumstances, a prerequisite for warrantless search and seizure activity. *Id.* at 341. A search unsupported by probable cause can be constitutional “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citations omitted). The Supreme Court has upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, *Skinner*, 489 U.S. at 602; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989); to maintain automobile checkpoints looking for illegal immigrants and contraband, *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); and drunk drivers, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

### 4.02.02 Legitimate Expectation of Privacy

In *Katz v. U.S.*, the Supreme Court articulated a two prong test to determine whether a warrantless search violated a defendant’s legitimate expectation of privacy. To receive the protection of the Fourth Amendment, the defendant must have a subjective expectation of privacy, and that expectation of privacy must be one that society is “prepared to recognize as reasonable.” *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan J., concurring); *Hudson v. Palmer*, 468 U.S. 517, 525 (1984).  *See also U.S. v. Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998) (en banc) (warrantless search of garbage cans not illegal where defendant had no reasonable expectation of privacy in trash placed near garage on joint-walk driveway), *cert. denied,525 U.S. 1066 (1999)*; *U.S. v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (canine sniff of warehouse door that sheltered marijuana was not illegal warrantless search where the defendant had no legitimate expectation that canine would not detect odor of marijuana in warehouse); *U.S. v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999) (warrantless scan of defendant’s home with thermal imaging device does not infringe upon legitimate expectation of privacy); *U.S. v. Depew*, 210 F.3d 1061 (9th Cir. 2000) (thermal scan of defendant’s home did not infringe upon legitimate expectation of privacy); *U.S. v. Cormier*, 220 F.3d 1103, (9th Cir. 2000) (no reasonable expectation of privacy in motel guest registration records); *U.S. v. Dunn*, 480 U.S. 294, 301 (1987) (defendant did not possess a legitimate expectation of privacy in his barn which was located 50 yards away from his home and had locked, waist-high gates barring entry); *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 239 (1986) (open areas of industrial plant, spread over two thousand acres, not analogous to curtilage for purposes of aerial surveillance, but more comparable to open field); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (unreasonable expectation that backyard “garden” be protected from naked-eye aerial observation); *U.S. v. Place*, 462 U.S. 696, 707 (1983) (dog sniff without more is not a search within the meaning of the Fourth Amendment because it “discloses only the presence or absence of narcotics, a contraband item.”).  *But see U.S. v. Sandoval*, 200 F.3d 659, 660 (9th Cir. 2000) (warrantless search of unoccupied tent located on Bureau of Land Management land near marijuana crop was illegal and infringed upon a legitimate expectation of
privacy, due to the locality of the tent in an area of dense vegetation, the fact that agents could not see into the tent, and the fact that the defendant left prescription medicine within the tent); *U.S. v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998) (warrantless search of cardboard box illegal where homeless man had reasonable expectation of privacy in container stored in another’s garage).

In addition, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise “illegitimate.” See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (prisoner has no reasonable expectation of privacy in his cell); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (defendant has burden of proving legitimate expectation of privacy).

Three principles guide the inquiry of whether one has a legitimate expectation of privacy. First, “the Fourth Amendment protects people, not places.” *Katz v. U.S.*, 389 U.S. 347, 351 (1967). Thus, the question that must be answered is not whether a particular area is somehow private in the abstract, but whether one has a reasonable expectation of privacy therein. *Rakas v. Illinois*, 439 U.S. 128, 139-43 (1978). Second, a privacy interest, in the constitutional sense, consists of a reasonable expectation that uninvited and unauthorized persons will not intrude into a particular area. One may freely admit guests of one’s choosing -- or be legally obliged to admit specific persons -- without sacrificing one's right to expect that a space will remain secure against all others. *Stoner v. California*, 376 U.S. 483, 489-90 (1964); *Chapman v. U.S.*, 365 U.S. 610, 616-17 (1961). Third, an expectation of privacy, strictly speaking, consists of a belief that uninvited people will not intrude in a particular way. A person may renounce the assumption that he is immune from one kind of invasion while retaining the belief that he is protected from others; by exposing one’s self to public view, for instance, one does not relinquish one’s right not to be overheard. *Katz*, 389 U.S. at 352.

### 4.03 THE EXCLUSIONARY RULE

Under the Exclusionary Rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961). This includes the “fruit” of such illegal conduct. *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963). The Exclusionary Rule is a judicially created remedy designed to deter law enforcement misconduct. Therefore, the application of the rule has been restricted to those areas where its remedial objectives are thought to be best served.

#### 4.03.01 Attenuation Doctrine

The Exclusionary Rule applies to exclusion of derivative evidence, both tangible and testimonial, that is the product of unlawfully seized evidence or is acquired as an indirect result of such conduct; “the fruits of the poisonous tree.” *Wong Sun*, 371 U.S. at 487-88. However, merely because unlawful conduct has occurred does not mean that all later discovered evidence is the fruit of the illegality. *New York v. Harris*, 495 U.S. 14, 18 (1990). While rejecting an all or nothing (but for the illegal police conduct) test, the Court articulated the question as follows:
Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

_Wong Sun_, 371 U.S. at 488 (quotations and citations omitted).

Where it can be shown that the illegality was not exploited to gather additional evidence, and the evidence is therefore ‘attenuated’ from the illegal conduct, the deterrence which would result from exclusion is considered minimal, and the evidence will be admissible. _See e.g., Taylor v. Alabama_, 457 U.S. 687 (1982) (confession given in conformity with _Miranda_ after an unlawful seizure); _U.S. v. Bradley_, 922 F.2d 1290, 1296 (6th Cir. 1991) (consent to a search given after an unlawful seizure), _overruled on other grounds by U.S. v. McGlocklin_, 8 F.3d 1037 (6th Cir. 1993); _Oregon v. Elstad_, 470 U.S. 298, 309 (1985) (second confession in conformity with _Miranda_ after an unwarned confession); _U.S. v. Ceccolini_, 435 U.S. 268, 279 (1978) (unlawful search resulting in a witness who testified for the government).

The Court has identified several factors to consider when applying the “fruit of the poisonous tree” doctrine articulated in _Wong Sun_. These factors include: (1) the purpose and flagrancy of the police misconduct; (2) the time lapse between the illegal police conduct and obtaining the evidence; and (3) and intervening circumstances. _Brown v. Illinois_, 422 U.S. 590, 603-04 (1975).

4.04 SCOPE OF THE RULE

4.04.01 Good Faith Exception

The Exclusionary Rule was limited by the Supreme Court in _U.S. v. Leon_, 468 U.S. 897, 906 (1984), which created a good-faith exception to the warrant requirement. Recognizing “[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands,” the Court held that evidence obtained by law enforcement officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unconstitutional should not be excluded from the prosecution’s case-in-chief. The purpose in establishing the good-faith exception was to limit the exclusionary rule to deterring illegal behavior of officers, not behavior based upon an officer’s reasonable reliance on a faulty warrant. _Id._ at 918; _See also U.S. v. Gantt_, 194 F.3d 987, 1006 (9th Cir. 1999).

To invoke the Exclusionary Rule in warrant cases, defendants are required to demonstrate not only the unconstitutionality of the warrant, but also that the police lacked a reasonable good faith belief in the propriety of their actions. _See also Arizona v. Evans_, 514 U.S. 1, 12-13 (1995) (evidence seized in violation of the Fourth Amendment as a result of clerical errors of court employees fell within good faith exception to Exclusionary Rule). There are, however, five instances in which the good faith exception does not apply and suppression remains an appropriate remedy: (1) the affiant intentionally or recklessly misleads the magistrate with material misstatements or omissions, _Franks v. Delaware_, 438 U.S. 154, 155-56 (1978); (2) the issuing magistrate was not “neutral and detached” and wholly abandoned the judicial role and acted as a “rubber stamp,” _Aguilar v. Texas_, 378 U.S. 108, 111 (1964), _abrogated on other
The Fourth Amendment and the Exclusionary Rule 4-125

grounds by Illinois v. Gates, 462 U.S. 213 (1983); (3) the warrant is based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” U.S. v. Leon, 468 U.S. 897, 923; (4) the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot “reasonably” presume it to be valid, Leon, 468 U.S. at 923; and (5) the warrant itself is the fruit of a prior illegal search. Wong Sun v. U.S., 371 U.S. 471 (1963).

4.04.02 Statutes

Statutes may regulate the seizure of evidence thereby precluding its use if the statute is violated. For example, evidence of an illegal wire interception may be suppressed pursuant to 18 U.S.C. §§2510-21, and a search of a dwelling may be improper for failure to give proper notice as required by 18 U.S.C. §3109. See, e.g., Sabbath v. U.S., 391 U.S. 585 (1968); Miller v. U.S., 357 U.S. 301 (1958).

Statutes which purport to authorize searches and seizures without probable cause or search warrants may ultimately provide grounds for suppression of evidence. See Torres v. Com. of Puerto Rico, 442 U.S. 465 (1979) (Puerto Rican statute authorizing police to search the luggage of any person arriving from United States held invalid). See also Almeida-Sanchez v. U.S., 413 U.S. 266 (1973)(Immigration and Nationality Act provision and INS regulation authorizing warrantless searches of vehicles within 100 miles of border held invalid). See infra §4.16.13; Sibron v. New York, 392 U.S. 40, 60-61 (1968) (a state may develop its own law of search and seizure, however “it may not . . . authorize police conduct which trenches upon Fourth Amendment rights . . ”); Berger v. New York, 388 U.S. 41 (1967) (wiretapping statute held invalid because it required no showing of particularity nor any showing of exigent circumstances). In Michigan v. DeFillippo, 443 U.S. 31, 39 (1979), the Court described the statutes in this earlier line of cases as “statutes, which by their own terms, authorized searches under circumstances which did not satisfy traditional warrant and probable cause requirements of the Fourth Amendment.” The Court distinguished this case and upheld the search because the statute was not facially invalid. See id. The Court has expanded on this reasoning and held that the Exclusionary Rule does not apply to evidence obtained by police officers who act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, even if the statute was eventually found to violate the Fourth Amendment. See id. at 40. In Illinois v. Krull, 480 U.S. 340 (1987), the Court held that evidence seized in good-faith reliance on a statute later declared unconstitutional did not have to be excluded from a criminal trial. The Court reasoned that since police must obey statutes as written, excluding evidence would have no deterrent effect. See id. at 349-50. The only exception would be if the legislature “wholly abandoned its responsibility to enact constitutional laws,” or if the law is so clearly unconstitutional that “a reasonable officer” should have known “it was invalid.” Id. at 354-55.

4.04.03 Habeas Corpus

The Exclusionary Rule is no longer available for state prisoners in a federal habeas corpus post-conviction collateral attack as long as the state has provided an opportunity for a full and fair hearing of any search and seizure claim. Stone v. Powell, 428 U.S. 465, 482 (1976). In Stone, the Court
reasoned that the Fourth Amendment's purpose of deterring police misconduct would be minimally served, as compared to the burden and expense of overturning convictions on grounds that they either were, or could have been, litigated in the state courts. *Id.* at 493-94. See also *Caldwell v. Cupp*, 781 F.2d 714 (9th Cir. 1986) (no habeas relief on Fourth Amendment claim where state provided opportunity for full litigation of issue). However, in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court held that Stone’s restriction on federal habeas review of Fourth Amendment claims should not be extended to Sixth Amendment ineffective assistance of counsel claims founded on incompetent representation with respect to a Fourth Amendment issue.

**4.04.04 Evidence of Prior Bad Acts -- Fed. R. Evid. 404(b)**

Circuits differ as to the admissibility of illegally seized evidence to prove an element of the crime under Fed. R. Evid. 404(b). The Tenth Circuit has held that an element of the offense cannot be proven by illegally obtained evidence through the use of Rule 404(b). *U.S. v. Hill*, 60 F.3d 672, 677 (10th Cir. 1995); while the Ninth Circuit has held that such evidence is admissible. *U.S. v. Basinger*, 60 F.3d 1400, 1407 (9th Cir. 1995).

**4.04.05 Grand Jury**

Evidence seized in violation of the Fourth Amendment is admissible at grand jury proceedings, and its validity cannot be challenged. *U.S. v. Calandra*, 414 U.S. 338 (1974). The rule announced in *Calandra* has served as a basis for strictly limiting the Exclusionary Rule to the criminal trial proper.

**4.04.06 Impeachment**

Illegally seized evidence may be used to impeach the defendant’s own testimony. *Walder v. U.S.*, 347 U.S. 62 (1954). In *U.S. v. Havens*, 446 U.S. 620, 627-28 (1980), the Court expanded this rule to permit prosecutors to introduce illegally obtained evidence in order to impeach defendant’s answers put to him on cross that are plainly within the scope of defendants direct examination. This exception applies only to defendants and not to other witnesses. *James v. Illinois*, 493 U.S. 307 (1990).

**4.04.07 Probation / Supervised Release Violation Proceedings**

Parole boards are not required to exclude evidence obtained in violation of the Fourth Amendment. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 118 S. Ct. 2014 (1998). In *Scott*, the Court reasoned that application of the exclusionary rule in the context of parole revocation would “both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings.” *Id.* at 364. See also *U.S. v. Montez*, 952 F.2d 854, 857 (5th Cir. 1992) (Exclusionary Rule does not apply to revocation of supervised release); *U.S. v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975) (holding that evidence obtained in violation of the Fourth Amendment is admissible in probation revocation proceedings and in imposing sentence if at the time of the search the officers did not know that the subject was on probation); *U.S. v. Winsett*, 518 F.2d 51 (9th Cir. 1975) (Fourth Amendment does not require suppression of evidence in probation revocation proceeding where at the time
of the illegal arrest and search, the police had neither knowledge nor reason to believe that the suspect was on probation); *U.S. v. Hebert*, 201 F.3d 1103 (9th Cir. 2000) (exclusionary rule does not apply in a supervised release revocation hearing).

**4.04.08 Sentencing**

Use of illegally seized evidence is permissible in sentencing hearings. *U.S. v. Lynch*, 934 F.2d 1226, 1230 (11th Cir. 1990) (judge may consider unlawfully obtained evidence at sentencing); *U.S. v. Torres*, 926 F.2d 321, 325 (3d Cir. 1991) (illegally seized evidence may be considered in determining appropriate sentencing guidelines); *U.S. v. Tejada*, 956 F.2d 1256, 1263 (2d Cir. 1992) (absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the Fourth Amendment); *U.S. v. Kim*, 25 F.3d 1426 (9th Cir.1994) (methamphetamine found during illegal search of hotel room was admissible during sentencing phase).

However, the Exclusionary Rule might apply where the defendant can show that he or she is the victim of police harassment. See *U.S. v. McCrory*, 930 F.2d 63, 68 (D.C. Cir. 1991) (suppression required at sentencing where defendant can show that police undertook illegal search for purpose of obtaining evidence to increase a defendant’s sentence).

**4.04.09 Civil Deportation Hearings**

The Exclusionary Rule does not apply to civil deportation proceedings. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (illegally seized evidence admissible in civil deportation proceedings). However, in *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994), the court held that although the Exclusionary Rule does not apply in deportation proceedings, evidence obtained by egregious violations of the Fourth Amendment should be suppressed.

**4.04.10 Evidence Obtained in Violation of Agency Regulations**

The Exclusionary Rule has been held inapplicable to evidence obtained in violation of internal IRS regulations governing electronic monitoring of non-telephonic conversations with the consent of one party. *U.S. v. Caceres*, 440 U.S. 741, 755-57 (1979). The use of a trial court’s supervisory powers to exclude evidence was seriously abrogated by the Supreme Court in *U.S. v. Payner*, 447 U.S. 727 (1980). While disapproving the tactics used by the IRS agents in obtaining evidence against a criminal tax defendant, the Court held that the district court had no right to use its supervisory power as a substitute for Fourth Amendment analysis to suppress evidence that was otherwise admissible under the Fourth Amendment. *Id.* at 734-36.

The Ninth Circuit has interpreted *Caceres* to hold that the exclusionary rule will not be applied to enforce an agency regulation where the violation does not raise a constitutional question, and the defendant cannot claim that he reasonably relied on the regulation or that its breach affected his conduct. See *U.S. v. Ani*, 138 F.3d 390, 392 (9th Cir. 1998) (citing *U.S. v. Choate*, 619 F.2d 21, 23 (9th Cir. 1980)).
Ani, the defendant moved to suppress evidence on the ground that it was seized in violation of a regulation which required “reasonable cause” to search incoming international mail. Because border searches of incoming packages do not require any suspicion, the Ninth Circuit found that no constitutional violation had occurred. Id. at 391. Absent a constitutional violation, suppression was not appropriate. Id.

4.04.11 Identity of Defendant

The “body” or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest, search or seizure. U.S. v. Guzman-Bruno, 27 F.3d 420, 421 (9th Cir. 1994). In Guzman-Bruno, the Ninth Circuit held that the Exclusionary Rule was inapplicable to an illegal arrest leading to the discovery of a deported alien’s identity, name and birth date).

4.04.12 Evidence Obtained Through Private Citizens

The Exclusionary Rule does not apply to the acts of private citizens. Since the primary purpose of the Exclusionary Rule is deterrence of illegal governmental actions, it is an inappropriate remedy for unofficial wrongdoing. See U.S. v. Livesay, 983 F.2d 135 (8th Cir. 1993) (package opened by UPS employees); U.S. v. Pierce, 893 F.2d 669 (5th Cir. 1990) (package opened by airline officials); U.S. v. Mulder, 808 F.2d 1346 (9th Cir. 1987) (search of hotel room by hotel employees); U.S. v. Miller, 688 F.2d 652 (9th Cir. 1982) (theft victim going on defendant’s property to look for stolen property is not a government action). If a private party conducts a search at the behest of the government, however, then the private party becomes in effect the instrument or agent of the state and the search falls within the scope of the exclusionary rule. See U.S. v. Bennett, 709 F.2d 803 (2d Cir. 1983).

To determine whether a private party has acted as an agent or instrument of the government, the Ninth Circuit has articulated a two part inquiry: (1) whether the government knew or acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or to further his or her own goals. U.S. v. Reed, 15 F.3d 928, 931 (9th Cir. 1994) (citing U.S. v. Miller, 688 F.2d 652, 657 (9th Cir. 1982)). See e.g. U.S. v. Young, 153 F.3d 1079 (9th Cir. 1998) (common carrier’s policy of searching packages containing drugs did not make it a government actor); U.S. v. Andrini, 685 F.2d 1094 (9th Cir. 1982) (the fact that officer was present when clerk opened defendant’s bag not sufficient to characterize private individual as government actor).

4.04.13 Acts of Foreign Officials

Fourth Amendment protection is not applicable to the acts of foreign officials or to the acts of United States officials in foreign countries. In U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment did not apply to a search by American authorities of the Mexican residence of a Mexican citizen who had no voluntary attachment to the United States. The Court further stated that the Fourth Amendment was intended to protect people of the United States against arbitrary action by their own government, rather than to restrain actions of the federal government against aliens outside United States territory. Id. at 266. See also U.S. v. Benedict, 647 F.2d 928 (9th Cir. 1981) (Fourth Amendment is not applicable to search initiated by the Thai police under Thai law); U.S.
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_v. Janis_, 428 U.S. 433, 455 n.1 (1976) (recognizing rule that excluding evidence seized in violation of Fourth Amendment rights is not applicable where foreign government commits the offending act). If United States law enforcement officers participate in a foreign search, however, or if the search is the result of its coordination or an agency relationship between the United States agents and their foreign counterparts, the Fourth Amendment protections may be triggered. _See U.S. v. Maturo_, 982 F.2d 57 (2d Cir. 1992), _cert. denied sub nom. Pontillo v. U.S._ 508 U.S. 980 (1993); _U.S. v. Mitro_, 880 F.2d 1480, 1482-84 (1st Cir. 1989).

4.04.14 Failure to Afford Consular Notification

The First Circuit, sitting _en banc_, recently held that failure to afford notification and access to the consulate does not afford the individual deprived of this right the remedy of suppression or dismissal of the indictment against a foreign national. _U.S. v. Li_, 206 F.3d 56 (1st Cir. 2000) (en banc). The Ninth Circuit, sitting on _en banc_ in _U.S. v. Lombera-Camorlinga_, 170 F.3d 1241 (9th Cir. 1999), also has held that a violation of the Vienna Convention’s consular notification requirement does not require suppression.
4.05 STANDING

The fundamental inquiry regarding standing to object to a search is whether the conduct which the defendant wants to put in issue involved an intrusion into his or her reasonable expectation of privacy. See *U.S. v. Padilla*, 508 U.S. 77 (1993) (rejecting Ninth Circuit’s co-conspirator exception to traditional standing inquiry); *Mancusi v. DeForte*, 392 U.S. 364 (1968). The issue of standing to challenge a search is not a concept which is separate and distinct from the merits of the underlying Fourth Amendment claim. In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Supreme Court discarded the concept of “standing” on the basis of a separate inquiry in favor of an analysis simply of whether a defendant’s rights were violated by an allegedly illegal search or seizure. *Id.* at 139. The Court formulated a test in *Rakas* requiring a defendant to show that he could “legitimately expect privacy in the areas which were the subject of the search and seizure [he] sought to contest.” *Id.* at 149. In *U.S. v. Salvucci*, 448 U.S. 83 (1980), the Supreme Court abolished the “automatic standing” rule whereby defendants charged with possessory crimes are entitled to challenge the legality of the search automatically. Under the current case law, defendants charged with crimes of possession may only claim the benefits of the Exclusionary Rule if their own Fourth Amendment rights have in fact been violated. *Id.* at 85.

4.05.01 Standing if Present on the Premises

An overnight guest enjoys a legitimate expectation of privacy in the home of his host. *Minnesota v. Olson*, 495 U.S. 91 (1990). In *Olson*, the Court found that the defendant’s status as an overnight guest was sufficient to demonstrate he had an expectation of privacy in the home that society was prepared to recognize as reasonable and, therefore, conferred on him standing to challenge the legality of his warrantless arrest which tainted a later statement he made. *Id.* at 98. See also *U.S. v. Echegoyen*, 799 F.2d 1271, 1277 (9th Cir. 1986) (invited overnight guest had legitimate expectation of privacy). But see *U.S. v. Armenta*, 69 F.3d 304, 308 (9th Cir. 1995) (defendant’s bald assertion that he was overnight guest not enough to establish standing).

Mere presence in another’s home is not sufficient to establish a legitimate expectation of privacy concerning the search of the home. See *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). In *Carter*, a police officer peered through an apartment window through a gap in the closed blinds and observed the defendants bagging cocaine with the leaseholder. The defendants moved to suppress the evidence obtained from the apartment on the ground that the officer’s act of looking through the window amounted an unreasonable search. The U.S. Supreme Court held that the defendants did not have a legitimate expectation of privacy in the apartment because the “purely commercial nature” of the their activities, the short period of time on the premises, and the absence of any other connection to the leaseholder indicated that they were merely present on the premises with the consent of the host. *Id.* In *U.S. v. Nerber*, 222 F.3d 597 (9th Cir. 2000), however, the 9th Circuit held that where the government intrusion on privacy is egregious, non-residents may have a legitimate expectation of privacy in another person’s apartment or hotel room.

4.05.02 Derivative Standing: Co-defendants and Co-conspirators
A defendant does not have standing to seek suppression of evidence merely because that evidence was allegedly obtained in violation of the Fourth Amendment rights of a co-defendant or co-conspirator. See *Alderman v. U.S.*, 394 U.S. 165, 171-72 (1969). In *Alderman*, the Court held that co-conspirators and co-defendants have no special standing for suppression of evidence under the Fourth Amendment where their rights are not violated by the search itself. The Court further stated that while expectations of privacy in property interests govern the analysis of Fourth Amendment search and seizure claims, a conspiracy neither adds nor detracts from such privacy expectations or interests despite participation in a criminal conspiracy. See *U.S. v. Zermeno*, 66 F.3d 1058 (9th Cir. 1995) (co-defendant who did not reside at residence searched and who was not present during search lacked standing to contest search; storing contraband at residence was insufficient to create legitimate expectation of privacy); *U.S. v. Lockett*, 919 F.2d 585 (9th Cir. 1990) (defendant’s mere membership in joint criminal venture did not give him legitimate expectation of privacy in property used by joint venture). But see *U.S. v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) (defendants had standing to contest search of premises on which marijuana plants were found though they failed to show that they lived on the property or that they were physically present at time of search, where there was evidence of participation by defendants in arrangement indicating joint control and supervision of place searched sufficient to give rise to expectation of privacy by defendants).

In addition, although the Ninth Circuit previously had carved out a “co-conspirator exception” to the general *Rakas* rule against asserting another person’s Fourth Amendment rights, the Supreme Court has rejected that rule. *U.S. v. Padilla*, 508 U.S. 77 (1993). In *Padilla*, the Supreme Court reversed the Ninth Circuit’s holding that defendants who owned a car used to transport cocaine could contest its seizure even though neither one was driving the car when it was stopped. The Court held that the co-conspirator exception was contrary to its previous holding in *Alderman* and reversed the lower court’s decision.

### 4.05.03 Ownership and Possession

#### 4.05.03.01 Ownership of Real Property

An individual with a present possessory interest in the premises searched may have standing to challenge that search even though he was not present when that search was made. This includes those who at the time of the search are tenants of a house or apartment. *See Chapman v. U.S.*, 365 U.S. 610 (1961) (search of rented premises without warrant and in absence of tenant but with consent of landlord was unlawful and evidence seized was inadmissible). However, if there is no possessory interest in the place searched, there is no standing. *See U.S. v. Bianco*, 998 F.2d 1112 (2d Cir. 1994) (defendants who claimed no proprietary or possessory interest in house lacked standing to challenge electronic surveillance); *U.S. v. Molina-Garcia*, 634 F.2d 217 (5th Cir. 1981) (defendant lived in house for six weeks but did not have possessor's interest and thus no standing); *U.S. v. Buchanan*, 633 F.2d 423 (5th Cir. 1980) (where lease expired and defendant was not present when search of apartment was made, defendant had no standing).

In addition, those who are renting a room in a hotel, motel, or rooming house may have standing. *See Stoner v. California*, 376 U.S. 483 (1964) (search of defendant’s hotel room without consent of defendant and without warrant was unlawful though conducted with the consent of hotel clerk); *U.S. v.
Bulman, 667 F.2d 1374, 1384 (11th Cir. 1982) (occupant of a motel room had an expectation of privacy in the room itself equivalent to that of a home owner in his dwelling); U.S. v. Lyons, 706 F.2d 321 (D.C. Cir. 1983) (the defendant had a legitimate expectation of privacy in a hotel room and closet therein rented for him by undercover narcotics agents). But see U.S. v. Grandstaff, 813 F.2d 1353 (9th Cir. 1987) (because mere presence in another’s room is insufficient, co-defendant had no standing in hotel room where there was no showing that he shared the room, stayed there or stored luggage); U.S. v. Rambo, 789 F.2d 1289, 1295 (8th Cir. 1986) (ejection from hotel because of disorderly conduct terminated rental period and reasonable expectation of privacy in premises); U.S. v. Diggs, 649 F.2d 731, 735 (9th Cir. 1981) (no standing when one abandons a hotel room and sends back the key), overruled on other grounds by U.S. v. McConney, 728 F.2d 1195 (9th Cir. 1984) (en banc).

4.05.03.02 Ownership Personal Property

Ownership of the items seized is insufficient by itself to invoke the protection of the Fourth Amendment. Rawlings v. Kentucky, 448 U.S. 98 (1980). In Rawlings, the Court held that the defendant had no legitimate expectation of privacy in his girlfriend’s purse and therefore no standing to challenge the search. The Court reasoned that “ownership of the drugs is undoubtedly one fact to be considered,” but “arcane” concepts of property rights are not determinative in establishing the right to claim a Fourth Amendment violation. Id. at 105. See also U.S. v. Buchner, 7 F.3d 1149, 1154 (5th Cir. 1993) (defendant, as owner of shoulder bag found in girlfriend’s car, had legitimate expectation of privacy with respect to contents of bag and standing to object to government search of bag); Rakas v. Illinois, 439 U.S. 128 (1978) (no standing to suppress because defendant did not own the car, the rifle or the shells); U.S. v. Payner, 447 U.S. 727 (1980) (defendant possessed no privacy interest in the documents seized and therefore had no standing).

A defendant’s denial of ownership should not defeat legitimate expectations of privacy in the space invaded. See U.S. v. Angulo-Fernandez, 53 F.3d 1177,1179 (10th Cir. 1995) (although registered owner of car denied ownership, such evidence is not determinative of defendant’s right to possess car and, absent contrary evidence that defendant had stated he had borrowed the car from his friend, it was sufficient to meet defendant’s burden of standing); U.S. v. Issacs, 708 F.2d 1365, 1368 (9th Cir. 1983) (defendant had a legitimate expectation of privacy in a safe in which journals were found despite the fact that he initially denied ownership); U.S. v. Portillo, 633 F.2d 1313 (9th Cir. 1980) (despite disclaimer of ownership, defendant maintained privacy interest in contents of two paper bags found in locked trunk of car under his control) But see U.S. v. Huffhines, 967 F.2d 314, 318 (9th Cir. 1992) (where defendant abandoned property by disavowing any connection with car, he lacked standing to object to search of vehicle).

In addition, if the abandonment results from a Fourth Amendment violation then the abandonment is not voluntary, and will not defeat standing. U.S. v. Stephens, 206 F.3d 914, 917 (9th Cir. 2000) (where detention on bus amounted to unlawful seizure, defendant did not abandon his bag despite disclaiming ownership three times).
Owners cannot contest legality of search when the item is under another person’s control. *U.S. v. One 1977 Mercedes Benz*, 708 F.2d 444, 449-50 (9th Cir. 1983) (owner could not contest legality of seizure of cocaine from car when car in possession of third party; *U.S. v. Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (absent legal owner of a mobile home used by someone else has no standing to protest the search); *U.S. v. Dall*, 608 F.2d 910 (1st Cir. 1979) (although ownership relevant to expectation of privacy, owner of car not present when it is searched may not have standing).

The person who rents a boat on behalf of another person has no standing to complain about an illegal search. *U.S. v. Coats*, 611 F.2d 37 (4th Cir. 1979) (no showing of property right when third party entitled to possession and control of vessel); see also *U.S. v. Dyar*, 574 F.2d 1385, 1390 (5th Cir. 1978) (even if co-defendant had leasehold interest in searched aircraft sufficient to create traditional property right, when pilot took possession, co-defendant lost any expectation of personal privacy in aircraft and thus lacked standing to contest legality of search).

### 4.05.03.03 Exclusion of Statements Made to Establish Standing

Where a defendant is required to make statements or testify under oath to establish standing (namely, to ascertain either a legitimate expectation of privacy, or a possessory interest, in the subject of the search), such statements are not admissible against the defendant at trial on the issue of guilt. Such statements could be admissible, however, for impeachment purposes. See *Simmons v. U.S.*, 390 U.S. 377, 389-94 (1968).

### 4.05.03.04 Transponder Installation

Standing to complain of an illegal transponder installation is normally reserved to those with a possessory interest in the suspect vehicle or a legitimate expectation of privacy with respect to its interior. See, e.g., *U.S. v. Webster*, 750 F.2d 307, 317 n.9 (5th Cir. 1984) (assuming, without deciding, that a violation of a person’s privacy interest in his property, through which agents gained access to his airplane, conferred standing to suppress fruits of transponder); *U.S. v. Strmel*, 744 F.2d 1086 (5th Cir. 1984) (post-installation passenger lacks standing); *U.S. v. Whitley*, 670 F.2d 617, 619 (5th Cir. 1982) (member of ground crew lacks standing to attack transponder installation); *U.S. v. Parks*, 684 F.2d 1078, 1086 (5th Cir. 1982) (pilot and passenger lack standing where no showing of ownership or proprietary interest).

### 4.05.03.05 Outrageous Governmental Conduct

No matter how outrageous the government conduct is, when the defendant’s Fourth Amendment rights are not violated, there is no standing to complain. *U.S. v. Payner*, 447 U.S. 727 (1980) (although government agents arranged burglary and obtained factual material leading to evidence against defendant, defendant had no standing to complain because his own Fourth Amendment rights were not violated); *U.S. v. Kuespert*, 773 F.2d 1066 (9th Cir. 1985) (driver has no standing to challenge search of passengers); *U.S. v. Bell*, 651 F.2d 1255 (8th Cir. 1981) (no standing to protest introduction of incriminating evidence seized by search of third person’s premises or property).
4.06 SEIZURE

4.06.01 Nonseizures

Every encounter between a private individual and law enforcement will not ripen into a seizure. See Florida v. Bostick, 501 U.S. 429, 434 (1991). Nonseizures are defined as consensual encounters between law enforcement and private citizens. A consensual encounter is one in which a private citizen would feel free to disregard the police. The focus in these types of cases is not the basis for the officers’ approach – it is clear that the officer need no probable cause or reasonable suspicion. The officer’s belief can be as minimal as a hunch. The distinguishing factor between a nonseizure and a seizure is that there is no mandatory compliance in a nonseizure.

As the Court noted in Terry v. Ohio, 392 U.S. 1 (1968), the officer must inhibit the liberty of an individual either by some physical restraint or show of authority for a seizure to occur. Terry, 392 U.S. at 19 n.16. The mere presence of the police officer, however, does not result in a seizure. The Court, in Florida v. Royer, 460 U.S. 491 (1983), reaffirmed that officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place. Moreover, the fact that an officer identifies himself as a police officer, without more, does not convert the encounter into a seizure requiring some level of objective justification. In addition, routine police questioning does not convert an encounter into a seizure. The person, however, “may not be detained even momentarily without reasonable, objective grounds for doing so; the refusal to listen or answer does not, without more, furnish those grounds.” Id. at 498. In short, unsolicited interaction with law enforcement will not rise to the level of a seizure for Fourth Amendment purposes.

The Court in Brower v. Inyo County explained it best:

[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.

489 U.S. 593, 596-97 (1989). The Supreme Court also established a test applicable to situations where a person is in a confined setting where walking away is not an option (e.g., on a bus), holding that “[s]o long as a reasonable person would feel free ‘to disregard the police and go about his business,’ the encounter is consensual and no reasonable suspicion is required.” Bostick, 501 U.S. at 434 (citing California v. Hodari D., 499 U.S. 621, 628 (1991)). See also U.S. v. Kim, 27 F.3d 947, 950-51 (3d Cir. 1994) (encounter at the roomette on train not a seizure under facts of case because reasonable person would have felt free to decline to speak or end conversation with law enforcement agent).

4.06.02 Lesser Intrusions
Other encounters may involve some degree of restriction without probable cause or reasonable suspicion and still be permissible under the Fourth Amendment. In these circumstances, the encounter involves more than routine questioning or a brief interaction with the police. These intrusions are actually classified as seizures, however these seizures are held to be reasonable.

The leading case in this area is Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam). In Mimms, the police stopped Mimms for a traffic violation. For his protection, the officer ordered him out of the car after the stop. Observing a bulge in Mimms’ jacket, the officer conducted a pat-down and found a .38 caliber gun. The Court rejected Mimm’s argument that being asked to step out of the car was an “impermissible seizure” violative of the Fourth Amendment. The Court observed that the “additional intrusion can only be described as de minimis . . . What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.” Id. at 111. The Court held that once a vehicle has been lawfully detained for a traffic violation, police may order the driver to exit the vehicle. In Maryland v. Wilson, 519 U.S. 408 (1997), the Court extended Mimms to hold that a passenger may also be ordered to step out in the course of a traffic stop.

The underlying rationale for these cases is the officer’s safety. Michigan v. Summers, 452 U.S. 692 (1981), upheld a seizure on the grounds of officer safety but did so in a different context. The officers encountered Summers as they approached his home to execute a search warrant. They ordered Summers back inside his house and held him there until the search was completed. After finding narcotics, the police placed Summers under arrest and conducted a search of his person which also revealed narcotics. The district court granted Summers’ motion to suppress the evidence and the Michigan Court of Appeals and state Supreme Court affirmed. The Supreme Court reversed. Although they noted that Summers’ initial detention “constituted a ‘seizure’ within the meaning of the Fourth Amendment the Court held that the officers had limited authority pursuant to the validly issued search warrant to detain the occupants of the premises during the search. Id. at 696, 705.

4.06.03 What Constitutes a Seizure?

The leading rule on this subject is articulated in Bostick:

[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.

501 U.S. at 439-40.

The Fourth Amendment principles governing the legality of police-citizen encounters depend on a balancing of the degree to which the police intrude upon the liberty of an individual and the importance of the governmental interests alleged to justify the intrusion. The Fourth Amendment’s prohibition against
searches and seizures that are not supported by some objective justification governs all seizures of the person, “including seizures that involve only a brief detention short of traditional arrest.” U.S. v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); see also Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. at 16-19. Fourth Amendment protection also extends to seizure of property. See Payton v. New York, 445 U.S. 573, 585 (1980); see infra §4.13 Seizure of Property.

Voluntary interaction between the state and its citizens, as well as police-initiated contact which a reasonable person would not feel compelled to continue, do not implicate Fourth Amendment protections. See, e.g., U.S. v. Berry, 670 F.2d 583, 590 (5th Cir. 1982) (Unit B) (en banc). A seizure can take place when there is an actual detention, or in other situations where there is intimidating or threatening law enforcement presence, display of a weapon, show of authority by the police, physical contact or touching with a suspect by the police, or use of language or tone of voice implying that one was not free to leave. See U.S. v. Mendenhall, 446 U.S. 544, 553-55 (1980). A “seizure” of the person must be supported by probable cause unless it falls within a narrow exception to the probable cause requirement reserved for police activity that does minimal violence to the “sanctity of the person.” Reasonable suspicion suffices for seizures in this category. Dunaway v. New York, 442 U.S. 200 (1979) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). When counsel is presented with a Fourth Amendment violation, he or she should always seek to emphasize the intrusiveness of the encounter as the facts allow.

Beginning with Terry, the Supreme Court has repeatedly recognized that the Fourth Amendment’s proscription of unreasonable “seizures” protects individuals during encounters with police that do not give rise to an arrest. Terry recognized that when a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. The Court rejected the notion that a stop “is outside the purview of the Fourth Amendment because . . . [it is not a] ‘seizure’ within the meaning of the Constitution.” Terry, 392 U.S. at 16 (footnote omitted). The Court concluded that “the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.” Id. at 18 n.15. The Court noted, however, that “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” Id. at 19 n.16.

In U.S. v. Mendenhall, 446 U.S. 544 (1980), the Court articulated the appropriate test to apply when determining if a seizure has occurred. Justice Stewart explained that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Id. at 554. Not all police contacts with citizens, however, are deemed “seizures.” A seizure can also occur when there has been no attempt to leave. The Court, however, has been very careful not to create a bright-line rule in this area of search and seizure law. Rather, whether a seizure has occurred is an issue decided on a case-by-case basis.

Stationing agents at factory doors while individuals were being questioned within does not amount to a seizure of the work force. See INS v. Delgado, 466 U.S. 210 (1984). Under the Court’s analysis,
since there was no seizure of the work force by virtue of the method of conducting the factory surveys, the issue of individual questioning of the workers could be presented only if someone had in fact been seized. The questioning of each respondent, however, was held to be nothing more than a brief encounter.

_Michigan v. Chesternut_, 486 U.S. 567 (1988), provided an objective standard to the seizure doctrine. The Court held that police do not seize a motorist if they merely drive alongside of him and do not use a siren or otherwise interfere with his ability to proceed. _Id._ at 572-75. Adopting a “reasonable person” standard, the Court suggested an analysis that would be more consistent than looking at every “particular individual’s response to the actions of the police.” _Id._ at 574. Rather, the Court recognized “[t]he test’s objective standard -- looking to the reasonable man’s interpretation of the conduct in question.” _Id._. The rationale behind this objective standard was that the police would be able to “determine in advance” whether the conduct would result in a seizure.

Government conduct not actuated by either an investigative or administrative purpose is not a “search” or “seizure” for Fourth Amendment purposes. _U.S. v. Attson_, 900 F.2d 1427, 1431 (9th Cir. 1990). In _Attson_, the Ninth Circuit held that where blood samples are routinely requested for medical reasons, admission of blood alcohol level into evidence was proper because the government’s conduct was not prompted by an investigative or administrative purpose. _Id._ at 1433. _See also U.S. v. Chukwubike_, 956 F.2d 209 (9th Cir. 1992) (surgical intervention for medical purposes not a search or seizure).

The next major impact on seizure law was the Supreme Court’s decision in _California v. Hodari D._, 499 U.S. 621 (1991). The Court considered whether an individual who does not yield to a “show of authority” is “seized” for Fourth Amendment purposes. While patrolling a high crime area, plain clothes officers with “police” labeled on their jackets observed several young men gathered around a car. When the men noticed the police approaching, they ran. As the officers gave chase, Hodari threw away what appeared to be a small rock. The officers tackled Hodari, and discovered that the discarded rock was crack cocaine. The Court held that the mere show of authority does not necessarily mean a seizure has occurred even though the subject does not yield. _Id._ at 626. The Court further held that the defendant was not under arrest until the police officer physically overcame the defendant and tackled him, because there had been no previous “show of authority” indicating that Hodari had to stop. _Id._. An arrest requires either physical force or, in its absence, submission to the assertion of authority. _Id._.

Activation of a marked law enforcement vehicle's overhead lights is not an innocuous “show of authority” to be analyzed under the _Mendenhall-Chesternut_ objective “totality of the circumstances” test; rather, it is a direct application of police authority designed to restrict the freedom of movement of an identifiable vehicle. _See Brower v. Inyo County_, 489 U.S. 593, 597 (1989) (police officers overtly acted to restrain an individual’s liberty “through means intentionally applied”); _U.S. v. Santamaria-Hernandez_, 968 F.2d 980 (9th Cir. 1992) (seizure occurs when police physically subdue a subject at the end of a car chase, not when the police activate their lights and sirens; further, if the subject does not yield to show of authority, no seizure occurs). _Cf. U.S. v. Chan-Jimenez_, 125 F.3d 1324 (9th Cir. 1997) (after pulling behind defendant with flashing lights and identifying himself as a police officer, defendant was seized when the officer retained his identification documents, kept his hand on his revolver and proceeded to investigate him).
Florida v. Bostick, 501 U.S. 429 (1991), offered yet another context in which to analyze what constitutes a seizure. In Bostick, sheriffs encountered bus passengers who were asked for permission to search their luggage during drug interdiction efforts. Without any articulable suspicion, officers asked Bostick for his ticket and identification and promptly returned them. Though advising Bostick of his right to refuse consent and at no time threatening him, the sheriffs again requested consent to search his luggage. Bostick consented and the resulting search yielded cocaine. The Florida Supreme Court suppressed the evidence. It ruled that Bostick had been seized because a reasonable passenger on the bus in his situation would not have felt free to leave to avoid questioning by the police. The Supreme Court reversed and held that the lower court erred in focusing on the “free to leave” test. There is no per se rule that every encounter on a bus constitutes a seizure within the meaning of the Fourth Amendment. The mere fact that Bostick did not feel free to leave did not mean that he had been seized. The confinement of his movements resulted from his decision to take the bus, and not whether the police conduct at issue was coercive. Here, the appropriate inquiry is whether a reasonable person would feel free to decline the officer’s request or otherwise end the encounter. See also U.S. v. Gonzales, 979 F.2d 711 (9th Cir. 1992) (police permitted to approach bus passenger without articulable suspicion, seek identification and consent to search luggage as long as officer does not imply mandatory compliance).

In Soldal v. Cook County, Illinois, 506 U.S. 56 (1992), the Supreme Court extended the meaning of seizure to address areas where an owner’s privacy interest was not invaded. In Soldal, petitioners brought action under 42 U.S.C. §1983, claiming that property owners, Terrace Properties and Hale (“Terrace”), had conspired with Cook County deputy sheriffs to unreasonably seize and remove their mobile home from the Terrace mobile home park. Terrace had lawfully initiated eviction proceedings against the Soldal family but had obtained no judge’s order for the eviction. Nevertheless, they arranged to have deputies present while Terrace employees forcibly removed the trailer home from its foundation two weeks prior to the scheduled eviction hearing. The Supreme Court held that the seizure and removal of the trailer home implicated petitioner’s Fourth Amendment rights. See infra §4.13 Seizure of Property.

4.07 REASONABLE SUSPICION / PROBABLE CAUSE

Once it is determined that a stop is indeed a “seizure” warranting Fourth Amendment protection, then there must be a determination regarding reasonable suspicion or probable cause. The two are different standards applicable to different factual scenarios and the justification for one may or may not equate to that for the other. It is clear that not all seizures of the person or an inanimate object must be justified by probable cause. Which standard to apply depends on whether the encounter is a stop, arrest, or a search.

4.07.01 Reasonable Suspicion Defined

In Terry v. Ohio, 392 U.S. 1 (1968), the Court held that certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. Reasonable suspicion is a lesser standard than probable cause. Alabama v. White, 496 U.S. 325, 330 (1990). It can be established with information that is different in quantity or content and it can also arise from information that is less reliable. Id. The Supreme Court has used the “totality of the

The Second Circuit rendered a practical definition of this rather amorphous term:

Although the concept of reasonable suspicion is not susceptible to precise definition . . . the requisite level of suspicion to make an investigative stop is considerably less than the proof of wrongdoing by a preponderance of the evidence . . . Still, the Fourth Amendment requires some minimal level of objective justification for making the stop . . . Consequently, an officer’s inchoate suspicion or mere hunch is insufficient to justify a \textit{Terry}-type stop.


In other words, an officer must be able to articulate facts that a suspect has been engaged or is about to engage in a crime. For example, the Supreme Court has held that an anonymous tip, corroborated by independent investigation, gave reasonable suspicion for a stop where the tip provided information as to the specific time the defendant would be leaving a certain address, a description of the automobile the defendant was driving, what motel she would be going to, and that she possessed an ounce of cocaine inside a brown briefcase. \textit{Alabama v. White}, 496 U.S. 325 (1990). Although the tip standing alone would not have provided sufficient reasonable suspicion to justify the stop, the tip had carried sufficient “indicia of reliability,” and had been sufficiently corroborated to furnish the requisite reasonable suspicion that the defendant was engaged in criminal activity even though the stop was effected prior to defendant reaching the motel. \textit{Id.}

Reliance on a flyer issued by another department was reasonable to support an investigatory stop and the admission of the evidence found during the stop. \textit{U.S. v. Hensley}, 469 U.S. 221, 232 (1985). If the flyer was issued on the basis of articulable facts supporting a reasonable suspicion that the person wanted committed an offense, then reliance on the flyer justified the stop to check identification, to pose questions, or to detain the person briefly while attempting to obtain further information. \textit{Id.}

An anonymous tip that a person is carrying a gun cannot justify a \textit{Terry} stop. \textit{Florida v. J.L.}, 529 U.S. 266, 120 S. Ct. 1375 (2000). Because there was no corroboration, the mere description of someone’s clothing was insufficient. The tip “provided no predictive information and therefore left the police without means to test the informant’s knowledge and credibility.” \textit{J.L.}, 120 S.Ct. at 1376. The Court did leave open the possibility that a tip without a corroboration might be sufficient for a stop if the subject of the tip is a bomb or if the firearm is alleged to be in a school or an airport. \textit{See also U.S. v. Thomas}, 211 F.3d 1186 (9th Cir. 2000) (tip to FBI agent that he “might want to pay particular attention to a certain house” based on a “suspicion that there was a possibility that there might be some narcotics” lacked indicia of reliability and was to vague to support reasonable suspicion).
An individual that is unaware, or that cannot answer questions, concerning his or her exact location or destination does not support a Terry stop, since it does not indicate that a crime has been committed or is about to be committed. *U.S. v. Corona*, 661 F.2d 805, 807 (9th Cir. 1981). The court analogized this case to the stop in *Brown v. Texas*, 443 U.S. 47 (1979), where there was also no founded suspicion that the defendant, though in a high crime area, was armed and dangerous. See also *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1983) (no articulable objective facts that person was alien illegally in this country), republished as modified on reh’g, 748 F.2d 539 (9th Cir. 1984).

### 4.07.02 Probable Cause Defined

Probable cause is required for an arrest. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). Although the existence of probable cause must be determined with reference to the facts of each case, in general, probable cause to arrest exists when officers have knowledge or reasonably trustworthy information of facts and circumstances sufficient to warrant a person of reasonable caution to believe that: (1) an offense has been or is being committed; and (2) by the person to be arrested. *Dunaway v. New York*, 442 U.S. 200, 208 & n.9 (1979)(citations and quotations omitted); *Beck v. Ohio*, 379 U.S. 89 (1964). The constitutional protection against an illegal arrest or search, however, obviously will vary greatly as no two factual patterns are exactly the same. See §4.10 Arrest.

Probable cause can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the arrest when there is some degree of communication between both parties. See *U.S. v. Webster*, 750 F.2d 307, 319 (5th Cir. 1984); *U.S. v. Ashley*, 569 F.2d 975, 983 (5th Cir. 1978). The government, however, may not bootstrap probable cause from the innocent act of a police officer following instructions to arrest. *Whitely v. Warden*, 401 U.S. 560 (1971). When the arresting officer has no personal knowledge of any of the facts establishing probable cause, then the officer who issues the directive must have probable cause to arrest. Where the arresting officer with some personal knowledge of facts, which standing alone do not establish probable cause, adds information known by other officers, then probable cause to arrest exists. *Webster*, 750 F.2d at 323; *U.S. v. Allison*, 616 F.2d 779, 782 (5th Cir. 1980).

In *Ornelas v. U.S.*, 517 U.S. 690 (1996), the Supreme Court addressed the complexity involved in assessing reasonable suspicion and probable cause. The thrust of the Court’s holding was that the determination of either probable cause or reasonable suspicion is based on two things: (1) a determination of the historical facts leading up to the encounter; and (2) a mixed question of law and fact of whether the historical facts from the reasonable officer’s point of view amount to reasonable suspicion or probable cause. *Id.* at 695-97. Although *Ornelas* primarily discussed the issues of probable cause and reasonable suspicion in the context of appellate review (holding that the review should be de novo), the Court reiterated its precedent noting that the concepts of probable cause and reasonable suspicion do not lend themselves to a precise definition. *Id.* at 695. Rather, they are fluid concepts that must be determined on a case-by-case basis. *Id.*

### 4.07.03 Drug Courier Profile
Perhaps the most tenuous basis for reasonable suspicion is the drug courier profile, which has a "chameleon-like way of adapting to any particular set of observations." *U.S. v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., with whom Brennan, J., joined, dissenting) (quotations and citations omitted). Initially the Supreme Court expressed doubt about allowing citizens to be stopped because their behavior, while consistent with innocence, supposedly also fit the profile of drug couriers. *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam). In *Sokolow*, however, the Court embraced the practice of stopping people who meet those criteria and held that fitting a detailed profile can amount to reasonable suspicion. There, the Court found that DEA agents had reasonable suspicion of drug trafficking to stop a traveler between Honolulu and Miami, who had paid $2,100 cash for two round-trip tickets, stayed in Miami only 48 hours, used a phone number listed under another name, did not check his luggage and wore a black jumpsuit and gold jewelry.

In *U.S. v. Berry*, 670 F.2d 583 (5th Cir. 1982) (Unit B) (en banc), the court held that an airport stop based on a drug courier profile will be a seizure if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 595 (quoting *U.S. v. Mendenhall*, 446 U.S. at 554). Specific factors to be examined are whether the officer: (1) blocks the defendant’s path or intercepts him to prevent progress; (2) retains a ticket; (3) states that the individual is suspected of smuggling drugs; and (4) informs the defendant that an innocent person would cooperate with the police. *Id.* at 597. The court also found that airport stops of individuals by police, if restricted in scope and conducted in a completely non-coercive manner, do not involve the Fourth Amendment.

4.08 STOPs

The fundamental confrontation between the law enforcement officer and the innocent citizen or possible suspect has become a focal point of the law of search and seizure. Something less than probable cause is required for the momentary stop and questioning. Because a stop cannot be justified by subsequent events, the founded suspicion must be based solely upon those facts and circumstances known to the officers at the time of the stop. *U.S. v. Patterson*, 648 F.2d 625, 634 n.25 (9th Cir. 1981).

4.08.01 *Terry v. Ohio*

The leading case on stops, rather than questioning, is *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22. The practical effect of *Terry* is that despite the seizure of the individual, the fundamental right (duty) of an officer to safely investigate potential crime outweighs a minimal intrusion on the suspect. If the officer has a reasonable suspicion to believe that there is some criminal activity afoot, he may stop an individual and conduct a protective pat-down frisk to determine if the suspect is armed. See §4.08.02 Stop and Frisk. The *Terry* "stop" is only proper where the officer has reason to believe that the person is armed and dangerous. *Id.* at 27.

A *Terry* stop is also known as an "investigative detention." The basis of these stops, as noted above, is a reasonable suspicion that some criminal activity has occurred. The purpose of the stop is to
allow an officer the opportunity to follow-up on suspected criminal activity. Although *Terry* serves as a justification for many day-to-day seizures, in theory it is narrowly proscribed. *Terry* stops must be limited in scope to the justification for the stop. *Terry*, 392 U.S. at 29. Officers may ask the detained individual questions during the *Terry* stop in order to dispel or confirm suspicions. The Court in *Berkemer v. McCarty*, 468 U.S. 420 (1984), noted that “an officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information conforming or dispelling the officer’s suspicions. But the detainee is not obliged to respond. And, unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released.” *Id.* at 439-40. A seizure that goes beyond *Terry’s* limited scope, must be supported by probable cause in order to withstand constitutional challenge. See *Royer v. Florida*, 460 U.S. 491, 496 (1983). See infra §4.10 Arrest and §4.10.02 Stop Versus Arrest.

A *Terry* stop also must be reasonable. In *U.S. v. Winfrey*, 915 F.2d 212, 216 (6th Cir. 1990), the court noted, “The reasonableness of an investigative stop, then, is a dual inquiry: (1) whether the officers’ conduct is supported by articulable suspicion; and (2) whether the detention and investigative methods used were reasonable under the circumstances.”

Although *Terry* and its progeny created a limited exception, cases like *U.S. v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993), have noted that “[t]he last decade . . . has witnessed a multifaceted expansion of *Terry*.” One of the trends to which the Tenth Circuit was referring was “allowing police to use handcuffs or place suspects on the ground during a *Terry* stop” and courts’ concluding that “such intrusive measures do not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment.” *Id.* at 1463 (citing cases from nine circuits allowing such a practice). *Perdue* is one such case. Officers went in a rural neighborhood in Kansas to execute a search warrant. The premises contained 500 marijuana plants, drug paraphernalia and firearms. *Id.* at 1458. Perdue approached this area and was stopped by officers when they “became suspicious because it was a remote, rural area and anyone using the road was probably visiting the property being searched.” *Id.* The officers ordered Perdue and his pregnant fiancee out of the vehicle with weapons drawn and instructed Perdue to lie on the ground. Perdue was also handcuffed during this encounter while the police questioned him. Although “bordering on an illegal arrest,” this encounter was upheld as a valid *Terry* stop. *Id.* at 1463. The court rationalized this conclusion, particularly the use of force, noting that because the area was so remote that anyone approaching the searched premises was probably connected to the drug activity, thereby suggesting to the officers that Perdue could be armed and dangerous. *Id.* at 1465.

4.08.02 Stop and Frisk

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

In determining the reasonableness of stopping an individual suspected of criminal activity and patting him down, courts weigh the intrusion on the individual’s liberty against the need for officer safety and effective law enforcement. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968). In developing this balance, the Court explained, “It is quite plain that the Fourth Amendment governs ‘seizures’ of a person which do not eventuate a trip to the station house . . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry*, 392 U.S. at 16.

*Terry* requires “a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989). Questioning may be used to dispel the notion that a crime has been or is about to be committed. *Terry*, 392 U.S. at 1. The officer need not advise the detained citizen that s/he is free to leave before engaging in consensual interrogation. *Ohio v. Robinette*, 519 U.S. 33 (1996).


While presence in a high crime area is not enough to justify a *Terry* stop, headlong and unprovoked flight after seeing police officers combined with presence in a high crime area does justify an investigatory stop. *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673 (1999).
4.08.02.01 Conduct Amounting to Seizure

Mere questioning is neither a search nor a seizure. *U.S. v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993). Some encounters between law enforcement and private citizens are consensual, and are outside of the Fourth Amendment’s protection. *Cf. U.S. v. Little*, 60 F.3d 708 (10th Cir. 1995) (accusatory, persistent and intrusive questioning can turn a voluntary encounter between a citizen and a police officer into a coercive encounter, thus turning a stop into a seizure). The fact that a police officer identifies himself as an officer does not in itself convert the encounter into a seizure. *Florida v. Royer*, 460 U.S. 491, 497 (1983). *But see U.S. v. Osborn*, 203 F.3d 1176 (9th Cir. 2000) (police questioning friend of son who was suspected of threatening to kill mother, at mother’s home, amounted to a seizure; officer had a duty to question further in that situation).

A slight physical touching of a suspect by a police officer, effectuated under circumstances falling short of probable cause, did not in itself transform a lawful *Terry* stop into an unlawful *de facto* arrest in *U.S. v. Zapata*, 18 F.3d 971 (1st Cir. 1994). Officers had reasonable suspicion when they approached Zapata, including an informant’s tip that Zapata was trafficking drugs, observations made during surveillance, and the elusive manner in which Zapata drove. *Id.* at 974. One officer patted Zapata’s back, apparently to get his attention. *Id.* The court rejected Zapata’s argument that *Hodari D.* created a rule that any application of physical force is an arrest. *Id.* at 976. The court pointed out that a *Terry* stop will often include a pat down, and that *Terry* is applicable precisely in the situation where there is not probable cause for an arrest. *Id.* at 977. *See also U.S. v. Dotson*, 49 F.3d 227 (6th Cir. 1995) (after valid *Terry* stop, officer placing hands on defendant’s shoulder to counteract a flight attempt did not make the stop an arrest).

Officers may draw weapons as part of a valid *Terry* stop where making the stop may endanger the officers. *U.S. v. McMurray*, 34 F.3d 1405 (8th Cir. 1994). However, where defendant has been stopped at gunpoint, the stop has a heightened degree of intrusiveness, and should be carefully scrutinized under the Fourth Amendment. *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996).

Detaining a drug suspect for 10 to 15 minutes while waiting for DEA agents to arrive has been held not to be an unreasonably long *Terry* stop. *U.S. v. Winfrey*, 915 F.2d 212 (6th Cir. 1990). An investigative detention consisting of 15 minutes of questioning, accompanied by travel for two miles to the border and an additional 15 to 20 minutes of questioning at the border checkpoint, was found to comply with the Fourth Amendment. *U.S. v. Pollack*, 895 F.2d 686 (10th Cir. 1990).

4.08.02.02 Grounds Required to Frisk

*Terry* allows an officer to conduct a weapons frisk where he or she has reasonable suspicion that a person possesses a weapon. *Terry* does not, however, allow an officer to frisk for weapons on less than reasonable suspicion directed at the person to be frisked, even if that person is on the premises when an authorized narcotics search is taking place. *Ybarra v. Illinois*, 444 U.S. 85 (1979). Thus, a two part inquiry is called for in determining whether an investigative detention and protective pat down were permissible: (1) was the officer justified in initially detaining the individual based on specific and articulable
facts; and (2) were specific and articulable facts suggesting that the individual presented a threat of harm to the officer or others articulated in order to justify the pat down? Additionally, the investigative methods employed during the detention should be examined to assure that they were minimally intrusive. *U.S. v. Holzman*, 871 F.2d 1496, 1501 (9th Cir. 1989), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990).

In *U.S. v. Michelletti*, 13 F.3d 838 (5th Cir. 1994) (en banc), the court found that the Fourth Amendment was not violated where an officer lightly frisked defendant’s pants pocket. Defendant had his hand in the pocket, had potentially broken the law by leaving a bar with a beer in his other hand, and defendant was walking toward a group of people gathered behind the building where the bar was located. The court stressed that the decision rested on the reasonableness of the officer’s decision to frisk. While stating that *Terry* still requires particularized suspicion that someone is armed and presents a danger to the officer or others to justify a frisk, the court simultaneously stated that the number of police officers killed annually had tripled since the *Terry* decision, and the number of officers assaulted and wounded in the course of duty had risen by a factor of twenty. *Id.* at 844. This information apparently, but not explicitly, indicated that courts may require lesser showing of reasonable suspicion as a result.

The fact that defendant exited the mens’ room near a table where a gun had been seized, combined with the fact that defendant was a patron in a neighborhood bar where people were likely to know one another, was insufficient to support specific and articulable facts to justify the frisk of defendant in *U.S. v. Jaramillo*, 25 F.3d 1146 (2d Cir. 1994). Without a showing of specific and articulable facts as to Jaramillo in particular, the record developed at the suppression hearing was insufficient to support the frisk, and the conviction was vacated. *Id.*

Where a police officer explained that he searched a counterfeiting suspect “basically for my own safety,” and added that he (the officer) was alone, investigating a felony, and that the suspect was “a pretty big guy,” there were insufficient facts presented to justify a frisk. *U.S. v. Thomas*, 863 F.2d 622, 628 (9th Cir. 1988). In its decision, the Ninth Circuit explained that “a lawful frisk does not always flow from a justified stop.” *Id.* at 627.

After a valid *Terry* stop, officers’ knowledge of the detainee’s criminal record is insufficient by itself to provide reasonable suspicion to search. *U.S. v. Lee*, 73 F.3d 1034, 1039 (10th Cir. 1996).

**4.08.03** Types of Searches Allowed Under *Terry*

Under *Terry*, evidence which may result from a frisk is not limited to weapons. The Supreme Court has found that if an officer discovers an object “whose contour or mass” makes it readily identifiable as contraband during a pat-down search, seizure of the contraband is justified. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). But see *U.S. v. Gibson*, 19 F.3d 1449, 1451 (D.C. Cir. 1994) (no probable cause for further search arose where officer felt hard, flat, angular object in suspect’s pocket).

*Terry* has been significantly expanded to allow for more than a pat down of a suspect pursuant to a valid stop. In *U.S. v. Place*, 462 U.S. 696 (1983), the Court held that *Terry* principles apply to permit
a warrantless seizure of personal luggage on the basis of less than probable cause. This is permissible for the purpose of conducting a limited investigation, short of opening the luggage, when this investigation will quickly confirm or dispel the authorities suspicion.

In *Place*, an investigative detention of the defendant’s luggage was permissible on less than probable cause. Exposing the luggage to a trained narcotics dog was permissible, and was a limited intrusion on Place’s privacy, since this did not entail opening the luggage. Since Place’s luggage was detained for 90 minutes, however, the Fourth Amendment was violated, as this seizure lasted for an unreasonable amount of time. *Id.* at 709.

A canine sniff of a drug suspect’s commercial warehouse did not constitute a search in *U.S. v. Lingenfelter*, 997 F.2d 632, 637 (9th Cir. 1993). Since there was no search, a warrant, probable cause or reasonable suspicion was not required prior to the sniff. *Id.* at 639. The Ninth Circuit further held that where a canine alerts, this alone can supply probable cause for issuance of a search warrant, so long as the warrant affidavit established the dog’s reliability. *Id*; *but see U.S. v. Rivas*, 157 F.3d 364 (5th Cir. 1998) (canine sniff of a vehicle suspected of carrying drugs resulting in the canine “casting” toward the vehicle, which is less than an alert, did not establish reasonable suspicion for the non-routine search of drilling into the vehicle).

A permissible search may be invalid where the officer performing the search goes beyond the scope of what it permitted. For example, in *U.S. v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994), an officer searched Ashley pursuant to Ashley’s consent and found crack rocks concealed under two pair of pants and a pair of underwear in Ashley’s groin area. One question presented on appeal was whether the search, which involved reaching into Ashley’s underpants, was impermissibly invasive under the circumstances. The trial court had stated that under *Dickerson’s* “plain touch” doctrine, the question was whether the searching officer’s suspicion had reached the point of “probable cause” necessary for further searching. *See supra §4.16 Warrantless Searches.* The court held that since precautions were taken to prevent Ashley from public embarrassment, the seizure of the drugs did not add significantly to the invasion of privacy involved in the initial pat-down search. *Id.* at 682.

**4.08.04 Vehicle Stops**

Stops of a vehicle can also be considered seizures and accorded Fourth Amendment protection “even though the purpose of the stop is limited and the resulting detention quite brief.” *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *U.S. v. Sharpe*, 470 U.S. 675, 682 (1985). If an officer believes that “the vehicle’s occupants were, are, or will be engaged in criminal activity,” he or she may stop the car to investigate. *U.S. v. Kimball*, 25 F.3d 1, 6 (1st Cir. 1994) (citations omitted); *see also U.S. v. Hensley*, 469 U.S. 221, 229 (*Terry* stop permissible to determine if occupant “was involved in or is wanted in connection with a completed felony”). The dual inquiry noted in *Terry* is the same in the context of a vehicle stop: was the officer’s action justified at its inception and was it reasonably related in scope to the circumstances justifying the stop in the first place. *Terry*, 392 U.S. at 20. *Prouse* classified these stops as seizures because they “interfere with freedom of movement, are inconvenient, and consume time . . . [and] may create substantial anxiety.” *Prouse*, 440 U.S. at 657 (comparing a traffic stop to a “roving -
patrol stop”). An investigatory stop of a vehicle does not only affect the driver, rather, “all occupants of that vehicle are subjected to seizure, as defined by the Fourth Amendment.” Kimball, 25 F.3d at 5. See also U.S. v. Twilley, 222 F.3d 1092 (9th Cir. 2000) (noting that while a passenger does not have legitimate expectation of privacy sufficient to challenge a search, he or she may challenge the initial stop, and move to suppress any evidence seized as fruit of the poisonous tree).

As with pedestrian stops, a vehicle stop must be supported by reasonable suspicion and “analyzed under the framework established by Terry v. Ohio.” U.S. v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993). See also Prouse, 440 U.S. at 663. “An ordinary traffic stop is a limited seizure, however, and is more like an investigative detention than a custodial arrest.” U.S. v. Walker, 933 F.2d 812, 815 (10th Cir. 1991). If the stop is extended and the occupants detained, there must be additional reasonable suspicion to support the seizure. See U.S. v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996); U.S. v. Cummins, 920 F.2d 498, 502 (8th Cir. 1990). The Sixth Circuit, however, has held that the Fourth Amendment doesn’t require a police officer to release a lawfully detained driver without further questioning once he or she has determined that the driver has not committed the criminal conduct for which he was initially detained. U.S. v. Erwin, 155 F.3d 818, 820 (6th Cir. 1998) (en banc), cert. denied, 522 U.S. 1100 (1999) (where deputies had reasonable suspicion that defendant may have been drug dealer, then officers could justifiably detain him after being satisfied that he was not intoxicated, the initial reason for the stop). The Ninth Circuit has found, however, that an encounter which is commenced as a traffic stop is not deemed consensual unless the driver’s documents have been returned to him. U.S. v. Lee, 73 F.3d 1034, 1040 (10th Cir. 1996) (where consent to search was requested and obtained before license was returned, consent was not voluntary).

The majority of these stops are rationalized as traffic stops, and if the officer states a legitimate reason, most courts will uphold the stop regardless of the degree of the infraction. See U.S. v. Cummins, 920 F.2d at 500 (“[w]hen an officer observes a traffic offense -- however minor -- he has a probable cause to stop the driver of the vehicle . . .”). The Supreme Court noted in Whren v. U.S., 517 U.S. 806 (1996), that “the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” Id. at 810. See supra §4.08.04.01 Pretextual Stops.

The Ninth Circuit has ruled that there is no good-faith exception to the requirement of reasonable suspicion where the officer stops the vehicle under a mistaken belief that the defendant was violating the law concerning the placement of Mexican registration tags. See U.S. v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir. 2000).

A suspicion based on a mistake of law cannot support reasonable suspicion required for a valid traffic stop. U.S. v. Twilley, 222 F.3d 1092 (9th Cir. 2000) (stop invalid where officer pulled over car because he mistakenly believed that the driver had violated California law by displaying only one license plate).

A reasonable, good faith mistake of fact, however, may provide reasonable suspicion for a traffic stop. See U.S. v. Wallace, 213 F.3d 1216 (9th Cir. 2000) (where officer stops a vehicle because he
mistakenly believed the windows were overly tinted, probable cause exists to believe the degree of window
tinting was unlawful and it is irrelevant that the officer’s belief was erroneous). See also U.S. v. Garcia-
Acuna, 175 F.3d 1143 (9th Cir.), cert. denied, 120 S. Ct. 550 (1999) (district court may consider
the officer’s factually erroneous, but reasonable, belief that the vehicle displayed license plates that did not
belong to it).

Some factors supporting reasonable suspicion used to justify traffic stops are: vehicle driving in area
of suspicious activity, U.S. v. Ordaz, 145 F.3d 1111 (9th Cir. 1998); tailgating, U.S. v. Patch, 114 F.3d
131, 134 (9th Cir. 1997); a broken rear vent window, U.S. v. Jackson 113 F.3d 249, 251 (D.C. Cir),
cert. denied, 522 U.S. 901 (1997); blocking traffic, U.S. v. Stanfield, 109 F.3d 976, 978 (4th Cir.),
See also U.S. v. Mattarolo, 209 F.3d 1153 (9th Cir. 1999) (officer was parked on a dark street after
midnight known for crime, spotted a pickup truck in the driveway of a closed construction cite with a crate
in the back, subsequent stop and pat-down the driver and ultimate search of the truck was valid based on
reasonable suspicion). But see U.S. v. Jimenez-Medina, 173 F.3d 752 (9th Cir. 1999) (no objective
basis to stop vehicle with local license plates and Mexican registration in alien smuggling area); U.S. v.
Toro-Pelaez, 107 F.3d 819, 825 (10th Cir. 1997) (although a traffic violation occurred, it was not
asserted as justification for the stop, therefore the stop had to be supported by reasonable suspicion of
some other criminal activity to comport with the Fourth Amendment); U.S. v. Wilson, 205 F.3d 720 (4th
Cir. 2000) (en banc) (traffic stop simply because vehicle had temporary tags is unconstitutional stop); U.S.
v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000) (no reasonable suspicion to stop vehicle when officer
erroneously believed registration decal was not properly displayed); U.S v. Thomas, 211 F.3d 1186 (9th
Cir. 2000) ("sound" of marijuana being dropped into the back of a truck does not constitute reasonable
suspicion); U.S. v. Arvizu, 217 F.3d 1224 (9th Cir. 2000) (fact that minivan slowed as it approached
Border Patrol vehicle, and fact that children waved without turning around, are irrelevant to reasonable
suspicion inquiry).

An Iowa statute provided that Iowa police officers having cause to believe that a person has
violated any traffic or motor vehicle equipment law may arrest the person and immediately take the person
before a magistrate. Upon stopping Knowles for speeding and issuing a citation, but not arresting him, the
officer conducted a full search of the car and found marijuana and a pipe. Knowles v. Iowa, 525 U.S. 113
(1998). The Court held that once Knowles was stopped for speeding and issued a citation, all the evidence
necessary to prosecute the offense was obtained. The Court also held that a “search incident to citation”
is not per se justified. See §4.08.04.01 Pretextual Stops.

4.08.04.01 Pretextual Stops

“A pretextual stop occurs when the police use a legal justification to make the stop in order to
search a person, place, or to interrogate a person, for an unrelated serious crime for which they do not have
the reasonable suspicion necessary to support a stop.” U.S. v. Guzman, 864 F.2d 1512, 1515 (10th Cir.
1988), overruled by U.S. v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995) on grounds that
subjective test is “unworkable.” See also U.S. v. Rivera, 867 F.2d 1261, 1263 (10th Cir. 1989) (stop
is merely pretextual “when police lack the reasonable suspicion necessary to support a stop, but use a
minor violation to support a stop in order to search a person or place for evidence of an unrelated serious crime.”).

Pretextual traffic stops are no longer unconstitutional, so long as the stop for the underlying offense is valid. *Whren v. U.S.*, 519 U.S. 408 (1997). In light of *Whren*, the term “pretextual stop” is meaningless, since the only area of inquiry is the objective circumstances surrounding the arrest, not the officer’s subjective intent. *U.S. v. Williams*, 106 F.3d 1362 (7th Cir. 1997). In *Whren*, plainclothes District of Columbia police became suspicious when they observed Whren and his passenger Brown, two young black men, in a Pathfinder with temporary license plates. After waiting at a stop sign for an “unusually long time -- more than 20 seconds,” Whren made a sudden right turn and was stopped for failure to use his turn signal. The stop revealed the presence of several forms of illegal drugs. Whren’s pretrial motion to suppress was denied and the court held that the officer’s actions were consistent with a normal traffic stop. *Id.* at 809. The Supreme Court affirmed Whren’s conviction and rejected his argument that the test should not be whether there was probable cause for the stop but rather, whether a reasonable officer would have made the stop for the given reason. Whren argued that minor traffic violations occur quite frequently and would thus provide a “means of investigating other law violations, as to which no probable cause or even reasonable suspicion exists.” *Id.* at 810. The Court, however, analyzed its precedents and concluded that there was no support for the argument that “the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.” *Id.* at 813. The Court essentially refused to inject a subjective analysis into objectively justifiable behavior under the Fourth Amendment.

An objective test is used to examine the officers motives in a case involving a pretextual stop; “the actual motivations of the individual officers involved” are irrelevant. *Whren*, 517 U.S. 806. Thus, as long as the stop is legitimated by some sort of illegal conduct, the motivation of the officer is irrelevant. The Ninth Circuit has also adopted an objective standard and held that:

[1]n order to determine the lawfulness of a traffic stop, the trial court need only find that (1) under the circumstances a reasonable officer would stop the suspect for violation of a specified law, and (2) it was within the detaining officer’s scope of responsibility to enforce the law. The trial court need not answer the more specific question of whether a reasonable officer assigned to the particular duties of the detaining officer would stop the suspect.

*U.S. v. Robles-Alvarez*, 75 F.3d 559, 561 (9th Cir. 1996).

In *U.S. v. Castro*, 166 F.3d 728 (5th Cir.) (en banc) (per curiam), *cert. denied*, 120 S. Ct. (1999), the Fifth Circuit reversed an earlier panel decision which had concluded that the police officer had conducted an unreasonable seizure by stopping and arresting the defendants for a seat belt violation as a pretext to impound their car and search for contraband. In *Castro*, the arresting officer was instructed to watch for the defendants’ vehicle and “develop his own probable cause” for stopping it. *Id.* at 730. After following the vehicle for several miles on the highway, the officer stopped the defendants for speeding and seat belt violations. Although Castro produced a valid driver’s license and a license check revealed no
outstanding warrants, the officer decided to arrest Castro and his passenger for seat belt violations on the basis of nervousness and conflicting statements. *Id.* at 731. After consent to search the vehicle was denied, the officer took the defendants into custody and impounded the car. After Castro again refused to consent to a search, a canine sniff dog was brought to the vehicle and subsequently alerted to the rear. Sitting *en banc*, the Fifth Circuit rejected the defendants’ argument that the impoundment and search of their vehicle exceeded the scope of permissible intrusion under *Terry*. *Id.* at 734. After finding that the officer had reasonable suspicion to stop the vehicle and probable cause to arrest Castro and his passenger for violations of seat belt laws, the court concluded that the impoundment was permissible because it was carried out in “furtherance of a community care taking function.” *Id.* Citing *Whren*, the court rejected the defendants’ argument that the officer’s hidden motives transformed the stop and impoundment into an unreasonable seizure. *Id.*
4.08.04.02 Limitations on Pretextual Stops

Whren is limited in cases involving temporary detentions by Knowles v. Iowa, 525 U.S. 113 (1998). The “search incident to arrest exception” rationale used in Whren does not encompass a “search incident to a citation.” Knowles v. Iowa, 525 U.S. 113, 118 (1998). In Knowles, the Court held unconstitutional an Iowa state law which authorized police officers to conduct a full search of an automobile pursuant to issuing a citation for speeding. The Court reasoned that “[a] routine traffic stop... ‘is analogous to a so-called Terry stop.’” Thus, the rationale underlying the “search incident to arrest” exception -- concern for officer safety and the need to preserve evidence -- is much less compelling in the context of the issuance of a traffic citation. Id. at 488. The Court noted two historical rationales for an exception to the warrant requirement for a search incident to arrest: “(1) The need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.” Id. at 116 (citing U.S. v. Robinson, 414 U.S. 218, 234 (1973)). The Knowles court found that neither exception applied to support the search of the vehicle stopped for speeding. Knowles, at 118. “The threat to officer safety from issuing a traffic citation [] is a good deal less than in the case of a custodial arrest.” Id. at 117. As to preservation of evidence, the Court stated,

[...]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Id. at 118.

4.08.04.03 Stops on the Basis of Race

Race will not provide the reasonable suspicion to justify a Terry stop. See U.S. v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975). Stops made on the basis of race will be found constitutionally impermissible. Id. Courts like those in the Ninth Circuit, however, have noted that “although race or color alone is not a sufficient basis for making an investigatory stop... racial appearance may be considered as a factor contributing to a founded suspicion of criminal conduct.” U.S. v. Fouche, 776 F.2d 1398, 1402-403 (9th Cir. 1985). Fouche involved a broadcast description of the defendant which included his race and color. The court found that those factors were permissible to consider when the police stopped Fouche. Id. at 1402.

In Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994), an agent testified that he stopped a vehicle because the defendant and his father appeared to be “Hispanic,” sat up straight in their seats, did not look at the agents, and were blushing. Further, one of the passengers had a dry mouth and appeared to be nervous. The Ninth Circuit held that a stop based solely on the basis of race egregiously violated the defendant's Fourth Amendment rights. Id. at 1452.

In U.S. v. Rodriguez, 976 F.2d 592 (9th Cir. 1992), agents testified that they stopped Rodriguez while driving a late model Ford on Interstate 8 in Southern California because he looked Hispanic, sat
straight up, kept both hands on the wheel, and looked straight ahead without acknowledging the agents. The agents testified that looking straight ahead was suspicious because all the other motorists and passengers passing by would have arms and feet out the window and would wave at the agents. The Ninth Circuit explained that reasonable suspicion must be founded upon a particularized and objective basis for suspecting the particular person stopped of criminal activity. *Id.* at 593. In this case, explained the court, “[t]he agents tender[ed] innocent driving behavior but ask us to accept it as signifying criminal behavior.” *Id.* at 596.

**4.09 BORDER STOPS AND CHECKPOINTS**

**4.09.01 “Immigration” Checkpoints**

In *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Supreme Court approved stops at permanent border checkpoints in the absence of specific and articulable facts where the purpose of the stop is to ask about citizenship and immigration. *See also U.S. v. Santa Maria*, 15 F.3d 879, 882 (9th Cir. 1994); *U.S. v. Ludlow*, 992 F.2d 260, 262-63 (10th Cir. 1993) (there is no requirement that stops on major routes inland be based on reasonable suspicion); *U.S. v. Ramirez-Lujan*, 976 F.2d 930, 933 (5th Cir. 1992) (border patrol can stop vehicles at checkpoints without reasonable suspicion); *U.S. v. Ramirez-Jiminez*, 967 F.2d 1321, 1324 (9th Cir. 1992) (stop of vehicle was permissible as a stop for brief questioning routinely conducted at permanent checkpoints). Routine stops at temporary checkpoints are also permissible. *See U.S. v. Soto-Camacho*, 58 F.3d 408, 411 (9th Cir. 1995) (a stop conducted at a clearly visible temporary checkpoint pursuant to a routine inspection of all vehicles for illegal aliens is not unreasonable under the Fourth Amendment).

A vehicle may be detained so long as the scope of the detention is limited to a few brief questions about citizenship or immigration status, the production of immigration documents, and a “visual inspection of the vehicle . . . limited to what can be seen without a search.” *Martinez-Fuerte* at 558. *See also U.S. v. Ledesma-Dominguez*, 53 F.3d 1159, 1161 (10th Cir. 1995) (initial questioning regarding citizenship and customs matters may be conducted at either the primary or secondary inspection areas without any individualized suspicion); *U.S. v. Sukiz-Grado*, 22 F.3d 1006, 1008-09 (10th Cir. 1994) (to prevent smuggling of contraband, a routine stop may include a cursory visual inspection of the vehicle as well as brief questions concerning vehicle ownership, destination, and travel plans). If during the inquiry, contraband comes into plain view of agents or probable cause otherwise exists, a warrantless search of the vehicle may be proper. *See infra §4.16 Warrantless Searches.*

No reasonable suspicion is required to refer a vehicle to secondary inspection. *U.S. v. Barnett*, 935 F.2d 178, 179 (9th Cir. 1991); *U.S. v. Pierre*, 958 F.2d 1304 (5th Cir. 1992) (en banc); *U.S. v. Dovali-Avila*, 895 F.2d 206, 207 (5th Cir. 1990) (“the constitutional rights of a traveler on our highways are simply not infringed by the mere requirement that he move his car out of the flow of traffic from the primary area to the secondary area”). Agents may also make referrals to conduct inquiries about controlled substances. *U.S. v. Hernandez*, 976 F.2d 929 (5th Cir. 1992). *See also U.S. v. Koshnevis*, 979 F.2d 691 (9th Cir. 1991) (border patrol agent had probable cause to search trunk of car where defendant appeared nervous and made inconsistent statements). Detention for a dog sniff is also permissible. *See
The Fourth Amendment and the Exclusionary Rule

4.09.02 Roving Border Patrol

Roving border patrol stops require reasonable suspicion. The only place where individualized suspicion is not required for a brief investigatory detention is at a fixed checkpoint. Otherwise, there must be a reasonable and articulable suspicion that the person seized is engaged in criminal activity. In *U.S. v. Olafson*, 203 F.3d 560 (9th Cir. 2000) (a combination of facts, including a sensor being set off, fresh footprints on a trail “notoriously traveled by alien smugglers” leading to a specific address that had been previously involved in alien smuggling, where an agent witnessed a vehicle departing and radioed a second agent describing the vehicle, gave the second agent reasonable suspicion to stop the vehicle); *U.S. v. Chavez-Villarreal*, 3 F.3d 124, 126-27 (5th Cir. 1993) (based on the totality of the circumstances, the detaining officers must have a particularized and objective basis for suspecting the person stopped of criminal activity); *U.S. v. Alarcon-Gonzalez*, 73 F.3d 289, 293 (10th Cir. 1996). In *U.S. v. Garcia-Camacho*, 53 F.3d 244, 249 (9th Cir. 1995), the court stated that “we are not prepared to approve the wholesale seizure of miscellaneous persons, citizens or non-citizens in the absence of well-founded suspicion based on particular, individualized, and objectively observable factors which indicate that the person is engaged in criminal activity.”

The fact that passengers appear to be Hispanic does not, by itself, create the reasonable suspicion required under the Fourth Amendment to conduct a roving border patrol stop. See *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975) (investigative stop of automobile was improper when stop was made merely because three Mexican-looking men were riding in it within a few miles of the Mexican border); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1446 (9th Cir. 1994) (the conduct does not become suspicious simply because the skins of the occupants are nonwhite). However, Mexican appearance is considered a relevant factor when the stop occurs near the United States-Mexico border. See *U.S. v. Lopez-Martinez*, 25 F.3d 1481, 1487 (10th Cir. 1994). One court even went so far as to take judicial notice of the fact that, “Mexican males, driving old model General Motors sedans, blend into the morning commuter traffic to transport tons of Mexican marijuana from ports of entry in small towns along the Arizona-Sonora border.”

*U.S. v. Salinas*, 940 F.2d 392, 394 (9th Cir. 1991) (ultimately finding stop was not justified because there was no basis for the border patrol agents’ suspicion).

The factors which are considered in determining whether “reasonable suspicion” exists to justify stopping a vehicle include, but are not limited to, the following:

1. characteristics of the area;
proximity to the border;
(3) usual patterns of traffic and time of day;
(4) previous alien or drug smuggling in the area;
(5) behavior of the driver, including “obvious attempts to evade officers;”
(6) appearance or behavior of passengers;
(7) model and appearance of the vehicle; and
(8) officer experience.

U.S. v. Garcia-Barron, 116 F.3d 1305, 1307 (9th Cir. 1997) (citing Brignoni-Ponce, 422 U.S. 873 (1975)); U.S. v. Arvizu, 217 F.3d 1224, 1228 (9th Cir. 2000); U.S. v. Montero-Camargo, 208 F.3d 1122, 1136 (9th Cir. 2000) (en banc). In Garcia-Barron, the court found that deliberate evasion of an immigration check-point, coupled with other factors which included the activity taking place at 3 a.m., the unusual route taken, and that the area was known for alien smuggling, gave rise to “reasonable suspicion” under the circumstances to stop the vehicle and see if alien smuggling was indeed taking place. Id. See also U.S. v. John Doe, 701 F.2d 819, 821 (9th Cir. 1983); U.S. v. Robert L., 874 F.2d 701, 702 (9th Cir. 1989).

Courts have found the following facts insufficient by themselves to support reasonable suspicion; absence of license tags, U.S. v. Rodriguez-Rivas, 151 F.3d 377, 381 (5th Cir. 1998); inoperative tail light; U.S. v. Jones, 149 F.3d 364, 370 (5th Cir. 1998); and time of day when vehicle comes through border checkpoint, Jones, 149 F.3d at 370.

While no particular factor is controlling, and the totality of the circumstances governs, the one vital element is that the agent must have had reason to believe that the vehicle had come from the border. As the international border becomes more distant, distance assumes greater significance in the equation used to measure power to stop when there is no articulable suspicion. U.S. v. Venzor-Castillo, 991 F.2d 634, 637-39 (10th Cir. 1993). In Venzor-Castillo, the court held that the stop was unreasonable where it occurred approximately 235 miles from United States-Mexico border on a road that is not a direct route from border and which passes through thirteen New Mexico towns and cities between the nearest border entry and the location of stop. Although there is no bright line rule, a vehicle traveling more than 50 miles from the border is generally regarded as too distant from the border to support an inference that its journey originated at the border. Jones, 149 F.3d at 367. Once a vehicle is a substantial distance from the border, an independent ground of suspicion must justify an agent’s conclusion that the vehicle began its journey there. Id.

Apparent efforts to avoid checkpoints combined with other factors have generally been found to constitute “reasonable suspicion.” U.S. v. Rodriguez-Sanchez, 23 F.3d 1488 (9th Cir. 1994). A “U-turn” type maneuver within sight of a checkpoint being approached gives rise to the reasonable suspicion that it is taken to avoid going through the checkpoint. U.S. v. Ramirez-Lujan, 976 F.2d 930, 933 (5th Cir. 1992) (circumstances of defendant’s U-turn in close proximity to checkpoint generated good faith belief that defendant was attempting to avoid checkpoint); U.S. v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) (en banc) (vehicle’s turnaround prior to reaching checkpoint with tandem driving sufficient to justify stop). But see U.S. v. Chavez-Villarreal, 3 F.3d 124 (5th Cir. 1993) (agent’s observations of a Hispanic
male cautiously driving a popular older model vehicle on an interstate highway 350 miles from Mexican border, at 9:00 a.m., with a passenger who briefly slumped in seat, combined with observations that the vehicle changed lanes, slowed down, and resumed speed, did not constitute reasonable suspicion).

4.09.03 Sobriety Checkpoints

Roadblock stops for the purpose of checking a driver’s license, and for checking the driver’s sobriety, have been upheld against Fourth Amendment challenges. In Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), the Court held that a state’s use of highway sobriety checkpoints does not violate the Fourth Amendment. The Court found the balance of the state’s interest in preventing drunken driving, the extent to which the checkpoint system could be said to advance that interest, and the degree of intrusion upon individual motorists all weighed in favor of the program. In Romo v. Champion, 46 F.3d 1013, 1016 (10th Cir. 1995), the court stated that in determining whether the seizure is unreasonable, the court evaluates the circumstances of the stop and the relevant interests at stake, including the gravity of public concerns served by the seizure, degree to which it advances the public interest and severity of interference with individual liberty. See also McGann v. Northeast Illinois Regional Commuter R.R. Corp., 8 F.3d 1174, 1186 (7th Cir. 1993). The court in U.S. v. Trevino, 60 F.3d 333, 337 (7th Cir. 1995), noted that, “what was dispositive in Sitz was that pursuant to neutral guidelines, uniformed officers conducting the checkpoint stopped every incoming vehicle, and were not at liberty to randomly decide which motorists would be stopped and which would not. In this manner, incoming motorists could observe that the stop was official, and that it was being applied to everyone . . .”

Detention of particular motorists for more extensive sobriety testing may require satisfaction of an individualized suspicion standard. Sitz, 496 U.S. at 451 (1990). In limited instances of motorists who were delayed for significantly more than the brief time it took to conduct the license check and who were told they could not turn around and leave the line before reaching the roadblock, the roadblocks could constitute an unreasonable seizure. Merret v. Moore, 58 F.3d 1547, 1553 (11th Cir. 1995). In addition, the police procedures used to stop vehicles pursuant to a sobriety checkpoint must be reasonable. See e.g. U.S. v. Huguenin, 154 F.3d 547, 558-59 (6th Cir. 1998) (disapproving Tennessee sheriff department’s practice of trapping motorists by posting signs on the freeway falsely stating that a checkpoint was ½ mile ahead, and then setting up the checkpoint at the first available exit after the sign).

If in the process of stopping a car at a roadblock to check a driver’s license the officers see evidence of other crimes, they have the right to take reasonable investigative steps. Officials, however, cannot set up a roadblock for the sole purpose of subjecting all the stopped vehicles to a canine sniff of the exterior of the car. U.S. v. Morales-Zamora, 974 F.2d 149, 151 (10th Cir. 1992). The Sixth Circuit has recognized that a “pretextual roadblock has pitfalls that come perilously close to permitting unfettered government intrusion on the privacy interests of all motorists.” U.S. v. Huguenin, 154 F.3d 547, 554 (6th Cir. 1998). In Huguenin, the court held unconstitutional a Tennessee sheriff department’s program of setting up random DUI/narcotic checkpoints. Although the police department claimed that the primary purpose of the challenged roadblock was to catch intoxicated drivers, the court found that the program was actually established as a pretext to interdict drugs. Id. at 555. While noting that prevention of drug trafficking was a legitimate and important government interest, the court nevertheless emphasized that the
a system of random roadblocks designed to detect drugs was simply unreasonable where there was no traffic violation, probable cause or even reasonable suspicion to stop the vehicle. *Id.* at 559.

In *Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), *cert. granted, City of Indianapolis v. Edmond*, 120 S. Ct. 1156 (2000), the Seventh Circuit held unconstitutional the Indianapolis city police department’s practice of setting up random roadblocks solely to catch drug offenders. The court emphasized that, absent special needs for reasons other than crime detection, searches must ordinarily be based on particularized suspicion of wrongdoing. *Edmond*, 183 F.3d 659, 665. Because the city did not articulate a valid regulatory purpose for its policy, e.g., to protect the safety of other motorists, the court characterized the program of drug roadblocks as belonging to “the genre of general programs of surveillance which invade the privacy wholesale in order to discover evidence of crime.” *Id.*

### 4.10 ARREST

#### 4.10.01 Definition and Standard

The Fourth Amendment protects the “right of the people to be secure in their persons . . .” Thus, an illegal arrest or other unreasonable seizure of a person is a violation of the Fourth Amendment. *See Davis v. Mississippi*, 394 U.S. 721, 726 (1969) (“Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, . . .”). In *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980), Justice Stewart announced what would become the standard for an arrest, “a person has been ‘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.” Thus, an arrest occurs when the officer has in some way restrained a person’s liberty. *U.S. v. Benjamin*, 995 F.2d 756, 759 (7th Cir. 1993). *See also Florida v. Royer*, 460 U.S. 491 (1983) (officers held defendant’s ticket, luggage and identification and thus as a practical matter defendant was under arrest because he was not free to go). *But see U.S. v. Meza-Corales*, 183 F.3d 1116 (9th Cir. 1999) (since weapons had been found, fleeing persons were on the loose, and uncooperative persons were inside Meza’s residence, permissible detention rather than arrest where agent temporarily restrained Meza with handcuffs while questioning him, amount to an arrest).

An arrest must be based upon probable cause. “The general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest is unreasonable unless it is supported by probable cause.” *Michigan v. Summers*, 452 U.S. 692, 700 (1981). Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. *Henry v. U.S.*, 361 U.S. 98, 102 (1959). Probable cause must be determined at the time the arrest is made, with facts known to officer at the moment the arrest is made. *Id.* An objective standard is used in evaluating whether there was probable cause to arrest. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). In *Rivera v. Murphy*, 979 F.2d 259, 263 (1st Cir. 1992), the court stated that “[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police.”

#### 4.10.02 Stop versus Arrest
An oft-litigated issue is whether a brief detention has in fact ripened into an arrest requiring probable cause. In *U.S. v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir. 1996), the court stated that when determining whether an arrest has occurred, a court must examine all the surrounding circumstances, including the extent to which liberty of movement is curtailed and the type of force or authority employed. In *Dunaway v. New York*, 442 U.S. 200 (1979), the Court held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly “was 'seized' in the Fourth Amendment sense,” *Id.* at 216, even though “he was not told that he was under arrest.” *Id.* at 203. The Court recognized that the nature of the defendant's detention was critical in determining whether a seizure had occurred and emphasized both the length and the involuntariness of Dunaway’s seizure. *See U.S. v. Obasa*, 15 F.3d 603, 608 (6th Cir. 1994) (detention became an arrest when defendant was searched, given *Miranda* warnings, and transported back to the airport police station); *see also U.S. v. Ricardo D.*, 912 F.2d 337 (9th Cir. 1990) (detention of defendant in a patrol car constituted an arrest with no probable cause and thus the defendant’s un-*Mirandized* statements had to be suppressed).

There is no bright line of demarcation between an investigative stop and an arrest. *U.S. v. Bloomfield*, 40 F.3d 910, 916-17 (8th Cir. 1994). Courts have considered many factors in determining whether a detention was actually an arrest requiring probable cause. *See U.S. v. Perea*, 986 F.2d 633, 644 (2d Cir. 1993). Factors to consider are:

1. **Duration of detention;** see, e.g., *U.S. v. Edwards*, 103 F.3d 90, 93 (10th Cir. 1996) (length of time is most important consideration in determining whether a restraint is a stop or a full-fledged arrest forty-five minutes was not reasonable time). Unnecessary delay may contribute to a finding that an arrest has occurred. *See Eubanks v. Lawson*, 122 F.3d 639, 641 (8th Cir. 1997) (investigative stop may become arrest requiring probable cause if it lasts for unreasonably long time); *U.S. v. Codd*, 956 F.2d 1109, 1111 (11th Cir. 1992) (seizing and handcuffing of suspect for extended period constituted an arrest); however, there is no per se rule regarding the length of time a suspect may be detained before the detention becomes a full scale arrest. *U.S. v. Sharpe*, 470 U.S. 675 (1985) (20-minute detention of a defendant did not amount to an arrest because the police were diligently pursuing an investigation that was likely to confirm or dispel their suspicions quickly);

2. **The degree of fear and humiliation that the police conduct engenders** may contribute to a finding of arrest; *U.S. v. Lego*, 855 F.2d 542, 544-45 (8th Cir. 1988); *see also U.S. v. Del Vizo*, 918 F.2d 821 (9th Cir. 1990) (arrest occurred when suspect ordered from car at gunpoint, forced to lie on ground, and then handcuffed);

3. **Transporting a suspect to another location or isolating him from others** can create an arrest; *see Hayes v. Florida*, 470 U.S. 811 (1985) (when police, without probable cause or warrant, forcibly removed defendant from home and took him to station and detained him, the seizure was sufficiently like arrest to invoke need for probable cause);
handcuffing the suspect may constitute arrest, but courts have been unwilling to hold that handcuffing a suspect without probable cause to arrest is unlawful per se. *U.S. v. Smith*, 3 F.3d 1088, 1094 (7th Cir. 1993). See, e.g., *U.S. v. Esieke*, 940 F.2d 29, 36 (2d Cir. 1991) (use of handcuffs and leg irons may not turn otherwise permissible detention into detention that violates Fourth Amendment); *U.S. v. Bautista*, 684 F.2d 1286, 1288 (9th Cir. 1982) (use of handcuffs during separate questioning did not convert stop into an arrest);

the extent to which the individual’s freedom of movement was restrained including confining suspect in a police car should also be considered; see *U.S. v. Richardson*, 949 F.2d 851 (6th Cir. 1991) (placement of suspect in police cruiser turned detention into arrest); *U.S. v. Thompson*, 906 F.2d 1292, 1296 (8th Cir. 1990); but see *U.S. v. Bradshaw*, 102 F.3d 204, 211 (6th Cir. 1996) (detention in police car not automatically arrest); *U.S. v. Greene*, 783 F.2d 1364 (9th Cir. 1986) (per curiam) (no arrest merely because freedom restricted and use of force occurred);

the amount of force used by police may contribute to a finding that an arrest occurred; see *U.S. v. King*, 990 F.2d 1552, 1563 (10th Cir. 1993) (brandishing of gun and encircling of suspect’s car amounted to an arrest); *U.S. v. Novak*, 870 F.2d 1345, 1351 (7th Cir. 1989) (arrest when suspect surrounded by six or more officers with one gun drawn); *U.S. v. Al-Azzaway*, 784 F.2d 890 (9th Cir. 1985) (arrest occurred at time that officers surrounded trailer with weapons drawn); *U.S. v. Johnson*, 626 F.2d 753, 893 (9th Cir. 1980) (arrest occurred when defendant faced with officers at door of his home with guns drawn), aff’d, 457 U.S. 537 (1982); but see *U.S. v. Edwards*, 53 F.3d 616, 619-20 (3d Cir. 1995) (no arrest where police blocked in vehicle, approached with barking police dogs and with their hands on their weapons); *U.S. v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) (finding no arrest when armed officers ordered suspects to exit their car and to lie on the ground, noting however that detention bordered on an illegal arrest);

the number of agents involved may contribute to a finding of arrest; see *U.S. v. Robertson*, 833 F.2d 777 (9th Cir. 1987) (detention of suspect at gunpoint by at least seven officers was an arrest); and

whether the target of the stop was suspected of being armed may lead court to find no arrest occurred; see *U.S. v. Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980) (policeman’s show of force precipitated by action of taxi driver and necessary to prevent him from driving away), cert. denied, 449 U.S. 1113 (1981). Usually when courts find an intrusive detention to be only a *Terry* stop and not an arrest, the police have had a reasonable basis to believe the suspect was armed or otherwise dangerous. See, e.g., *U.S. v. Merkley*, 988 F.2d 1062, 1063 (10th Cir. 1993) (display of firearms and use of handcuffs reasonable when suspect had threatened to kill someone and was acting violently and officer observed him pounding his fists on the steering wheel); *U.S. v. Alexander*, 907 F.2d 269 (2d Cir. 1990); *U.S. v. Alvarez*, 899 F.2d 833 (9th Cir. 1990).
4.10.03 Arrest Warrants

An arrest warrant requires probable cause. “Probable cause for an arrest warrant is established by demonstrating a substantial probability that a crime has been committed and that a specific individual committed the crime.” *Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996). *See also Kaul v. Stephan*, 83 F.3d 1208,1213 (10th Cir. 1996). The proper inquiry is whether there is a reasonable belief that the suspect resides at the place to be entered to execute the arrest warrant and whether the officers have reason to believe that the suspect is present. *U.S. v. Lauter*, 57 F.3d 212, 214 (2d Cir. 1995). A valid arrest warrant carries with it the implicit but limited authority to enter the residence of the person named in the warrant in order to execute that warrant. *See U.S. v. Risse*, 83 F.3d 212, 215 (8th Cir. 1996); *U.S. v. Magluta*, 44 F.3d 1530, 1533 (11th Cir. 1995); *U.S. v. Morehead*, 959 F.2d 1489, 1496 (10th Cir. 1992). In addition, the arrest warrant permits a search of the dwelling provided the officers have reason to believe the suspect is there. *U.S. v. May*, 68 F.3d 515, 516 (D.C. Cir. 1995).
4.10.04 Warrantless Arrests

A person may be arrested without a warrant if there is probable cause to believe that the person committed a crime. See U.S. v. Martinez-Molina, 64 F.3d 719, 726 (1st Cir. 1995). See also Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995). In the context of warrantless arrests, probable cause must be evaluated in light of the totality of the circumstances. The Supreme Court has held that the standard for warrantless arrests is at least as stringent as the standards applied with respect to the magistrate’s assessment of probable cause when issuing a warrant. See Whitley v. Wyoming, 401 U.S. 560, 566 (1971). The arresting officers need to show that at the time of the arrest the facts and circumstances known to the them were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. U.S. v. Torres-Maldonado, 14 F.3d 95, 105 (1st Cir. 1994). See also Atwater v. City of Lago Vista, 195 F.3d 242 (5th Cir. 1999) (en banc) (motorist arrested and taken to jail for failing to wear her seat belt, failing to fasten her children in seat belts, driving without license, and failing to provide proof insurance was found not have undergone an unreasonable arrest or seizure).

Officials may rely on outside information and informants to make warrantless arrests if the officers have trustworthy information that would lead a prudent person to believe that the suspect has committed a crime. U.S. v. Sherrill, 27 F.3d 344 (8th Cir.), cert. denied, 513 U.S. 1048 (1994). In Whitley, the police based their warrantless arrest on a state police bulletin which was issued pursuant to a complaint by a sheriff of another county and which was based on an informer’s tip. The Court held that arresting officers did not have probable cause for a warrantless arrest. When an informant tip is corroborated, however, the officers may have probable cause to arrest. In U.S. v. Foxworth, 8 F.3d 540 (7th Cir. 1993), cert. denied, 511 U.S. 1025 (1994), the court held that there was probable cause to arrest defendant without a warrant when police learned from three informants the stated method defendant followed in selling drugs and police observed defendant follow this procedure, informant told police that a certain type of car would be parked in the parking lot, which was the same car the officer had seen on two earlier occasions parked next to a car in which he had found drugs, and informant told police that defendant would arrive at motel in car with out-of-state license plates, which defendant did. See also U.S. v. Sherrill, 27 F.3d 344 (8th Cir. 1994) (the police had substantially corroborated the informant’s tip by independent investigation and based on the totality of circumstances, the court concluded that probable cause existed to arrest Sherrill).

If probable cause exists, no warrant is required to apprehend a suspected felon in a public place. Steagald v. U.S., 451 U.S. 204 (1981). See also Fontenot v. Cromier, 56 F.3d 669, 675 (5th Cir. 1995). Although courts have held that it would be better to get a warrant first, officers are not required to have a warrant if the arrest occurs in a public place. U.S. v. Watson, 423 U.S. 411 (1976). See also U.S. v. Wright, 16 F.3d 1429, 1438 (6th Cir. 1994) (the Fourth Amendment permits an officer to make a warrantless arrest in a public place even though he had adequate opportunity to get a warrant).

4.10.05 Mere Presence

The Supreme Court held that mere propinquity to criminal conduct does not give rise to probable cause to arrest and search. Ybarra v. Illinois, 444 U.S. 85, 91 (1979). In Ybarra, this Court found no probable cause to seize and search customers found in a tavern for which officers possessed a lawful search
warrant. Where the standard is probable cause, before officers may conduct a search or seizure they must have “probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another . . . .” *Id.* In *U.S. v. Robertson*, 833 F.2d 777, 782 (9th Cir. 1987) the mere presence standard was applied to a woman leaving a house where agents possessed probable cause to believe that methamphetamine was being manufactured. The Ninth Circuit followed *Ybarra* in ruling that her mere presence on the premises, without more, cannot support probable cause for her arrest. *Id.* at 782-83.

**4.10.05.01 “Passenger Doctrine”**

The passenger doctrine is based upon the analysis of *Ybarra* applied to vehicle passengers. In essence a passenger’s mere presence in a vehicle containing contraband is not sufficient to establish probable cause for an arrest. This doctrine was first announced in *U.S. v. Di Re*, 332 U.S. 581 (1948). In *Di Re*, the Supreme Court ruled that mere presence in a vehicle containing counterfeit coupons is not sufficient to establish probable cause for the arrest of a passenger. *Id.* at 593. *See also* 2 W. LaFave, *Search and Seizure*, 3rd, §3.6(c) at 310 (*Di Re* makes it clear that companionship with an offender at the very time of the latter’s criminal conduct is not inevitably sufficient to establish probable cause for arrest of the companion. This is particularly true when, as in *Di Re*, it is very possible for the criminal conduct to be occurring without the knowledge of the companion).

The recent Supreme Court case in *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297 (1999), reaffirmed that *Di Re* is controlling authority with respect to the permissibility of the seizure of the person of a passenger, rather than merely searching a passenger’s container found in a vehicle. In *Houghton*, the defendant was the passenger in a car that was stopped for speeding and a faulty tail light. After the officer seized a hypodermic needle from the driver, the officer had probable cause to search the vehicle for drugs. His search included Houghton’s purse, which was found to contain methamphetamine.

The Supreme Court held that the search of Houghton’s purse was reasonable under the Fourth Amendment. *Id.* at 300-306 The Supreme Court found support for its ruling in the diminished expectation of privacy enjoyed by individuals traveling by car. *Id.* at 304 (citations omitted). *Houghton* recognized that rather than the search of a bag, *Di Re* and *Ybarra* were concerned with a far greater intrusion “upon personal privacy and . . . personal dignity” the seizure of the person of the passenger. *Id.* at 303 (citations omitted). Unlike *Houghton*, *Di Re* and *Ybarra* “turned on the unique, significantly heightened protection afforded against searches of one’s person.” *Id.*

Other cases following *Di Re* have been expanded by the ruling in *Ybarra* that probable cause must be particularized to the individual prior to an arrest. *See U.S. v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993) (a passenger’s mere presence in a vehicle where there was the odor of methamphetamine or marijuana cigarettes, does not give rise to probable cause to arrest and search him). *But see U.S. v. Buckner*, 179 F.3d 834, (9th Cir. 1999) (the Ninth Circuit held that a passenger’s mere presence in a vehicle, with questionable ownership and procurement, which contains a commercial quantity of contraband is sufficient to support a finding of probable cause). *cert. denied sub nom., Murry v. U.S.*, 120 S. Ct. 831 (2000); *U.S. v. Heiden*, 508 F.2d 898 (9th Cir. 1974) (*pre-Ybarra* case holding that passenger’s mere presence in a vehicle containing a commercial
quantity of contraband is sufficient to support a finding of probable cause); *Fernandez v. Perez*, 937 F.2d 368, 371 (7th Cir. 1991) (probable cause existed to arrest a passenger who was merely present in a vehicle containing a handgun and metal piercing bullets). It is important to note that many of the decisions finding probable cause to arrest a passenger in a vehicle rest on additional facts which tie the passenger to the criminal enterprise.

**4.10.06 Vehicle Search Incident to Arrest**

After stopping a vehicle, a police officer may search the driver, the passenger compartment and the vehicle itself as a “contemporaneous incident” of a lawful arrest. *U.S. v. Belton*, 453 U.S. 454, 460 (1981). See also *U.S. v. Carter*, 139 F.3d 424, 425 (4th Cir. 1998) (en banc) (detention of defendant’s luggage in connection with the pending charge of theft of another’s luggage reasonable because officers are not required to return to defendant admissible evidence seized incident to lawful arrest for theft). The “search incident to arrest exception” does not, however, encompass a “search incident to a citation.” *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, the Court held unconstitutional an Iowa state law which authorized police officers to conduct a full search of an automobile pursuant to issuing a citation for speeding. The Court reasoned that the rationale underlying the “search incident to arrest” exception -- concern for officer safety and the need to preserve evidence -- is much less compelling in the context of the issuance of a traffic citation. *Id.* at 488.

In a case which involves a search incident to an arrest, it is important to determine “whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former.” *U.S. v. Abdul-Saboor*, 85 F.3d 664 (D.C. Cir. 1996). See e.g., *U.S. v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997) (no “search incident to arrest” where search of vehicle occurred thirty to forty minutes after defendant arrested, handcuffed and placed in police car); *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (no “search incident to arrest” where thirty to forty five minute delay between arrest and search resulted from officer’s repeated attempts to obtain consent to search). But see *U.S. v. McLaughlin*, 170 F.3d 889, 893 (9th Cir. 1999) (where delay caused by completion of impoundment paperwork, search of vehicle five minutes after arrest qualifies as “search incident to arrest” because arrest, filling out paperwork and search were all “one continuous series of events closely connected in time.”).

**4.10.07 Use of Force During Arrest**

A search may be unreasonable where officers use excessive force. See *Tennessee v. Garner*, 471 U.S. 1 (1985) (police permitted to use deadly force against fleeing suspects who pose a threat of serious physical harm to officers or others; fleeing unarmed, nighttime burglar did not meet this standard). But see *Forret v. Richardson*, 112 F.3d 414, 419 (9th Cir. 1997) (deadly force only requires probable cause to believe that suspect has committed crime involving infliction or threatened infliction of serious physical harm), overruled on other grounds by *Chroma Lighting v. GTE Products Corp.*, 127 F.3d 1136 (9th Cir. 1997). To determine whether the force employed is excessive, courts balance the intrusion on a person’s Fourth Amendment interest against the countervailing government interest. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that the proper standard for evaluating claims under 42 U.S.C. §1983 is the Fourth Amendment’s standard of reasonableness).
The Fourth Amendment and the Exclusionary Rule

4.11 HOMES

4.11.01 Privacy Interest Greater in the Home

The Supreme Court has consistently maintained that the Fourth Amendment strongly protects privacy interests in the home. In Welsh v. Wisconsin, 466 U.S. 740, 748 (1984), the Court decreed that “it is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” See also Parkhurst v. Trapp, 77 F.3d 707, 711 (3d Cir. 1996) (“freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment”); Buonocore v. Harris, 65 F.3d 347, 356 (4th Cir. 1995) (“special protection to be afforded a person’s right to privacy within his own home”); Sheik-Abdi v. McCellan, 37 F.3d 1240, 1243 (7th Cir. 1994) (overriding respect for the sanctity of the home), cert. denied, 513 U.S. 1128 (1995); Ayeni v. Motola, 35 F.3d 680, 684 (2d Cir. 1994) (“the home has properly been regarded as among the most highly protected zones of privacy”); O’Brien v. City of Grand Rapids, 23 F.3d 990, 996 (6th Cir. 1994) (“It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable”); U.S. v. Becker, 23 F.3d 1537, 1539 (9th Cir. 1994) (“the sanctity of a person’s home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment”); U.S. v. Dawkins, 17 F.3d 399, 403 (D.C. Cir. 1994) (“[i]n the clearest of terms, the Fourth Amendment has drawn a firm line at the entrance to the house”).

In Soldal v. Cook County, 506 U.S. 56 (1992), the Court stated that the Fourth Amendment protection of the home extends not only to the privacy interests normally associated with home life, but also to the physical structure which is the home. In Soldal, the police stood guard as a landlord disconnected and removed a mobile home from its park. Id. at 59. The Court pointed out that not all seizures of property produce cognizable Fourth Amendment claims, but reasoned that because houses are explicitly mentioned by the Fourth Amendment, they are protected against unreasonable seizures. Id. at 62 n.7.

4.11.02 Arrests in the Home

Payton v. New York, 445 U.S. 573, 576 (1979) holds the police may not arrest a person in his or her home without a warrant, absent exigent circumstances. If the police have an arrest warrant, however, the warrant carries with it the limited power to enter a person’s home to execute it. Id. at 603. The Fourth Amendment, however, requires that police actions in executing the warrant be related to the objectives of the authorized intrusion. Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692, 1698 (1999) (holding that the police violate the Fourth Amendment rights of homeowners when they allow media representatives to accompany them during execution of a warrant in their home); Hanlon v. Berger, 526 U.S. 808, 119 S.Ct. 1706 (1999) (same).

If the police believe that the person sought is in a third party’s home, the officers must obtain a search warrant to lawfully enter that home, absent exigent circumstances. Steagald v. U.S., 451 U.S. 204 (1981); Perez v. Simmons, 900 F.2d 213 (9th Cir. 1990), amending, 884 F.2d 1136 (9th Cir. 1988)
(police may enter a home with an arrest warrant only if they have probable cause to believe the person named in the warrant resides there).

If the police spot a person outside the home, the person cannot simply go inside the home and invoke the protections of the Fourth Amendment. *U.S. v. Santana*, 427 U.S. 38 (1976). In *Santana*, defendant was spotted outside her home by the police who announced their presence. Defendant retreated into her dwelling. The Supreme Court said that she could not thwart an otherwise lawful arrest by retreating into the home. *See, e.g., U.S. v. Patch*, 114 F.3d 131 (9th Cir. 1997) (police can pursue Native American onto reservation); *Fontenot v. Cormier*, 56 F.3d 669, 674 (5th Cir. 1995) (no expectation of privacy in home when suspect stands at open door or is otherwise publicly accessible). *Welsh v. Wisconsin*, 466 U.S. 740 (1984); however, holds that if the offense is minor, then that must be considered when deciding whether exigent circumstances justify a warrantless entry. *Welsh* involved a non-criminal, driving under the influence offense, where defendant had crashed his car and walked home. Police found Welsh’s car, ran the registration, and went to his home and entered without a warrant to arrest him. The Court held the arrest illegal; the police were not in hot pursuit and no exigency obtained because defendant was already home and was not a threat to public safety. *New York v. Harris*, 495 U.S. 14 (1990) holds that if even if police violate *Payton*’s proscription on warrantless arrests in the home, a subsequent *Mirandized* confession will not be excluded. The Court reasoned that *Payton* protects the physical integrity of the home and not defendant’s subsequent statements outside the home. *Payton*, 445 U.S. at 17. *Payton* already requires that any evidence seized in conjunction with the illegal entry would be suppressed, which provides police with strong incentive to abide by the rule. *Id*. Extending *Payton* to cover subsequent statements outside the home would provide minimal extra deterrence. *Id* at 20.

### 4.11.03 Other Places with High Privacy Expectations


### 4.12 HEIGHTENED INTRUSIONS

#### 4.12.01 Bodily Intrusions
By its plain terms, the Fourth Amendment protects the right of people to be secure in their persons. U.S. Const. amend. IV. When considering bodily intrusions, the government’s entitlement to the information is balanced against the person’s interest in bodily integrity. See Harrington v. Almy, 977 F.2d 37, 43 (1st Cir. 1992). The greater the intrusion on the body, the more likely that a warrant will be required and that the search will be held unreasonable.

In Cupp v. Murphy, 412 U.S. 291, 292 (1973), the Supreme Court held that police could scrape the fingernails of defendant, without a warrant, because probable cause existed to believe that evidence was on the nails and that evidence was evanescent. See also U.S. v. Bridges, 499 F.2d 179, 184 (7th Cir. 1974) (swabbing defendant’s hands to discover evanescent evidence required no warrant). Even swabbing defendant’s genitalia requires no warrant if the test is reasonable and probable cause exists. U.S. v. Smith, 470 F.2d 377 (D.C. Cir. 1972). Requiring a defendant to give a voice exemplar likewise requires no warrant. U.S. v. Dionisio, 410 U.S. 1, 15 (1973). Clipping a few strands of hair does not require a warrant because it is such a minimal intrusion. U.S. v. D’Amico, 408 F.2d 331, 332-33 (2d Cir. 1969) (analogizing clipping hair to the taking of fingerprints and photographs).

More invasive recovery of evidence is more likely to result in the search being found unreasonable. In Rochin v. California, 342 U.S. 165, 172 (1952), it “shocked the conscience” of the Court that officers pumped defendant’s stomach to retrieve some pills he had swallowed, and thus held that use of the capsules to obtain a conviction was a due process violation. In Schmerber v. California, 384 U.S. 757, 769-70 (1966), the Court held that police could take blood samples from a defendant, suspected of driving under the influence, after a car accident. The Court reached this conclusion by noting that the taking of blood is a routine and common procedure in society, the blood was taken by a doctor, and the evidence of blood alcohol level is evanescent. Id. See also U.S. v. Berry, 866 F.2d 887 (6th Cir. 1989) (taking blood sample from an unconscious motorist reasonable where officer had good cause to believe that defendant under the influence of alcohol). Taking blood without a warrant falls under the exigent circumstances exception and does not require an arrest to be valid. U.S. v. Chapel, 55 F.3d 1416, 1419 (9th Cir. 1995) (en banc), overruling U.S. v. Harvey, 701 F.2d 800, 803-04 (9th Cir.1983) (which held that the Schmerber exception was premised upon the blood being taken incident to a valid arrest and was, therefore, hinged to the suspect being validly arrested); see also U.S. v. Wright, 215 F.3d 1020 (9th Cir. 2000) (anonymous tip and other evidence supported probable cause to believe defendant’s blood would have evidentiary value -- court ordered a blood sample from suspect to be compared with blood sample left by bank robbers).

A urine test does not violate an arrestee’s Fourth Amendment rights. U.S. v. Edmo, 140 F.3d 1289, 1292 (9th Cir. 1998). The Ninth Circuit reasoned that providing a urine sample was far less intrusive search than withdrawing blood, and involved no risk of trauma or pain. Id. at 1292. Noting that the police had probable cause to believe that the defendant had ingested a controlled substance, the Court concluded that the search was reasonable because it was administered to prevent the “dissipation of necessary evidence.” Id.

A test for HIV, however, does not fall within Schmerber’s narrow exception to the warrant requirement because HIV is not evanescent. Barlow v. Ground, 943 F.2d 1132, 1138 (9th Cir. 1991).
Because the *Schmerber* exception did not apply, the court then looked to whether any other exigency justified the taking of the blood without a warrant and concluded there were none. *Id.* at 1138-39.

The state can draw blood from prisoners without their consent and use that blood to put together a data bank of known sex offenders and murderers. *Rise v. State*, 59 F.3d 1556 (9th Cir. 1995) (Oregon statute requiring inmates to give blood samples for data bank upheld); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (Virginia statute requiring convicted felons to provide blood samples for DNA analysis to determine identification characteristics upheld); *Boling v. Romer*, 101 F.3d 1336, 1339 (10th Cir. 1996) (Colorado statute requiring inmates convicted of offense involving sexual assault to provide state with DNA samples before their release on parole did not violate Fourth Amendment).

A compelled surgical intrusion into an individual’s body for evidence . . . implicates expectations of privacy and security of such a magnitude that the intrusion may be unreasonable even if likely to produce evidence of a crime.

*Winston v. Lee*, 470 U.S. 753, 759 (1985). In *Winston*, the government wanted to have surgery performed on defendant to remove a bullet lodged in this chest, which was, most likely, evidence of the crime. Noting the risks to defendant and the abundance of other evidence that the state had to prove defendant’s guilt, the Court affirmed the decision to disallow the surgery, even though probable cause existed to retrieve the bullet. *Id.* at 766.

Endoscopy procedure to retrieve narcotics violates the Fourth Amendment. *U.S. v. Nelson*, 36 F.3d 758, 761 (8th Cir. 1994). In *Nelson*, the Eight Circuit suppressed narcotics retrieved through an endoscopy because no exigency justified the procedure and the warrant the officers had did not authorize the procedure. The court noted that the officers’ conduct did not fall in the *Leon* good faith exception because “there is no ‘objectively reasonable basis for the officers' mistaken belief’ that the authorization contained in the warrant extended to the endoscopy.” *Id.* at 761 (citing *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984)).

Forcibly taking blood and hair samples when officers have a warrant does not violate the Fourth Amendment. *U.S. v. Bullock*, 71 F.3d 171 (5th Cir. 1995). In *Bullock*, the Fifth Circuit noted that the procedure was performed by a registered nurse and was virtually pain and risk free. *Id.* at 176. Additionally, the government had demonstrated a great need for the evidence, as the eyewitnesses to the defendant’s crime were unable to identify him. *Id.* at 177.

A blood test for the presence of drugs at the behest of police officers, where the doctors believed that the test was necessary to save the life of the defendant did not violate the Fourth Amendment. *U.S. v. Chukwubike*, 956 F.2d 209, 212 (9th Cir. 1992). The court relied upon *U.S. v. Attson*, 900 F.2d 1427, 1433 (9th Cir.1990), for the principle that invasions of the body by doctors for medical purposes are neither a search nor a seizure.

#### 4.12.02 Body Cavity Searches
Bell v. Wolfish, 441 U.S. 520, 560-61 (1979), holds that prisons may conduct strip searches and visual inspections of body cavities on less than probable cause. See Thompson v. Souza, 111 F.3d 694 (9th Cir. 1997) (visual strip search of prisoner's body cavities was reasonably related to penological interests, notwithstanding fact that guard told prisoner to run his fingers around his gums after having him manipulate his own genitalia, that genitalia inspection was not last step of search as suggested by prison guidelines, that strip searches were not discussed in officials' search plan, and that searches were conducted in view of other prisoners). Nonetheless, prison officials must have reasonable suspicion to conduct strip searches and bodily cavity inspections. See Kelly v. Foti, 77 F.3d 819, 821 (5th Cir. 1996) (without reasonable suspicion that an arrestee has contraband or weapons, jail officials cannot strip search persons arrested for minor offenses awaiting the posting of bond (citing Watt v. City of Richardson Police Dept., 849 F.2d 195, 197 (5th Cir. 1988)); Spear v. Sowders, 33 F.3d 576, 582 (6th Cir. 1994)(per curiam) (prison officials needed reasonable suspicion before strip searching, visually inspecting and digitally penetrating body cavities of prison visitor); Kennedy v. Los Angeles Police Dept., 901 F.2d 702 (9th Cir. 1990) (blanket policy of strip searching all felony arrestees invalid); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984) (reasonable suspicion required to conduct strip searches of detainees); Tribble v. Gardner, 860 F.2d 321, 325-26 (9th Cir. 1988) (digital rectal searches of prisoners unrelated to security needs would violate Fourth Amendment); Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988) (rectal search violated Fourth Amendment because it was conducted in a patently unreasonable manner).

Prisoners retain limited constitutional rights to bodily privacy which extends to preventing unreasonable strip searches, such as those conducted by members of the opposite sex. Hayes v. Marriott, 70 F.3d 1144, 1446 (10th Cir. 1995) (citations omitted); Canedy v. Boardman 16 F.3d 183 (7th Cir. 1994); but see Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995) (opposite-sex monitors of nude prisoners is not necessarily a constitutional violation). This interest, however, is balanced against the penological interests of the institution. Elliot v. Lynn, 38 F.3d 188, 191 (5th Cir. 1994) (prison officials could conduct strip searches en masse when security conditions of the prison so warranted). Even juveniles can be strip searched upon reasonable suspicion. Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992).

4.13 SEIZURE OF PROPERTY

4.13.01 In General

Seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. Soldal v. Cook County, 506 U.S. 56 (1992). A seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property. U.S. v. Jacobsen, 466 U.S. 109, 113 (1984). It is the extent of the interference with the defendant’s possessory interest in his property, not the physical movement of the property, that determines whether a seizure has occurred. U.S. v. England, 971 F.2d 419, 420 (9th Cir. 1992). Brief detentions of personal effects are minimally intrusive and thus do not rise to the level of Fourth Amendment protection. Horton v. California, 496 U.S. 128, 133-34 (1990). The Supreme Court has viewed a seizure of personal property as per se unreasonable unless it is accomplished pursuant to a judicial warrant that was issued upon probable cause and particularly describes the items to be seized. U.S. v. Place, 462 U.S.
696, 701 (1983). However, the heightened protection accorded privacy interests are not implicated where solely seizure, and not search, is at issue. Segura v. U.S., 468 US 796, 810 (1984). Weapons and contraband found in a public place may be seized by the police without a warrant because items which are in plain view carry no reasonable expectation of privacy. Payton v. New York, 445 U.S. 573, 586-87 (1980). Furthermore, the Fourth Amendment does not require the police to obtain a warrant before seizing a car from a public place when they have probable cause to believe that it is forfeitable contraband. Florida v. White, 526 U.S. 559, 119 S.Ct. 1555 (1999).

The destruction of property also is at times viewed as a seizure. The killing of a dog is recognized as a seizure under the Fourth Amendment. Fuller v. Vines, 36 F.3d 65, 68 (9th Cir. 1994). The destruction of property is “meaningful interference” constituting a seizure under the Fourth Amendment because the destruction of property poses as much a threat, if not more, to people’s right to be secure as does the taking of property. Id.

“When police seize property for a criminal investigation, due process does not require them to provide the owner with notice of state law remedies, which are established by published, generally available state statutes and case law.” City of West Covina v. Perkins, 525 U.S. 234, 119 S. Ct. 678 (1999). However, “when law enforcement agents seize property pursuant to a warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.” Id. at 240.

4.13.02 Seizure of Luggage

A limited seizure of a person’s luggage is permissible if there is reasonable suspicion that it contains seizureable items. The Supreme Court in U.S. v. Place, 462 U.S. 696 (1983), concluded that when an officer’s observations lead to the reasonable belief that a traveler is carrying luggage containing narcotics, Terry permits the officer to detain the luggage and investigate briefly the circumstances that arouse suspicion provided that the investigative detention is properly limited in scope. In Place, the police conduct exceeded the permissible limits of a Terry-stop. The 90-minute detention of the luggage in itself precluded the conclusion that the seizure was reasonable in the absence of probable cause. Florida v. Royer, 460 U.S. 491 (1983), involved an airport stop where defendant was carrying heavy bags, paid for his airfare in cash, was traveling under an alias, and was a suspected drug courier. The Supreme Court found that although the police had grounds to temporarily detain the defendant and his luggage in order to verify or dispel their suspicions, the police exceeded the limits of the investigative stop when they kept defendant’s ticket and driver’s licence and asked him into a small room for further questioning. Id. The Court stressed that an investigative detention must be temporary and last no longer than necessary, and that the least intrusive means reasonably available should be employed to verify or dispel the officer’s suspicion in a short period of time. Id.

Some courts have elaborated upon the holding in Place to determine that a detention and “sniff test” are reasonable. U.S. v. West, 731 F.2d 90 (1st Cir. 1984). In West, the court found that the diligence of the officers in pursuing their investigation so as to minimize the intrusion, the brevity of the detention, and the information afforded West regarding the detention and the return of his luggage amounted
to a reasonable detention of the luggage under the circumstances. *Id.* at 92. *See also* U.S. *v. Tillman*, 81 F.3d 773 (8th Cir. 1996) (police must have consent or reasonable suspicion that luggage contains drugs in order to detain a person’s luggage for a sniff search); *U.S. v. Aldaz*, 921 F.2d 227 (9th Cir. 1990) (mailed packages held until the next day for canine sniffs, with additional five-hour time lapse between the dog sniffs of mailed packages and the execution of search warrants reasonable); *U.S. v. Gonzales*, 979 F.2d 711 (9th Cir. 1992); *U.S. v. Belcher*, 685 F.2d 289 (9th Cir. 1982) (probable cause required for detention of luggage in defendant’s physical possession); *U.S. v. Carter*, 139 F.3d 424 (4th Cir. 1998) (same). *But see* U.S. *v. Erwin*, 803 F.2d 1505 (9th Cir. 1986) (luggage seizure only required reasonable suspicion, not probable cause); *U.S. v. Hillison*, 733 F.2d 692 (9th Cir. 1984) (segregation and nine-hour detention of mailed package not unreasonable). Other factors to be included in the reasonableness analysis are failure to inform a defendant where the luggage is being detained, how long the detention will last, and whether or not arrangements were made for a narcotics dog to sniff the luggage. *See U.S. v. Place*, 462 U.S. 696 (1983).

4.14 WARRANTS

The Fourth Amendment requires a warrant for all searches and arrests performed by government actors. This warrant requirement is subject to a limited number of exceptions. *See §4.16 Warrantless Searches.*

4.14.01 Issuance

The Fourth Amendment decrees, in pertinent part, that “no Warrants shall issue, but upon probable cause, supported by Oath affirmation, and particularly describing the place to be searched and the persons or things to be seized.” U.S. Const. amend. IV. Probable cause must be determined by a neutral and detached magistrate. Fed. R. Crim P. 41(a).

4.14.02 Particularity Requirement

Under the Fourth Amendment, warrants must describe with particularity the place to be searched and the person or things to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, reh’g denied, 404 U.S. 874 (1971). The issuing court must independently determine if reasonable cause exists to believe that the specific items to be searched for and seized are present on the property to be entered. *See U.S. v. Bieri*, 21 F.3d 811 (8th Cir. 1994). The sufficiency of the warrant’s specificity is evaluated by the totality of the circumstances. U.S. Const. amend. IV. Failure to particularly describe the place to be searched and/or the articles to be seized invalidates a warrant. *U.S. v. Roche*, 614 F.2d 6 (1st Cir. 1980); *U.S. v. Higgins*, 428 F.2d 232 (7th Cir. 1970).

4.14.02.01 Scope of the Warrant

The scope of a search warrant depends upon the premises described in the warrant and the objects sought. If a warrant authorizes agents to search an apartment, that includes a locked bedroom within it. *U.S. v. Kyles*, 40 F.3d 519 (2d Cir. 1994). *See also Maryland v. Garrison*, 480 U.S. 79 (1987) (search
warrant authorizing search of third-floor apartment upheld for both apartments on third floor, since police found the floor had been subdivided into two separate apartments after drugs were found in the apartment not targeted by the warrant).

Where officers obtained a warrant to search for narcotics evidence and brought a postal inspector to help spot postal theft evidence, the scope of the warrant was not impermissibly exceeded. *U.S. v. Ewain*, 78 F.3d 466 (9th Cir.), amended, 88 F.3d 689 (9th Cir. 1996). The officers had a valid expectation of finding narcotics evidence, the search was not a pretext, and evidence of postal theft was properly seized under the plain view doctrine. *Id.*

The general rule in searches made pursuant to warrants is that only items specifically enumerated may be seized, and once those items are found, the search must stop. See, e.g., *U.S. v. Gagnon*, 635 F.2d 766 (10th Cir. 1980) (agents did not exceed warrants authority to search for and seize narcotics by staying at site an extra day after seizure to ensure that narcotics were properly disposed); *U.S. v. Odland*, 502 F.2d 148 (7th Cir. 1974).

While executing a search warrant, the officers may answer the telephone in limited circumstances. In *U.S. v. Gallo*, 659 F.2d 110 (9th Cir. 1981), during the search of the premises, an agent answered defendant’s telephone numerous times and learned that callers were attempting to place bets with defendant. Despite Gallo’s argument that the warrant did not include the calls within the description of items to be seized in the warrant, the court found that the warrant was not exceeded when officers answered the telephone. See also *U.S. v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) (holding the fact that an item seized happens to contain other incriminating information not covered by the terms of the warrant does not compel suppression); *U.S. v. Fuller*, 441 F.2d 755 (4th Cir. 1971) (same). A court should not, however, allow officers to reconnect a previously disconnected telephone so they can answer it while executing a search warrant. See *U.S. v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979) (reconnecting phone violated Title II of the Omnibus Crime Control and Safe Streets Act of 1968, as well as the Fourth Amendment).

### 4.14.02.02 Non-Specific and Overbroad Warrants

An overbroad warrant is invalid. See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (inclusion of a phrase allowing for any other evidence of the crime of false pretense not fatally general when phrase appeared at the end of a long list of particulars); *U.S. v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). For example, a search warrant allowing the seizure of “fruits and instrumentalities” of a narcotics offense was held overbroad. *U.S. v. Clark*, 31 F.3d 831 (9th Cir. 1994). However, a warrant describing items to be seized in generic and broad terms will be upheld when the description is as specific as the circumstances or activity under investigation will permit. *U.S. v. Wicks*, 995 F.2d 964 (10th Cir. 1993); *U.S. v. Harris*, 903 F.2d 770 (10th Cir. 1990).

In *U.S. v. Hillyard*, 677 F.2d 1336 (9th Cir. 1982), the court upheld a warrant authorizing a search of all motor vehicles found in a lot to determine if any were stolen. The court reasoned that when there is probable cause to believe that the searched premises contain a class of generic goods, of which
some are contraband, a search warrant does not fail for lack of particularity and may direct inspection of the entire class if there are objective standards for the executing agents to distinguish between legally possessed property and stolen property. \textit{Cf. U.S. v. Tamura}, 694 F.2d 591 (9th Cir. 1982) (wholesale seizure of documents, although overbroad, did not compel reversal). \textit{But see U.S. v. Guarino}, 729 F.2d 864 (1st Cir. 1984) (warrant authorizing seizure of a “quantity of obscene materials, including books, pamphlets, magazines, newspapers, films, and prints” was impermissibly overbroad).

A “John Doe” caption on a search warrant affidavit will not render it defective where the proposed search is of a described premise and for described items rather than of an individual. \textit{U.S. v. McClard}, 333 F. Supp. 158 (D. Ark. 1971), aff’d, 462 F.2d 488 (8th Cir. 1972). Nor is a “John Doe” warrant defective where the warrant contains the physical description of the suspect coupled with the precise location at which he can be found. \textit{U.S. v. Ferrone}, 438 F.2d 381 (3d Cir. 1971) (“John Doe” warrant for white male with black wavy hair and stocky build in specific apartment at specific address was valid). A “John Doe” warrant containing only a physical description is invalid. \textit{U.S. v. Traylor}, 656 F.2d 1326 (9th Cir. 1981).

A warrant authorizing the seizure of all of a corporation’s business and financial records and computer hardware and software, without limits on which items in each category could be seized, and without specifying how the items allegedly related to criminal conduct, or specifying a time frame in which the conduct occurred, was invalid as an overly broad “general warrant.” \textit{U.S. v. Kow}, 58 F.3d 423 (9th Cir. 1995).

A warrant and its supporting affidavit may fail to identify a specific offense for which items are being seized and still be held valid. \textit{U.S. v. Hill}, 55 F.3d 479 (9th Cir. 1995). The \textit{Hill} court reasoned that no statute required the offense to be identified, Hill had been shooting in his backyard, and that more than 20 firearms had been confiscated from his home in the month preceding the challenged search. \textit{Id.} at 480.

Some circuits have held that a warrant may be properly construed by referring to the affidavit in order to give sufficient particularity to the premises to be searched and items to be seized. \textit{See, e.g., U.S. v. Lightfoot}, 506 F.2d 238, 243 (D.C. Cir. 1974) (“the terms of a search warrant may be construed by reference to the circumstances disclosed in the accompanying affidavit”); \textit{U.S. v. Rael}, 467 F.2d 333 (10th Cir. 1972). The Ninth Circuit has recently held that an affidavit specifying the type of criminal activity suspected and the evidence sought, which is referenced in the search warrant, must be affixed to the warrant when the search is executed. \textit{U.S. v. McGrew}, 122 F.3d 847 (9th Cir. 1997).

\textbf{4.14.03 Definition of Probable Cause}

A warrant must be supported by probable cause, i.e., in view of the totality of the circumstances, the judicial officer who issued the warrant had a substantial basis for finding a fair probability that contraband or other evidence of a crime would be found in the place searched. \textit{Illinois v. Gates}, 462 U.S. 213 (1983).
Probable cause to issue a wiretap must include probable cause to believe that: (1) an individual is committing, did commit, or is about to commit a specified offense; (2) that communication relevant to the offenses will be intercepted through the wire tap; and (3) that the individual who is the focus of the investigation will use the tapped phone. **U.S. v. Meling**, 47 F.3d 1546 (9th Cir. 1995).

### 4.14.04 The Magistrate’s Independent Determination

The issuing magistrate must perform his or her neutral and detached function based on the facts presented. In essence, approving a warrant requires more than a mere “rubber stamp.” **U.S. v. Travisano**, 724 F.2d 341, 345 (2d Cir. 1983). In examining the propriety of a warrant’s issuance, the question is whether the facts and circumstances taken as a whole gave the magistrate probable cause to believe the desired items would be found in the search. See **U.S. v. Rabe**, 848 F.2d 994 (9th Cir. 1988) (magistrate could rely on expert opinion and needed only a fair probability that seizable items were at the area to be searched); **U.S. v. Brinklow**, 560 F.2d 1003 (10th Cir. 1977).

The nature of the criminal activity involved and the kind of property sought are also relevant to the magistrate’s determination. See, e.g., **U.S. v. Gann**, 732 F.2d 714 (9th Cir. 1984); **U.S. v. Reid**, 634 F.2d 469 (9th Cir. 1980); **U.S. v. Steeves**, 525 F.2d 33 (8th Cir. 1975). But see **U.S. v. Bertrand**, 926 F.2d 838 (9th Cir. 1991) (although affidavit did not specifically request a search of the land, it nevertheless provided probable cause for the search).

The Fourth Amendment requirement that warrants be issued by a “neutral and detached” magistrate does not prevent the government from re-submitting a rejected warrant to a second magistrate. **U.S. v. Pace**, 898 F.2d 1218 (7th Cir. 1990). Additionally, where a magistrate altered a search warrant to allow the defendant himself to be searched, the magistrate’s neutrality was not deemed breached, since the changes made to the affidavit were minor and were based on the magistrate’s conclusion that probable cause existed. **U.S. v. Ramirez**, 63 F.3d 937 (10th Cir. 1995). Facts in separate affidavits may be cumulated to reach sufficient probable cause. See, e.g., **U.S. v. Fogarty**, 663 F.2d 928 (9th Cir. 1981) (two affidavits, one supporting an arrest warrant and the other supporting a search warrant, were aggregated).

### 4.14.05 Informants

The reliability of information provided by an informant is assessed under the “totality of the circumstances” made known to the magistrate issuing a warrant. **Illinois v. Gates**, 462 U.S. 213 (1983). The *Gates* opinion also made it clear that the task of a court in reviewing the issuance of a warrant is not to conduct a *de novo* review, but to determine from the record if substantial evidence supported the magistrate’s decision to issue a warrant. Id.

In applying the totality of the circumstances test, the identity and credibility of the informant is assessed, as is corroboration of the information the informant has provided. Id. See also **U.S. v. Allen**, 211 F.3d 970 (6th Cir. 2000) (en banc) (affidavit for search warrant based upon personal observation of criminal activity by a confidential informant who was named to the magistrate and who had provided
reliable information to the police in the past about criminal activity, was sufficient for a magistrate to find probable cause to issue search warrant); *U.S. v. Reeves*, 210 F.3d 1041 (9th Cir. 2000) *(Franks* hearing unnecessary where failure to disclose informant’s criminal history because informant had been used in the past and was reliable).

**4.14.05.01 Private Citizen Informants**

Information from a private citizen is sufficient to constitute probable cause where reliability is based on: (1) the nature of the information; (2) the opportunity to see or hear the matter reported; and (3) verification by police investigation. *See U.S. v. Salas*, 879 F.2d 530 (9th Cir. 1989); *U.S. v. Gagnon*, 635 F.2d 766 (10th Cir. 1980).

**4.14.05.02 Anonymous Informants**

Assessing the reliability of an anonymous tip for determining whether there is probable cause for a warrant’s issuance requires a fact-dependant analysis. An affidavit used to support probable cause for a warrant which is based solely on the hearsay report of an unidentified informant must set forth some of the underlying circumstances from which the officer concluded that the informant was credible. *Aguilar v. Texas*, 378 U.S. 108 (1964). Where the informer’s tip is a necessary element in finding of probable cause, corroboration sufficient to allow the magistrate to perform an independent assessment of probable cause is required. *Spinelli v. U.S.*, 393 U.S. 410 (1969). However, the rigid two-prong *Aguilar-Spinelli* test is no longer valid as it was abandoned in favor of the “totality of the circumstances” test of *Gates*. *Gates*, 462 U.S. at 213.

An anonymous telephone tip to police detailing the location and size of marijuana plants and the homeowner’s name sufficed for probable cause when police officers verified the tip by finding the occupant’s name and utility bills, and where the officers observed the premises before applying for a warrant. *U.S. v. Jackson*, 898 F.2d 79 (8th Cir. 1990).

An anonymous uncorroborated tip containing no information other than that marijuana was being cultivated, and which gave no indication of reliability, was insufficient to establish probable cause that defendant was growing marijuana. Therefore, the warrant issued was invalid. *U.S. v. Clark*, 31 F.3d 831 (9th Cir. 1994).

**4.14.05.03 Law Enforcement Informants**

Information received from another law enforcement officer participating in a common investigation may constitute probable cause. *See U.S. v. Barnett*, 667 F.2d 835 (9th Cir. 1982); *U.S. v. Beusch*, 596 F.2d 871 (9th Cir. 1979) (customs agent); *Brooks v. U.S.*, 416 F.2d 1044 (5th Cir. 1969) (local sheriff furnished FBI with affidavit of informant’s observations).

**4.14.05.04 Victim as Informant**
Information received from a crime victim who is credible and reliable is given great weight. See, e.g., *U.S. v. Melvin*, 596 F.2d 492 (1st Cir. 1979); *U.S. v. McCreia*, 583 F.2d 1083 (9th Cir. 1978). If police information about a suspect is from an eyewitness to the crime, probable cause to arrest the suspect may exist even without an independent showing of the eyewitness’ reliability. *U.S. v. Mahler*, 442 F.2d 1172 (9th Cir. 1971).

4.14.06 Staleness Challenges

If the information supporting probable cause for a warrant’s issuance is not current, the warrant may be challenged on grounds of staleness. Fed. R. Crim. P. 41(a) states that the search warrant shall allow the search to occur under a specified time period not exceeding 10 days.

4.14.06.01 Factors Involved in a Staleness Challenge

Each claim of staleness must be decided on its facts. Some factors include: (1) continuity of the alleged criminal activity, see *U.S. v. Dennis*, 625 F.2d 782, 792 (8th Cir.1980); *U.S. v. Hyde*, 574 F.2d 856 (5th Cir.1978); (2) the time elapsed between the last events giving rise to probable cause and the issuance of the warrant; (3) the use of words of present or past tense in the affidavits, see *U.S. v. Harris*, 403 U.S. 573, 579 (1971); and (4) the likelihood that any property sought could be moved, see *U.S. v. Brinklow*, 560 F.2d 1003, 1006 (10th Cir.1977). The overall test for staleness is that the facts must be sufficient to justify a conclusion that property which is the object of a search is probably on the premises to be searched. *U.S. v. Greany*, 929 F.2d 523 (9th Cir. 1991); see also *U.S. v. Schauble*, 647 F.2d 113 (10th Cir.1981) (information was not stale since informants statement could be interpreted to include growing marijuana which likely would still be growing); *U.S. v. Rowell*, 903 F.2d 899, 903 (2d Cir.1990) (eighteen month old information not stale because evidence was of a drug distribution business).

4.14.06.02 Application of Case Law to Staleness Factors

A two-week period between an informant’s last sighting of stolen property in defendant’s trailer and the issuance of a search warrant did not render the informant’s identification of the trailer as a repository of stolen items stale in *U.S. v. LaMorie*, 100 F.3d 547 (8th Cir. 1996). Although the alleged co-perpetrator remained in the area and could have removed the items, he also could have continued using the property as part of a continuing series of crimes. Id. Additionally, the property at issue was not subject to spoilage or immediate use, and other residents of the trailer had not been seen during the two-week period. Id. See also *U.S. v. Myers*, 106 F.3d 936 (10th Cir. 1997) (defendant’s drug activities were “ongoing and continuous,” so informant-provided information was not stale despite the fact that it was 5 months old when the warrant was issued).

In light of a tip provided by defendant’s acquaintance that defendant had an illegal firearm in his home within six weeks of a search, combined with information that defendant possessed firearms over six months prior to the search, there was sufficiently recent information to support the issuance of a warrant in *U.S. v. Collins*, 61 F.3d 1379 (9th Cir. 1995). The above facts led the court to believe that defendant’s possession of illicit firearms was an ongoing and continuous activity. See also *U.S. v. Canan*, 48 F.3d 954
(6th Cir. 1995) (en banc) (no staleness where affidavit alleged ongoing activities and contained corroboration by recent events).

The Ninth Circuit has found two-year-old evidence of marijuana growing activity at a residence sufficient to withstand a staleness challenge. *U.S. v. Greany*, 929 F.2d 523 (9th Cir. 1991). The court found that marijuana growth is likely to be ongoing and continuous in nature because of the time involved in growing and cultivating the plants from seed.

4.14.06.03 Rectifying Staleness Problems

Where there is undated information in an affidavit, and the undated information is factually interrelated to dated information, the inference that the events took place in close proximity to the date actually given is permissible. *U.S. v. Bridges*, 419 F.2d 963 (8th Cir. 1969). Passage of time between discovery of facts establishing probable cause and the application for a search warrant, absent an updating of facts or explanation for the delay, may preclude a finding of probable cause. See *U.S. v. Neal*, 500 F.2d 305 (10th Cir. 1974) (3-month-old information about stolen cars located on described premises too old); *Schoeneman v. U.S.*, 317 F.2d 173 (D.C. Cir. 1963) (107-day old information too stale to support search warrant absent other proof that the information was still valid).

Staleness may be rectified if an additional affidavit updates, substantiates, or corroborates otherwise stale material. *U.S. v. Dethlefs*, 883 F. Supp. 766 (D. Me. 1995). Additionally, a claim that the criminal activity is ongoing may defeat a staleness challenge. *U.S. v. Soussi*, 29 F.3d 565 (10th Cir. 1994); *U.S. v. Morales*, 851 F. Supp. 112 (S.D.N.Y. 1994). *See also U.S. v. Vaandering*, 50 F.3d 696 (9th Cir. 1995) (although some information in probable cause affidavit was 22 months old, the information was not stale because it was coupled with more recently obtained evidence).

Expert testimony may also be used to counter a staleness challenge. See, e.g., *U.S. v. Lacy*, 119 F.3d 742 (9th Cir. 1997) (10-month-old information that defendant had downloaded graphic depiction of minors engaged in sexual activity from a computer bulletin board was not stale, since one affiant explained that child pornography collectors rarely dispose of material, but rather secure it for a long time in a safe place, typically their home). Defense counsel asserting a staleness claim in the possession of pornography context should argue that expert testimony by an affiant regarding the nature of “child molesters,” “pornographers,” or “pedophiles” should be rejected where there is no showing, outside of the material found in the search, that the defendant is in fact a member of one of these groups. See *U.S. v. Weber*, 923 F.2d 1338 (9th Cir. 1991) (information regarding pornographic advertising material sent to defendant 20 months prior to search was stale; testimony of purported expert that “child molesters” and “pedophiles” retain this information in their homes for long periods of time was not relevant to probable cause since there was no evidence presented that Weber was a child molester or pedophile).

4.14.07 Anticipatory Warrants

In carefully controlled circumstances, the government may use anticipatory search warrants. Anticipatory search warrants authorize a search based on finding that probable cause will arise in the near
future. *U.S. v. Garcia*, 882 F.2d 699 (2d Cir. 1989). An affidavit in support of an anticipatory search warrant must show that the property sought is on a “sure course” to the destination targeted by the search. *U.S. v. Ruddell*, 71 F.3d 331 (9th Cir. 1995). For example, in *Ruddell*, a postal inspector’s plans to execute a controlled delivery of a videotape to defendant’s house made the delivery of the illicit tape on sufficient “sure course” for the issuance of a valid anticipatory warrant.

The existence of conditions precedent to an anticipatory warrant’s execution are integral to its validity. U.S. Const. amend. IV. There is, however, disagreement as to whether the conditions precedent necessarily have to be listed on the face of the warrant. The First Circuit requires that an anticipatory search warrant must, on its face, specifically identify the triggering event in such a way as to leave “as little as possible to the discretion of the agent executing the warrant.” *U.S. v. Ricciardelli*, 998 F.2d 8, 13 (1st Cir. 1993). The Ninth Circuit held that “in order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event.” *U.S. v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998). In contrast, the Second Circuit has held that an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution when: (1) clear, explicit, and narrowly drawn conditions for the execution of the warrant are contained in the affidavit that applies for the warrant application; and (2) those conditions are actually satisfied before the warrant is executed. See *U.S. v. Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995). The Sixth, Seventh, Eight and Tenth Circuits also addressed this issue and adopted view similar to *Moetamedi*. See *U.S. v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991); *U.S. v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997); *U.S. v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *U.S. v. Hugoboom*, 112 F.3d 1081, 1086-87 (10th Cir. 1997). The mere fact that a warrant sought by law enforcement is anticipatory does not subject the warrant application to any heightened or special scrutiny. *Id*.

4.14.08 Execution of the Warrant

Execution of a warrant requires lawful entry onto the property. If police are executing an arrest warrant at the home of someone not named in the warrant, a search warrant for that home is required. *Steagald v. U.S.*, 451 U.S. 204, 212-13 (1981).

A warrant must be executed within a specified statutory period after its issuance. Under Fed. R. Crim. P. 41(c)(1), that period is 10 days. In the absence of a controlling statute, execution must be within a reasonable length of time. A delay within the statutory period may be excessive if the facts establishing probable cause have changed. *See House v. U.S.*, 411 F.2d 725 (D.C. Cir. 1970); *Spinelli v. U.S.*, 382 F.2d 871 (8th Cir. 1967), rev’d on other grounds, 393 U.S. 410 (1969); *Mitchell v. U.S.*, 258 F.2d 435 (D.C. Cir. 1958).

The Fourth Amendment’s prohibition of unreasonable searches requires searching at a reasonable time and in a reasonable fashion. *See Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985); *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994). A search may be invalid if carried out in an unreasonable fashion. *Id.* at 875. Whether an otherwise valid search was carried out in an unreasonable manner is examined with an objective assessment of the stated facts and circumstances confronting the officers conducting the search. *Id.*

In *Franklin*, a man suffering from an advanced case of multiple sclerosis was removed from his bed and forced to sit handcuffed in his living room, wearing only a tee-shirt, with his genitals exposed, for over an hour after officers had finished searching his bedroom. The Ninth Circuit used *Graham v. Conner*, 490 U.S. 386 (1989), as the cornerstone of its analysis. In *Graham*, the Supreme Court stated that determining the reasonableness of a seizure “requires careful attention to the facts and circumstances of each case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the arresting officers or others, and whether he is attempting to evade arrest by flight.” *Id.* at 396. The *Franklin* court expanded upon *Graham* by stating: “[w]e must look to whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*, and then must consider ‘whether the totality of the circumstances justifies a particular sort of seizure.’” *Franklin v. Foxworth*, 31 F.3d at 876 (citations omitted). *Franklin* was remanded, as the violation was found “egregious” by the appellate court. *Id.*

News reporters brought into home during attempted execution of warrant violated the Fourth Amendment rights of homeowners. *See Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 1695 (1999). Police actions in execution of a warrant must be related to objectives of an authorized intrusion and the presence of media inside the home was not related to the purpose of the authorized intrusion. *Id.*

Under federal law, a special procedure must be followed in order to obtain a warrant which can be executed at nighttime. *See Fed. R. Crim. P. 41(c)(1).* A daytime warrant can be executed at night if the premises are unoccupied. *U.S. v. Ravich*, 421 F.2d 1196 (2d Cir. 1970). *But see O’Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir. 1989) (entry of a residence at night to execute an arrest warrant
violated the Fourth Amendment in the absence of the issuing magistrate’s determination that nighttime service is reasonable under the circumstances).

Once a valid search warrant has been issued, it may be executed by almost any means necessary. In *U.S. v. Becker*, 929 F.2d 442 (9th Cir. 1991), the court held that the use of a jackhammer to search below a concrete slab on the premises specified in the search warrant was not an unreasonable execution of the search warrant.

### 4.14.09 Knock and Announce Requirements


The Supreme Court has refused to allow a blanket exception to the knock-and-announce requirement for felony drug investigations. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Instead, to justify an unannounced entry, police must have reasonable suspicion that knocking and announcing their presence, under circumstances particular to the case, would be dangerous, futile, or inhibit the effective investigation of crime by, for example, giving suspects a chance to destroy evidence. *Id.* The Supreme Court emphasized that when confronted with a case involving an unannounced entry, the facts and circumstances surrounding the particular entry must be scrutinized. *Id.*

The Supreme Court, in *Wilson*, stated: “[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.” *Wilson*, 514 U.S. at 929. When determining the reasonableness of a search, whether the officers knocked and announced prior to entering is one factor to be considered. *Id.* Countervailing law enforcement interests, which may include threats of physical harm to officers, hot pursuit, or a specific reason to believe evidence will likely be destroyed if notice is given, may establish the reasonableness of an unannounced entry. *Id.* However, the Supreme Court explicitly left the countervailing factors to be decided by lower courts. *Id.*

The interests protected by the “knock and announce” principle include reduction of potential violence to both police officers and the occupants of the premises searched; needless destruction of private property, and the recognition of the individual’s privacy interests in his or her home. *See U.S. v. Bates*, 84 F.3d 790 (6th Cir. 1996). For this reason, police officers must have more than a hunch or suspicion before exigency excuses the need to knock and announce their presence and purpose before entering someone’s home. *Id.* In *Bates*, a police informant reported that there was a weapon in an apartment to be searched. There was no evidence indicating that the suspects would use the gun, none had a criminal history for violence or a reputation for violence, and none had threatened violence against any law enforcement official. The court found there was no exigency to excuse the knock and announce requirement. *Id.* *Cf. U.S. v. Pearson*, 746 F.2d 787 (11th Cir. 1984) (exigent circumstances excused
the knock-and-announce requirement where suspects were armed, had prior felony convictions, and executing agents had reason to believe the house held a stockpile of firearms).

Refusal of entry is required before entry may be accomplished by force. Title 18 U.S.C. §3109 states that: “The officer may break open any outer . . . door or window of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . .” See, e.g., U.S. v. Wallace, 931 F. Supp. 1556 (M.D. Ala. 1996). Exigent circumstances may excuse an unannounced forcible entry. Id. In addition, a failure to respond by occupants may be constructive refusal. Id. Exigent circumstances exist only where the officers face the threat of physical violence, the subject of the warrant may escape, or the police have reason to believe the occupant will destroy evidence if given notice of the pending entry. Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson, 514 U.S. at 927. Where an entry causes destruction of property, the exigency must consist of more than a generalized and nonspecific fear, U.S. v. Perez, 67 F.3d 1371 (9th Cir.), op. withdrawn in part on other grounds, 116 F.3d 840 (9th Cir. 1997) (en banc). However, the lawfulness of a no-knock entry does not depend on whether property is damaged during the course of entry. U.S. v. Ramirez, 523 U.S. 65 (1998). But “excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though entry itself is lawful and the fruits of a search are not subject to suppression.” Wilson, 514 U.S. at 997. When police have properly knocked and announced their identity and purpose, mild exigency has been sufficient to justify simultaneous entry if it can be accomplished without destruction of property. There is no type of crime or evidence, standing alone, that justifies a forced entry. See U.S. v. Likas, 448 F.2d 607 (7th Cir. 1971) (warrant for “flash paper” did not excuse failure to announce authority and purpose before forceful entry).

The government bears the burden of proving that exigent circumstances warranted the entry of a residence by police officers executing a warrant without first announcing their presence and authority. U.S. Const. amend. IV; U.S. v. Bates, 84 F.3d at 790. The remedy for failing to knock and announce is suppression of evidence. U.S. v. Kennedy, 32 F.3d 876 (4th Cir. 1994); U.S. v. Becker, 23 F.3d 1537, 1541-42 (9th Cir. 1994); U.S. v. Finch, 998 F.2d 349, 354 (6th Cir. 1993).

Exigent circumstances may exist when: (1) persons within the premises to be searched already know of the officer’s authority and purpose; (2) the officers have a justified belief that someone inside the dwelling is in imminent peril of bodily harm; or (3) the officers have a justified belief that those within know the officers are present and are either actively escaping or destroying evidence. Finch, 998 F.2d at 354.

4.15 DEFECTS IN WARRANTS

4.15.01 False Affidavits

Where a defendant makes a substantial preliminary showing that a false statement was included knowingly and intentionally, or with reckless disregard for the truth, by an affiant in a search warrant affidavit, and if the allegedly false statement was necessary to a finding of probable cause, the Fourth
Amendment requires that an evidentiary hearing be held at defendant’s request to determine the validity of the warrant issued pursuant to this information. *Franks v. Delaware*, 438 U.S. 154 (1978).

Under *Franks*, a defendant must satisfy a two-pronged test to obtain an evidentiary hearing. First, a defendant must make a “substantial preliminary showing” that the affidavit contains actual falsity, and that this falsity was deliberate or in reckless disregard of the truth. *Id.* at 171. Clear proof of deliberate or reckless misstatement or omissions is not required at this stage, but rather is reserved for the evidentiary hearing. *See U.S. v. Stanert*, 762 F.2d 775, 781 (9th Cir.), amended, 769 F.2d 1410 (9th Cir. 1985); *U.S. v. Chesher*, 678 F.2d 1353, 1362 (9th Cir. 1982). All that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly misstated or omitted facts required to prevent technically true statements in the affidavit from being misleading. *Id.*

The second prong of the *Franks* test requires a court to find that the challenged statements are necessary to a finding of probable cause. *Franks*, 438 U.S. at 171-72; *see also U.S. v. Wold*, 979 F.2d 632 (8th Cir. 1992) (affidavit that contains false statements made deliberately or with reckless disregard for the truth will invalidate a finding of probable cause); *U.S. v. DiCesare*, 765 F.2d 890, 894-95 (9th Cir.), amended, 777 F.2d 543 (9th Cir. 1985).

An omission by a government official who is not the affiant may serve as the basis for a *Franks* hearing. *See U.S. v. Kyllo*, 37 F.3d 526 (9th Cir. 1994); *U.S. v. DeLeon*, 979 F.2d 761 (9th Cir. 1992); *U.S. v. Calisto*, 838 F.2d 711 (3d Cir. 1988); *U.S. v. Pritchard*, 745 F.2d 1112 (7th Cir. 1984).

In *Kyllo*, the defendant was erroneously denied a *Franks* hearing. The Defendant, Kyllo, satisfied the first prong of *Franks* when he showed that key facts were omitted from the affidavit supporting a warrant to search his residence. The affidavit established probable cause, in part, by stating that Kyllo’s wife had a recent drug-related arrest. Omitted from the affidavit, however, were the facts that Kyllo and his wife were separated, living in different states, and that Kyllo’s wife was using her maiden name. *Kyllo*, 37 F.3d at 528. The affiant’s reliance on information provided by another law enforcement agent did not alone establish the affiant’s accuracy. *Id.* at 529.

Additionally, Kyllo showed that he was prejudiced by the omission of facts from the affidavit. Without information regarding his wife’s arrest, the affidavit probably did not provide probable cause to search. *Id.* at 530. As a consequence, Kyllo was granted a remand for a *Franks* hearing. *Id.* at 531.

Failure to investigate fully is not evidence of an affiant’s reckless disregard of the truth for purposes of a *Franks* hearing. *U.S. v. Dale*, 991 F.2d 819, 844 (D.C. Cir. 1993). A *Franks* hearing will be denied where the allegedly false or misleading information in a warrant affidavit would not negate probable cause. *See U.S. v. Millar*, 79 F.3d 338, 342-43 (2d Cir. 1996); *see also U.S. v. Reeves*, 210 F.3d 1041 (9th Cir. 2000) (no error in denying *Franks* hearing where informant’s prior criminal history was omitted, because even if officer had informed magistrate of this information, it would not have affected the probable cause determination).
In dealing with both material misstatements in the affidavit as well as material omissions, the Ninth Circuit has held that the Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit which is valid on its face but contains deliberate or reckless omissions of facts tending to mislead the magistrate. See U.S. v. Ippolito, 774 F.2d 1482, 1486-87 (9th Cir. 1985); U.S. v. Stanert, 762 F.2d at 780-81. Therefore, when applying the Franks analysis, the court must delete the falsity from the original affidavit and then insert the omissions which misled the magistrate. Ippolito, 774 F.2d at 1487 n.1.

A defendant who claims that the affiant misrepresented or invented information allegedly supplied by a confidential informant is, in some instances, entitled to a Franks hearing. The first step is usually an ex parte, in camera hearing so the judge may determine whether the individual was, in fact, the informant. If the individual is the informant, the in camera hearing must be extended since its purpose was merely to determine whether the defendant has made a threshold showing of substantial falsehood. See U.S. v. Kiser, 716 F.2d 1268 (9th Cir. 1983).

A district court must suppress evidence seized under a warrant when an affiant has knowingly or recklessly included false information in the affidavit. U.S. v. Dozier, 844 F.2d 701, 705 (9th Cir.1988).

4.15.02 Defective Return of Search Warrants

The defective return of a search warrant was discussed in Cady v. Dombrowski, 413 U.S. 433 (1973). In Cady, Wisconsin police failed to list that a sock and floor mat had been seized on the search warrant before they returned the warrant. At a hearing subsequent to the warrant’s return, the sheriff responsible for executing the warrant did not state that these items had been seized. The Court rejected the argument that the defective return rendered the search invalid under the Fourth Amendment. Since the items were constitutionally seized, the Court held that it was not constitutionally significant that they were omitted from the warrant.

4.15.03 Failure to Provide Warrant

In U.S. v. Gantt, 194 F.3d 987 (9th Cir. 1999), the Ninth Circuit found that the failure to give defendant, who was present during search, a complete copy of the search warrant justified suppression of the evidence. Id. at 1006.

4.16 WARRANTLESS SEARCHES

Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.

Warrantless searches are presumptively illegal. *Katz v. U.S.*, 389 U.S. 347 (1967). A few specifically established exceptions, have been “jealously and carefully drawn,” and will justify the admission of evidence obtained from a warrantless search. *Jones v. U.S.*, 357 U.S. 493, 499 (1958). Where special needs beyond the normal requirements of law enforcement would make procurement of a warrant impracticable, or the goal of deterring future violations of the Fourth Amendment, would not be furthered, the Court has recognized exceptions to the warrant requirement. The minimal deterrence which would derive from the application of the Exclusionary Rule in these recurring situations is thought to be outweighed by the loss of highly reliable evidence.

Once it is established that a warrantless search occurred, the burden is on the government to establish by a preponderance that their conduct was within one of the recognized exceptions and was reasonable. See *U.S. v. Jeffers*, 342 U.S. 48, 51 (1951); *U.S. v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983). A general “reasonableness” exception has been rejected in favor of specifically delineated ones. *U.S. v. Bute*, 43 F.3d 531 (10th Cir. 1994).

### 4.16.01 Search Incident to Lawful Arrest

#### 4.16.01.01 Scope

A warrantless search of a person being arrested and the area from which an arrestee might gain possession of a weapon or destructible evidence does not violate the Fourth Amendment, as long as it is contemporaneous to the arrest. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). A search may also occur subsequent to a valid arrest as long as the officers initially had probable cause to arrest. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). No probable cause or reasonable suspicion that the suspect possesses evidence or weapons need be present. *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Although its original justification was the preservation of evidence and ensuring the safety of officers, the scope of such searches has been broadly construed. As the Court noted only four years after its creation,

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . a search incident to the arrest requires no additional justification.


The area of the search has been held to include areas which could not possibly have been within reach of an arrestee, including the search of an area after a suspect is handcuffed and removed from the room. *U.S. v. Turner*, 926 F.2d 883 (9th Cir. 1991). A search of the area within reach of a third party present at the time of the arrest may also be justified by the officers’ reasonable fears for their safety and destruction of evidence. *U.S. v. Simmons*, 567 F.2d 314 (7th Cir. 1977) (search of arrestee’s companion valid as incident to arrest).
Searches which extend to an area that was not possibly within the arrestee’s control at the time of arrest are proscribed by the Fourth Amendment. See, e.g., U.S. v. Strahan, 984 F.2d 155, 159 (6th Cir. 1993) (where defendant was arrested 30 feet away from his car, the passenger compartment was not within his immediate control at the time of the arrest and was illegally searched); U.S. v. Bonitz, 826 F.2d 954 (10th Cir. 1987) (search not related to safety of officers or to prevent destruction of evidence not justified as incident to arrest); U.S. v. Cueto, 611 F.2d 1056 (5th Cir. 1980) (search of room that defendant had not been in when arrested, after defendant was handcuffed and under arrest not incident to arrest). See also U.S. v. Perea, 986 F.2d 633, 643 (2d Cir. 1993) (exception cannot be satisfied by bringing arrestee to area that police want to search, or item to area of arrest). The Court has unanimously refused to create a homicide scene exception. Mincey v. Arizona, 437 U.S. 385 (1978). See also Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7 (1999) (per curiam) (before any arrests were made, police officers reentered a building where a homicide had occurred and spent over 16 hours taking photographs, collecting evidence, and searching the building; the Supreme Court remanded the case ordering the trial court to find either an exception for the warrantless search or to suppress the evidence found).

A search of luggage held by the arrestee will be valid even after he has been handcuffed and the luggage is in the custody of the police, as long as it is relatively contemporaneous with the arrest. U.S. v. Queen, 847 F.2d 346, 353-54 (7th Cir. 1988). A search of the car may occur even where the first contact with defendant is shortly after leaving the vehicle. U.S. v. Arango, 879 F.2d 1501 (7th Cir. 1989) (defendant’s proximity to vehicle at beginning of encounter justified search incident to arrest). While courts have allowed some flexibility in the amount of time which elapses between the arrest and search, a search too remote in time cannot qualify as incident to arrest. U.S. v. Vasey, 834 F.2d 782 (9th Cir. 1987) (search after 30-45 minute delay after defendant was under arrest and removed from car was not incident to arrest).

Although a search incident to arrest will only be legal if the underlying arrest was, Michigan v. DiFillippo, 443 U.S. 31 (1979), the Eighth Circuit has held that the legality of an arrest should be determined merely by a probable cause standard, even if the arrest was made under state law. The court noted:

[W]e do not think Fourth Amendment analysis requires reference to an arrest’s legality under state law ... An arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause . . . . On remand, the district court should evaluate the case as if federal officers had stopped [defendant].

U.S. v. Bell, 54 F.3d 502, 504 (8th Cir. 1995).

4.16.01.02 Contemporaneous Requirement

To be incident to arrest, a search must be substantially contemporaneous with the arrest. See Shipley v. California, 395 U.S. 818, 819 (1969). See, e.g., U.S. v. Hudson, 100 F.3d 1409 (9th Cir. 1996) (search a few minutes after defendant was arrested and removed from room was substantially contemporaneous with arrest); U.S. v. McLaughlin, 170 F.3d 889, 893 (9th Cir. 1999) (search of vehicle
that commenced five minutes after defendant was arrested and removed from scene qualified as search incident to arrest; but see U.S. v. Johnson, 16 F.3d 69 (5th Cir.) clarified on reh’g, 18 F.3d 293 (5th Cir. 1994) (warrantless search of briefcase within 6-8 feet of defendant not proper as incident to arrest where officer was not concerned with the destruction of evidence or his safety); U.S. v. $639,558 in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992) (search of suitcase in possession of police a half hour after the arrest was not incident to arrest). A search that occurs at the station house which could have occurred at the time of arrest even after a substantial delay will usually be considered incident to arrest. U.S. v. Edwards, 415 U.S. 800 (1974).

4.16.01.03 Protective Sweep

Where officers have an articulable suspicion that a dangerous individual may be in the area to be searched, a “protective sweep” may be performed to ensure the officers’ safety. Maryland v. Buie, 494 U.S. 325 (1990) (only cursory search of areas where person may be found upon articulable suspicion that another dangerous individual may be present). The Buie Court limited the newly created exception to, “[A] quick and limited search of premises . . . narrowly confined to cursory visual inspection of those places in which a person might be hiding.” Id. at 335-36. See, e.g., U.S. v. Ford, 56 F.3d 265 (D.C. Cir. 1995) (sweep of apartment proper where defendant arrested in hallway immediately adjoining apartment); U.S. v. Lauter, 57 F.3d 212 (2d Cir. 1995) (even in absence of particularized suspicion, search of room immediately adjoining room where arrest took place was valid as protective sweep); U.S. v. Legg, 18 F.3d 240 (4th Cir. 1994) (seizure of firearm in plain view during protective sweep valid).

The protective sweep exception has been analogized to an investigative stop and frisk (Terry v. Ohio, 392 U.S. 1 (1968)) and the protective search of a vehicle (Michigan v. Long, 463 U.S. 1032 (1983)) since its underlying justifications are safety of police rather than the procurement of evidence. Evidence obtained during a search which lasts longer than necessary to complete the arrest and depart the premises will not be admissible as obtained during a protective sweep. See, e.g., U.S. v. Noushfar, 78 F.3d 1442 (9th Cir. 1996) (30 minute search of apartment after defendant was arrested, handcuffed, and sitting in other room exceeded protective sweep).

The court has also resisted the creation of a per se classification which allows protective sweeps for certain categories of crimes. See U.S. v. Hatcher, 680 F.2d 438, 444 (6th Cir. 1982) (arrests for drug crimes, although often dangerous, do not, standing alone, justify protective sweep). Additionally, in justifying a protective sweep it is improper for the government to rely upon the characteristics of the arrestee as a measure of dangerousness of another individual who might be present. U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996).

Where an arrest occurs outside of an individual’s home, a search of the home is usually not justified. Vale v. Louisiana, 399 U.S. 30 (1970); but see U.S. v. Santana, 427 U.S. 38 (1976) (once defendant is exposed to public view from doorway, pursuit into home and subsequent search proper); U.S. v. Hoyos, 892 F.2d 1387 (9th Cir. 1989) (where arrest takes place outside, protective sweep of residence justified if police had reason to believe that evidence would have been destroyed or that officers might have been harmed).
4.16.02 Automobile Exception

Due to their inherent mobility and the diminished expectation of privacy, cars are subject to a distinct Fourth Amendment analysis. *California v. Acevedo*, 500 U.S. 565 (1991); *Carroll v. U.S.*, 267 U.S. 132 (1925). A car’s interior compartment and any containers therein can be searched upon a custodial arrest of any of its occupants. *New York v. Belton*, 453 U.S. 454 (1981) (search of passenger compartment valid after custodial arrest for traffic infraction, even though not for evidence of the crime). This includes the search of a locked glove compartment. *U.S. v. Woody*, 55 F.3d 1257 (7th Cir. 1995). The scope of a vehicle search under *Belton* has been broadly construed. It has been noted: “[t]hat *Belton* unmistakably forecloses all . . . post facto inquiries on actual ‘reachability’. . . the only question a trial court asks is whether the area searched is generally ‘reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible.’” *U.S. v. Doward*, 41 F.3d 789, 794 (1st Cir. 1994) (quoting 3 Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* §7.1 (c) at 16-17 (2d ed. 1987)) (emphasis in original). Police officers with probable cause to search a car may also inspect a passenger’s belongings that are found in the car if the belongings are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297 (1999).

A warrantless search also may be conducted where probable cause exists that evidence of a crime or contraband are present. *U.S. v. Ross*, 456 U.S. 798, 804-09 (1982). This rule of law was recently reasserted by the Supreme Court in *Maryland v. Dyson*, 527 U.S. 465 (1999); see also *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *U.S. v. Garcia*, 205 F.3d 1182 (9th Cir. 2000) (warrantless trunk search after narcotic detector dog alerted to the trunk is valid because it is based on probable cause). In *Labron*, the Court held that where a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the car without a warrant. *Labron*, 518 U.S. at 940. Items in plain view in a car which has been lawfully stopped or is in police custody may also be seized. *Michigan v. Long*, 463 U.S. 1032 (1983). The Court has also held that there is no expectation of privacy in a car’s vehicle identification number (VIN). *New York v. Class*, 475 U.S. 106 (1986).

A search of luggage held by the arrestee will be valid even after he has been handcuffed and the luggage is in the custody of the police, as long as it is relatively contemporaneous with the arrest. *U.S. v. Queen*, 847 F.2d 346, 353-54 (7th Cir. 1988). A search of the car may occur even where the first contact with defendant is shortly after leaving the vehicle. *U.S. v. Arango*, 879 F.2d 1501 (7th Cir. 1989) (defendant’s proximity to vehicle at beginning of encounter justified search incident to arrest). While courts have allowed some flexibility in the amount of time which elapses between the arrest and search, a search too remote in time cannot qualify as incident to arrest. *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search after 30-45 minute delay after defendant was under arrest and removed from car was not incident to arrest).

A passenger can be removed from the vehicle while a traffic stop is being conducted. *Maryland v. Wilson*, 519 U.S. 408 (1997). This follows the Court’s earlier holding that the driver can be asked to exit the vehicle during a traffic stop without any further justification. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). However, an encounter which is commenced as a traffic stop is not deemed consensual unless
the driver’s documents have been returned to him. *U.S. v. Lee*, 73 F.3d 1034, 1040 (10th Cir. 1996) (where consent to search was requested and obtained before license was returned, consent was not voluntary).

Pretextual traffic stops are no longer unconstitutional, so long as the stop for the underlying offense is valid. *Whren v. U.S.*, 519 U.S. 408 (1997). In light of Whren, the term “pretextual stop” is meaningless, since the only area of inquiry is the objective circumstances surrounding the arrest, not the officer’s subjective intent. *U.S. v. Williams*, 106 F.3d 1362 (7th Cir. 1997). In rejecting a standardized test for determining whether a reasonable officer would make a traffic stop on the given facts, Justice Scalia noted that it would be impossible to “[p]lumb the collective consciousness of law enforcement . . . .” *Whren*, 517 U.S. at 815. See supra §4.08.04.01 Pretextual Stops.

### 4.16.02.01 Motor Homes and Houseboats

The vehicle exception has also been extended to motor homes and houseboats in certain circumstances. See *California v. Carney*, 471 U.S. 386, (1985) (holding that a readily mobile motor home could be searched without a warrant because both justifications for the vehicle exception applied); *U.S. v. Albers*, 136 F.3d 670 (9th Cir. 1998) (finding that the vehicle exception applies to houseboats so long as *Carney’s* requirements are met).
4.16.02.02 Bus Searches

The Ninth Circuit has stated that the test to determine if a bus search is legal is whether a reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter. *U.S. v. Stephens*, 206 F.3d 914 (9th Cir. 2000). In *Stephens*, three officers boarded a bus because they observed Stephens placing a heavy and bulging gym bag in an overhead compartment. 206 F.3d at 916. The officers, who were not in uniform, placed themselves in the front, middle and back of the bus. *Id.* The officer in front used the public address system to announce that they were police officers conducting a routine narcotics investigation. *Id.* The officer informed them that they weren’t under arrest and were free to leave. *Id.* The Ninth Circuit characterized the officer’s admonishment as a “Hobson’s choice” because the passenger could remain on the bus and consent, or exit the bus and run the risk of giving the officers reasonable suspicion to detain. *Id.* at 817. Given that the interaction took place in the “cramped confines of a bus,” that three officers boarded the bus, while two others waited outside, and that the officers used the bus company’s public address system, the Court held that the encounter between Stephens and the officer amounted to an seizure. *Id.* at 918.

4.16.02.03 Inventory Search

After a lawful, custodial arrest, an administrate inventory search may be conducted of defendant’s possessions pursuant to established administrative procedures. *Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367 (1987). This search is not to procure evidence, but rather to protect the suspect’s belongings while in custody, to protect the police against claims of theft, and to protect the police from potentially dangerous articles. *Id.* The search must be in accordance with standardized procedures which limit an officer’s discretion to search. A search will be allowed where the arrest is one for which the officer had the discretion to make a custodial arrest, and is not limited to those which require a custodial arrest. An unreasonable delay after arrest will not be considered an inventory search. *Chambers v. Maroney*, 399 U.S. 42 (1970). Once a suspect is arrested and taken into custody, a full body search may be performed even if not for the purpose of disarming him or preserving evidence. *U.S. v. Robinson*, 414 U.S. 218 (1973).

4.16.03 Private Searches

Because the Exclusionary Rule is a deterrent to police misconduct, the Fourth Amendment only proscribes government action. *Burdeau v. McDowell*, 256 U.S. 465 (1921). A threshold issue to any Fourth Amendment analysis is whether the conduct in question constituted government action. In the overwhelming majority of cases, government action is apparent. With the growth of private “police forces” and use of security guards, the analysis has become increasingly complicated. The Court has held that when a private company performs a “public function” it may be subject to Fourth Amendment restrictions. *Marsh v. Alabama*, 326 U.S. 501 (1946) (private company’s act of owning and operating town was the performance of a “public function” and their actions are subject to Fourth Amendment restrictions). The holding in *Marsh*, however, has been narrowly construed, and has not been expanded to apply to private security guards and police forces, even though their motivation for securing convictions (to protect their
employer’s interests) could be said to be similar to those of the government, and the purpose of the Exclusionary Rule would seem to be served by applying it to these actors as well.

The government cannot do through a private citizen what it cannot legally do itself. Evidence obtained by private citizens at the behest or encouragement of the government will be considered government action. *U.S. v. Reed*, 15 F.3d 928 (9th Cir. 1994); *U.S. v. Bennett*, 709 F.2d 803, 805 (2d Cir. 1983) (use of informant by ATF to take photos constituted government action). Searches conducted by private citizens in the mere hope of turning evidence over to the government will not constitute government action. *U.S. v. Scarborough*, 43 F.3d 1021 (6th Cir. 1994) (tape recording made by private citizen and turned over to government in hopes of sentence reduction did not constitute government conduct). The defendant has the burden of establishing by a preponderance that the private party acted as a government agent. *U.S. v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987).

Compliance by private citizens with government regulations has been held to constitute government conduct. *See, e.g.*, *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (urine test after accident as required by federal law is government action, and is subject to a Fourth Amendment analysis); *U.S. v. Ross*, 32 F.3d 1411 (9th Cir. 1994) (search of airline passenger’s bag pursuant to airline and FAA regulations constituted government conduct). A government agent who is acting in a seemingly public capacity may be deemed to be a government actor for Fourth Amendment purposes. *U.S. v. Dansberry*, 500 F. Supp. 140 (N.D. Ill. 1980) (search conducted by off duty police officer working as security guard in store was government action). Where a government agent acts outside the scope of his employment, his actions may not constitute government action. *U.S. v. Smith*, 810 F.2d 996 (10th Cir. 1987).

More complicated is the situation where both private and governmental conduct is involved in the search. In *Walter v. U.S.* 447 U.S. 649 (1980), the Court held that where a private courier company turned movies over to the FBI that appeared to be obscene based upon the covers they had upon them, and were found to be obscene after being viewed by agents, that an illegal search had occurred, since the viewing by the agents exceeded the scope of the private search. The Court held that the agents should have obtained a warrant before viewing the movies. This is distinguishable from a governmental search which reveals no more than a private search, as was the case in *U.S. v. Jacobson*, 466 US 109 (1984). In *Jacobson*, a search conducted by a private courier uncovered a white powder suspected to be cocaine which was turned over to the government. The government tested the substance to determine if it was in fact cocaine. The *Jacobson* Court held that the government’s actions of testing the substance did not violate any reasonable expectation of privacy, since it would only determine whether or not the powder was contraband.

The First Circuit has held that a warrantless search by DEA agents was improper even when an X-ray of a passenger’s baggage revealed what could have been a weapon, revealed objects that were, upon further inspection, believed to be drugs, and the baggage was turned over to the DEA by airport checkpoint employees. The packages were then opened to reveal drugs. The court held that once it was determined that no security concern existed, the DEA search was more intrusive than the earlier search, not merely an extension of the checkpoint search, and violated the Fourth Amendment. *U.S. v. Doe*, 61 F.3d 107 (1st Cir. 1995).
Police presence in the vicinity of a private search may not constitute government conduct if their presence is solely to ensure the safety of the private individuals. *U.S. v. Cleaveland*, 38 F.3d 1092 (9th Cir. 1994) (despite presence of police nearby, search of defendant’s property by electric company was not governmental conduct since search was initiated and performed by electric company, and police were nearby solely to ensure safety of employees).

Still more questions arise where a search is conducted by a government agent whose job is not the uncovering of crime. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court held that the Fourth Amendment applies to civil as well as criminal authorities, and rejected the government’s position that teachers, in their role as surrogate parents, should be immune from the restrictions of the Fourth Amendment.

### 4.16.04 Foreign Police

The Fourth Amendment does not apply to searches conducted by United States authorities of another country. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This is also true where the government is aware that a search will occur and is interested in its outcome. See, e.g., *Stonehill v. U.S.*, 405 F.2d 738 (9th Cir. 1968) (government was aware of and inspected and copied documents seized in search conducted by foreign government).

The analysis is more complicated where governmental involvement is more significant. To be immune from the Fourth Amendment, it must be shown that the United States did not initiate, supervise, control or direct the search. The degree of government participation will be determinative. Where the government is found to be “full partners” in a search with a foreign government, suppression is warranted. See, e.g., *U.S. v. Peterson*, 812 F.2d 486 (9th Cir. 1987) (DEA agents’ participation on a daily basis with interception and translation of messages warranted suppression); *Lau v. U.S.*, 778 F. Supp. 98 (D. P.R. 1991), aff’d, 976 F.2d 724 (1st Cir. 1992) (government’s actions in connection with search of defendant’s home in St. Martin warranted suppression).

### 4.16.05 Border Searches

Searches at the border without a warrant, probable cause, or even reasonable suspicion are *per se* reasonable. *U.S. v. Montoya De Hernandez*, 473 U.S. 531 (1985). This is true even where a search at the borderer is performed by or at the behest of another government agency. *U.S. v. Alfonso*, 759 F.2d 728 (9th Cir. 1985) (warrantless search at border by DEA agents valid). At the border, the Fourth Amendment balance of interests leans heavily to the government because of national self-protection and the need to protect its territorial integrity. *U.S. v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir. 1994). The same standard applies to those areas which have been deemed to be the “functional equivalent of borders,” such as an airport where international flights arrive. *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973); *U.S. v. Mayer*, 818 F.2d 725 (10th Cir. 1987).

The above standard has also been extended to those exiting the country. See, e.g., *U.S. v. Oriakhi*, 57 F.3d 1290, 1296 (4th Cir.) (border search exception applies whether the item or person is
entering or exiting the country), cert. denied, 516 U.S. 952 (1995); *U.S. v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1995) (routine warrantless stop and search for currency of persons exiting the country subject to same Fourth Amendment analysis as people entering the country). Similarly, mail arriving from foreign countries may be searched on “reasonable cause” that contraband may be contained in it. *U.S. v. Ramsey*, 431 U.S. 606 (1977); *U.S. v. Taghizadeh*, 87 F.3d 287 (9th Cir. 1996); *U.S. v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993).

### 4.16.05.01 “Non-Routine” Searches

Non-routine border searches and inspections must be supported by reasonable suspicion. *U.S. v. Sandoval Vargas*, 854 F.2d 1132, 1134 (9th Cir.), cert. denied, 488 U.S. 912 (1988); *U.S. v. Rivas*, 157 F.3d 364 (5th Cir. 1998) (A canine sniff of a vehicle suspected of carrying drugs resulting in the canine “casting” toward the vehicle, which is less than an alert, did not establish reasonable suspicion for the non-routine search of drilling into the vehicle). The degree of invasiveness or intrusiveness will determine whether or not a search was routine. *U.S. v. Robles*, 45 F.3d 1, 5 (1st Cir. 1995). Although the Supreme Court has never identified those activities which are “routine,” many Circuit courts have identified factors to evaluate whether a search or detention is non-routine. In *U.S. v. Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988), the court articulated the following factors: (1) whether the suspect was required to disrobe or expose intimate body parts; (2) whether physical contact with the suspect was made during the search; (3) whether force was used; (4) whether the suspect was exposed to pain or danger; (5) the overall manner of the search; and (6) whether the reasonable expectation of privacy of the suspect was violated.


The removal of one’s shoes is routine and does not require any suspicion. *U.S. v. Ramos-Saenz*, 36 F.3d 59 (9th Cir. 1994). Telling a person to drop their pants and underwear is not routine, *U.S. v. Vance*, 62 F.3d 1152 (9th Cir. 1995); *Gonzalez-Rincon*, 36 F.3d at 859, but requesting a woman to raise her skirt in a private room with a female agent is permissible. *U.S. v. Braks*, 842 F.2d at 509 (1st Cir. 1988).

### 4.16.05.02 Roving Border Patrols

Stops near the international boarder to determine the occupant’s immigration status may be conducted only upon “reasonable suspicion.” *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Mexican ancestry, by itself, does not constitute reasonable suspicion). See supra §4.09.02 Roving Border Patrols.

### 4.16.06 Exigent Circumstances

Where probable cause exists, but immediate and serious consequences would occur if a warrant were obtained, a warrantless search may be justified. The need for quick action in an emergency situation
sometimes excuses the requirement of first obtaining a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, reh’g denied, 404 U.S. 874 (1971). The analysis is necessarily fact sensitive, and requires a court to determine whether, when considered from the perspective of the officer, the totality of the circumstances justified the warrantless governmental conduct at the time it occurred. See, e.g., *Murdock v. Stout*, 54 F.3d 1437, 1440 (9th Cir. 1995) (totality of circumstances analysis), *abrogated on other grounds by U.S. v. Ramirez*, 523 U.S. 65 (1998). The analysis ultimately hinges upon whether the officer had an “objectively reasonable” belief that there existed a situation where speed was essential. *U.S. v. Robles*, 37 F.3d 1260, 1263 (7th Cir. 1994) (burden of proving reasonableness of government conduct is on the government); *Mincey v. Arizona*, 437 U.S. 385, 391 (1978) (warrantless search that spanned several days was not objectively reasonable).

The existence of exigent circumstances, however, does not excuse the probable cause requirement to search the area in question. *U.S. v. Johnson*, 9 F.3d 506, 509 (6th Cir. 1993). Nor may the exigency relied upon be one which is created by the government’s failure to secure a timely warrant. *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir. 1984); *U.S. v. Collazo*, 732 F.2d 1200 (4th Cir. 1984). Similarly, the police may not create an exigent circumstance, and then rely upon its existence to justify a warrantless search. *U.S. v. Ogbuh*, 982 F.2d 1000, 1004 (6th Cir. 1993); *U.S. v. Johnson*, 12 F.3d 760, 764 (8th Cir. 1993).

The burden necessary to prove the existence of exigent circumstances is a heavy one, and will not easily be met by the government. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984). The Supreme Court has only recognized the gravity of the underlying offense as relevant to the exigent circumstances analysis. *Id.* at 753-54. However, several Circuits have provided a framework for the exigent circumstances analysis, and all of these frameworks are based upon *Dorman v. U.S.*, 435 F.2d 385, 392 (D.C. Cir. 1970) (en banc) which noted six additional factors that should be considered. These factors are: (1) a reasonable belief that the suspect is armed; (2) a clear showing of probable cause; (3) a strong belief that the suspect is on the premises; (4) likelihood that suspect will escape if not quickly apprehended; (5) a nonforcible entry providing reasonableness of police conduct; and (6) time of entry. See, e.g., *U.S. v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987) (per curiam) (application of *Dorman* factors).

The Second Circuit has articulated six “touchstones” used by courts for determining the existence of exigent circumstances. They are: (1) the gravity or violent nature of the underlying offense; (2) whether the suspect is believed to be armed; (3) the clear existence of probable cause; (4) strong reason to believe that the suspect is in the premises to be entered; (5) a likelihood that the suspect will escape if not quickly apprehended; and (6) the peaceful circumstances of the entry. *U.S. v. Brown*, 52 F.3d 415, 421 (2d Cir. 1995).

The Fifth Circuit recently articulated five factors which should be considered in the exigent circumstances analysis: (1) degree of urgency and amount of time necessary to obtain a warrant; (2) reasonable belief that contraband is about to be removed; (3) possible danger to officers guarding the site of the contraband; (4) indications that those in possession of the contraband are aware that the police are on their trail; and (5) ready destructibility of the contraband. *U.S. v. Howard*, 106 F.3d 70 (5th Cir. 1997).
4.16.06.01 Reasonableness Requirement

Even where exigent circumstances exist, the search must be conducted in a reasonable manner. *U.S. v. Brown*, 64 F.3d 1083, 1086-87 (7th Cir. 1995).

4.16.06.02 Destruction of Evidence

A circumstance often relied upon by the government to justify a warrantless search is the destruction of evidence such as drugs which are easily disposable. The court recently held that a search for drugs which are easily disposable will usually constitute exigent circumstances. *Richards v. Wisconsin*, 520 U.S. 385 (1997).


4.16.06.03 Officer Safety

Officers’ fear for their own safety may also constitute exigent circumstances. *U.S. v. Hardy*, 52 F.3d 147 (7th Cir. 1995); *U.S. v. Wilson*, 36 F.3d 205 (1st Cir. 1994).

4.16.06.04 Hot Pursuit

The police may follow a fleeing suspect into a building or dwelling without first obtaining a warrant. *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). The scope of the search permitted will be as broad as necessary to prevent the dangers that the suspect may resist or escape. *U.S. v. Santana*, 427 U.S. 38 (1976). The hot pursuit exception should not be invoked where police officers find it inconvenient to secure a warrant, but should instead be relied upon only where speed is essential to protect a compelling governmental interest. *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir. 1984). The Ninth Circuit has recently held that the hot pursuit exception to the warrant requirement still applies when police interrupt chase to wait for backup. *U.S. v. Johnson*, 207 F.3d 538 (9th Cir. 2000). The court held that because the area was not secure and the action was not controlled, the thirty minute delay for backup was consistent with hot pursuit along with concerns for officer safety. *Id.*

4.16.06.05 Rendering Emergency Assistance

Police may enter a home to assist someone who they reasonably believe is in distress and needs immediate assistance, such as emergency medical care. *U.S. v. Dunavan*, 485 F.2d 201 (6th Cir. 1973)

The Ninth Circuit recently adopted the following three factor test to evaluate the validity of search under the emergency doctrine: (1) whether the police have reasonable grounds to believe that there is an emergency and an immediate need for assistance for the protection or life or property; (2) whether the search was motivated primarily by intent to arrest and seize evidence; and (3) whether there is a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. *U.S. v. Morales Cervantes*, 219 F.3d 882 (9th Cir. 2000) (citing *People v. Mitchell*, 39 N.Y.2d 173, (1976)). In *Cervantes*, contacted the police after investigating a citizen complaint about a strong chemical odor in an apartment complex. 219 F.3d at 886. The police identified the odor as consistent with methamphetamine lab. *Id.* After determining that the odor came from Cervantes’ apartment, an officer peered through the windows and saw three men, one couch and a large pot on the kitchen floor. *Id.* After receiving no response to their request to investigate the odor, the officers entered the apartment and discovered a laboratory and thirty pounds of methamphetamine. *Id.* at 886-87. The Ninth Circuit held that the emergency doctrine justified the officers’ entry into the apartment because: (1) since methamphetamine labs are associated with dangerous chemicals, the officers reasonably believed that an emergency existed, and that assistance was necessary to protect lives; (2) the officer was primarily motivated by concern for the safety of the apartment building’s occupants; and (3) the officer had a reasonable basis to believe that the noxious chemical was coming from Cervantes’ apartment. *Id.* at 889-91.

A call for assistance will not allow a boundless search. *Thompson v. Louisiana*, 469 U.S. 17 (1984) (emergency call did not justify search). The police may enter a residence to fight a fire or determine its source without a warrant. *Michigan v. Clifford*, 464 U.S. 287 (1984); *U.S. v. Echegoyen*, 799 F.2d 1271, 1278-79 (9th Cir. 1986) (where immediate action was required due to serious fire hazard, warrantless entry was permissible); *but cf. U.S. v. Warner*, 843 F.2d 401, 404 (9th Cir. 1988) (warrantless entry not justified despite presence of volatile chemicals, since nobody was inside the premises, and chemicals had been present for two weeks without incident). Reentry for the purpose of investigation without a warrant will not be allowed unless the exigency still exists, or the search is conducted in accordance with established administrative procedures. *Michigan v. Tyler*, 436 U.S. 499 (1978). After a fire, an individual still maintains an expectation of privacy in his home, although it may be diminished. *Clifford*, 464 U.S. at 287. The *Clifford* Court announced a three part test to determine the validity of such a search: (1) the legitimate expectation of privacy of the homeowner; (2) the absence of exigent circumstances; and (3) whether the search was conducted in order to gather evidence of a crime or to determine the cause of the fire. A car which has been exploded also may be searched without a warrant to determine the source of the explosion. *U.S. v. Metzger*, 778 F.2d 1195, 1199-200 (6th Cir. 1985).

4.16.06.06 Entry on Private Property
In *U.S. v. Duran-Orozcod*, 192 F.3d 1277 (9th Cir. 1999), National Guardsmen observed eight persons carrying backpacks cross the border from Mexico into the United States. Border agents located footprints leading to a residence. The agents peered through the front window and viewed footprints leading to a closed room in the back of the house. They went to the backyard and looked through a back window where the agents observed what they suspected to be marijuana. The agents retreated, reported to a DEA agent, and the DEA agent applied for and obtained a warrant. The packages of marijuana were subsequently seized with the warrant. The evidence obtained after entering the backyard had to be suppressed as it was obtained after an illegal entry not falling into any exigent circumstance exception. *Id.* at 1281.

### 4.16.06.07 Telephonic Warrants

Where circumstances make it necessary to dispense with a written affidavit, a warrant may be issued based on sworn oral testimony communicated by telephone or other appropriate means. Fed. R. Crim. P. 41(c)(2)(A). Where the government relies upon exigent circumstances at a time when cellular telephones are extremely prevalent, counsel should consider whether a telephonic warrant could have been sought in a reasonably short time. *See, e.g., U.S. v. Patino*, 830 F.2d 1413 (7th Cir. 1987) (warrantless search not justified where warrant should have been obtained during 30 minute period); *U.S. v. Alvarez*, 810 F.2d 879, 882-84 (9th Cir. 1987) (warrantless search not justified where 90-minute period provided adequate time to secure telephonic warrant).

### 4.16.07 Plain View / Touch / Smell / Hearing

Evidence that is in plain view may be seized without a warrant in certain situations. The Court has set out a three prong test which must be “scrupulously” adhered to in order for a plain view seizure to be held valid: (1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the incriminating character of the object was immediately apparent; and (3) the officer had a lawful right of access to the object itself. *Horton v. California*, 496 U.S. 128 (1990). Additionally, the *Horton* Court eliminated the requirement that to qualify as plain view, discovery of the evidence had to be inadvertent. *Horton*, at 136-37. *See also U.S. v. Scopo*, 19 F.3d 777, 783 (2d Cir. 1994) (no inadvertency requirement); *U.S. v. Hill*, 19 F.3d 984, 989 (5th Cir. 1994) (same). Therefore, a search conducted in anticipation of uncovering evidence in plain view not specified in the warrant will be valid. *Moore v. Felger*, 19 F.3d 1054 (5th Cir. 1994).

#### 4.16.07.01 Lawful Position to View Object

In order to seize an item in plain view the police officer must have a legal right to be where he is. As the *Horton* Court noted, “It is, of course, an essential predicate to any valid warrantless seizure . . . that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.” 496 U.S. at 136.

#### 4.16.07.02 Whose Incriminating Character is Immediately Apparent
In order to seize evidence in plain view, probable cause must exist to believe the item is either evidence of a crime or contraband. “If the officer, unsure of what the object is, needs to uncover what he cannot already see to verify that it is probative of criminal activity, that verification process entails a search.” U.S. v. Brown, 79 F.3d 1499, 1508 (7th Cir. 1996). The correct analysis is whether the incriminating character was apparent to a trained officer, not an untrained person. U.S. v. Cortez, 449 U.S. 411, 418 (1981). Where an officer invites along another officer to whom the incriminating nature of evidence in plain view is immediately apparent, it does not establish that the search went beyond the scope of the warrant. U.S. v. Ewain, 78 F.3d 466 (9th Cir.) (accompaniment by postal inspector during execution of warrant for other items and to whom postal items were immediately incriminating was permissible), amended, 88 F.3d 689 (9th Cir. 1996)

In Arizona v. Hicks, 480 U.S. 321 (1987), the Court suppressed stereo equipment seized during the execution of a search warrant for other items, because probable cause to believe the equipment was stolen existed only after the items were moved, exposing serial numbers. See also U.S. v. Rude, 88 F.3d 1538 (9th Cir. 1996) (police review of documents not specified in warrant was beyond the scope of the warrant, and not within plain view exception, since further examination was required to determine if they were in fact incriminating), cert. denied, 519 U.S. 1058 (1997); U.S. v. Wilson, 36 F.3d 1298 (5th Cir. 1994) (seizure of checks which were only determined to be stolen upon the comparison of numbers was unreasonable).

4.16.07.03 Plain Touch

The plain view exception has been interpreted to include “plain touch.” Minnesota v. Dickerson, 508 U.S. 366 (1993). The requirements for plain touch are the same as those for plain view, as enumerated by the Horton Court. Id. at 375-76. As with plain view, to qualify, the incriminating character of the item must be immediately apparent. As the Dickerson Court noted, “If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object -- i.e., if its incriminating character [is not] ‘immediately apparent,’” Id. at 136 --” the plain view doctrine cannot justify its seizure.” Arizona v. Hicks, 480 U.S. 321 (1987). Dickerson, 508 U.S. at 375 (citations in original). In Dickerson, the Court held that an illegal warrantless search had occurred because the nature of the object (a rock of crack cocaine) discovered during a Terry stop became apparent to the officer only after extensive manipulation. Since Terry allows a pat-down search whose purpose “[i]s not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . .” (citing Terry, 392 U.S. at 26), the search which occurred went beyond the purview of what Terry authorizes. The Dickerson Court recognized that to allow such an exception would virtually swallow the Fourth Amendment, since almost any search which revealed contraband could be justified after-the-fact under this theory. However, Dickerson does not preclude the application of the plain-view doctrine to “plain-feel” situations where contraband (immediately apparent to the officer’s touch) is discovered during the course of an otherwise lawful search. U.S. v. Craft, 30 F.3d 1044 (8th Cir. 1994).

The “plain touch” doctrine does not permit an officer to physically manipulate a defendant’s bag. Bond v. U.S., ___ U.S. ___, 120 S. Ct. 1462 (2000). A border patrol agent boarded a bus in Texas to check the immigration status of its passengers. As he was leaving the bus, he “squeezed the soft luggage
which passengers had placed in the overhead storage space. He squeezed a canvas bag above [defendant’s] seat and noticed that it contained a ‘brick-like’ object.” *Id.* at 1463-64. The defendant then consented to a search of his bag and the agent discovered a “brick” of methamphetamine. The Supreme Court found that the defendant “sought to preserve privacy by using an opaque bag and placing that bag directly above his seat.” *Id.* at 1465. The Court also stated that the defendant’s expectation of privacy was reasonable and that “the agent’s physical manipulation of [defendant’s] bag violated the Fourth Amendment.” *Id.*

4.16.07.04 Plain Smell

The plain view exception has also been extended to include plain smell. *See, e.g.*, *U.S. v. Staula*, 80 F.3d 596, 602-03 (1st Cir. 1996) (warrantless search of car stopped for traffic violation justified by odor of marijuana); *U.S. v. Nicholson*, 17 F.3d 1294 (10th Cir. 1994) (same); *U.S. v. Haley*, 669 F.2d 201, 203 (4th Cir. 1982) (same); *U.S. v. Miller*, 812 F.2d 1206 (9th Cir. 1987) (strong smell of chemical used to make methamphetamine detected as coming from car in public place).
4.16.07.05 Plain Hearing

The plain view exception has also been extended to plain hearing. See U.S. v. Jackson, 588 F.2d 1046 (5th Cir. 1979) (warrantless seizure valid where the government rented a hotel room next to suspect’s from which they could overhear conversations).

4.16.07.06 Lawful Right of Access to Object

A police officer must have a lawful right of access to an item in plain view. For example, where an officer on the street sees an object in plain view through the window of a house which is plainly contraband, it cannot automatically be seized. U.S. v. Naugle, 997 F.2d 819 (10th Cir. 1993). The plain view doctrine cannot justify a warrantless seizure of this item, because to do so would require a warrantless entry upon private premises. Id. See also Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2000) (where police officer entered Bilida’s backyard in response to a security alarm signal and observed a raccoon in a cage in violation of state law prohibiting possession of raccoons as pets, officer violated Fourth Amendment by re-entering property to seize raccoon without a warrant).

4.16.08 Consent Searches

4.16.08.01 Voluntariness

If the government exerts undue pressure or improper means to secure consent, instead of obtaining a warrant as it can easily do, it is going to lose cases.

U.S. v. De Los Santos Ferrer, 999 F.2d 7, 11 (1st Cir. 1993)

The Court has held that, unlike those rights which are guaranteed to a criminal defendant to ensure a fair trial, the Fourth Amendment protects interests which are “of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.” Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Unlike the “fair trial” rights whose waiver must be “knowing and intelligent,” a Fourth Amendment waiver is a question of fact subject only to a “totality of the circumstances analysis.” Id. Failure to inform the subject of the search that refusal is an option (such as is required by Miranda), is one factor to be considered, and is not dispositive. U.S. v. Mendenhall, 446 U.S. 544 (1980); U.S. v. Knight, 58 F.3d 393 (8th Cir. 1995) (consent after Miranda tends to show voluntariness).

The court must determine whether, considering the totality-of-the-circumstances, the “consent” was unequivocal, specific, and given without duress or duration. U.S. v. Hathcock, 103 F.3d 715 (8th Cir.), cert. denied, 521 U.S. 1127 (1997). As with any totality-of-the-circumstances or consent analysis, courts must assess various aspects such as the education level, age, maturity, mental competence, impressionability, and emotional state of the person at the time consent was given. Other factors which bear upon the coerciveness of the encounter include the number of officers present, whether they were armed and/or displayed their weapons, whether the defendant was in custody, the circumstances of the
custody, and whether the “consent” was the product of custodial interrogation. Schneckloth, 412 U.S. at 218. See also U.S. v. Ayon-Meza, 177 F.3d 1130 (9th Cir. 1999) (“walk and talk” procedure where officer stops individuals, explains that they don’t have to talk to her, requests tickets, identification and then consent to search, does not amount to an involuntary stop).

A claim by police that they have a warrant, or can conduct the search even without permission will usually vitiate consent. See Go-Bart Importing Co. v. U.S., 282 U.S. 344, (1931); Bumper v. North Carolina, 391 U.S. 543 (1968). Similarly, incorrect assertions by the police that, based upon the circumstances, they can conduct a search without a warrant will void “consent.” Amos v. U.S., 255 U.S. 313 (1921). Where a warrant could have been obtained, such a statement is usually not considered coercive. U.S. v. Vasquez, 638 F.2d 507 (2d Cir. 1980).

Where consent is obtained from an encounter which begins as a traffic stop, failure to notify the driver that he was free to leave may vitiate the consent. Ohio v. Robinette, 519 U.S. 33 (1996). But cf. U.S. v. Torres-Sanchez, 83 F.3d 1123 (9th Cir. 1996) (consent given after 20 minute “investigative detention” in back of patrol car without receiving Miranda or being informed of the right to refuse was, considering totality-of-circumstances, voluntary). Additionally, where a driver gives consent in the context of a traffic stop, it will not be deemed voluntary if the driver’s documents were not returned to him before the request, since the defendant would not have felt free to terminate the encounter. U.S. v. Gonzalez-Lerma, 14 F.3d 1479 (10th Cir. 1994); U.S. v. Lee, 73 F.3d 1034, 1040 (10th Cir. 1996).

The government must prove by a preponderance that consent was voluntarily obtained, U.S. v. Miller, 20 F.3d 926 (8th Cir. 1994). Mere acquiescence to the demands of law enforcement will not satisfy the government’s burden. U.S. v. Shaibu, 920 F.2d 1423 (9th Cir.) (mere nonresistance to search not consent), amended, 912 F.2d 1193 (9th Cir. 1990). However, consent given while in custody, although subject to a more scrupulous review, is not necessarily invalid. U.S. v. Smith, 543 F.2d 1141 (5th Cir. 1976). The court has distinguished between situations where the consent was given as the product of the defendant’s valid or invalid custodial status. Where the defendant’s consent is the result of an illegal arrest, the “consent” may be characterized more properly as the product of undue coercion which vitiates such consent. Bumper v. North Carolina, 391 U.S. 543, (1968). But cf. U.S. v. Ramos, 42 F.3d 1160 (8th Cir. 1994) (written consent to search given after illegal detention based on valid traffic stop was sufficiently “purged of the taint” to make consent to search voluntary where defendant was advised, both orally and in writing of the right to refuse).

Since the analysis is necessarily fact sensitive, many circuits have enumerated factors that should be considered. The Fifth Circuit employs an analysis which takes into consideration the following factors: (1) voluntariness of the defendant’s custodial status; (2) presence of coercive police procedure; (3) extent and level of cooperation with police; (4) defendant’s awareness of his right to refuse consent; (5) defendant’s education and intelligence; and (6) defendant’s belief that no incriminating evidence will be found. U.S. v. Gonzales, 79 F.3d 413, 421 (5th Cir. 1996).

The Eighth Circuit also utilizes a test which considers five factors. They are: (1) age; (2) general intelligence and education; (3) whether the consent was given while defendant was under the influence of
drugs or alcohol; (4) if *Miranda* rights were given; and (5) familiarity with the criminal justice system through prior contacts with it. *U.S. v. Hathcock*, 103 F.3d 715 (8th Cir.), *cert. denied*, 521 U.S. 1127 (1997).

The Tenth Circuit employs a two part test to determine voluntariness. The government must prove: (1) that consent was unequivocal, specific and freely and intelligently given; and (2) that consent was given without implied or express duress or coercion. *U.S. v. Sanchez*, 89 F.3d 715, 719 (10th Cir. 1996).

Consent can be implied from words, acts or conduct. *U.S. v. Garcia*, 56 F.3d 418 (2d Cir. 1995); *U.S. v. Rosi*, 27 F.3d 409 (9th Cir. 1994). *But cf. U.S. v. Shaibu*, 920 F.2d 1423 (9th Cir.), *amended*, 912 F.2d 1193 (9th Cir. 1990).

4.16.08.02 Deception

One who reveals incriminating evidence to another in the mistaken belief that the latter will not disclose it is not protected by the Fourth Amendment. *Lewis v. U.S.*, 385 U.S. 206 (1966) (federal agent gained access to defendant’s house by claiming that he wanted to purchase narcotics and by misrepresenting his identity); *Hoffa v. U.S.*, 385 U.S. 293 (1966) (defendant’s statements to friend who was acting as undercover government agent admissible). Misrepresentation about the reason for seeking consent can also vitiate consent. *Alexander v. U.S.*, 390 F.2d 101 (5th Cir. 1968).

4.16.08.03 Authority to Consent

Reliance upon the consent of one who, “projects an aura of authority upon which one can reasonably rely,” will validate the search, even where the person lacked authority to consent. *U.S. v. Elliott*, 50 F.3d 180, 185-86 (2d Cir. 1995); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The mistake, however, must be as to a *factual*, and not *legal* mistake. *U.S. v. Brown*, 961 F.2d 1039, 1041 (2d Cir. 1992) (officer’s mistaken belief that landlady could authorize entry for the limited purpose of retrieving a firearm did not validate warrantless search); *Stoner v. California*, 376 U.S. 483 (1964) (officer’s mistaken belief that hotel clerk had legal authority to consent to search of tenant’s room did not validate warrantless search).

Permission to search may be obtained from a person who has “common authority” over the area of the search. *U.S. v. Matlock*, 415 U.S. 164 (1974). The *Matlock* Court identified two factors to determine common authority: (1) that the consenting party could permit the search “in his own right”; and (2) that the defendant had “assumed the risk” that another occupant might permit the area to be searched. Where the government relies upon a claim of common authority, it has the burden of proving that common authority existed by a preponderance. *U.S. v. Iribe*, 11 F.3d 1553 (10th Cir. 1993).

In *U.S. v. Fiorillo, Jr.*, 186 F.3d 1136 (9th Cir. 1999), the fire department received a tip that hazardous materials were being stored in a room that agents had not discovered during a previous inspection for explosives at a warehouse used by a chemical company. Officials conducted a reinspection of the warehouse and found an unmarked door. At the request of the investigators, an independent
contractor hired by Fiorillo’s company asked Fiorillo, the president of the company, for keys to the room. After protesting that there was nothing in the room, Fiorillo handed the contractor the key. Upon entering the room, the inspectors discovered industrial cleaning products that were supposed to have been dumped. Later, the inspectors learned that the Fiorillo leased the room to co-defendant, Krueger. *Id.* at 1144. The Ninth Circuit held that the warrantless search of the room was valid because Fiorillo had apparent authority to consent to the search. *Id.* Given that Fiorillo had given them the key, and was the president of the company which managed the warehouse, the Court reasoned that the inspectors had no reason to believe either that the room was being leased to a third party, or that Fiorillo could not consent to search of the room. *Id.*

Consent has been upheld when given by the spouse of the accused. *U.S. v. Betts*, 16 F.3d 748 (7th Cir. 1994), *abrogated on other grounds by U.S. v. Mills*, 122 F.3d 346 (7th Cir. 1997). Consent has also been upheld where given by the accused’s parent, *U.S. v. Peterson*, 524 F.2d 167 (4th Cir. 1975); and minor child, *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995). Additionally, consent has been upheld where given by the owner of a storage locker on which a lien had been obtained for overdue rent. *U.S. v. Poulsen*, 41 F.3d 1330 (9th Cir. 1994).

The Ninth Circuit has held that where co-occupants disagree as to whether to consent to a search, and both are present, the fruits are admissible against the non-consenting defendant, unless it is a “special and private place within the joint residence.” *U.S. v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995).

### 4.16.08.04 Consent Once Removed

Consent once removed applies where the undercover agent or government informant: (1) Entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers. *See, e.g., U.S. v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995) (informer was invited onto property to negotiate a drug deal and notified agents; as he was leaving, agents arrived and arrested defendant and conducted search); *U.S. v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (undercover agents invited onto property by defendant could consent for other officers to enter property to search, but the permissible scope of the search was limited to area of defendant’s initial consent).

### 4.16.08.05 Scope of Consent

The extent of the search consented to will be considered under an objective reasonableness standard which considers what a typical reasonable person would have understood by the exchange between the officer and the suspect. Once given, consent can be limited in scope or revoked, unless probable cause exists to continue. *U.S. v. Ho*, 94 F.3d 932 (5th Cir. 1996). The revocation or limiting of consent should not contribute towards the reasonable suspicion necessary to conduct further inquiry, although the manner in which consent is withdrawn may be a factor. *U.S. v. Fletcher*, 91 F.3d 48 (8th Cir. 1996); *U.S. v. Green*, 52 F.3d 194 (8th Cir. 1995) (manner of withdrawal may be considered).
While silence will not constitute consent, a defendant’s failure to object to the breadth of a search may be considered “an indication that the search was within the scope of the initial consent.” *U.S. v. McSween*, 53 F.3d 684, 688 (5th Cir. 1995). *See also U.S. v. Berke*, 930 F.2d 1219, 1222 (7th Cir. 1991) (scope not exceeded where defendant did not attempt to clarify its extent, did not object during search, and did not withdraw consent).
4.16.09 Inevitable Discovery

Otherwise inadmissible evidence that is obtained by unlawful police conduct is admissible where the government can show by a preponderance that had the illegality not occurred, the evidence would “ultimately or inevitably have been discovered by lawful means.” *Nix v. Williams*, 467 U.S. 431, 445 (1984). Although *Nix* involved only the fruits of an unlawful confession, primary evidence (the direct result of the illegal police conduct) may also be admissible. *Murray v. U.S.*, 487 U.S. 533, 536 (1988). It is also clear that while *Nix* involved a Sixth Amendment violation, the inevitable discovery doctrine also applies to Fourth and Fifth Amendment violations. The *Nix* Court rejected a “good faith” requirement for the government to benefit from the exception. The rationale for this exception is that police misconduct would not be deterred by excluding this type of evidence, since an officer who is aware that a valid search is in progress would not want to risk having the evidence thrown out based on an illegal search. Balancing the minimal deterrent effect of the exclusion of such evidence against society’s interest in having juries receive highly probative evidence, the government should be in the same, not worse, position than if the illegality had not occurred. Additionally, exclusion of such evidence is thought to further neither the fairness or the integrity of the prosecution.

Inevitable discovery will not excuse the mere failure to obtain a warrant where the government should have done so. *U.S. v. Mejia*, 69 F.3d 309 (9th Cir. 1995) (rejection of officer’s claim that if consent was held invalid he could have secured a warrant, making the evidence inevitably discoverable); *U.S. v. Cabassa*, 62 F.3d 470 (2d Cir. 1995) (officers who were in the process of obtaining a warrant when other officers illegally broke into defendant’s home and obtained an invalid consent to search, upon which point they terminated the warrant application; when consent was held invalid, government argued that the evidence would have inevitably been discovered if the warrant process had not been abandoned. In rejecting this position, the court noted that it was not clear that the evidence would not have been removed by the time the warrant was obtained).

Circuits differ as to whether the independent police conduct must have commenced in order to qualify as an inevitable discovery, or can satisfy this exception by testimony about hypothetical police conduct which would have occurred, had the discovery not taken place. The Fifth and Eleventh Circuits, for example, require that the police must be actively engaged in the conduct which would have lead to the discovery at the time which it occurs. *See U.S. v. Khoury*, 901 F.2d 948 (11th Cir. 1990); *U.S. v. Cherry*, 759 F.2d 1196 (5th Cir. 1985).

Other circuits require only that the facts which inevitably would have lead to discovery were discovered independently of the illegal conduct. *See U.S. v. Ivey*, 915 F.2d 380 (8th Cir. 1990); *U.S. v. Boatwright*, 822 F.2d 862 (9th Cir. 1987).

Evidence resulting from a search that would have occurred as a matter of routine procedure will qualify as an inevitable discovery. *U.S. v. Horn*, 970 F.2d 728 (10th Cir. 1992) (established police procedure would have resulted in an inventory search and yielded the evidence).
Additional criteria for admissibility may also be imposed. The First Circuit, for example, employs a three part analysis which requires, the usual two requirements of an independent source that would have lead to the inevitable discovery as well as an analysis of, “whether application of the doctrine . . . will not sully the prophylaxis of the Fourth Amendment.” *U.S. v. Zapata*, 18 F.3d 971, 978 (1st Cir. 1994).

In the Ninth Circuit, inevitable discovery rulings are reviewed under a clearly erroneous standard. *U.S. v. Long*, 149 F.3d 1044 (9th Cir.), amended, 157 F.3d 1161 (9th Cir. 1998) (conviction upheld where defendant disclosed location of drugs without being advised of his *Miranda* rights, because the agent would have eventually searched the location and inevitably found the drugs).

### 4.16.10 Open Fields Doctrine

“Open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance.” *U.S. v. Ford*, 34 F.3d 992, 996 (11th Cir. 1994).


To qualify under the open fields exception, the area of the search need not be open or a field. The Court announced a four part test to determine whether an area is protected as “curtilage,” or instead enjoys no Fourth Amendment protection. *U.S. v. Dunn*, 480 U.S. 294 (1987). In *Dunn*, the Court held that a barn 60 yards from house was not within the curtilage of a home, although “No Trespassing” signs were posted, fences had to be crossed in order to see the inside of the barn, and the fact that police were clearly trespassing when they made their observations. The factors to be considered are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) steps taken by the resident to protect the area from observation by people passing by. *See also, California v. Ciraolo*, 476 U.S. 207 (1986). Courts also look for activities “commonly associated with domestic life.” *U.S. v. Van Damme*, 48 F.3d 461, 464 (9th Cir. 1995).

A related issue is whether a search warrant authorizing the search of a residence also authorizes the search of the residence’s curtilage. The Ninth Circuit has held that it does. *U.S. v. Gorman*, 104 F.3d 272 (9th Cir. 1996).

Aerial searches also have been allowed under this doctrine. *See, e.g., Dow Chemical Co. v. U.S.*, 476 U.S. 227 (1986) (warrant not required for flyover of commercial property with mapmaking camera); *Florida v. Riley*, 488 U.S. 445 (1989) (flyover and naked eye observations of greenhouse on private property which was partially exposed to public not proscribed by Fourth Amendment); *U.S. v. Fernandez*, 58 F.3d 593 (11th Cir. 1995). Circuits are divided as to whether the use of highly sophisticated military
technology (forward looking infrared devices) which enable the government to “see” heat emanating from objects and people constitutes a search which requires a warrant. For a discussion of cases addressing the use of thermal imaging devices, see generally, Scott J. Smith, “Thermal Surveillance and the Extraordinary Device Exception: Redefining the Scope of the Katz Analysis,” 30 Va. L. Rev. 1071 (1996).

4.16.11 Independent Source

Where a Fourth Amendment violation occurs prior to the discovery of evidence, but the illegal conduct is not in the causal sequence leading to the discovery, the evidence is admissible if an “independent source” existed for the discovery of the evidence. Murray v. U.S., 487 U.S. 533 (1988). In such cases, the evidence must be independently discovered as the result of a wholly lawful sequence distinct from the illegal conduct which preceded its discover. This should be distinguished from the “Attenuation Doctrine.” See supra §4.03.01 Attenuation Doctrine, which requires a showing that the illegal conduct was not exploited. The independent source doctrine requires a showing of wholly lawful conduct leading to the discovery of the evidence. The rationale for admission, however, is the same as that posited for the inevitable discovery exception: that intentional police misconduct would not be deterred by exclusion, and the government should be in the same, not worse, position than had the illegal conduct not occurred.

Typically, the government relies upon this exception where probable cause exists for a warrant, but a Fourth Amendment violation occurs before one is obtained. The warrant is then obtained, and evidence seized pursuant to it. On these facts, such evidence will be admissible so long as the warrant was obtained wholly independent of the fruits of the prior unlawful conduct. See U.S. v. Herrold, 962 F.2d 1131 (3d Cir. 1992). Where an independent source has been established, it has been held to allow the admission of illegally viewed evidence, and evidence illegally seized and later re-seized pursuant to an independently obtained valid warrant. U.S. v. Herrold, 962 F.2d 1131 (3d Cir. 1992). Where illegally obtained evidence is relied upon to secure a warrant, the Court has seemingly approved of a less stringent Franks v. Delaware, 438 U.S. 154 (1978), analysis. See U.S. v. Walton, 56 F.3d 551 (4th Cir. 1995).

4.16.12 Use of Technology to Search

The general rule regarding the use of technological devices is that the government may not employ an electronic device to obtain information in an area where one has a reasonable expectation of privacy that could not be gained through sensory observation. See U.S. v. Karo, 468 U.S. 705, 715 (1984); U.S. v. Knotts, 460 U.S. 276 (1983).

4.16.12.01 Installation of a Tracking Device, or “Beeper”

In Karo, the installation of a “beeper” in a container of ether belonging to a confidential informant, who then transferred it to the defendant did not violate that Fourth Amendment. Karo, 468 U.S. at 713. The installation of the beeper was not a search, since it infringed on no privacy interest. Id. at 712. The Court further held that the transfer of the container to the defendant did not constitute a seizure, since there was no meaningful interference with the individual’s possessory interest in the property. Id.
4.16.12.02 Monitoring Devices Where One Has a Reasonable Expectation of Privacy

Whether or not the monitoring of a technological device violates the Fourth Amendment turns on whether there is a reasonable expectation of privacy in the place being monitored. If a reasonable expectation of privacy exists, agents need to have an independent sensory observation. Monitoring a “beeper” within the private residence violates the Fourth Amendment, since private residences are not open to visual surveillance. *Karo*, 468 U.S. at 714. Even if visual surveillance of the residence reveals that the article containing the “beeper” was brought to and taken into the residence, the monitoring of the “beeper” illegally verifies the fact that the article is still within the residence, something that cannot be visually verified. See id., at 715.

However, in *Karo* the monitoring of the “beeper” to find that the container had been taken to a public storage locker was legal, since the “beeper” did not tell the agents the specific locker the container was stored in. The agents had to traverse the public area of the facility and find the smell of either since the “beeper” could not tell the agents the specific locker, thus, the agents own sensory observations led to the discovery of the storage locker containing the “beeper.” Id. at 720-21.

4.16.12.03 Automobile Tracking Devices

A tracking device may be placed on an automobile without violating the Fourth Amendment. In a case of first impression, the Ninth Circuit in *U.S. v. McIver*, 186 F.3d 1119 (9th Cir. 1999), cert. denied, 120 S.Ct. 1210 (2000), held that it was not a violation of the Fourth Amendment to attach two magnetic electronic tracking devices (Global Positioning System, and a Birddog 300 transmitter) on the undercarriage of defendant’s vehicle. Id. at 1123. The device was used to track the vehicle driven by the defendant to a marijuana crop. Id. The Ninth Circuit ruled that there was no Fourth Amendment interest concerning either a search, or a seizure. The Ninth Circuit relied upon *U.S. v. Rascon-Ortiz*, 994 F.2d 749 (10th Cir. 1993) holding that a search was not conducted since there is no reasonable expectation of privacy in the undercarriage of one’s vehicle. *McIver*, 186 F.3d at 1127. The Ninth Circuit further held that a seizure did not occur since there was neither a meaningful interference with an individual’s possessory interests in the property, nor was there any deprivation of the dominion and control of the vehicle. Id.

4.16.12.04 Infrared and Other Technology

Circuits are divided as to whether the use of highly sophisticated military technology (forward looking infrared devices) which enable the government to “see” heat emanating from objects and people constitutes a search which requires a warrant. The analysis turns on whether one has a reasonable expectation of privacy to heat emanating from one’s dwelling. The Eighth Circuit has held that forward looking infrared devices when used on a home to detect heat is not a search. See *U.S. v. Pinson*, 24 F.3d 1056, 1058 (8th Cir. 1994); *U.S. v. Robertson*, 39 F.3d 891, 894 (8th Cir. 1994). For a discussion of cases addressing the use of thermal imaging devices, see generally, Scott J. Smith, “Thermal Surveillance
4.16.12.05 Wiretaps

Title 18 U.S.C. §2511 prohibits the interception of any wire communication except under certain circumstances. The applicable statute provides:

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.


The remedy,

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.


An application for a wiretap requires “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonable appear to be unlikely to succeed if tried or to be too dangerous.” U.S. v. Bennett 219 F.3d 1117, 1120 (9th Cir. 2000) (quoting 18 U.S.C. §2518(1)(c)). The government is not required to “exhaust every conceivable investigative technique in order to show necessity.” Id. at 1122 (internal citations omitted) (where informant able to buy drugs from defendant but unable to penetrate drug organization, government satisfied showing of necessity for wiretap).

Officials must minimize the interception of non-relevant phone conversations. See Bennett, 219 F.3d at 1123. To determine whether agents have properly minimized interception of such conversations, courts will evaluate the facts and circumstances of each case. Id. (citing Scott v. U.S., 436 U.S. 128, 140 (1978)).

4.16.12.06 Flyovers
Aerial searches have also been allowed under the open field doctrine. See, e.g., *Dow Chemical v. U.S.*, 476 U.S. 227 (1986) (warrant not required for flyover of commercial property with mapmaking camera); *Florida v. Riley*, 488 U.S. 445 (1989) (flyover and naked eye observations of greenhouse on private property which was partially exposed to public not proscribed by Fourth Amendment); *U.S. v. Fernandez*, 58 F.3d 593 (11th Cir. 1995).
4.16.13 Border Patrol Searches Within Twenty-Five Miles of U.S. Border

United States Border Patrol officers and employees are delegated the authority to make warrantless entries upon private property within twenty-five miles of the United States international borders pursuant to Title 8 U.S.C. §1357(a). Title 8 U.S.C. §1357(a) provides:

(3) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
. . . within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . . .

Title 8 U.S.C. §1357(a)(3). The scope of this power specifically is set forth in the Code of Federal Regulations. The relevant subsection provides:

(c) Patrolling the border. The phrase patrolling the border to prevent the illegal entry of aliens into the United States as used in section 287 of the Immigration and Nationality Act means conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States.

8 C.F.R. §287.1(a)(2)(c) (emphasis in original). Title 8 U.S.C. §1357(a)(3) seems to conflict with Oliver v. U.S., 466 U.S. 170  (1984), where the Supreme Court stated that the heightened Fourth Amendment protection afforded dwellings also extends to the area immediately surrounding the home known as the “curtilage.” Id. at 178. “[A]n individual may not legimate demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.” Id. Title 8 U.S.C. §1357(a)(3) draws no distinction between “curtilage” and “open fields”. Attempts to challenge this law should be brought on its constitutionality as well as challenging 8 C.F.R. §287.1(a)(2)(c) on vagueness grounds.

4.17 ADMINISTRATIVE SEARCHES

Recognizing the need to protect public health and safety, and the reasonable expectation of privacy enjoyed by citizens in their homes, the Court has set out a procedure for administrative searches in Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967). Where consent cannot be obtained to conduct administrative searches of residences, the municipality can apply for an administrative warrant. The factors to be considered include the conditions in the area and the age and nature of the buildings.

4.17.01 Commercial Property

A warrantless inspection which occurs in conjunction with a statutorily authorized regulatory program does not necessarily violate the Fourth Amendment. However, if an inspection is not statutorily authorized, or conducted to further federal governmental interests, a warrant is required. There is a diminished expectation of privacy in a commercial establishment. This expectation is further diminished
where the business is one that is heavily regulated. See, e.g., New York v. Burger, 482 U.S. 691 (1987) (automobile junkyards can be searched without warrant for stolen vehicles or parts). Circuits are split as to whether businesses required to keep records pursuant to a federal regulatory scheme must consent to an inspection of those records without a warrant. See, e.g., Brock v. Emerson, 834 F.2d 994 (11th Cir. 1987) (employer had privacy interest in OSHA records); Cf. U.S. v. Blocker, 104 F.3d 720 (5th Cir. 1997) (statutorily mandated warrantless examination of insurance company’s records does not violate Fourth Amendment). Even statutorily authorized inspections of a heavily regulated business will be invalidated if not reasonable. Illinois v. Krull, 480 U.S. 340 (1987) (statute authorizing inspections gave too much discretion to government agents). The Court annunciated a three part inquiry to determine the reasonableness of a warrantless search in accordance with an authorized regulatory program in Burger. A search is only reasonable where: (1) there is a “substantial” government interest that supports the regulatory scheme; (2) the inspection must be necessary to further the regulatory scheme; and (3) discretion of inspectors is limited, and the owner of the premises is notified that the search is authorized by law and limited in scope. Suspicion of wrongdoing will not invalidate an otherwise valid regulatory search. U.S. v. Villamonte-Marquez, 462 U.S. 579 (1983) (although acting on an informant’s tip, government could rely on statute that authorized search).

4.17.02 Searches of Students in School

Where reasonable suspicion exists that either a school rule or a criminal statute has been violated, a school official may conduct a search of the student’s purse. New Jersey v. T.L.O., 469 U.S. 325 (1985). Noting that it applies equally to both civil and criminal authorities, the T.L.O. Court, however, refused to exempt teachers from compliance with the Fourth Amendment. Id. The Court also has upheld suspicionless drug testing of high school students participating in school sponsored athletic programs, noting that participation in such programs is analogous to participation in a closely regulated industry, where one enjoys a diminished expectation of privacy. Vernonia School District 47 v. Acton, 515 U.S. 646 (1995).

4.17.03 Government Employees

Non-investigative work-related searches or searches to reveal job-related misconduct may be conducted without a warrant. O’Connor v. Ortega, 480 U.S. 709 (1987). Suspicionless random drug testing has been upheld for those applying to government jobs and for government employees. This has been, however, an area of extensive litigation, where acceptable standards are constantly evolving. See Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); cf. Chandler v. Miller, 520 U.S. 305 (1997) (the Court found no inherent need to drug test candidates for public office).

4.17.04 Searches on Federal Property

Although a limited administrative search for explosives and weapons upon entering a public building is permissible, the scope of such a search does not include an inspection for alcohol, narcotics or gambling materials. See U.S. v. Bulacan, 156 F.3d 963, 967, 974 (9th Cir. 1998). An unlawful secondary purpose may invalidate an otherwise permissible administrative search scheme, i.e. where the scope of the search
includes criminal investigatory purposes, it can no longer be justified as an administrative search. *Bulacan*, 156 F.3d at 969. For example, in *Bulacan*, the Ninth Circuit limited the reach of a federal statute which authorized federal officers to inspect containers possessed by persons entering, visiting, or departing from federal property. Because the regulation gave the officer unfettered discretion, and the intrusiveness of an inspection for narcotics, alcohol or gambling materials outweighed the government’s need to conduct such searches, the 9th Circuit narrowed the scope of the regulation to permit only a search for weapons and explosives. *Id.* at 974.

**4.17.05 Defendant on Probation or Parole**

A defendant on probation or parole enjoys a diminished expectation of privacy. *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of home, car and person of defendant on probation based on “reasonable suspicion” rather than probable cause justified). The *Griffin* Court noted that such searches were constitutionally permissible only because of the probation department’s “special needs beyond normal law enforcement.” *Griffin*, 483 U.S. at 873-74. *See also U.S. v. Lewis*, 71 F.3d 358 (10th Cir. 1995); *U.S. v. Vought*, 69 F.3d 1498 (9th Cir. 1995). Such searches may be conducted pursuant to local statute or as a condition of probation or parole. Such searches are not to aid police in the detection of crime, but rather to ensure compliance with the probation and parole process, and should not be used as a subterfuge for a criminal investigation. *See U.S. v. Knights*, 219 F.3d 1138, (9th Cir. 2000); *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir. 1975) (en banc). There must also be a reasonable relationship between the search and the terms of defendant’s probation or parole. *Portillo v. U.S. District Court for Dist. of Arizona*, 15 F.3d 819 (9th Cir. 1994) (presentence drug testing ordered by probation not justified for theft arrest).

However, the fact that a police investigation precedes a parole search does not necessarily render the search a subterfuge. *U.S. v. Jarrad*, 754 F.2d 1451 (9th Cir. 1985). As the Ninth Circuit recently noted:

> [T]he appropriate inquiry is whether the probation officer used the probation search to help police evade the Fourth Amendment’s usual warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives.

*U.S. v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995), *rev’d on other grounds*, 519 U.S.148 (1997). In *Watts*, the defendant, a probationer, claimed that the probation officer had, in effect, become a “stalking horse” for the police by authorizing a warrantless search of his premises. The Ninth Circuit rejected this contention, despite the fact that the probation officer was a member of a team which included several law enforcement agencies, and the team’s purpose was to enforce drug laws. Noting that he had already “crystallized” his suspicions about defendant before seeking assistance from other task force members (including police officers), the Ninth Circuit held that the warrantless search in this case was proper. *Id.* at 794. This, despite the district court’s finding that the probation officer’s dual role as both a probation officer and his participation on a project dedicated to law enforcement and the express finding that, “at least one of the purposes . . . is to allow for probation searches in cases where police officers want to search . . . a probationer and avoid the necessity of getting a warrant . . . .” *Id.* While noting that they were
“troubled” by this situation, the Ninth Circuit ultimately determined that the probation officer, not the police, “was calling the shots.” *Id.*

### 4.18 PRETRIAL MOTIONS TO SUPPRESS

Evidence acquired in violation of the Fourth Amendment is not excluded from criminal trials as a matter of course. The defense must make a motion to suppress prior to trial. Fed. R. Crim. P. 12(b)(3) and 41(f).

#### 4.18.01 Suppression of Evidence and Statements Based upon an Illegal Arrest

Most of the focus on the suppression of evidence concerns evidence seized as a result of a Fourth Amendment violation. A motion to suppress statements and other evidence can be made as the fruit of an illegal arrest. Although an illegal arrest is not a defense to the underlying criminal charge it can be used to suppress evidence subsequently obtained. If the arrest is found to be invalid then the statements made, or evidence obtained, during or after the illegal arrest should be suppressed as being derived from an illegal arrest under the “fruit of the poisonous tree” doctrine. *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963). *See supra* §4.10.05 Mere Presence, §4.10.05.01 “Passenger Doctrine,” §4.10.06 Vehicle Search Incident to Arrest, §4.10.07 Use of Force During Arrest, for other examples where evidence including statements can be challenged as a result of an illegal arrest.

#### 4.18.02 Evidentiary Hearings

Defense counsel must be aware that an evidentiary hearing may not be automatically granted and “need be held only when the moving papers allege facts with sufficient specificity to enable the trial court to conclude that relief must be granted if the facts alleged are proved.” *See, e.g.*, *U.S. v. DiCesare*, 765 F.2d 890 (9th Cir.), *amended*, 777 F.2d 543 (9th Cir. 1985); *Gentile v. County of Suffolk*, 926 F.2d 142, 147 (2d Cir. 1991).

The Ninth Circuit has taken this requirement a step further. Not only must the moving papers set forth with sufficient specificity those facts in contention that would entitle the defendant to an evidentiary hearing on a motion to suppress, it is within a district court’s discretion to compel a declaration to be filed on behalf of the defendant “containing only such facts as would be admissible in evidence and shall show affirmatively that the [declarant] is competent to testify to the matters stated therein.” *U.S. v. Wardlow*, 951 F.2d 1115, 1116 n.1 (9th Cir. 1991). The effect of *Wardlow* is that, in addition to the contested facts being contained in the defendant’s moving papers, the defendant can no longer submit a declaration by counsel, but must either submit the declaration himself or file one written by a person with personal knowledge of the contested facts. *Cf. U.S. v. Batiste*, 868 F.2d 1089 (9th Cir. 1989) (district court may choose to hear live testimony at probable cause hearing). Counsel should rebut this practice on the grounds that it violates the defendant’s Fifth Amendment privilege.

A hearing is required when there is a dispute concerning issues of fact relevant to the legality of a search. However, the denial of an evidentiary hearing on a motion to suppress is not error when the movant presents no factual issues. *See Franks v. Delaware*, 438 U.S. 154 (1978) (where defendant makes a substantial preliminary showing that a false statement included in a search warrant affidavit was made knowingly and intentionally or with reckless disregard for the truth, and the statement is necessary to a finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request). It should be noted that district courts may grant an evidentiary hearing without such declarations. In those cases, “whether an evidentiary hearing is appropriate [still] rests in the reasoned discretion of the district
court.” *U.S. v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986). See also *U.S. v. Batiste*, 868 F.2d at 1092 & n.5 (a defendant is entitled to a fair hearing to determine reliability of underlying factual issues and voluntariness). Thus, pretrial pleadings should be drafted with sufficient specificity to preclude the denial of an evidentiary hearing on the grounds that the facts alleged fail, as a matter of law, to demonstrate entitlement to relief. On the other hand, the statement should not be so expansive as to afford the government undue discovery.
CHAPTER 5

SUPPRESSION OF STATEMENTS

updated by

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If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath -- to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.¹

5.01 INTRODUCTION

This chapter reviews justifications for the suppression of statements in federal court. The chapter primarily addresses suppression of statements for violations of the rules developed under *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny. In addition, this chapter also discusses suppression of involuntary statements under the Fifth Amendment, statements taken in violation of a defendant’s Fifth and Sixth Amendment right to counsel, statements taken after an unnecessary delay between arrest and presentment, in violation of the Due Process Clause and federal law, and statements elicited after law enforcement officers’ violation of the Fourth Amendment prohibition against unreasonable searches and seizures, and statements of non-testifying co-defendants under the Confrontation Clause of the Sixth Amendment. Finally, this chapter reviews exceptions to the grounds for suppression of statements and, particularly, the application of the harmless error doctrine during a determination of the admissibility of a defendant’s statements at trial.

5.02 SUPPRESSION OF STATEMENTS UNDER THE FIFTH AMENDMENT

The Fifth Amendment privilege against self-incrimination governs the admissibility of most statements. The Fifth Amendment requires that no person “be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. However, the self-incrimination privilege does not proscribe the admissibility of all statements. Rather, the privilege “protects a person only against being incriminated by his own compelled testimonial communications.” Doe v. U.S., 487 U.S. 201, 207 (1988) (quoting Fisher v. U.S., 425 U.S. 391, 409 (1976)) (other internal citations omitted). A statement that is not the product of “government compulsion” is not subject to the protections of the self-incrimination privilege. Thus, subpoenas for voluntarily prepared or generated documents or evidence do not “compel oral testimony,” even if the act of production involves force. See Barrett v. Acevedo, 169 F.3d 1155, 1168 (8th Cir. 1999) (en banc) (Fifth Amendment does not protect against the disclosure of the contents of a “voluntarily created and negligently disclosed journal” abandoned at a fast food restaurant) (quoting Couch v. U.S., 409 U.S. 302, 336 (1973)); see also U.S. v. Doe, 465 U.S. 605, 610 (1984) (subpoena compelling production of respondent’s voluntarily prepared business records does not “compel oral testimony” under the Fifth Amendment).

A statement constitutes a testimonial communication if it “relate[s] a factual assertion or disclose[s] information.” Doe, 487 U.S. at 210. The Court argued, further, that “[t]he vast majority of verbal statements will be testimonial,” since “there are very few instances where a verbal statement . . . will not convey information or assert facts.” Pennsylvania v. Muniz, 496 U.S. 582, 597 (1990) (quoting Doe, 487 U.S. at 213). Nevertheless, the self-incrimination privilege does not limit the admissibility of statements offered for reasons other than their content. See, e.g., U.S. v. Dionisio, 410 U.S. 1, 5 (1973) (subpoena compelling petitioner to provide a voice exemplar did not violate the Fifth Amendment because the petitioner merely submitted to the “compelled display of identifiable physical characteristics,” the physical properties of his voice, and did not provide additional incriminating information beyond the reading of the transcripts); U.S. v. Wade, 388 U.S. 218, 222-23 (1967) (FBI agent’s instruction to appellant to “exhibit his person for observation by a prosecution witness” and to repeat a phrase at a post-indictment line-up, did not did not violate the privilege against self-incrimination); Gilbert v. California, 388 U.S. 263, 267 (1967) (ruling that handwriting exemplars are “identifying physical characteristics” not precluded from admission into evidence by the privilege against self-incrimination); Schmerber v. California, 384 U.S. 757, 765 (1966) (extraction of blood sample from a suspect did not violate the petitioner’s privilege against self-incrimination); Barrett, 169 F.3d at 1168 (admission of a journal into evidence at trial did not violate the Fifth Amendment, because the appellant and testifying law enforcement officers already established the “existence, possession, and authenticity” of the journal, and because the mere act of production did not disclose additional incriminating information beyond any previously elicited testimony).

Evidence of a defendant’s responses to questioning may be considered non-testimonial in nature, even if that evidence, at first glance, depicts a defendant’s communication with authorities. In Muniz, for example, the respondent moved to suppress a videotape of his "responses" to booking questions after his arrest for driving under the influence of alcohol. See Muniz, 496 U.S. at 586-87, 590. The Court determined that the evidence of the respondent’s slurred speech and “other evidence of lack of muscular coordination” in the videotape were not testimonial in nature. Id. at 592. However, the Court deemed the defendant’s incorrect answer to the question, “when was your sixth birthday?” testimonial evidence because the jury could infer, from the content and delivery of the response, the “confused” mental state of the respondent and the respondent’s lack of sobriety at the time of his arrest. Id. at 592-93. In U.S. v.
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Velarde-Gomez, as well, the Ninth Circuit ruled that evidence of a defendant’s “physical reactions and emotional state” during questioning could be properly admitted into evidence because testimony about the defendant’s appearance during his interrogation presented “evidence of physical characteristics rather than communicative evidence.” U.S. v. Velarde-Gomez, 224 F.3d 1062, 1070-71 (9th Cir.), amended and superceded on other grounds, No. 99-50602, 2000 WL 1514639 (9th Cir. Oct. 13, 2000). The court acknowledged that “some nonverbal communication, such as a nod or a shake of a head, may carry with it a ‘testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another.’” Id. (quoting Muniz, 496 U.S. at 595 n.9). Nevertheless, it concluded that evidence of the defendant’s “relaxed and unemotional” demeanor during the interrogation “describes one’s mood” rather than “one’s communicative responses.” Id.

Counsel for the accused must conduct two separate inquiries when considering the admissibility of a statement under the Fifth Amendment. First, the attorney must determine if law enforcement officials administered to the client warnings of the client’s constitutional rights, as required by Miranda v. Arizona. See Miranda, 386 U.S. at 444 (ruling that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”). Second, counsel must determine if law enforcement officials elicited an involuntary statement from the client, notwithstanding any efforts by the officials to administer the requisite Miranda warnings. See Arizona v. Fulminante, 499 U.S. 279, 288 (1991) (providing that the court must consider whether the defendant’s will was “overborne in such as way as to render his confession a product of coercion,” in violation of the Fifth Amendment).

5.03 SUPPRESSION OF STATEMENTS UNDER MIRANDA

The most common ground for suppression of statements is a violation of the rules promulgated in Miranda v. Arizona. Miranda declared that custodial interrogation generates “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he does not otherwise do so freely.” Miranda, 384 U.S. at 467. Therefore, the prosecution may not use statements elicited through custodial interrogation unless the use of procedural safeguards guarantee that the accused has been informed of and has freely waived the Constitutional privileges of the Fifth Amendment. See id. at 444-45. Under Miranda, law enforcement officers must warn a defendant that “he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed,” prior to the commencement of any interrogation. Id. at 444. Second, if the defendant “indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning.” Id. at 444-45. Further, “if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.” Id. at 445. The defendant may waive the exercise of his or her Miranda rights, “provided the waiver is made voluntarily, knowingly, and intelligently.” Id. at 444. The purpose of the warnings is to guard against self-incrimination during “‘incommunicado interrogation’ of individuals in settings dominated or controlled by law enforcement officers. Illinois v. Perkins, 496 U.S. 292, 295 (1990).
The Court recently revisited the applicability of the *Miranda* doctrine. In *Dickerson v. U.S.*, the Court reaffirmed that the *Miranda* warnings were “‘not simply a preliminary ritual to existing methods of interrogation,’” but instead referenced “‘rights grounded in a specific requirement of the United States Constitution.’” *See Dickerson v. U.S.*, ___ U.S. __, 120 S. Ct. 2326, 2334 n.4 (2000) (citing *Miranda*, 384 U.S. at 476, 489); *see also Withrow v. Williams*, 507 U.S. 680, 691 (1993) (stating that “[p]rophylactic though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a ‘fundamental trial right.’”) (quoting *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). Thus, it announced a constitutional rule through its interpretation of the Fifth Amendment self-incrimination privilege in *Miranda* that could not be overruled or superceded by Congress. See *id.* at 2329. Furthermore, since the Court announced a constitutional rule in *Miranda*, rather than an interpretation of federal statutes or judicial rules, principles of *stare decisis* mandated that no departures from precedent be taken unless supported by some “‘special justification.’” *Id.* at 2336 (citing *U.S. v. International Bus. Mach. Corp.*, 517 U.S. 843 (1996)) (other internal citations omitted). The Court declined to overrule *Miranda*, arguing that the *Miranda* warnings had become so “embedded in routine police practice to the point where the warnings have become part of our national culture.” *Id.* (citing *Mitchell v. U.S.*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting)).

5.03.01 The *Miranda* Inquiry: Custody and Interrogation

The *Miranda* requirement only affects the admissibility of statements obtained through “custodial interrogation.” *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980). Custodial interrogation consists of “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. A criminal defendant must meet two threshold requirements before claiming the protections of *Miranda*. First, the accused must have made his or her statements while under the custody of law enforcement officers. *See infra* §5.03.02. Second, the accused must make the statements in response to interrogation by government agents. *See infra* §5.03.03. These areas of inquiry may overlap. For instance, the manner of interrogation may provide indicia of the accused’s placement into custody under *Miranda*.

5.03.02 Custody

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2 The Court’s opinion in *Dickerson* concerned Congress’ enactment of a statute, two years after the *Miranda* opinion, which provided that “‘[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given.’” 18 U.S.C. §3501 (a), quoted in *Dickerson*, 120 S. Ct. at 2332. The Court found that “Congress intended by its enactment [of the statute] to overrule *Miranda*” through its “express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession” within the statute. *Id.* The Court found, further, that “Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.” *Id.* (internal citations omitted). However, notwithstanding this legislative power, the Court declared that “Congress may not legislatively supercede our decisions interpreting and applying the Constitution.” *Id.* (citing *City of Boerne v. Flores*, 521 US. 507, 517-21 (1997)). The Court concluded that the protections embodied in the *Miranda* warnings were “constitutionally required” because they protected the privilege against self-incrimination.” *Id.* at 2332, 2334. Therefore, it rejected any assertion that Congress overruled *Miranda* through its statutory enactment. *See id.* at 2336.
A person is in custody if a reasonable person in the same situation would freely terminate the interrogation. See Thompson v. Keohane, 516 U.S. 99, 112 (1995). To determine if an individual is placed into custody under Miranda, counsel must first consider “the circumstances surrounding the interrogation.” Id. Next, counsel must determine whether, “given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Id. Ultimately, a court must apply an “objective test” to conclude that officers conducted “a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.” Id. A determination of whether officers placed an individual into custody under Miranda depends upon an evaluation of the circumstances by a reasonable person in the suspect’s position. See Stansbury v. California, 511 U.S. 318, 323 (1994) (stating that “[t]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation”) (quoting Berkemer, 468 U.S. at 442). The “reasonable person” is “neutral to the purposes of the investigation -- that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." U.S. v. Bengivenga, 845 F.2d 593, 596 (5th Cir. 1985).

In most cases, an individual is placed into custody whenever law enforcement officials conduct a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” California v. Beheler, 463 U.S. 1121, 1125 (1983) (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam); see also U.S. v. Jones, 933 F.2d 807, 809 (10th Cir. 1991); U.S. v. Bengivenga, 845 F.2d at 596 (stating that a suspect is placed into custody “when placed under formal arrest or when a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with a formal arrest”).

Nevertheless, some seizures do not place suspects into custody under Miranda. In Berkemer v. McCarty, 468 U.S. 420, 438-40 (1984), the Supreme Court held that routine traffic stops do not ordinarily place individuals into custody under Miranda because they are typically brief, conducted in public, and do not take place in a police-dominated atmosphere; see also Pennsylvania v. Bruder, 488 U.S. 9, 10-11 (1988) (per curiam) (mere questioning by officers after the end of an investigative traffic stop does not place a defendant “in custody” under Miranda, absent some “indicated restraint” beyond the initial detention); U.S. v. Sullivan, 138 F.3d 126, 130-31 (4th Cir. 1998) (same). However, "lower courts must be vigilant that police do not `delay formally arresting detained motorists, and ... subject them to sustained and intimidating interrogation at the scene of their initial detention."' Bruder, 488 U.S. at 10 n.1 (quoting Berkemer, 468 U.S. at 440).

Counsel for the accused should evaluate all objective factors that give indicia of an arrest or restraint on liberty to argue that a custodial interrogation occurred. See Thompson, 516 U.S. at 113 n.11 (adopting a “totality of the circumstances” approach to custody determinations under Miranda); U.S. v. McKinney, 88 F.3d 551, 554 (8th Cir. 1996). The location, timing, and length of the questioning, as well as the length of the suspect’s detention before questioning, may give some indication of whether officers placed a defendant into custody under Miranda. See, generally, Orozco v. Texas, 394 U.S. 324, 326-27 (1969) (stating that the suspect’s interrogation in a bedroom of a boarding house at 4:00 a.m. indicated that officers placed the defendant into custody under Miranda); U.S. v. Planche, 525 F.2d 899, 900 (5th Cir. 1976) (holding that suspect subjected to custodial interrogation, where eight or nine police officers met petitioner in his or her place of business after receiving a tip from an informant and interrogated the
petitioner for almost four hours). The presence and placement of multiple officers during an interrogation session, and officers’ brandishment of weapons, may affect counsel’s assessment of a client’s placement into custody under Miranda. See New York v. Quarles, 467 U.S. 649, 655 (1984) (respondent was in police custody within the meaning of Miranda because at least four officers surrounded him during his interrogation in handcuffs); U.S. v. Griffin, 7 F.3d 1512, 1519 (10th Cir. 1993) (citing the “threatening presence of several officers” and the “display of a weapon by an officer” as factors to consider when making a determination of whether a defendant has been placed into custody under Miranda). But see U.S. v. Howard, 115 F.3d 1151, 1153 (4th Cir. 1997) (appellant was not in custody under Miranda because appellant retained the opportunity to refuse the agents’ offer to give appellant a ride to the probation office, because officers failed to place appellant under arrest or handcuff him during their interview, and because the officers did not “brandish their weapons” or “flank” the appellant after they first approached him in their vehicle). The officers’ efforts to block a suspect’s only means of egress from the scene of the interrogation may also indicate that the suspect is in custody under Miranda. See Berkemer, 468 U.S. at 437-38; McKinney, 88 F.3d at 554 (questioning the defendant in the back seat of a police-operated vehicle did not place the defendant into custody because there was no indication that defendant could not leave the vehicle). Additionally, the nature of the questioning might transform an otherwise consensual encounter into custody for the purposes of Miranda. See U.S. v. Henley, 984 F.2d 1040, 1042 (9th Cir. 1993) (suspect was placed into custody when law enforcement officers questioned him while he sat, handcuffed, in the back of police car, even though the officers did not formally arrest him); U.S. v. Lee, 699 F.2d 466, 468 (9th Cir. 1982) (stating that the “totality of the circumstances” indicate that respondent was in custody under Miranda, because FBI agents questioned him in a patrol car for over an hour, confronted the respondent with evidence of his guilt, and told him that “it was time to tell the truth”); U.S. v. Estrada-Lucas, 651 F.2d 1261, 1266 (9th Cir 1980) (petitioner was in custody under Miranda, because customs officials failed to inform her that she could leave the officers’ presence, and because evidence of petitioner’s guilt, “valuable jewelry,” was “displayed prominently” on an adjacent counter while the officers questioned the petitioner).

Finally, a law enforcement officer’s belief regarding the “potential culpability of the individual being questioned” and of the “nature of the interrogation,” is relevant to the assessment of custody only if the officer “manifest[s] [his beliefs or opinions] to the individual under interrogation,” and if the officers’ expression of those beliefs would have affected a reasonable person’s perceptions of his or her freedom under the circumstances. Stansbury, 511 U.S. at 325 (internal quotations omitted); see also U.S. v. Streifel, 781 F.2d 953, 959 (1st Cir. 1986) (uncommunicated intent of police to prevent suspects from leaving their presence is relevant to a determination of whether suspects thought they could leave the scene of the arrest under Miranda). The uncommunicated views of the officer may still be relevant, however, in testing the credibility of the officer’s account of the interrogation. See Stansbury, 511 U.S. at 325.

**5.03.02.01 Specific Locations of Custody**

Particular locations at which officers choose to initiate questioning or interrogation appear more threatening to clients, and thus give rise to a client’s reasonable belief that he or she would not be permitted to leave the premises. Questioning at a police station, for example, will likely be more custodial in nature than a more “neutral” location for questioning, such as a hotel room or bedroom. See Orozco, 394 U.S. at 326-27. Yet, an accused may not be in custody if the accused enters the precinct for questioning
voluntarily. See Beheler, 463 U.S. at 1122-23 (respondent not in “custody” because he initiated his encounter with the police and voluntarily entered the precinct); Mathiason, 429 U.S. at 495 (suspect not in “custody” because he agreed to come to the precinct for questioning about a burglary after officers contacted him); Bains v. Cambra, 204 F.3d 964, 968, 972 (9th Cir. 2000) (defendant was not in custody before he requested the assistance of counsel, even though three police officers and a polygraph examiner engaged in targeted questioning of him for almost four hours before his request, because the appellant voluntarily accompanied officers to the precinct for questioning in an unlocked room).

An accused’s imprisonment for a different crime does not, alone, mandate a finding of “custody” that triggers the Miranda requirements. Rather, a court should determine that investigators subjected a prisoner to more than the usual restraints to find that prisoner to be in custody under Miranda. See U.S. v. Conley, 779 F.2d 970, 973 (4th Cir. 1985) (holding that petitioner was not in custody, despite his incarceration, because correctional officers did not segregate him from the general inmate population for questioning, and because the inmate was questioned briefly, wore handcuffs as part of a “standard procedure” to transfer inmates to the infirmary, and did not experience “a change in the surroundings . . . which results in an added imposition on his freedom of movement” apart from his incarceration) (citing Cervantes v. Walker, 589 F.2d 424, 428 (9th Cir. 1978)) (internal quotations omitted). But see Mathis v. U.S., 391 U.S. 1, 3-4 (1968) (questioning an inmate regarding an unrelated matter may trigger Miranda requirements). Counsel should consider the language used to summon the inmate for questioning, the physical surroundings in which officers conducted the interrogation, the extent to which the inmate was confronted with evidence of guilt, and the exertion of any additional pressure by correctional officers upon the inmate to submit to questioning to conclude that the prisoner was "in custody.” Cervantes, 589 F.2d at 428; see also U.S. v. Chamberlain, 163 F.3d 499, 503-04 (8th Cir. 1998) (holding that Miranda warnings are not automatically required when questioning an inmate, but that the circumstances of the questioning may trigger the required administration of the Miranda warnings); U.S. v. Turner, 28 F.3d 981, 984 (9th Cir. 1994) (prisoner’s response to a postal inspector’s comment, "the best thing [for Turner] to do would be to clear the matter up," was not elicited during custodial interrogation because the prisoner initiated the call, asked questions of the inspector, was not pressured into answering questions, and could have terminated any communications with the inspector at his option).

Law enforcement officials’ restrain of a person’s liberty in other circumstances may not necessarily place that individual into custody, even if the officers significantly restrain that individual’s freedom of movement. A person subjected to “routine” questioning at the border regarding that person’s entry into the United States is not “in custody” for the purpose of Miranda. See U.S. v. Ozuna, 170 F.3d 654 (6th Cir. 1999); see also U.S. v. Leasure, 122 F.3d 837, 840 (9th Cir. 1997) (per curiam) (petitioner, who entered the United States from Mexico, was not "in custody" when she made statements to customs inspectors during her detention in the pre-primary area of inspection, because “stops and questioning are the norm at the border in primary inspection areas,” and because an objective view of the circumstances indicated nothing that suggested that the defendant was in custody before officers asked her to step out of her vehicle). However, the circumstances surrounding an interrogation and variations from the typical battery of questions posed to all entrants into the United States may transform otherwise routine questioning into a custodial situation under Miranda. For example, in U.S. v. Salinas, the Fifth Circuit required the administration of Miranda warnings in a case in which officers conducted an interrogation in a strip-search room. See U.S. v. Salinas, 439 F.2d 376, 380 (5th Cir. 1971). Also, the Ninth Circuit required customs
inspectors to read *Miranda* warnings when the inspectors had probable cause to arrest someone and when reasonable people in the individual’s position would not have felt free to leave the presence of the customs inspectors. *See Estrada-Lucas*, 651 F.2d at 1265.

A defendant who reports to probation or other court officers generally is not usually “in custody” at the time he reports to those officers, even though the officers may compel the individual to appear before them for questioning on penalty of imprisonment. In *Minnesota v. Murphy*, a defendant who reported to his parole officer as a condition of probation was not in custody for *Miranda* purposes because there was no formal arrest. *See Minnesota v. Murphy*, 465 U.S. 420, 430 (1984). An officer’s compulsion of a probationer to give truthful information was “indistinguishable,” in the Court’s view, from that of any ordinary witness, and was insufficient to excise the failure of the defendant to assert his Fifth Amendment right against self-incrimination. *See id.; see also U.S. v. Nieblas*, 115 F.3d 703, 705 (9th Cir. 1997) (no custodial interrogation where probationer voluntarily appeared for her scheduled probation interview under a threat of revocation of his probation, because the petitioner could leave the interview at any time, and because officers did not elicit the incriminating information to charge her with a new offense). *But see U.S. v. Andaverde*, 64 F.3d 1305, 1310-11 (9th Cir. 1995) (custodial statements made to probation officers are subject to same voluntariness analysis as statements made to other law enforcement officers under *Miranda*).

Moreover, a grand jury does not place a witness into custody within the meaning of *Miranda* when it subpoenas a witness to appear before it, even if that witness was a target of the grand jury’s investigation. *See U.S. v. Mandujano*, 425 U.S. 564, 581, 584 n.9 (1976). Yet, the compelled appearance of a target of a grand jury investigation may implicate the privilege against self-incrimination. In *U.S. v. Hubbell*, the respondent promised to provide the Independent Counsel with information relevant to the Whitewater investigation as part of a plea agreement. *See U.S. v. Hubbell*, __ U.S. __, 120 S. Ct. 2037, 2040 (2000). Although the respondent invoked his Fifth Amendment privilege when he appeared before the grand jury, he ultimately produced the requested information in response to a subpoena. *See id.* at 2040-41. The Court stated that he was immune from prosecution for an unrelated charge based upon information discovered through perusal of the requested documents. *See id.* at 2046, 2048. The immunity that the Independent Counsel granted to the defendant in exchange for the subpoenaed documents precluded the prosecution because the testimonial act of document production was the first necessary step in the discovery of evidence supporting second prosecution. *See id.*

*Miranda* warnings are not required for questioning in preparation for civil proceedings, deportation hearings, or prosecutions in jurisdictions outside the United States. *See U.S. v. Balsys*, 524 U.S. 666, 669 (1998) (concern for foreign prosecution was beyond scope of Fifth Amendment privilege against self-incrimination); *U.S. v. Solano-Godines*, 120 F.3d 957, 960, 962 (9th Cir. 1997) (holding that *Miranda* warnings are not required before questioning concerning civil deportation proceedings); *U.S. v. Alderete-Deras*, 743 F.2d 645, 648 (9th Cir. 1984) (same).

Other locations of law enforcement interrogation do not generally present the type of coercive atmosphere that would warrant a finding of custody. An individual may not be in custody if he or she is questioned at a place of employment, even if law enforcement officers occupy a business owned by that individual. *See U.S. v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998) (use of defendant’s pre-arrest,
Pre-Miranda silence during a meeting between the defendant and his supervisors, did not violate Fifth Amendment because the defendant was not under government compulsion to speak with authorities at the time of his silence); U.S. v. Crawford, 52 F.3d 1303, 1308 (5th Cir. 1995) (F.B.I. agents executing a search warrant on an electronics business did not place the defendant into custody and were not required to administer Miranda warnings to the defendant). U.S. v. Crisco, 725 F.2d 1228, 1231 (9th Cir. 1984) (defendant was not in custody when questioned at a government recruiting center at which defendant, an army staff sergeant, was stationed, because the interrogation took place “in surroundings familiar to the defendant and in an atmosphere of confusion as to who was in charge”).

Likewise, defendants are not ordinarily placed into custody when officers question them in a hospital, so long as the government did not cause the defendant’s hospitalization. See U.S. v. Martin, 781 F.2d 671, 673 (9th Cir. 1985); see also U.S. v. Eide, 875 F.2d 1429 (9th Cir. 1989) (no custody existed, where defendant was questioned by Veterans Administration supervisor in a hospital, because police “had nothing to do with” defendant after his supervisors chose to discipline the defendant for drug use within the agency, rather than seek the assistance of law enforcement in dealing with the defendant).

The circumstances surrounding a period of interrogation in a defendant’s place of residence may indicate that an individual is placed into custody. In Orozco, the court determined that the accused was in custody when armed officers forcibly entered his boarding house at 4:00 a.m. and surrounded him in the bedroom in which he stayed. See Orozco, 394 U.S. at 325-27. But see New York v. Harris, 495 U.S. 14, 18-19 (1990) (despite illegal arrest of petitioner at home, statements made outside the house were admissible because police had probable cause to arrest the petitioner); Beckwith v. U.S., 425 U.S. 341, 342, 347 (1976) (holding that questioning of a suspect in his home by IRS Intelligence Division agents did not constitute custody, since the interrogation was free of coercion).

**5.03.03 Interrogation**

After establishing that the accused made statements while in custody, counsel must establish that the incriminating statements were made in response to government interrogation. Interrogation is defined as “express questioning” or any activity by law enforcement officers “reasonably likely to elicit an incriminating response.” Rhode Island v. Innis, 446 U.S. 291, 300 (1980). While direct questioning by agents falls within the traditional definition of interrogation, government agents may engage persons in a dialogue that does not directly elicit incriminating responses, or that does not appear directed toward the accomplishment of that goal. In Innis, the defendant brought officers to the location of a gun after the officers expressed their concern to the defendant that a disabled child, located close to the area where the officers believed the gun may have been tossed, might find the weapon and hurt him or herself. See id. at 294-95. The Court held that the officers’ comments did not constitute interrogation. However, the Innis Court noted that police officers’ awareness of the weaknesses or susceptibilities of the accused would be relevant to a determination of whether the induced statements would constitute interrogation. See id. at 302 n.8. Moreover, the agents may even engage in deception when conducting questioning of a defendant, without actually interrogating him. See Shedelbower v. Estelle, 885 F.2d 570, 571, 573 (9th Cir. 1989) (no interrogation occurred, where a police officer, lying to the suspect, told him that he had been identified by the victim).
The intent of the officers in questioning the accused is one factor courts may consider in determining whether interrogation occurred. Only questions or actions which the government agents “should know are reasonably likely to elicit an incriminating response from the suspect” constitute interrogation. In "Innis," 446 U.S. at 300. See "Crisco," 725 F.2d at 1232 (officer’s statements to the defendant about a prior meeting between them, in which the officer, acting in an undercover capacity, showed the defendant $60,000 to induce the defendant to sell drugs to him, did not constitute interrogation, because the officer did not know that his remarks would likely elicit an incriminating response). In "U.S. v. Moreno-Flores," the defendant was arrested on drug charges and invoked his right to remain silent. See "U.S. v. Moreno-Flores," 33 F.3d 1164, 1167-68 (9th Cir. 1994). The DEA agent told the defendant, after his arrest, that officers seized 600 pounds of cocaine, that he faced a stiff prison sentence, and that the government sought his cooperation in the investigation. See id. at 1168. When the arresting officer asked the defendant, the following morning, about his overnight stay in detention, the defendant confessed to the crime. See id. The Ninth Circuit did not suppress the defendant’s confession because, among other reasons, the officer did not intend to speak with the defendant until after he consulted with an attorney. See id. at 1170.

Counsel should look to all objective factors which indicate that questioning will likely elicit incriminating responses. In "U.S. v. LaPierre," the defendant asserted that officers had not recovered all money stolen during a bank robbery and offered to split the unrecovered proceeds with an officer after the officer informed the defendant that he had recovered all evidence of the robbery in which the defendant allegedly participated. See "U.S. v. LaPierre," 998 F.2d 1460, 1467 (9th Cir. 1993). The Court found that the officer’s comments did not constitute interrogation, and stated that, “in determining whether a suspect was being interrogated, the critical inquiry is whether ‘in light of both the context of the questioning and the content of the question,’ the statements made by the officers were of the sort that the police should know [are] reasonably likely to evoke an incriminating response.” Id. at 1466 (internal citations omitted). In "Arizona v. Mauro," police recorded a conversation between the accused and his wife after the accused invoked his Miranda rights. See "Arizona v. Mauro," 481 U.S. 520, 522 (1987). The Court found that no interrogation occurred because the officer asked no questions and because the officer’s decision to allow the accused to speak with his wife was not a “psychological ploy” amounting to the functional equivalent of interrogation. Id. at 527.

The officer’s intent is not dispositive on the issue of interrogation. In "Illinois v. Perkins," a police officer posed as an inmate imprisoned in a cell adjacent to the defendant cell to obtain a murder confession. See "Illinois v. Perkins," 496 U.S. 292, 294-95 (1990). After the officer asked the defendant if he had ever "done" anyone, the defendant then described the murder that he committed. Id. at 294-95. The Court held that this questioning “do[es] not implicate the concerns underlying Miranda” because "[t]he essential ingredients of a ‘police dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate.” Id. at 296. Note, however, that the Court deemed similar law enforcement activities violative of the Sixth Amendment. See infra §5.05.

Yet, a requirement that a defendant report to judicial officers may transform questioning of in-custody defendants into interrogation in certain circumstances, notwithstanding prior judicial determinations that such requirements do not place defendants into custody. But see "U.S. v. McLaughlin," 777 F.2d 388, 392 (8th Cir. 1985) (questioning by Pretrial Services officer about respondent’s address and place of employment did not constitute interrogation, but was a request for “basic identification information”).
Counsel should consider the timing of the questioning by officers or agents of the court, in relation to other events of the case, to determine whether an interrogation took place. See, e.g., U.S. v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir. 1984) (questioning by probation officer prior to entry of petitioner’s guilty plea was not interrogation because questions did not directly relate to the facts of the crime with which she was charged, and because the officer intended to gather materials for sentencing, not to incriminate the petitioner “on the underlying offence”).

Routine background questioning does not ordinarily elicit incriminating responses, and thus does not constitute interrogation. See Muniz, 496 U.S. at 601 (questions about the petitioner’s name, address, height, weight, date of birth, eye color, and age are not questions “intended to elicit information for investigative purposes”); McLaughlin, 777 F.2d at 391 (questioning by Pretrial Services officer was a request for basic identification information and could not have been expected to elicit an incriminating response); see also Territory of Guam v. Ichiyasu, 838 F.2d 353, 357-58 (9th Cir. 1988) (continuing to read Miranda warnings after the defendant requests an attorney is not interrogation).

However, law enforcement officers must administer Miranda warnings if the booking questions or biographical questions will likely elicit incriminating responses. See U.S. v. Henley, 984 F.2d 1040, 1041, 1043 (9th Cir. 1993) (question to driver of vehicle used in a bank robbery about the vehicle’s ownership called for an incriminating response because the officer knew, before his approach of the defendant, that some doubt existed as to the vehicle’s ownership); U.S. v. Gonzalez-Sandoval, 894 F.2d 1043, 1047 (9th Cir. 1990) (violation of Miranda to ask about citizenship status of suspected undocumented immigrant in police custody, when the individual’s response to that question would likely elicit a response which would substantiate a charge that the suspect violated federal prohibitions against illegal entry after deportation); U.S. v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981) (inquiry regarding reasons for being in a city and prior arrests constituted interrogation, because the answers to those questions could elicit responses that could be used against the defendant at trial). Similarly, innocuous questions asked during the booking process to allow for an inventory of a detainee’s possessions may constitute interrogation under some circumstances; U.S. v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986) (officer should have known that questions regarding arrestee’s residence were reasonably likely to elicit an incriminating response, where contraband was previously found in the arrestee’s suspected residence); U.S. v. Poole, 794 F.2d 462, 466-67 (9th Cir.) (holding FBI questions regarding defendant’s name to be interrogation, where defendant asserted the right to remain silent, and where agents knew that his answer to that question would likely elicit an incriminating response), amended, 806 F.2d 853 (9th Cir. 1986); U.S. v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983) (interrogation occurred when officers questioned the accused about his citizenship status, because the investigator knew that the defendant’s response to that line of questioning would expose the defendant to additional charges for possession of a firearm by an illegal alien); U.S. v. Downing, 665 F.2d 404, 407 n.1 (1st Cir. 1981) (questions of a federal customs officer to a defendant regarding the use of keys and the location of an airplane held by the defendant constituted express questioning within the meaning of Miranda and could be distinguished from routine booking questions intended to inventory the defendant’s personal belongings, where the officers subsequently obtained consent to search the airplane from the defendant and gained access to airport employees who implicated the defendant in a narcotics conspiracy as a result of the defendant’s responses); Harryman v. Estelle, 616 F.2d 870, 872-73 (5th Cir. 1980) (holding that the defendant’s pre-Miranda response to an officer’s query about a condom in the defendant’s possession that contained a white substance, “Oh, you know what it
is. It is heroin,” was the product of interrogation and subject to suppression under Miranda); U.S. v. La Monica, 472 F.2d 580, 581 (9th Cir. 1972) (defendant’s response to officer’s question about the significance of a receipt found in the defendant’s possession was admissible because the officer did not seek evidence, but only tried to identify possessions of the defendant at the time of the defendant’s arrest).

5.03.04 Adequacy of the Miranda Warning

After counsel for the accused determines that a custodial interrogation took place under Miranda, he or she should ascertain the exact statements recited by the officers to determine if the officers administered warnings that fully informed the defendant of his or her constitutional rights. See U.S. v. Noti, 731 F.2d 610, 615 (9th Cir. 1984) (defective Miranda warnings administered because officers did not tell the defendant that he could have an attorney present during questioning). The Supreme Court has not required a verbatim recitation of the Miranda warnings to satisfy the requirements of Miranda. See California v. Prysock, 453 U.S. 355, 359 (1981) (no "talismanic incantation" of warnings is necessary to satisfy the requirements of Miranda). The admonishment administered by the officers must reasonably convey the constitutional rights of the defendant. See id. at 361 (police “fully conveyed” respondent’s Miranda rights, including his right to have a lawyer appointed for him prior to and during interrogation, where officers informed the respondent of his right to the presence of an attorney prior to and during questioning, and, separately, of his right to the appointment of an attorney if he could not otherwise afford counsel); see also Noti, 731 F.2d at 614 (citing Prysock, 453 U.S. at 359) (non-verbatim recitation of the Miranda warning was adequate, as long as the officers did not unduly mislead the defendant as to the nature of his constitutional rights). Challenges raised to the adequacy of Miranda warnings are subject to de novo review. See id. Any factual findings underlying the adequacy challenge are reviewed for clear error. See U.S. v. Lares-Valdez, 939 F.2d 688, 689 (9th Cir. 1991) (per curiam) (quoting U.S. v. Bland, 908 F.2d 471 (9th Cir. 1990)) (other internal citations omitted).

Counsel for the accused should carefully examine the content of wording of Miranda warnings of the right to counsel. In Prysock, the Supreme Court excused the failure of officers to advise the accused of his right to have an attorney appointed for him before questioning because the totality of the warnings furnished to the accused the functional equivalent of the standard Miranda recitation. See Prysock, 453 U.S. at 361; see also Duckworth v. Eagan, 492 U.S. 195, 203-04 (1989) (holding that warning that an accused will receive the appointment of an attorney "if and when you go to court" was sufficient to comply with Miranda); Territory of Guam v. Snaer, 758 F.2d 1341, 1343 (9th Cir. 1985) (police officers administered adequate Miranda warnings by informing the defendant that "[y]ou have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned," notwithstanding the officers’ failure to expressly state the defendant’s right to consult with an attorney before questioning); U.S. v. Floyd, 496 F.2d 982, 988 (2d Cir. 1974) (advisement that suspect “had a right to remain silent, [that] anything he said can and would be used in a court of law, that he had a right to an attorney, [and that] if he could not afford an attorney, an attorney would be appointed for him by the court,” adequately advised the defendant of his constitutional rights, despite officers’ failure to inform the suspect that he had a right to have an attorney present before questioning). But see U.S. v. Tillman, 963 F.2d 137, 141 (6th Cir. 1992), (reversing the defendant’s conviction because the defendant was never told that his statements could be used against him, in violation of the privilege against self-incrimination); U.S. v. Bland, 908 F.2d 471, 473-74 (9th Cir. 1990) (officer’s failure to inform a suspect of his right to the presence of an attorney
during questioning rendered *Miranda* warnings inadequate); *Sanchez v. Beto*, 467 F.2d 513, 514-15 (5th Cir. 1972) (same).

Ambiguous warnings may also inadequately inform an accused of his or her constitutional rights. In *U.S. v. Connell*, the defendant was issued separate oral and written warnings. *See U.S. v. Connell*, 869 F.2d 1349, 1350 (9th Cir. 1989). The defendant was told orally that an attorney "may be appointed" for him if he could not otherwise afford counsel. *Id*. Officers gave him, at the same time, a written form to read while officers orally advised him of his *Miranda* rights, which stated that "arrangements will be made for me to obtain a lawyer in accordance with the law." *Id*. at 1350-51. The Ninth Circuit held that the composite produced by the written and oral warnings in this case was "equivocal and open to misinterpretation" and therefore was inadequate. *Id*. at 1353. Counsel, however, should not depend upon any particular language to determine the adequacy of any warnings. In *U.S. v. Miguel*, the Ninth Circuit held that informing an accused that an attorney "you may have an attorney appointed by the U.S. magistrate or the Court to represent you" does not necessarily fail to inform a suspect of his or her *Miranda* rights. *U.S. v. Miguel*, 952 F.2d 285, 287 (9th Cir. 1991). The court stated that a similar warning in *Connell* was ambiguous only in light of the other statement given by the police. *See id*. at 287-88.

Some special concerns arise in circumstances in which the accused holds citizenship outside the United States or otherwise lacks familiarity with the English language. Recently, the Ninth Circuit held that the failure of law enforcement officers to advise a foreign national of his or her right to contact his or her foreign consulate, in violation of the Vienna Convention’s consular notification requirement, does not require suppression of subsequently obtained evidence, but may be relevant to a consideration of the voluntariness of that statement. *See U.S. v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (en banc), cert. denied, 2000 WL 798553 (U.S. Nov. 13, 2000). Also, counsel may experience difficulty challenging the adequacy of *Miranda* warnings administered in a language other than English. For example, in jurisdictions bordering Mexico, federal officers often use poor Spanish translations of standardized *Miranda* forms to inform clients of their constitutional rights. However, when the forms are translated, verbatim, into English at a later suppression hearing, they may sound correct. Counsel may need to engage the services of an expert interpreter to inform the court that the content and grammatical structure of the translation renders the warnings incomprehensible and meaningless, and thus do not adequately inform the accused of his or her constitutional rights.

### 5.03.05 Exceptions to *Miranda*

#### 5.03.05.01 Cat-Out-of-the-Bag Doctrine

The "cat-out-of-the-bag" doctrine permits the introduction of statements elicited after a confession extracted from the defendant through a violation of the *Miranda* requirements. *See U.S. v. Bayer*, 331 U.S. 532, 540 (1947). The *Bayer* Court found “that making a confession under circumstances which preclude its use, [does not] perpetually disable[] the confessor from making a usable one after those conditions have been removed.” *Id*. at 541. Rather, a confession that follows a violation of *Miranda* may be admitted because, “after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having
confessed.” *Id.* Effectively, the defendant “can never get the cat back in the bag,” once the first confession is elicited. *Id.*

The Court elaborated on the cat-out-of-the-bag doctrine further in *Oregon v. Elstad*. In *Elstad*, police officers secured a custodial confession from an 18-year-old youth without a *Miranda* waiver. See *Oregon v. Elstad*, 470 U.S. 298, 301 (1985). The police later obtained a second confession following proper *Miranda* warnings. See *id.* at 301-02. The Court refused to exclude the later confession because there was no evidence that the first statement was the product of coercion. See *id.* at 308-09. The Court held that the fact that the second statement followed a prior, voluntary unwarned admission did not preclude the admission of a second confession made after the administration of *Miranda* warnings. See *id.* at 311-12; see also *U.S. v. Wauneka*, 842 F.2d 1083, 1088 (9th Cir. 1988) (applying *Elstad* analysis to conclude that post-warning statements after an uncoerced pre-warning statement were admissible). In *U.S. v. Gupta*, the Seventh Circuit stated that “nothing in the rationale of *Elstad* implies that the temporal proximity (or similarity) of the pre- and post-*Miranda* warning statements makes the latter any less valid for purposes of admissibility.” *U.S. v. Gupta*, 183 F.3d 615, 618 (7th Cir. 1999); see also *Wauneka*, 842 F.2d at 1088.

Courts have interpreted *Elstad* broadly in situations in which officers took the original statements under questionable circumstances. See *U.S. v. Lewis*, 833 F.2d 1380, 1387 (9th Cir. 1987) (unwarned statements elicited from respondent, while he recovered from the effects of an anesthetic administered during surgery, do not affect admissibility of statements elicited twenty-four hours after the prior unwarned statements, because agents secured a valid *Miranda* waiver, because the agents did not refer to the defendant’s prior admissions while they took the second statement, and because there was no evidence of coercion during the interviews); *Jenkins v. Wainwright*, 763 F.2d 1390, 1393 (11th Cir. 1985) (trial testimony three months after coercive interrogation found sufficiently attenuated from the coercive circumstances that produced the statement); *U.S. v. Cherry*, 759 F.2d 1196, 1210 (5th Cir. 1985) (rejecting argument that consent to a search obtained after statements was tainted by a violation of *Miranda* and was thus invalid). *Elstad* vitiates the presumption of coercion in a situation in which voluntary statements are elicited after officers secure an illegally obtained confession. If the warned confession occurs soon after the unwarned confession, the officers may combine the two statements into a composite statement in the police report. Counsel can then argue that the government must prove that the statements that the government wishes to admit into evidence were obtained after a proper waiver of *Miranda* rights, rather than from a violation of *Miranda*. The holding in *Miranda* supports this position insofar as the burden of proving compliance with *Miranda* always rests upon the government. See *Miranda*, 384 U.S. at 444 (stating that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”).

Counsel should carefully examine the policies of the interrogating agency to determine the applicability of the cat-out-of-the-bag doctrine. Some jurisdictions train officers to conduct a pre-*Miranda* interrogation, and to attempt to secure a *Miranda* waiver after they elicit a confession. If, on the other hand, the suspect invokes his *Miranda* rights, the agents have prevented the suspect from testifying at trial because the otherwise inadmissible confession would likely be used to impeach a testifying defendant.
Should counsel be able to establish such a department policy, counsel should urge the court to suppress any subsequent statement.

5.03.05.02 Public Safety Exception

In *New York v. Quarles*, the Court carved out the "public safety" exception to *Miranda*. See *New York v. Quarles*, 467 U.S. 649, 656 (1984). In *Quarles*, the police pursued a rape suspect who was reportedly armed. See *id.* at 651. A frisk of the suspect revealed an empty shoulder holster. See *id.* Police officers immediately questioned the suspect and ascertained the location of the gun from him without administering *Miranda* warnings. See *id.* The Court concluded that “the need for answers to questions in a situation posing as a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s ‘privilege against self-incrimination.’” *Id.* at 658-59.

Some circuits have upheld the admissibility of statements under this exception, notwithstanding the absence of specific facts indicating that an accused was armed. In *U.S. v. Brady*, the Ninth Circuit held that the "public safety" exception permitted unwarned interrogation of a suspect, even when the officer held no specific information indicating that the suspect was armed. See *U.S. v. Brady*, 819 F.2d 884, 888 (9th Cir. 1987). The court explained that the questions arose from a concern for public safety and a desire to control a potentially “dangerous situation.” *Id.* Because the questions were "not designed to obtain evidence of a crime," the accused was not entitled to *Miranda* warnings to secure his privilege against self-incrimination. *Id.* Further, some circuits have permitted the application of the “public safety” doctrine to allow for the admission of pre-warning confessions, even though suspects may assert their Fifth Amendment right to counsel during their arrest. In *U.S. v. DeSantis*, the Ninth Circuit upheld the admission of a defendant’s post-warning statement regarding the location of weapons in an adjoining bedroom, despite his request to contact his attorney during the execution of an arrest warrant and protective sweep. See *U.S. v. DeSantis*, 870 F.2d 536, 537 (9th Cir. 1989). The court recognized that an officer’s need to ensure his own safety and the safety of others outweighs the prophylactic requirement prohibiting officers from speaking with suspects after they request the assistance of counsel. See *id.* at 540-41.

Counsel for the accused should focus, however, on the context in which officers dispensed with the *Miranda* requirements to evaluate officers’ justifications for disregarding *Miranda* due to public safety concerns. In *U.S. v. Anderson*, a government agent arrested the suspect, placed him in a government vehicle, and told him to choose between the presence of an attorney during questioning or cooperation with the government. See *U.S. v. Anderson*, 929 F.2d 96, 97 (2d Cir. 1991). The Court rejected the government’s argument that the agent’s statements were not false or misleading under the circumstances, because the officer sought information to aid in the execution of a search warrant that only the defendant could immediately supply and held, instead, that the agent coerced Anderson’s statements by leading him to believe that he could only cooperate with the government at the time of his arrest. See *id.* at 100. Further, it concluded that the public safety exception did not apply in a situation in which the officer took the time to administer full *Miranda* warnings and would have told any suspect of the choice presented to Anderson, regardless of the presence of any exigency. See *id.*

5.03.06 Waiver of *Miranda* Rights
Nevertheless, a court may admit statements elicited after a recitation of Miranda warnings if police officers secured a valid waiver of Miranda rights before they elicited incriminating statements. Under the Miranda doctrine, however, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” Miranda, 384 U.S. at 475. Thus, the inquiry into the statement’s admissibility does not end, even when the government claims that the accused waived her Miranda rights. Rather, “the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception.” Moran v. Burbine, 475 U.S. 412, 421 (1986). Also, “the waiver must have been made with a full awareness, both of the nature of the right to be abandoned and consequences of the decision to abandon it.” Id.

Reviewing courts must look to the "totality of the circumstances surrounding the interrogation" to answer these inquiries. Id; see also, e.g., Tague v. Louisiana, 444 U.S. 469, 471 (1980) (per curiam) (government failed to show that petitioner had waived his Miranda rights, because the arresting officer could not remember the statements that he read to the petitioner from a notice of Miranda rights, whether he asked petitioner if he understood the rights, or whether he conducted any tests to determine if the petitioner was literate or otherwise capable of understanding his rights). Often, “the background, experience, and conduct of the accused” will indicate if officers secured a valid Miranda waiver. See North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Though the burden is on the government to demonstrate a valid Miranda waiver, it need only establish a valid waiver by a preponderance of evidence. See Lego v. Twomey, 404 U.S. 477, 488 (1972). Furthermore, the Ninth Circuit has held that the voluntariness of a Miranda waiver subject to de novo review and that a court must review a lower court's determination that the waiver was knowing and intelligent for clear error. See Derrick v. Peterson, 924 F.2d 813, 823 (9th Cir. 1990).

An express Miranda waiver need not be rendered in writing. See Butler, 441 U.S. at 373. A valid waiver of rights, however, cannot be presumed from mere silence after warnings. See id.; see also Miranda, 384 U.S. at 475. A refusal to sign a written waiver may actually constitute an invocation of Miranda rights, rather than a valid Miranda waiver. See U.S. v. Heldt, 745 F.2d 1275, 1278 (9th Cir. 1984) (internal citations omitted); see also U.S. v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) (holding that a defendant’s silence for up to 10 minutes in the face of warnings, and later responded to police statements, did not produce a valid Miranda waiver). But see Evans v. Demosthenes, 98 F.3d 1174, 1176 (9th Cir. 1996) (complaints about stomach pains in response to police questioning are not an invocation of right to remain silent); U.S. v. Boyce, 594 F.2d 1246, 1250 (9th Cir. 1979) (defendant waived his right to silence when he declined to sign a waiver form, but discussed his personal background and other matters, and later volunteered, "Let's talk," when told that police charged a co-defendant and placed the co-defendant into custody); U.S. v. Ogden, 572 F.2d 501, 502 (5th Cir. 1978) (finding an implicit waiver, where accused agrees to speak without expressly waiving his rights).

5.03.06.01 Voluntary Waiver

Counsel must consider the same factors relevant to the determination of the voluntariness of a Miranda waiver as those factors that influence a determination of the voluntariness of confessions. See, generally, Colorado v. Spring, 479 U.S. 564, 573 (1987); see also infra §5.04.
5.03.06.02 Knowing and Intelligent Waiver

The subjective background of the accused may be relevant to a determination of whether officers elicited a knowing and intelligent waiver of *Miranda* rights. *See U.S. v. Montoya-Arrubla*, 749 F.2d 700 (11th Cir. 1985) (intoxication considered as possible evidence of an invalid waiver); *U.S. v. Glover*, 596 F.2d 857, 864, 866 (9th Cir. 1979) (despite defendant's low level of intelligence, prior experience in criminal justice system may support finding of knowing waiver); *Sample v. Eyman*, 469 F.2d 819, 821 (9th Cir. 1972) (statement elicited from a man under severe emotional distress following his wife’s death, precluded a finding of a knowing and intelligent waiver of *Miranda* rights). An otherwise voluntary confession may be inadmissible, however, if the accused lacks the mental capacity to make a knowing and intelligent waiver. *See U.S. v. Frank*, 956 F.2d 872, 876 (9th Cir. 1991) (citing *Moran*, 475 U.S. at 421); *see also U.S. v. Garibay*, 143 F.3d 534, 537-38 (9th Cir. 1998) (defendant with limited English skills and low mental capacity did not validly waive his *Miranda* rights).

Courts have looked at many factors to determine whether a *Miranda* waiver was both knowing and intelligent. Ignorance of the nature of the crime about which officers hope to question a defendant does not invalidate a *Miranda* waiver. *See Colorado v. Spring*, 479 U.S. 564 (1987) (finding a valid waiver, where officers questioned a defendant about a murder after his arrest for interstate transportation of stolen firearms, despite ATF agents’ failure to inform Spring that they intended to engage in questioning about the murder before the interview). In *Grooms v. Keeney*, the Ninth Circuit admitted the defendant’s admission that he robbed and beat the alleged victim after he waived his *Miranda* rights, even though police did not inform the defendant that the victim died from the injuries inflicted by him. *See Grooms v. Keeney*, 826 F.2d 883, 884, 886 (9th Cir. 1987).
5.03.06.03 Other Considerations

The *Miranda* waiver must be reasonably contemporaneous with the interrogation. *See U.S. v. Hopkins*, 433 F.2d 1041, 1045 (5th Cir. 1970) (defendant executed a valid *Miranda* waiver, where *Miranda* warnings were given by a federal officer immediately prior to commencement of interrogation by state police detective on the same subject matter, despite the fact that the accused had been in custody for seven days after being arrested on an unrelated charge); *Miller v. U.S.*, 396 F.2d 492, 496 (8th Cir. 1968) (no additional waiver required where written statement, given almost four hours after his arrest, was substantially the same as the oral statement given shortly after time of arrest). In addition, the Tenth Circuit recently held that *Miranda* warnings do not lose their efficacy when one officer warns the defendant of his *Miranda* rights and another officer conducts the questioning. *See U.S. v. Gell-Iren*, 146 F.3d 827, 830-31 (10th Cir. 1998).

The validity of a waiver of *Miranda* rights may also hinge upon the scope of the alleged waiver. A suspect may waive *Miranda* rights selectively. *See Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975); *U.S. v. Thierman*, 678 F.2d 1331, 1335 (9th Cir. 1982). *See Bruni v. Lewis*, 847 F.2d 561, 562-63 (9th Cir. 1988) (the defendant selectively waived his *Miranda* rights when he told arresting officers that he would not answer their questions outside the presence of an attorney, but later stated that he would answer "those he felt good to answer or that he thought his attorney would probably advise him to answer") (citing *Thierman*, 678 F.2d at 1335). Moreover, a suspect may modify a partial waiver of *Miranda* rights. In *Wyrick v. Fields*, the accused, in the presence of counsel, waived *Miranda* rights while he took a polygraph test, and specifically waived his right to the presence of counsel at the polygraph examination. *See Wyrick v. Fields*, 459 U.S. 42, 43 (1982) (per curiam). The Court found that police officers were not required to advise the defendant of his *Miranda* rights a second time before questioning him about the results of the polygraph examination because the defendant understood the rights he waived and retained the power to stop questioning or to speak with counsel at any time. *See id.* at 48. However, in *U.S. v. Gillyard*, 726 F.2d 1426, 1429 (9th Cir. 1984), the Ninth Circuit found that a similar waiver applied only to the polygraph examination, and that subsequent answers to post-polygraph questions would be inadmissible.

Finally, the entry of a guilty plea, alone, does not produce a valid waiver of *Miranda* rights. A guilty plea is neither a waiver of the privilege against self-incrimination nor a waiver of the right to remain silent at sentencing. *See Mitchell v. U.S.*, 526 U.S. 314, 325, 327 (1999) (prohibiting the use of any adverse inference from the defendant’s silence during a sentencing hearing).

5.03.07 Invocation of *Miranda* Rights

Under the *Miranda* doctrine, “[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” *Miranda*, 384 U.S. at 473-74. Also, “[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id*. Once counsel is requested, officers cannot comply with *Miranda* by simply permitting the accused to speak with an attorney outside the interrogation room. *See Minnick v. Mississippi*, 498 U.S. 146, 152 (1990). Rather, *Edwards* requires that officials not reinitiate interrogation without counsel present, notwithstanding the presence of any opportunity of the defendant to consult with
counsel. See id. at 153. Moreover, the law imputes knowledge of an invocation of the right to counsel to all law enforcement officers who have contact with the accused. See Arizona v. Roberson, 486 U.S. 675, 687-88 (1988); U.S. v. Covington, 783 F.2d 1052, 1055 (9th Cir. 1985); U.S. v. Scalf, 708 F.2d 1540, 1544-45 (10th Cir. 1983).

An individual can expressly or impliedly invoke his or her Miranda rights. See supra §5.03.05. However, the individual must be in custody and must be subjected to ongoing or imminent interrogation to validly invoke his or her Miranda rights. See U.S. v. Bautista, 145 F.3d 1140, 1147 (10th Cir. 1998). An individual may invoke Miranda rights by refusing to speak with authorities or to answer officers’ questions. See U.S. v. Heldt, 745 F.2d 1275 (9th Cir. 1984) (defendant did not waive his Miranda rights when he refused to sign the waiver form and indicated that he did not wish to answer questions); U.S. v. Hernandez, 574 F.2d 1362 (5th Cir. 1978).

An accused does not invoke the right to counsel by agreeing to give a verbal statement to authorities after refusing to give a written statement to those officers outside the presence of an attorney. See Connecticut v. Barrett, 479 U.S. 523, 528 (1987). Rather, the individual effects a limited invocation of the right to counsel. Therefore, interrogation which elicits a verbal confession is proper. See id. The investigating officers should inform the accused that his failure to sign the waiver does not prevent the use of elicited statements against him at trial or at another court proceeding. See Heldt, 745 F.2d at 1278-79. But see U.S. v. Van Dusen, 431 F.2d 1278, 1280 (1st Cir. 1970) (agents are not required to orally inform defendant of his constitutional rights once he refused to sign a waiver of rights form, although such a course of action “would have been prudent” under the circumstances).

5.03.07.01 Invocation under Edwards

An accused may invoke Miranda rights by choosing to remain silent or by requesting the assistance of an attorney. See Miranda, 384 U.S. at 473-74. If the accused requests to see an attorney, counsel must be provided before questioning. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that a criminal defendant, “having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police”). Police officers may not vitiate the Fifth Amendment right to counsel and obtain a valid Miranda waiver if they delay efforts to secure counsel and subsequently elicit a statement from the defendant. See U.S. v. Lucas, 963 F.2d 243, 246 (9th Cir. 1992) (officer’s obligation to furnish access to counsel under Edwards was not relieved, where defendant was advised of Miranda rights by local police, invoked his Fifth Amendment right to counsel, was denied representation by the officers because no charges were pending, and made uncounseled statements to FBI agents after a waiver of his Miranda rights several hours after his request); U.S. v. Womack, 542 F.2d 1047, 1049, 1051 (9th Cir. 1976) (appellee’s failure to invoke his right to counsel at the time he made a second, incriminating statement was not a waiver of the right to counsel, but instead reflected his sense of futility upon officer’s failure to meet his requests, where appellee twice requested the assistance of counsel, was interrogated without any assessment of his desire to waive his right to counsel, and where the written waiver executed by the defendant before he made a second, incriminating statement was tainted by the police officers’ failure to obtain the requested counsel).
In *U.S. v. Nordling*, the defendant originally agreed to speak to law enforcement agents about an alleged murder, but then requested an attorney after being held for further questioning about narcotics transactions. *See U.S. v. Nordling*, 804 F.2d 1466, 1468-69 (9th Cir. 1986). At a subsequent hearing, an agent explained that no attorney was provided to the defendant because allowing defendants to consult with lawyers "has compromised investigations severely." *Id.* at 1471 n.4. The court found this attitude "disturbing" and suppressed the defendant’s statements. *See id.* at 1471 n.4, 1472.

Nevertheless, some statements may be admissible notwithstanding an earlier invocation of *Miranda* rights. For instance, when an accused is arrested on one charge, invokes his or her right to silence, and is admonished again before questioning regarding an unrelated charge, statements made after the second admonishment may be admissible, depending upon the circumstances surrounding the interrogation. *See Michigan v. Mosley*, 423 U.S. 96, 104-05 (1975) (finding no *Miranda* violation, where questioning took place at another location, by another officer, after a two hour break from initial questioning, and where questioning was on a crime of a different nature); *see also U.S. v. Hsu*, 852 F.2d 407, 411-12 (9th Cir. 1988) (finding no *Miranda* violation, where agent reinterrogated accused thirty minutes after the accused invoked the right to remain silent after another agent read the *Miranda* warnings, because officers admonished the defendant with a new set of *Miranda* warnings before he made any statements, because the defendant executed a valid waiver after being read his rights a second time, and because the officers “exerted no pressure” on the defendant to waive his rights).

Initiation of a conversation by an accused does not constitute an automatic waiver of previously invoked rights. Rather, the prosecution must show that subsequent events indicate that the defendant validly waived the right to the presence of counsel during the interrogation. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). *But see U.S. v. Moreno-Flores*, 33 F.3d 1164, 1170 (9th Cir. 1994) (voluntary post-*Miranda* statements made during discussion of the offense initiated by the accused the morning after he had invoked right to remain silent are admissible). Any subsequent waiver of *Miranda* rights must be knowing, voluntary and intelligent. *See id.* at 1046. (citing *Edwards*, 451 U.S. at 486 n.9).

Several circuits have restricted the *Edwards* holding to situations in which officers hold defendant in continual custody. In *U.S. v. Skinner*, the Ninth Circuit held that the *Edwards* rule may not apply to suspects who are not in continuous custody between the time they request counsel and the time that they are reinterrogated. *See U.S. v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982) (holding that a suspect validly waived his right to counsel by voluntarily accompanying officers to the precinct and by making statements after executing a *Miranda* waiver form one day after his initial custodial questioning, and by leaving the station after expressing his desire to contact an attorney before answering more questions). Instead, a confession obtained after a request for counsel is admissible after an intervening break in custody and the execution of a valid *Miranda* waiver. *See U.S. v. Hines*, 963 F.2d 255, 256-57 (9th Cir. 1992); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988); *McFadden v. Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987).

### 5.03.07.02 Equivocal Invocation of *Miranda* Rights

Difficulties arise when a defendant effects an ambiguous invocation of his *Miranda* rights. In *Davis v. U.S.*, the accused waived his *Miranda* rights and agreed to answer questions. After one and a half
hours, the accused said, "Maybe I should talk to a lawyer." *Davis v. U.S.*, 512 U.S. 452, 455 (1994). After an agent reiterated that questioning would not continue if the defendant requested a lawyer, the accused replied, "No, I'm not asking for a lawyer," and, later, "No, I don't want a lawyer." *Id.* The interview continued for another hour, until the accused said, "I think I want a lawyer before I say anything else," at which point all questioning ceased. *Id.* The Court held that the institution of a requirement that officers cease questioning whenever a suspect ambiguously requests the assistance of counsel would place an excessive burden on law enforcement efforts. See *id.* at 461. Instead, the Court held, "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Id.* (emphasis added). Nevertheless, if an accused has clearly requested counsel, "an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself," but can only be relevant to the determination of waiver. *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (per curiam).

The Ninth Circuit has held that an accused’s question to the police of if he should seek counsel does not constitute an equivocal request for counsel. The “[m]ere mention of an attorney does not constitute an equivocal request for counsel.” *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989). In *Smith v. Endell*, 860 F.2d 1528, 1529, 1531-32 (9th Cir. 1988), the same court found that the accused invoked his *Miranda* rights when he asked, "Are you looking at me as a suspect? [If you are], I think I should have counsel." On the other hand, it also found that the accused’s question, “What time will I see a lawyer?”, asked before the commencement of interrogation and officers’ efforts to administer *Miranda* warnings, did not invoke the Fifth Amendment right to counsel. See *U.S. v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999).

Law enforcement officers may question a suspect to "clarify" an "equivocal" request for counsel. *Robtoy v. Kincheloe*, 871 F.2d 1478 (9th Cir. 1989) ("maybe I should call my attorney" was an equivocal request for counsel, thus permitting an officer to seek clarification of defendant's wishes); *Grooms v. Keeney*, 826 F.2d 883, 886-87 (9th Cir. 1987) (police officer properly clarified petitioner’s ambiguous request for counsel by asking him if he wished to think about obtaining counsel, by telling him he could change his mind about obtaining the assistance of a lawyer, and by then asking if the petitioner wished to continue to answer questions outside the presence of counsel). In *Davis*, the Court specifically declined to adopt a hard line rule requiring the use of clarifying questions, although it recognized that interrogating officers could prudently clarify an accused’s request for an attorney. See *Davis*, 512 U.S. at 461.

### 5.03.08 Juveniles

Some special concerns must be taken into account when conducting a review of the admissibility of statements given by juvenile defendants. Federal law requires law enforcement agents who take a juvenile into federal custody to inform his parents or legal guardians of his custodial status, the nature of the offense, and the juvenile’s legal rights. See 18 U.S.C. §5033. In *U.S. v. Doe*, 170 F.3d 1162, 1167 (9th Cir. 1999), the Ninth Circuit held that the failure to advise a juvenile’s parents of the juvenile’s *Miranda* rights contemporaneously with the parental notification of the juvenile’s custody violated federal law. However, the Ninth Circuit also held that the failure to notify a juvenile’s parents of the juvenile’s custody and waiver of his *Miranda* rights is not a *per se* violation of the juvenile’s *Miranda* rights when the juvenile has not been placed into federal custody. See *U.S. v. Doe*, 155 F.3d 1070, 1073-74 (9th Cir. 1998) (en
banc). In *Doe II*, however, the same court held that suppression of a juvenile’s statement is required only if the *Miranda* violation is the cause of the confession and if the defendant was prejudiced by the admission of the confession. See id. at 1168. But see *U.S. v. John Doe*, 219 F.3d 1009, 1018 (9th Cir. 2000) (failure to comply with the parental notification provision of section 5033 resulted in actual prejudice to the defendant, since juvenile lost the opportunity to confer with his parents when he asserted his rights, and since the defendant’s father credibly testified that he would have advised his son to remain silent, had he known of his son’s custodial status). Note that the Tenth Circuit held that a juvenile is not “in custody” for purposes of *Miranda* when questioned by officers in his home with his parents present. *U.S. v. Erving L.*, 147 F.3d 1240, 1247-48 (10th Cir. 1998).

Some cases have held that a juvenile’s request to see his parents does not constitute a invocation of *Miranda* rights. See *U.S. ex rel. Riley v. Franzen*, 653 F.2d 1153, 1158-59 (7th Cir. 1981). Similarly, the Supreme Court held that a juvenile did not validly invoke his Miranda rights by requesting to see his probation officer. See *Fare v. Michael C.*, 442 U.S. 707, 724 (1979). However, the Court did not specifically determine that a juvenile did not validly invoke his right to remain silent by requesting to speak with someone other than his attorney. See id.

**5.04 SUPPRESSION OF INVOLUNTARY STATEMENTS**

In addition to proving compliance with *Miranda* and its progeny, the government must establish that the challenged statements were made voluntarily. See *Fulminante*, 499 U.S. at 288. Involuntary statements are inherently untrustworthy, and their use violates our fundamental sense of decency. See *Spano v. New York*, 360 U.S. 315, 320-21 (1959). A statement is involuntary if the will of the defendant “was overborne in such a way as to render his confession a product of coercion,” and thus inadmissible under the Fifth Amendment. Id.; see also *U.S. v. Bautista-Avila*, 6 F.3d 1360, 1364 (9th Cir. 1993) (declaring that "[a] statement is involuntary if it is extracted by any sort of threats or violence [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence") (internal citations omitted). A voluntary statement is “the product of an essentially free and unconstrained choice by its maker.” *Collazo v. Estelle*, 940 F.2d at 416 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)). But see *U.S. v. Miller*, 984 F.2d 1028, 1032 (9th Cir. 1993) (confession not coerced, where "nothing in the record indicat[e]d] [defendant's] decision to confess was anything other than `the product of a rational intellect and a free will” (internal quotations omitted). The voluntariness of a confession is a matter of law subject to *de novo* review. See id. at 415; see also *U.S. v. D.F.*, 115 F.3d 413, 418-19 (7th Cir. 1997).

The requirement that statements be voluntary is derived from the privilege against self-incrimination and the Due Process Clause of the Fifth and Fourteenth Amendments. See, generally, *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (comparing the admissibility of statements under *Miranda* and under a Fifth Amendment due voluntariness analysis). Exclusion of involuntary statements deters the use of coercive police tactics and techniques against the accused. See id. at 321. Since involuntary statements are inherently untrustworthy, a third party has standing to challenge their use and introduction into evidence on “fundamental fairness” grounds. See *U.S. ex rel. Cunningham v. DeRobertis*, 719 F.2d 892, 896 (7th Cir. 1983) (use of an involuntary statement of a witness to obtain conviction may violate the defendant’s right to a fair trial).
The government bears the burden of proving that the statement is voluntary by a preponderance of the evidence. *See Connelly*, 479 U.S. at 168 (internal citations omitted); *see also Lego*, 404 U.S. at 489; *U.S. v. Swint*, 15 F.3d 286, 289 (3d Cir. 1994). The defendant can request a hearing outside the presence of the jury on this preliminary fact determination. *See Jackson v. Denno*, 378 U.S. 368, 390 n.13, 394 (1964); *U.S. v. Restrepo*, 994 F.2d 173, 185 (5th Cir. 1993). *But see U.S. v. Kaba*, 999 F.2d 47, 50 (2d Cir. 1993) (holding a separate hearing is only necessary during a trial when additional evidence for the court’s consideration exists). However, the trial court need not hold a *Jackson v. Denno* hearing “when the issue of voluntariness of a confession is not properly before it.” *U.S. v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988) (citing *U.S. v. Gonzalez*, 548 F.2d 1185, 1190 (5th Cir. 1977)). Rather, *Jackson v. Denno* requires “not only that an objection to the introduction of a confession must be raised, but also that it be made sufficiently clear to the court that a *Jackson v. Denno* hearing is being requested.” *Id.* (citing *U.S. v. Moffett*, 522 F.2d 1379, 1380 (5th Cir. 1975)). The issue of voluntariness must be timely raised. *See U.S. v. Miller*, 987 F.2d 1462, 1464-65 (10th Cir. 1993) (court not required to hold hearing where issue not raised until fourth day of trial and after confession had already been offered).

If the court finds the challenged statements to be voluntary, counsel for the accused can still argue to the jury that the defendant's statement is untrustworthy or incredible due to the coercive techniques used by the police to elicit the confession. *See Crane v. Kentucky*, 476 U.S. 683, 688 (1986); *Lego*, 404 U.S. at 485-86 (1972) (permitting defense counsel to argue that an otherwise voluntary confession is unreliable, due to the pressure exerted by the police on the defendants).

### 5.04.01 Police Coercion

The Supreme Court has held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Courts’ traditional focus on the mental state of the defendant to discern the voluntary nature of a statement “does not justify a conclusion that a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional ‘voluntariness.’” *Id.* at 164. In *Connelly*, for instance, the defendant traveled from Boston to a Denver police station where he confessed to a murder. *See id.* at 160. Later interviews with a psychiatrist revealed that Connelly believed he was following the "voice of God" when he confessed to the murder. *Id.* at 161. The Court held that police officers elicited a voluntary confession from the defendant, and concluded that the questionable reliability of the statement, while considerable, is more appropriately addressed through the evidentiary laws of the forum and not through the Due Process Clause. *See id.* at 167

### 5.04.02 Third Party Coercion

The government need not always be the source of the due process violation. Rather, coercion exerted by private parties, but “procured and sanctioned” by the state, may be “fairly attributable” to the state and may render a statement involuntary under the Fifth Amendment. *See LoConte v. Dugger*, 847 F.2d 745, 753 (11th Cir. 1988). In *Fulminante*, a defendant's confessed to an informant after the informant told the defendant that other inmates knew of his rumored murder of a child in Arizona and after
the informant promised to protect the defendant against inmates who might mistreat him because of the rumor. See Fulminante, 499 U.S. at 281, 283. The Court deemed the statement involuntary, adopting the conclusion of the Arizona Supreme Court that "the confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess." Id. at 281, 286-87. The Court declared that "a finding of coercion need not depend upon actual violence by a government agent." Id. at 287 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)). Rather, "a credible threat is sufficient" to render a statement involuntary and inadmissible under the Fifth Amendment. Id.

Nevertheless, not every coercive act by a private party may be attributed to government agents. For instance, in U.S. v. Eide, the Ninth Circuit held that it could not review the alleged involuntary nature of a statement taken from a defendant induced by false promises to incriminate himself while under the influence of drugs because his supervisor at the Veterans Administration, conducted the interrogation instead of police officers. See U.S. v. Eide, 875 F.2d 1429, 1434 (9th Cir. 1989); U.S. v. Burns, 15 F.3d 211, 215 (1st Cir. 1994) (stating that concerns about the voluntariness of a confession do not apply in a context in which persons “without law enforcement responsibilities” obtain statements through interrogation). But see D.F., 115 F.3d at 420 (staff members of public mental health facility were state actors for purposes of determining the voluntariness of a confession).

5.04.03 Factors to Consider in Determining the Voluntariness of a Statement

The determination of voluntariness of a confession or admission requires consideration of the "totality of circumstances," including personal history, level of educational attainment, and physical condition of the accused, as well as the circumstances in which police officers elicited the statement. See Crane, 476 U.S. at 691 (evidence that an uneducated teenager was confined in a small, windowless room of a juvenile detention facility for a protracted period of time, that six police officers surrounded him during his interrogation, and that officers denied the defendant requests to contact his mother are relevant to a consideration of the voluntariness of defendant’s confession); Mincey v. Arizona, 437 U.S. 385, 400 (1978) (ruling that a statement given by appellant was involuntary and inadmissible because the defendant lay in a hospital intensive care unit with “unbearable leg pain,” repeatedly expressed his wish not to submit to questioning, and appeared “confused and unable to think clearly” at the time of his interrogation); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (citing, as circumstances which may affect a determination of voluntariness, the youth of the accused, the level of education or intelligence, the absence of advice to the individual about his constitutional rights, the length of detention, the use of physical force to extract a confession, and “the repeated and prolonged nature of the questioning”). A person’s education, intelligence, and background may also be a factor in discerning if police officers elicited a voluntary statement from the defendant. See Fulminante, 499 U.S. at 286 n.2 (finding that confession was coerced, where defendant possessed a below average intelligence and had dropped out of school in the fourth grade).

Courts may consider the age and general mental status of the accused at the time the statement is given. See Blackburn v. Alabama, 361 U.S. 199, 207-08 (1960) (reversing conviction taken from defendant, a paranoid schizophrenic, and citing age and level of educational attainment as factors in determining voluntariness of confession); Fikes v. Alabama, 352 U.S. 191, 193 (1957) (citing petitioner’s
level of education, psychiatric state, and socioeconomic status as factors in determining voluntariness; Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (citing petitioner’s youthful age as factor in finding confession involuntary); see also U.S. v. Roark, 753 F.2d 991 (11th Cir. 1985) (ruling that expert testimony under Fed. R. Evid. 702 should be admissible to explain susceptibility of defendant to confess untruthfully to a crime). However, a defendant’s mental illness alone, will not render a statement involuntary, absent additional coercion by law enforcement officers. See Connelly, 479 U.S. at 170-71.

The accused's status as a probationer or parolee may affect the voluntariness of a statement. See Jones v. Cardwell, 686 F.2d 754, 757 (9th Cir. 1982) (statement held involuntary when probation officer told defendant he had no choice but to speak). But see Minnesota v. Murphy, 465 U.S. 420, 436-37 (1984) (probation condition that accused "be truthful" with probation officer was not impermissibly coercive); U.S. v. Jackson, 886 F.2d 838, 842 (7th Cir. 1989) (custodial statements made by defendant to probation officer as part of an investigation before sentencing did not violate defendant's Fifth Amendment privilege against self-incrimination).

An accused's intoxication through drugs or alcohol may affect an assessment of the voluntariness of a confession elicited from the defendant at that time. See Beecher v. Alabama, 408 U.S. 234, 237 (1972) (confession suppressed, where accused made statement shortly after his receipt of two large morphine injections); U.S. v. Montoya-Arrubla, 749 F.2d 700, 702 (11th Cir. 1985) (confession not suppressed, despite defendant’s earlier intoxication, because there was no evidence of his intoxication on the day that the defendant confessed); U.S. v. Guaydacan, 470 F.2d 1173, 1173 (9th Cir. 1972) (per curiam) (citing defendant’s apparent status as under the influence of drugs as a factor in determining whether admission of defendant’s post-Miranda confession comported with constitutional standards). But see U.S. v. Lewis, 833 F.2d 1380, 1387 (9th Cir. 1987) (finding statement voluntary, despite the possibility that the defendant may have suffered from the effects of heroin addiction and anesthesia at the time she gave her statement, because the defendant appeared alert and not under the influence of any medication at the time of her confession).

Additionally, an unexplained, unreasonable delay between arrest and arraignment of more than six hours can itself form the basis for involuntariness. See U.S. v. Wilson, 838 F.2d 1081, 1086 (9th Cir. 1988); see also infra §5.06. But see U.S. v. Alvarez-Sanchez, 511 U.S. 350, 358-59 (1994) (delay between defendant’s arrest on state charges and presentment to federal magistrate on subsequent federal charges did not require suppression of statements made while defendant was in custody only on state charges and was not charged with any federal offense); U.S. v. Van Poyck, 77 F.3d 285, 289 (9th Cir. 1996) (weekend delay in arraigning defendant due to unavailability of magistrate was reasonable and thus defendant’s statements were admissible).

### 5.04.04 Physical Coercion

The Supreme Court first recognized the prospect of impermissible coercion in cases of physical abuse. See Brown v. Mississippi, 297 U.S. 278, 287 (1936) (holding confessions to be involuntary, where police officers subjected defendants to threatened death by hanging, whipping, and slashing of their backs with leather straps and belts). The use of physical coercion by police officers will result in the suppression of challenged statements. In U.S. v. Jenkins, the Ninth Circuit suppressed statements made within five hours after police officers beat the defendant and threatened his life, shuttled him between a
hospital and prison, and questioned him immediately upon his return from the hospital in the early hours of the morning. See U.S. v. Jenkins, 938 F.2d 934, 939-40 (9th Cir. 1991). The court stated that “in some cases, the need for such an individual calculus [regarding the voluntariness of statements] is obviated by the egregiousness of the custodian's conduct,” and that “confessions accompanied by physical violence wrought by the police have been considered per se inadmissible.” Id. at 938 (internal citations omitted).

5.04.05 Psychological Coercion

Threats of physical abuse and violence were among the next most egregious forms of coercion recognized by the judicial branch. See Payne v. Arkansas, 356 U.S. 560, 566 (1958) (basing conclusion that admission of defendant’s confession violated due process upon the “culminating threat of mob violence” implicit in police officer’s statement that defendant should confess because “there would be thirty or forty people there in a few minutes that wanted to get him’’); Ward v. Texas, 316 U.S. 547, 555 (1942) (moving defendant to strange towns, telling him of threats of mob violence, and questioning him continuously rendered confession “the product of coercion and duress” and thus inadmissible under the Fifth Amendment).

Threats to arrest a defendant’s family often constitute impermissible coercion that may render a resulting confession involuntary. In U.S. v. Moreno, officers separated the defendant from her 16-year-old daughter when both of them were crying. See U.S. v. Moreno, 891 F.2d 247, 249 (9th Cir. 1989). The officers then took her daughter into custody in handcuffs. See id. The defendant told police that she "would tell anything if her daughter could be released." Id. The court held that the circumstances surrounding the defendant’s confession presented evidence of "police overreaching" and remanded the case for a voluntariness hearing. Id.; see also Rogers v. Richmond, 365 U.S. 534, 538-39 (1961) (remanding for a determination of the voluntariness of a confession elicited after the threatened arrest of the defendant’s spouse and foster children); U.S. v. Finch, 998 F.2d 349, 356 (6th Cir. 1993) (finding the statement of appellant, who pointed to the location of alleged cocaine, involuntary and inadmissible because police officers elicited his statement after five police officers forcibly entered his residence, confronted the defendant and two other individuals separately, with their guns drawn, and threatened to arrest the defendant’s mother and female companion). But see U.S. v. Morris, 977 F.2d 677, 682-83 (1st Cir. 1992) (compromise that police not arrest woman in her home in exchange for defendant's statements did not render statements involuntary, since compromise was proposed voluntarily by defendant).

Police officers may exert psychological pressure upon criminal defendants by denying those individuals needed food, clothing, and other resources to further their investigation. See U.S. v. Eccles, 850 F.2d 1357, 1360 (9th Cir. 1988) (district court’s finding of involuntariness due to psychological coercion was supported by evidence that FBI agents told the respondent of threats to her life and her daughter’s life, instructed her not to contact anyone outside the government, informed her that she should obtain food, income, housing, education, detoxification, and other services, and could be reunified with her daughter, through the federal Witness Protection Program, moved the location of her methadone clinic so that she could only receive methadone in the presence of government agents, removed her from her residence, and denied her access to a telephone).
In particular, police officers have induced confessions from parents by threatening the continued receipt of food, clothing, and other benefits for their children, as well as the legal custody of their children. Government agents exert undue coercion upon defendants when law enforcement agents imply that custody of the suspect’s children and their continued receipt of federal welfare benefits for their care might be jeopardized if the defendant refused to speak with authorities. See Lynumn v. Illinois, 372 U.S. 528, 534 (1963); see also U.S. v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (finding confession to be involuntary because defendant was told that she would not see her young child "for a while" after an officer described the maximum penalties of the offense for which she was arrested).

A statement that resulted from psychological coercion is inadmissible for any purpose, regardless of officers’ actual compliance with the technical requirements of Miranda. See Henry v. Kernan, 197 F.3d 1021, 1026-28 (9th Cir. 1999) (ruling a statement elicited from the defendant to be inadmissible, when police officers deliberately violated the defendant’s Fifth Amendment rights by continuing with their interrogation for one hour after the defendant unequivocally requested the assistance of an attorney by using various coercive tactics, such as instructing the defendant that “. . . what you tell us we can’t use against you right now,” leaving the defendant “shaken, confused, and frightened, crying in parts and frequently asking for forgiveness” after his interrogation).
5.04.06 Intense and Lengthy Interrogation

Intense and lengthy questioning of suspects may constitute impermissible coercion, especially if officers deprived the suspects of food or sleep. See Reck v. Pate, 367 U.S. 433, 441-42 (1961) (finding confession involuntary, where defendant was interrogated continuously over five days, deprived of food and adequate medical treatment even though he fainted, complained of stomach and abdominal pains, and vomited blood, and was subjected to multiple show-up identification proceedings before as many as one hundred witnesses); Haley, 332 U.S. at 604, 606 (holding involuntary a confession of a fifteen-year-old boy after five hours of continuous questioning by multiple officers after midnight, after defendant had been held incommunicado for five days); see also Davis v. North Carolina, 384 U.S. 737, 743-47 (1966) (finding confession to be involuntary, where officers subjected the defendant to sixteen days of detention with a limited diet, and denied the defendant access to the telephone and to visitors outside the police department); Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944) (reversing conviction, where defendant was held incommunicado for thirty-six hours without sleep and interrogated continuously throughout the night by teams of investigators for all but one hour of his detention); U.S. v. Koch, 552 F.2d 1216, 1218 (7th Cir. 1977) (deeming involuntary a confession of a defendant held incommunicado in a six-foot by-eight-foot cell and deprived of his personal property, outside visibility, and “necessary hygiene,” in a situation in which prison officials knew of his previous suicide attempts under similar conditions of confinement).

5.04.07 Promises of Benefits or Leniency

Government agents’ promises of benefits or leniency, may be impermissibly coercive, even if government officials do not promise benefits of any significant value. See Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam); Bram v. U.S., 168 U.S. 532, 542-43 (1897) (holding that an admissible confession “must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence”) (internal quotations omitted). Law enforcement officers’ promises to reduce or dismiss criminal charges to secure an incriminating statement may have a particularly strong coercive effect. See Grades v. Boles, 398 F.2d 409, 412 (4th Cir. 1968) (prosecutor’s promise to drop other felony charges and to refrain from prosecuting the defendant as a habitual offender placed undue influence on the defendant and rendered his subsequent confession involuntary). Although an agent’s mere promise to communicate a suspect’s cooperation to the prosecutor does not, in itself, render a subsequent confession involuntary, a suspect’s will may be overborne if this promise is accompanied by threats or other coercive practices. See U.S. v. Leon Guerrero, 847 F.2d 1363, 1366 n.2 (9th Cir. 1988). In Payne, the Court found that a police officer coerced a confession from the petitioner by promising that he would protect the accused from an angry mob outside the door of the prison if he confessed. See Payne, 356 U.S. at 566; see also Fulminante, 499 U.S. at 283, 288 (finding that an informant coerced incriminating statements from the defendant by promising protection from other inmates who learned of his rumored murder of a child in Arizona).

However, courts will not find an officer’s statements to be coercive when the officer furnishes advice about the consequences of speaking with authorities, and did not issue an actual, direct, or implied promise. See U.S. v. Hart, 619 F.2d 325, 326 (4th Cir. 1980) (per curiam) (erroneous statements by police that defendant's cooperation could help with bond reduction did not render defendant's statements
involuntary); *U.S. v. Ferrara*, 377 F.2d 16, 17-18 (2d Cir. 1967) (agent's statements to defendant that his cooperation with the U.S. Attorney would result in a reduction in bail was not so coercive as to render defendant’s confession involuntary). However, police officers may exact involuntary statements from a defendant if they promise to communicate a defendant’s refusal to cooperate with authorities to other actors in the criminal justice system. *See U.S. v. Harrison*, 34 F.3d 886, 891 (9th Cir. 1994) (a defendant’s statement was involuntary when an agent implied he would inform the court of refusal to cooperate) (internal citations omitted).

### 5.04.08 Deceit by Law Enforcement

Deceitful behavior by law enforcement officers may affect an assessment of the voluntariness of a defendant’s confession. The Court has held confessions inadmissible in situations in which investigating officers acted as a "false friend" to the accused. *See Spano v. New York*, 360 U.S. 315 (1959). In *Spano*, the police officer was the suspect’s childhood friend and elicited statements from defendant on the basis of that “friendship.” *Id.* at 323. The court found that defendant’s will was overborne by “pressure, fatigue, and sympathy falsely aroused.” *Id.*

### 5.05 SUPPRESSION OF STATEMENTS OBTAINED IN VIOLATION

#### A DEFENDANT'S SIXTH AMENDMENT RIGHTS

The Sixth Amendment right to the assistance of counsel “protect[s] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime.” *McNeil v. Wisconsin*, 501 U.S. 171, 177-78 (1991) (quoting *U.S. v. Gouveia*, 467 U.S. 180, 189 (1984)) (emphasis added). Under the Sixth Amendment, an accused must not be questioned in the absence of counsel, absent a waiver of that defendant’s Sixth Amendment rights. *See Brewer v. Williams*, 430 U.S. 387, 409-10 (1977) (Powell, J., concurring). Any statements deliberately elicited from a defendant by law enforcement personnel after prosecutors charge or arraign the defendant on an indictment are inadmissible. *See U.S. v. Henry*, 447 U.S. 264, 270-71, 274 (1980) (suppressing defendant’s statements because government officials violated a defendant's Sixth Amendment rights when agents "deliberately elicited" information from the defendant by intentionally creating a situation likely to induce an indicted defendant to make uncounseled incriminating statements); *Massiah v. U.S.*, 377 U.S. 201, 206 (1964) (holding inadmissible statements made to co-defendant, who cooperated with the government after the defendant’s indictment and obtained incriminating statements from the defendant outside the presence of counsel by allowing law enforcement officials to install a hidden radio in his car to record his conversations with the defendant). The Sixth Amendment further requires suppression of all evidence gleaned through exploitation of the Government's wrongdoing. *See Nix v. Williams*, 467 U.S. 431, 441-43 (1984); *U.S. v. Kimball*, 884 F.2d 1274, 1278-79 (9th Cir. 1989) (stating that "the appropriate remedy for a violation of *Massiah* includes not only suppression of all evidence directly obtained through governmental misconduct, but also suppression of all evidence that can properly be designated fruits of that conduct"). *See, generally, Wong Sun*, 371 U.S. at 487-88. An accused may be entitled to an evidentiary hearing to resolve an alleged violation of the Sixth amendment. *See, e.g., Blackmon v. Scott*, 22 F.3d 560, 566 (5th Cir. 1994) (holding that hearing was required to resolve petitioner’s claim that officers violated his Sixth Amendment rights by eliciting his confession through the use of informants during post-indictment incarceration).
5.05.01 Sixth Amendment Attaches to a Specific Offense

The Sixth Amendment limits suppression of statements to those statements resulting from questioning about charges on which the right to counsel has attached. The Sixth Amendment’s coverage is "offense specific." McNeil, 501 U.S. at 175. A defendant cannot invoke his or her Sixth Amendment right to counsel for “all future prosecutions.” Id. An accused’s invocation of his Sixth Amendment right to the assistance of counsel merely encompasses representation on the charge(s) for which the defendant was arrested. See id. at 180. A request for an attorney upon admonishment of Miranda rights, however, “is not offense-specific: once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present.” Id. at 177 (citing Arizona v. Roberson, 486 U.S. 675 (1988)) (emphasis added).

In Illinois v. Perkins, officers arrested the defendant on a charge of aggravated battery. See Illinois v. Perkins, 496 U.S. 292, 293 (1990). Undercover agents who posed as cell mates of the defendant intentionally elicited incriminating statements from the defendant about an uncharged murder during his detention. See id. at 295. The Court found that Perkins' right to counsel on the murder charges had not attached because no charges had been filed on the subject of the informant’s interrogation. See id. at 299. Consequently, there was no Massiah violation. See id.

Courts have articulated several exceptions to this limitation upon the Sixth Amendment right to counsel. In U.S. v. Covarrubias, federal agents interrogated the defendants, knowing of the defendants’ arraignment on state charges and the prior appointment of counsel for the defendants on those charges. See U.S. v. Covarrubias, 179 F.3d 1219, 1222 n.3 (9th Cir. 1999). The Ninth Circuit found the dismissed state kidnaping charges and subsequent federal charges to be “inextricably intertwined,” thus triggering an exception to the offense specific nature of the Sixth Amendment right to counsel, because both charges arose from the same “continuous course of conduct.” Id. at 1225-26. Thus, the Sixth Amendment mandated suppression of the statements made to federal agents after the appointment of counsel for the defendants. See id. But see U.S. v. Wright, 962 F.2d 953, 955-56 (9th Cir. 1992) (statements made to agents about an unrelated offense were admissible because counsel's request to be present at all interviews subsequent to defendant's entry of guilty plea did not invoke the defendant’s right to counsel).

5.05.02 When Does the Sixth Amendment Right to Counsel Attach?

The Sixth Amendment right to counsel does not attach until the initiation of formal adversarial proceedings against a defendant. See Moran, 475 U.S. at 429-30 (police officers did not violate the defendant’s Sixth Amendment right to counsel because that right had not attached when they failed to inform the defendant, that his attorney was in the precinct and had attempted to contact him at the time of his interrogation). The right to counsel undoubtedly attaches at the time that judicial proceedings have been initiated against a defendant "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972) (defendant not entitled to counsel at pre-indictment show-up identification procedure); see also Brewer, 430 U.S. at 399 (right to counsel had attached after warrant was issued and defendant was arraigned); see also Gouveia, 467 U.S. at 188, 192 (indigent prisoners in administrative segregation not entitled to appointment of counsel to defend against potential criminal charges before the initiation of any adversary judicial proceedings).
The Sixth Amendment right to counsel does not apply during grand jury proceedings, ostensibly because no formal criminal charges have been instituted against the defendant before the grand jury chooses to bring charges through an indictment. See U.S. v. Mandujano, 425 U.S. 564, 581 (1976). However, the defendant retains his or her Sixth Amendment right to counsel during appeals of his case and during preparations for a new trial. In Cahill v. Rushen, the Ninth Circuit ruled that a statement elicited after trial but during a pending appeal was taken in violation of the Sixth Amendment and could not be admitted into evidence during a new trial following a successful appeal. See Cahill v. Rushen, 678 F.2d 791, 793-95 (9th Cir. 1982).

5.05.03 Invoking the Sixth Amendment Right to Counsel During Post-Indictment Questioning

Police officers may initiate post-indictment interviews with defendants if they do not specifically invoke their right to counsel. See Patterson v. Illinois, 487 U.S. 285, 290-291 (1988). The Court found, as a general matter, that Miranda warnings sufficiently informed the defendant of his Sixth Amendment right to counsel during post-indictment questioning. See id. at 293, 296. This holding is narrow and should be limited in its application. In Patterson, the defendant gave a lengthy written statement outside the presence of counsel concerning a gang-related murder after prosecutors indicted him for murder. See id. at 288. Patterson does not affect the admissibility of statements elicited after a defendant is arraigned on a complaint, in circumstances in which no indictment has been filed. Cf. Michigan v. Jackson, 475 U.S. 625, 635-36 (1986) (ruling invalid waivers of the Sixth Amendment right to counsel during police interrogation after defendants assert their Sixth Amendment right to counsel at an arraignment or similar prior adversarial proceeding, despite advice of rights and acquiescence in police-initiated questioning); 3 see also U.S. v. Harrison, 213 F.3d 1206, 1213-14 (9th Cir. 2000) (defendant with ongoing representation prior to indictment may have invoked the Sixth Amendment right to counsel at time of indictment through the existing attorney-client relationship, if the ongoing attorney-client relationship concerns the charges brought in the indictment).

5.05.04 Massiah Violations Committed by Individuals Outside Law Enforcement

The government may not conduct questioning or investigation through agents that it could not otherwise conduct lawfully. A Massiah violation may occur whenever a defendant is questioned by private parties, such as inmates recruited by governmental agents to elicit incriminating statements. See Maine v. Moulton, 474 U.S. 159, 176-77 (1985) (government’s use of co-defendant to record defendant’s statements to him violated the defendant's Sixth Amendment right to counsel because police officers arranged for the recording of the telephone conversations and knew, based on these recordings, that the defendant and the co-defendant would meet to discuss pending charges and to plan a defense at the time that the defendant made the challenged statements). But see U.S. v. Harris, 738 F.2d 1068, 1071 (9th Cir. 1984) (affirming district court’s conclusion that no Sixth Amendment violation occurred when an informant elicited incriminating statements from the respondent during a state investigation into the illegal

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3 The Court based its decision in Jackson on Miranda, rather than Massiah. See Jackson, 475 U.S. at 629. The Court did note, however, that the decisions in Massiah and Henry strengthened Jackson’s argument that the admission of his statements violated Miranda. See id. at 632.
sale of firearms, because the meeting between the informant and the defendant concerned charges distinct from the federal charges in question and because the state informant held no knowledge of the federal indictment; Stowers v. U.S., 351 F.2d 301, 303 (9th Cir. 1965) (appellant’s Sixth Amendment rights were not violated when a cell mate elicited incriminating statements from him outside the presence of counsel, absent any evidence of government “trickery or deceit” in placing the cell mate with the defendant, or any other evidence indicating that the inmate acted as an agent of the government). Perkins limited the applicability of Moulton. See supra §5.05.01. The question of an informant’s status as a government agent is a matter of law in some cases. See U.S. v. Fontenot, 14 F.3d 1364, 1369 (9th Cir. 1994) (confidential informant was not a government agent as a matter of law and, therefore, issue of agency was properly submitted to the jury); U.S. v. Busby, 780 F.2d 804, 806 (9th Cir.1986) (treating the question of agency as a matter of law for the purpose of determining whether entrapment occurred).

In U.S. v. Henry, a paid informant who befriended the defendant in prison was instructed by law enforcement agents to refrain from questioning the defendant regarding the offense for which the defendant had been indicted. See Henry, 447 U.S. at 266. The defendant eventually made incriminating statements to the informant regarding that offense. See id. The Court held that government agents deliberately elicited incriminating statements from the defendant and violated his Sixth Amendment rights by placing an informant in close proximity to the defendant in a correctional facility. See id. at 273. The Court also held that the informant used his relationship with the defendant to stimulate conversation which would likely elicit incriminating statements that were “the product” of his prison conversations. See id. But see Kuhlmann v. Wilson, 477 U.S. 436, 456 (1986) (no violation of the Sixth Amendment when informant makes no effort to stimulate conversations about the crime charged).

The acts of a private party will violate the Sixth Amendment if that person created an environment likely to result in the production of incriminating statements from the defendant. See LePage v. Idaho, 851 F.2d 251 (9th Cir. 1988). In LePage, government agents placed an informant in the defendant's cell. See id. at 252. An inmate in an adjacent cell testified to the contents of the statements made by the defendant. See id. at 253. The Court found that the agents violated the defendant’s Sixth Amendment rights under Massiah because they elicited statements from the defendant outside the presence of counsel, but found the error harmless, in light of the “overwhelming evidence[]” of guilt presented at trial. Id. at 253-54.

5.05.05 Waivers of Sixth Amendment Rights

The government may introduce statements taken in the absence of counsel after attachment of the right to counsel if it fulfills the "weighty obligation" of establishing a knowing and intelligent waiver of Sixth Amendment rights. See Brewer, 430 U.S. at 403; Baker v. City of Blaine, 221 F.3d 1108, 1111-12 (9th Cir. 1999) (finding, on collateral review, that state court reasonably concluded that the petitioner had knowingly and intelligently waived his Sixth Amendment right to counsel, in light of the judge’s explanation of the petitioner’s right to the appointment of an attorney and his discouragement of the petitioner’s choice to represent himself, and in light of the defendant’s unsuccessful request for court-appointed counsel his prior familiarity with the criminal justice system). Any “[d]oubts [about the validity of waivers] must be resolved in favor of protecting a constitutional claim.” Jackson, 475 U.S. at 632. A suspect’s mere “acquiescence in police-initiated questioning,” after a recitation of his or her constitutional rights, does not produce a waiver of those rights if the defendant has already requested counsel. See id. at 635.
The Ninth Circuit rejected the view of several other circuits by holding that *Miranda* warnings may sufficiently inform a defendant of his or her Sixth Amendment right to counsel and may allow for an intelligent waiver of that right. However, the defendant must be informed of the institution of formal proceedings against him before he can validly waive his Sixth Amendment right to counsel. *See U.S. v. Karr*, 742 F.2d 493, 496 (9th Cir. 1984).

### 5.06 SUPPRESSION OF STATEMENTS DUE TO UNNECESSARY DELAY

The “principles governing the admissibility of evidence in federal criminal trials has not been restricted . . . to those derived solely from the Constitution.” *McNabb v. U.S.*, 318 U.S. 332, 341 (1943). Rather, federal law provides that a defendant be promptly brought before a federal magistrate after his arrest on a federal charge. *See 18 U.S.C. §3501(c)*. In *McNabb*, the Court excluded statements that resulted from officers’ failure to take the accused promptly before a magistrate without unnecessary delay, in violation of federal law. *See id.* at 344 (holding inadmissible confessions of defendants elicited after they were held in a “barren cell” for fourteen hours and subjected to numerous rounds of questioning over a two-day period without being presented before a magistrate); *see also Mallory v. U.S.*, 354 U.S. 449, 455 (1957) (admission of the defendant’s statement was error, where defendant was not promptly arraigned without unnecessary delay before questioning and before his submission to a lie detector test).

However, the proscription against unnecessary delay applies only when the government institutes federal charges against the defendant. In *U.S. v. Alvarez-Sanchez*, the defendant was arrested on a Friday by state authorities after narcotics and counterfeit federal reserve notes were found in his house. *See U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994). Nearly three days later, the state police officers contacted federal authorities and informed them of the discovery of the counterfeit money. *See id.* Federal agents interviewed Alvarez-Sanchez, who confessed to knowledge of the money’s counterfeit nature. *See id.* Federal agents then arrested Alvarez-Sanchez on federal charges and prepared a complaint against him, but failed to present him before a magistrate judge until the following day, four days after his arrest on state charges. *See id.* The Court held that there can be no “delay” in bringing a person before a federal magistrate until an obligation arises to bring the individual before a federal judicial officer upon the individual’s arrest for a federal offense. *See id.* at 357. Therefore, the Court concluded that the state officers held no obligation to present the defendant before a federal magistrate empowered to enforce federal law, and, thus, did not violate federal law by causing any unnecessary delay the defendant’s presentment. *See id.* Alvarez-Sanchez left undecided the admissibility of statements in the "rare scenario" in which state and federal authorities colluded to arrest and detain someone under state charges so that federal officials could question that individual. *See id.* at 359.

Delays in arraignment remain a factor in determining the ultimate question of the voluntary nature of a statement elicited during that delay. *See U.S. v. Stage*, 464 F.2d 1057, 1058 (9th Cir. 1972) (holding that a *Miranda* waiver is “involuntary as a matter of law” when a defendant waives his rights after a five-day detention without presentment to a federal magistrate, after continuous rounds of questioning by federal officers, and after being denied repeated requests for counsel). *But see U.S. v. Van Poyck*, 77 F.3d 285, 289 (9th Cir. 1996) (weekend delay in arraignment, due to unavailability of magistrate, does not, by itself, render resulting confession inadmissible); *U.S. v. Manuel*, 706 F.2d 908 (9th Cir. 1983) (eighteen-hour delay permissible, and did not require suppression of an allegedly involuntary confession, because
defendant’s heavy intoxication necessitated the delay, and because other evidence indicated that the
confession was voluntary). Some courts have deemed an otherwise lengthy delay reasonable under the
circumstances. See U.S. v. Gaines, 555 F.2d 618, 625 (7th Cir. 1977) (forty-six hour delay between
arrest and presentment was not improper, absent evidence of collusion between federal and state authorities
to keep the defendant in state custody on an unrelated charge to permit interrogation outside the presence
of counsel); U.S. v. Edwards, 539 F.2d 689, 691 (9th Cir. 1976) (confession was voluntary, where delay
was caused by the inadvertent shortage of personnel and vehicles to transport defendant one hundred
twenty-five miles to the location of nearest federal magistrate); U.S. v. Collins, 462 F.2d 792, 795 (2d
Cir. 1972) (en banc) (twenty-six hour delay permissible, when delay was caused by routine processing and
transfer of defendant to federal custody).

In fact, any amount of delay may be permissible, if officers do not exploit the delay to obtain a
confession or admission. See U.S. v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977) (per curiam)
(concluding that statement elicited after a four-day delay in presentment was admissible, where accused
confessed one hour after his arrest). However, if law enforcement officials collude to cause a defendant
to miss his required presentment to obtain a confession, courts may suppress the statements resulting from
that collusion. In U.S. v. Wilson, the defendant was arrested, held overnight in solitary confinement,
questioned for two hours, and was then specially arraigned before a magistrate in the judge’s chambers
because he missed the first scheduled arraignment during questioning. See U.S. v. Wilson, 838 F.2d 1081,
1083 (9th Cir. 1988). The Ninth Circuit held that officers obtained an involuntary confession through an
unnecessary delay in presentment of the defendant before a federal judge. See id. at 1085. Specifically,
the Court found that the delay in presentment was caused by a tribal officers’ agreement with FBI agents
to delay the arraignment until the agents could secure a confession from the defendant. See id.

5.07 SUPPRESSION OF STATEMENTS ELICITED THROUGH AN ILLEGAL
SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

It is a well-established principle that evidence obtained as a result of government impropriety must
consider the extent to which “evidence to which instant objection is made has been come at by exploitation
of that illegality or instead by means sufficiently distinguished to be purged of the primary taint.” Id. at 488
(internal citations omitted). The Wong Sun doctrine may be used to move for exclusion of a confession
that resulted from the exploitation of police officers’ illegal activities. See Elstad, 470 U.S. at 306.

The Wong Sun doctrine applies in any situation in which a confession flows from a Fourth
Amendment violation. The administration of Miranda warnings after the occurrence of the Fourth
Amendment illegality and before the defendant’s admission does not, alone, purge the taint of the Fourth
Amendment violation. See Brown v. Illinois, 422 U.S. 590, 601 (1975). Moreover, a post-Miranda
confession’s voluntary nature does not purge the taint of an illegal arrest. See Lanier v. South Carolina,
474 U.S. 25, 25 (1985) (per curiam). Counsel for the accused must examine the circumstances in which
the statement was obtained to conclude that the statements resulted from government conduct in violation
of the Fourth Amendment. If the prosecution can meet the first burden of ensuring the voluntariness of a
statement under the Fifth Amendment, it then must prove that the statement resulted from an exercise of
the defendant’s free will sufficient to purge the primary taint of police illegality. See Wong Sun, 371 U.S.
at 486 (confession to narcotics use after illegal arrest did not result from “an intervening independent act of free will,” because defendant’s admission of narcotics use was elicited after six or seven officers broke through the front door to his residence, followed him into a bedroom where his wife and child slept, and immediately handcuffed and arrested him); U.S. v. Ricardo D., 912 F.2d 337, 342 (9th Cir. 1990) (quoting Brown, 422 U.S. at 602) (other internal citations omitted). But see U.S. v. Elie, 111 F.3d 1135, 1141 (4th Cir. 1997) (holding that a Miranda violation does not constitute “a poisonous tree” for the purpose of suppressing evidence discovered as a result of an illegally obtained statement, absent evidence that the officers exploited the Miranda illegality to obtain the derivative evidence). The court must consider the passage of time and the number and nature of the intervening events, as well as the “purpose and flagrancy of the police misconduct,” to determine if a statement resulted from a violation of the Fourth Amendment. Ricardo D., 912 F.2d at 342 (citing Brown, 422 U.S. at 603-04).

The Wong Sun doctrine also mandates the exclusion of involuntary statements elicited through a violation of Massiah. See U.S. v. Kimball, 884 F.2d 1274, 1279 (9th Cir. 1989). However, the fruits of statements elicited after a violation of Miranda may be admitted if only a "technical violation occurred," or if the first confession was otherwise voluntary. See, generally, Elstad, 470 U.S. at 318. But see Elstad, 470 U.S. at 314-15 (where the first interrogation which elicited inculpatory statements involved a Miranda violation, a second interrogation is admissible if the first statement was not coerced and if officers properly advised the defendant and secured a waiver of his Miranda rights before the second statement was taken). However, the Ninth Circuit specifically held that intentional violations of Miranda through the deceptive behavior of law enforcement agents renders any resulting statements involuntary and inadmissible for any purpose, even if those statements were originally admitted into evidence “in the guise of impeachment.” Kernan, 197 F.3d at 1029; see also Cooper v. Dupnik, 963 F.2d 1220, 1242, 1249 (9th Cir. 1992) (en banc) (holding that “there is no such thing as an impeachment exception for compelled, coerced, or involuntary statements,” where police officers conspired to ignore a defendant’s requests to seek counsel and to remain silent after an advisement of Miranda rights and grilled the defendant continuously for four hours until he confessed). Additionally, the involuntary nature of an earlier confession may be a consideration in evaluating the voluntariness of a later confession. See Lyons v. Oklahoma, 322 U.S. 596, 603-04 (1944).

5.07.01 Exceptions to the Wong Sun Doctrine

Several exceptions to the Wong Sun doctrine exist. For example, the testimony of live witnesses who come forward of their own volition may be admissible, even though the government discovered the existence of those witnesses through an illegal search. See U.S. v. Ceccolini, 435 U.S. 268, 279 (1978) (store clerk’s testimony about defendant supervisor’s activities was admissible, because sufficient time elapsed between an officers’ illegal search of an envelope at the defendant’s store and the time that the clerk gave her statement to dissipate the effect of the illegality, and because the clerk testified freely and without submission to police coercion). Unlike documentary evidence, witnesses “often come forward of their own volition to testify,” and any illegality perpetrated by the police during a search, detention or arrest “often will not have meaningfully affected that willingness [of the witness] to testify.” U.S. v. Ramirez-Sandoval, 872 F.2d 1392, 1396-97 (9th Cir. 1989). Moreover, “there is often a substantial likelihood that the witness would have been discovered by legal means, and in such circumstances, the link between the illegality and the testimony is weakened significantly.” Id. (citing Ceccolini, 435 U.S. at 274-75).
Moreover, statements that follow an illegal stop, search, or seizure may be admissible if the government can prove that law enforcement agents did not exploit their illegal conduct to gain access to the challenged statements. See Copeland v. U.S., 343 F.2d 287, 291 (D.C. Cir. 1964) (defendant’s apology to robbery victim was admissible, because the witness would have been summoned to the precinct and would have met the defendant absent the illegal interrogation). Courts have admitted otherwise excludable statements in circumstances in which a legal police investigation would have led to the admission or confession without the occurrence of the primary illegality. See Nix v. Williams, 467 U.S. 431, 447-48 (1984) (evidence of the location and condition of murder victim’s body was admissible, even though police officers violated the Sixth Amendment by obtaining the defendant’s statement, directing police to the location of the body, was obtained outside the presence of his attorney, because a two-hundred person ground search would have found the body several miles from the search location absent the defendant’s confession); U.S. v. Cella, 568 F.2d 1266, 1286 (9th Cir. 1978) (evidence of the use of phony invoices in a scheme to misappropriate funds and facilities from two hospitals was admissible, notwithstanding the allegedly illegal seizure of negatives and paste-ups of the phony invoices, because police officers learned of the existence of the challenged documents prior to their allegedly illegal seizure, and because subsequent audits of the hospitals in question did not result from the illegal seizure of the evidence); U.S. v. Evans, 454 F.2d 813, 819 (8th Cir. 1972) (names of two witnesses obtained from the driver of an illegally searched vehicle were admissible because the government would have inevitably discovered such information through the driver’s guilty plea or through trial preparation).

Other grounds for suppression of statements exist. Statements made during the course of plea negotiations with a prosecutor are inadmissible. But see U.S. v. Leon Guerrero, 847 F.2d 1363, 1367 (9th Cir. 1988) (defendant’s statements to FBI agents were not made in the course of “plea negotiations,” because the defendant had no reasonable, subjective expectation that he engaged in plea negotiations at the time he made his statements) (other internal citations omitted). Cf. Kercheval v. U.S., 274 U.S. 220, 225 (1927) (withdrawn plea inadmissible at subsequent trial); Hutto v. Ross, 429 U.S. 28, 29 (1976) (involuntary confession not per se inadmissible merely because it was made as result of an agreed-upon but unfulfilled plea bargain). However, a defendant can agree to waive the protection against the admission of statements made during plea negotiations. A waiver of these protections is enforceable, absent any showing that defendant entered into the agreement involuntarily or without full knowledge of the consequences of his waiver. See U.S. v. Mezzanatto, 513 U.S. 196, 210 (1995).

5.07.02 Admission of Otherwise Suppressed Statements For Uses Other Than as Substantive Evidence

Illegally obtained statements may be used for purposes other than substantive evidence. For example, in Pennsylvania v. Muniz, 496 U.S. 582, 585, 592 (1990), the Court held that defendant's videotaped responses to routine booking questions could be admitted for the non-testimonial purpose of demonstrating defendant's slurred speech and stumbling during the questioning. See Muniz, 496 U.S. at 585, 592. Also, in Jones v. Dugger, the Eleventh Circuit permitted a police officer to testify about his observations of the defendant's demeanor during questioning that violated Miranda to rebut an insanity claim. The Court ruled that the prosecutor’s questions of the officer did not address the content of defendant’s statements, but instead focused upon non-testimonial aspects of the defendant’s behavior during questioning. See Jones v. Dugger, 839 F.2d 1441, 1446 (11th Cir. 1988).
In particular, Statements that might otherwise be suppressed, due to violations of *Miranda* or the Sixth Amendment, may nonetheless remain available to the prosecution to impeach the defendant or other witnesses at trial, so long as the statements are not entered into evidence in the government’s case-in-chief. *See Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (Sixth Amendment); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (*Miranda*); see also *U.S. v. Ortega*, 203 F.3d 675, 681 (9th Cir. 2000) (permitting government to use statements obtained by an INS agent to impeach defendant’s inconsistent testimony, even though the INS agent violated the Sixth Amendment when he obtained statements from the defendant). However, the Supreme Court held that the *Harris* rule, which allows the prosecution to introduce illegally obtained evidence to impeach a defendant’s testimony, would not permit the prosecution to impeach the testimony of all defense witnesses with illegally obtained evidence. *See James v. Illinois*, 493 U.S. 307, 314-15 (1990). Additionally, the government may not deliberately attempt to elicit answers on cross-examination to enable it to impeach those answers with previously suppressed statements. *See U.S. v. Whitson*, 587 F.2d 948, 952-53 (9th Cir. 1978). However, prior inconsistent statements provided at a suppression hearing may be used to impeach trial testimony. *U.S. v. Beltran-Gutierrez*, 19 F.3d 1287, 1290 (9th Cir. 1994). The Ninth Circuit has expanded *Harris* to allow the government to use a plea agreement for impeachment of the defendant, even if the plea violated Rule 11 procedures safeguarding the plea’s voluntariness. *See U.S. v. Tsinnijinnie*, 91 F.3d 1285, 1287 (9th Cir. 1996) (permitting use of a plea agreement to impeach the defendant’s denial of his conduct at trial, where the defendant pled guilty to substantially the same conduct in tribal court).

**5.08 USE OF A DEFENDANT’S SILENCE AT TRIAL**

The Fifth Amendment’s privilege against self-incrimination contains the implicit promise that a defendant’s post-arrest silence will not prove detrimental to the defendant. Accordingly, the government may not refer to the defendant’s assertion of the right to remain silent at the time of his arrest and interrogation during trial, because jurors may infer guilt from the defendant’s refusal to speak with authorities. *See Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976); *U.S. v. Hale*, 422 U.S. 171, 180 (1975); *Miranda*, 384 U.S. at 468 n.37; *Territory of Guam v. Veloria*, 136 F.3d 648, 652-53 (9th Cir. 1998); *U.S. v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (citing *Doyle*, 426 U.S. at 619); *U.S. v. Valencia*, 773 F.2d 1037, 1040, 1042 (9th Cir. 1985); *U.S. v. Jones*, 696 F.2d 479, 490 n.13 (7th Cir. 1982); *U.S. v. Bridwell*, 583 F.2d 1135, 1138-39 (10th Cir. 1978). This rule rests on the rationale that a defendant's choice to remain silent will not be used against him or her. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 (1983)); *Griffin v. California*, 308 U.S. 609, 615 (1965) (holding that the Due Process Clause forbids comment by the prosecution on the accused’s silence during a trial of the defendant’s guilt or instructions by the court that such silence is evidence of guilt). This prohibition applies to all circumstances in which a defendant may invoke his right to silence, even if the defendant subsequently waives his rights and speaks with authorities. *See Velarde-Gomez*, 224 F.3d at 1070 (holding that defendant’s post-arrest, pre-*Miranda* silence, when faced with evidence of marijuana possession and importation, violated the defendant’s Fifth Amendment rights, even though the defendant executed a valid waiver and gave a statement to the agent after remaining silent).

*Doyle* violations will require reversal in many cases. In *U.S. v. Foster*, the Ninth Circuit ruled that the prosecutor’s cross-examination of the defendant about her post-arrest silence and comment on the defendant’s silence during a closing argument violated the defendant’s privilege against self-incrimination.
and reversed the defendant’s conviction. See U.S. v. Foster, 985 F.2d 466, 469 (9th Cir. 1993), amended on other grounds, 17 F.3d 1256 (9th Cir. 1994). The government petitioned for a rehearing of the case, arguing that no Doyle violation occurred because officers gave no Miranda warnings to the defendant. See U.S. v. Foster, 995 F.2d 882, 882 (9th Cir. 1993). The Ninth Circuit remanded the case for the district court’s determination of whether officers administered Miranda warnings had been given. See id. at 883. The Foster court remanded the case in light of Fletcher v. Weir, in which the Supreme Court held that it a prosecutor could cross-examine a defendant about his post-arrest silence when no Miranda warnings are given and the defendant appears as a witness in his trial. See Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam).

In U.S. v. Baker, the prosecutor commented on Baker’s post-arrest silence during his rebuttal argument. See U.S. v. Baker, 999 F.2d 412, 414 (9th Cir. 1993). On appeal, the prosecutor argued that no constitutional violation had occurred because his remarks only referred to post-arrest, pre-Miranda silence, and because he only intended to refer to pre-Miranda silence. See id. at 415. Although the Court recognized that comments on pre-Miranda silence may be admissible, it found that the judge never explained to the jury that the prosecutor’s comments only referred to pre-Miranda silence. See id. at 415-16. The Court found that the error was not harmless and remanded the case for a new trial because the prosecutor’s comments were “extensive and prejudicial.” See id. at 416. But see U.S. v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000) (plain error in admission of defendant’s post-arrest, pre-Miranda silence and in allowing the government to comment on this silence during its closing argument did not affect defendant’s substantial rights).

Nevertheless, a Doyle violation may be cured through a timely raised objection by defense counsel or through limiting instructions given to the jury by the presiding court. In Greer v. Miller, the government asked one impermissible question about a defendant’s silence and the court sustained an immediate objection to the question before the question was answered. See Greer v. Miller, 483 U.S. 756, 759 (1987). The court did not find a violation of Doyle because the prosecutor had not been allowed to impeach the defendant or call attention to his silence. See id. at 764. Yet, the Ninth Circuit has found that three improper questions and answers regarding the defendant’s silence required reversal, despite a strong jury instruction to disregard the questions. See U.S. v. Newman, 943 F.2d 1155, 1157-58 (9th Cir.1991). Also, the government may comment on a defendant’s post-Miranda silence if the defendant executes a waiver of his Miranda rights. See U.S. v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999) (admission of interrogating officer’s reference to defendant’s momentary silence during interrogation did not violate defendant’s Fifth Amendment right to remain silent, where at time of the recitation defendant had validly waived his right to remain silent and had not reinvoked it); see also Anderson v. Charles, 447 U.S. 404, 408 (1980) (cross-examination about prior inconsistent statements are permissible, where the defendant voluntarily spoke after being read Miranda warnings and was not induced to remain silent). Also, the government may impeach a defendant’s credibility as a witness by referring to the defendant’s silence. See Jenkins v. Anderson, 447 U.S. 231, 238 (1980). Cf. Fletcher, 455 U.S. at 607 (no violation to cross examine the defendant about his post-arrest silence, when Miranda warnings are not given).

Moreover, some judges may allow prosecutors to comment upon an accused's invocation of constitutional rights for uses other than as substantive evidence. See Territory of Guam v. Cruz, 70 F.3d
1090, 1093 (9th Cir. 1995) (reference to post-Miranda silence as evidence of the defendant’s sanity at the time of his arrest was not plain error and did not affect the defendant’s substantial rights); State v. Carrillo, 750 P.2d 883, 889 (Ariz. 1988) (evidence of mentally disabled defendant’s invocation of his Miranda rights after confessing to murder after prosecutors admonished him was admissible to rebut his contention that his confession was not voluntary because of his inability to understand the Miranda warnings). However, the Ninth Circuit has held that a prosecutor may not impeach the defendant’s exculpatory testimony by questioning him about an invocation of his right to remain silent without violating the Due Process Clause. See U.S. v. Valencia, 773 F.2d 1037, 1040 (9th Cir. 1985). The Valencia court distinguished the case before it from other cases in which a defendant makes subsequent inculpatory statements, reasoning that the privilege against self-incrimination does not focus upon the elicitation of exculpatory statements and that, therefore, the probative value of the evidence of invocation is clearly outweighed by its prejudicial effect upon the jury. See id. at 1042.

5.09 HARMLESS ERROR

The admission of statements admitted in violation of a defendant's Fifth and Sixth Amendment rights is subject to the harmless error standard announced in Chapman v. California, 386 U.S. 18 (1967). The harmless error rule requires courts to consider whether it would be “clear beyond a reasonable doubt that the jury would have returned a verdict of guilty” absent the constitutional violation. U.S. v. Hasting, 461 U.S. 499, 510-11 (1983) (applying harmless error analysis to Doyle violations through improper comment on a defendant’s silence at trial); see also Fulminante, 499 U.S. at 288 (applying the Chapman doctrine to exclude an involuntary confession); Milton v. Wainwright, 407 U.S. 371, 372-73 (1972) (error in admission of post-indictment, pretrial confession obtained by police officer, who posed as a fellow inmate to obtain the statement, was harmless beyond a reasonable doubt, in light of the overwhelming evidence of petitioner’s guilt); Velarde-Gomez, 224 F.3d at 1071 (holding that admission into evidence of defendant’s post-arrest, pre-Miranda silence was harmless beyond a reasonable doubt, in light of evidence that defendant drove and owned a car containing sixty-three pounds of marijuana, and in light of the inconsistent explanations offered by the defendant). An appellate court will reverse a defendant’s conviction only if the error was not harmless beyond a reasonable doubt. See Milton, 407 U.S. at 372.

The Supreme Court specifically subjected that admissibility of an involuntary statement to the harmless error rule. In Fulminante, the Court held that the erroneous admission of an involuntary statement and the erroneous admission of a statement in violation of the Sixth Amendment could not be distinguished from each other. See Fulminante, 499 U.S. at 310. The majority rejected the view that "an involuntary confession is the type of error which ‘transcends the criminal process,’" although it recognized that "an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors." Id. at 311-12. Furthermore, the Court recognized, it is fair to say that the reviewing court must be more scrupulous when reviewing the admission of an involuntary confession for harmless error. Id. at 295 (urging reviewing courts to “exercise extreme caution before determining that the admission of the [involuntary] confession at trial was harmless”).

However, it held, ultimately, that a due process violation committed through efforts to obtain an involuntary statement was no more egregious than officers’ violation of the Sixth Amendment in their efforts to elicit a confession from a defendant. See id. at 310.
5.10 SUPPRESSION OF STATEMENTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

The admission of statements against the defendant at trial may implicate the Confrontation Clause of the Sixth Amendment. A confession of a non-testifying co-defendant which implicates the defendant is inadmissible in a joint trial of the two individuals. See Bruton v. U.S., 391 U.S. 123, 124 (1968). The admission of such statements into evidence violates the Confrontation Clause because the non-testifying co-defendant can immunize himself from cross-examination by choosing not to incriminate himself by presenting testimony. The Confrontation Clause bars the admission of a non-testifying co-defendant’s incriminating confession “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.” Cruz v. New York, 481 U.S. 186, 193 (1987). In most cases, “[l]imiting instructions to the jury may not in fact erase the prejudice,” because a jury may be more inclined to believe the testimony of a co-defendant who was present during the commission of the crime, despite a co-defendant’s motives to place blame elsewhere. Bruton, 391 U.S. at 132 (internal citations omitted). The Court stated that “in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for cross-examination.” Id. at 137.

Nevertheless, several exceptions to the Bruton rule exist. First, a “defendant’s confession may be considered at trial in assessing whether his co-defendant’s statements are supported by sufficient ‘indicia of reliability’ to be directly admissible against him (assuming the ‘unavailability’ of the co-defendant) despite the lack of opportunity for cross-examination.” Id. at 193-94 (internal citations omitted). Second, an incriminating confession of a co-defendant may be admitted into evidence, notwithstanding its character as inadmissible hearsay, if the statement falls within a “firmly rooted” exception to the hearsay rule or contains “particularized guarantees of trustworthiness” so that cross-examination would not further enhance its reliability. Lilly v. Virginia, 527 U.S. 116, 123-25 (1999) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

Also, in some cases, “the Confrontation Clause is not violated by the admission of a non-testifying co-defendant’s confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant’s name, but any reference to his or her existence.” Richardson v. Marsh, 481 U.S. 200, 211 (1987). Yet, in 1998, the Court ruled inadmissible a confession of a co-defendant in which the government substituted a blank space or the word “deleted” for references to the defendant. Gray v. Maryland, 523 U.S. 185, 192 (1998).

The Supreme Court distinguished this redacted confession from one in Richardson v. Marsh because the state redacted the confession of the co-defendant to omit all references to Marsh and his involvement in the crime. See id. at 191. In contrast, references to the defendant, albeit disguised, remained within the document in the instant case despite the substitutions. See id. Thus, a confession akin to the one presented in the instant case “falls within the class of statements to which Bruton protections apply.” Id. at 197; see also U.S. v. Logan, 210 F.3d 820, 820 (8th Cir. 2000) (admission of non-testifying co-defendant’s post-arrest statements that he planned and committed robbery with “another individual” did not violate defendant’s Confrontation Clause rights, even if statements may have implicated defendant when viewed in light of other evidence introduced at trial), petition for cert. filed, No. 00-5274 (U.S. July 20, 2000).
CHAPTER 6
PRETRIAL AND OTHER MOTIONS

updated by

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6.01 INTRODUCTION

This portion of the manual discusses common pretrial motions other than those dealing with suppression of tangible evidence under the Fourth Amendment (see Chapter 4), suppression of statements under the Fifth Amendment (see Chapter 5), and prosecutorial misconduct (see Chapter 7). Since juvenile and immigration cases have many unique issues, it is strongly recommended that counsel review Chapter 18 on juveniles\(^1\) and Chapter 17 on immigration. With regards to the motions covered in this chapter, counsel is urged to pay particular care to in limine motions (1) to exclude a drug courier profile, (2) to exclude privileged statements, (3) for attorney conducted voir dire, and (4) discovery motions. However, this compilation of possible motions should not be considered exhaustive; counsel’s skill and ingenuity may significantly expand the possibilities.

Defense counsel may bring pretrial motions not only to obtain the relief requested by the given motion, but also to launch a vigorous defense aimed at taxing the government’s time and resources and neutralizing its opening move. The game is complex, and this chapter is meant only as a starting point.

6.02 MOTION TO DISMISS DUE TO ILLEGALLY CONSTITUTED GRAND JURY

A defendant in a criminal case has a constitutional and statutory right to indictment by an unbiased grand jury. U.S. v. Burke, 700 F.2d 70, 82 (2d Cir. 1983). Defendants may seek dismissal of an indictment on the grounds that the grand jury was improperly selected in violation of the Indictment Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Impartial Jury Clause of the Sixth Amendment, or the Jury Selection and Service Act of 1968. See Rose v. Mitchell, 443 U.S. 545, 551 (1979) (equal protection); Costello v. U.S., 350 U.S. 359, 363 (1956) (Indictment Clause

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\(^{1}\) Motions based upon a juvenile’s right to have a substantive notification of the rights of the juvenile given to the juvenile’s parents or consulate is an example of one such unique motion. See generally, 18 U.S.C. §§5031-5042.

A defendant challenging the composition of a grand jury on constitutional grounds must establish a *prima facie* case of improper selection by showing that: (1) the group discriminated against is a “recognizable, distinct class” singled out for different treatment; (2) the group is under represented in comparison to its proportion in the total population; and (3) the selection process is racially charged or susceptible to abuse. *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977); *U.S. v. Brummitt*, 665 F.2d 521, 527 (5th Cir. 1981). *But see Rich v. Calderon*, 187 F.3d 1064,1068 (9th Cir. 1999) (finding “exclusion of a group constituting 7.7% or less of the total [county] population is, standing alone, generally insufficient to establish a prima facie case of systematic exclusion); *Boykins v. Maggio*, 715 F.2d 995, 996 (5th Cir. 1983) (1.56 standard statistical deviations for black venire deemed inadequate *prima facie* showing), *cert. denied*, 466 U.S. 940 (1984); *U.S. v. Schmidt*, 711 F.2d 595, 599-600 (5th Cir. 1983) (technical deviations from grand jury selection statute do not constitute noncompliance), *reh’g en banc denied*, 716 F.2d 901 (1983), *cert. denied*, 464 U.S. 1041 (1984). The Ninth Circuit adds the additional requirement that the underrepresentation be “unreasonable.” *U.S. v. Artero*, 121 F.3d 1256 (9th Cir. 1997).

In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court reversed a murder conviction because members of the defendant’s race had been systematically excluded from the grand jury. The Court affirmed the district court’s application of *Castaneda* and approved admission of statistical data which established underrepresentation and likely discriminatory intent. *Id.* at 257-60. Counsel attempting to prove underrepresentation of a distinctive group must provide data showing that the percentage of group members in the jury wheel is significantly lower than the percentage eligible to serve on juries. *Artero*, 121 F.3d at 1256.

In *Artero*, the government relied on census data concerning the number of Hispanics along the Mexican border in the Southern District of California. The defense showed that 24.2 percent of the region is made up of Hispanics, and only 9.7% are in the jury wheel, for a disparity of 14.5%. However, the government’s statistics indicated that many of those Hispanics were not eligible to sit on a jury (probably because they were not U.S. citizens), were not old enough to vote, or did not speak English. Given this information, the court concluded that the actual disparity was only 4.9%, which was not enough to show discriminatory intent. The court stated: “[t]he right question is whether Hispanics eligible to serve on federal juries were underrepresented because of systematic exclusion.” The case is instructive for attorneys raising similar challenges because it shows the type of evidence they will need to establish a *prima facie* case. *Id.* See also *U.S. v. Esquivel*, 88 F.3d 722, 724 (9th Cir. 1996).

In *Vasquez*, the high court held that discriminatory grand jury selection is not subject to “harmless error” review; rather, such error requires automatic reversal. *Vasquez*, 474 U.S. at 263-64. The Court’s refusal to apply harmless error contrasts with a string of opinions applying that doctrine to other constitutional violations. *See Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of psychiatric testimony in violation of Sixth Amendment); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (violations of the Confrontation Clause of the Sixth Amendment); *U.S. v. Lane*, 474 U.S. 438 (1986) (misjoinder of

In Vasquez, the defendant was of the same race as the persons who were excluded from the grand jury. However, the Court’s analysis did not limit application of Vasquez to challenges by defendants of the same race as the excluded jurors. Recent Supreme Court cases suggest that the defendant need not be of the same race as the persons excluded in order to argue that the grand jury selection is biased. Powers v. Ohio, 499 U.S. 400 (1991); Holland v. Illinois, 493 U.S. 474 (1990). In Holland, the Court held that a white defendant may challenge the exclusion of blacks from a petit jury. Id. at 504-08. Although the Court based its decision on the Sixth Amendment, a similar analysis should apply to equal protection challenges to the composition of the grand jury. Id. (Stevens, J., dissenting). See also U.S. v. Holman, 680 F.2d 1340, 1355-56 (11th Cir. 1982). Campbell v. Louisiana supports this proposition. 532 U.S. 392 (1998). Relying on Powers, the Court in Campbell held that a white defendant had standing to challenge the exclusion of blacks from the process of grand jury selection. Id. at 397. 2 But see U.S. v. Coletta, 682 F.2d 820. 821 (9th Cir. 1982) (defendant must be member of allegedly excluded class to challenge selection of grand jury foreperson).

The Court has also held that the Equal Protection Clause forbids intentional gender discrimination in jury selection. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). Under the court’s reasoning in Vasquez, this ruling should apply to gender-based discrimination in grand jury selection as well. See Vasquez, 474 U.S. at 263-64.

In Morgan v. U.S., 696 F.2d 1239 (9th Cir. 1983), the Ninth Circuit reversed the trial court's denial of an evidentiary hearing where the appellant alleged that no blacks had served on a federal jury in the district for 20 years. Absolute exclusion of blacks violates equal protection even where the number of blacks in the population is small. Cf. Boykins, 715 F.2d at 996 (prima facie showing requires a difference between the expected value and the observed number to be greater than two or three standard deviations).

Defendants may also argue that the selection of the grand jury foreperson violated the Fifth Amendment. In Hobby, however, the Supreme Court held that discrimination against non-whites will not warrant reversal of a conviction of a white defendant. Hobby v. U.S., 468 U.S. 339, 344 (1984); see also Coletta, 682 F.2d at 821 (defendant must be member of allegedly excluded class to challenge selection of grand jury foreperson). An ambitious defense might challenge the same race requirement of Hobby by arguing that equal protection requires that any defendant may challenge discrimination in the selection of grand jury foreperson. See Powers, 499 U.S. 400. Similarly, a defendant may challenge discrimination based on gender in the selection of a grand jury foreperson. Cf. J.E.B., 511 U.S. at 129 (male defendant challenging exclusion of males from jury).

6.03 MOTION TO INSPECT JURY RECORDS AND TO QUASH JURY PANEL

2 The discrimination of which Campbell complained involved the selection process of the grand jury foreperson. However, because of the manner in which Louisiana selects its grand jury forepersons, the Court treated Campbell’s claim as one of discrimination in the selection process of the grand jury. Id. at 397. The Court, therefore, distinguished Campbell’s claim from the claim it confronted in Hobby v. U.S., 468 U.S. 339 (1994).
A motion to inspect the jury lists helps lay the necessary foundation for a motion to quash a jury panel and to dismiss the indictment due to an illegally constituted grand jury.

The provisions of the Jury Selection and Service Act of 1968 allow both parties an unqualified right to inspect the jury list at all reasonable times during the preparation of a motion to challenge compliance with the jury selection procedure. U.S. v. Studley, 783 F.2d 934, 937-38 (9th Cir. 1985); Test v. U.S., 420 U.S. 28, 30 (1975); U.S. v. Beaty, 465 F.2d 1376, 1381-82 (9th Cir. 1972); 28 U.S.C. §1867(f).

A defendant in a federal criminal case has a constitutional and statutory right to a grand jury chosen without discrimination from a fair cross-section of the community, and a petit jury chosen without discrimination. Glasser v. U.S., 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940); 28 U.S.C. §1861. But see Anaya v. Hansen, 781 F.2d 1 (1st Cir. 1986) (while a court may not exclude blue collar workers and young adults as a whole, those groups do not constitute cognizable classes in and of themselves); Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985) (allowing the use of statistics to show discrimination only where group excluded is clearly identifiable by a common and specific characteristic, such as a similarity in attitude, ideas or experience). See supra section 6.02, and infra Chapter 8, Jury Selection.

There are a number of cases where a prima facie case has been made that a cognizable class of persons may have been excluded. See, e.g., Duren v. Missouri, 439 U.S. 357 (1979) (women underrepresented on weekly venire, 21% grand jury venire); Turner v. Fouche, 396 U.S. 346 (1970) (blacks underrepresented by 23% on grand jury); Whitus v. Georgia, 385 U.S. 545 (1967) (blacks underrepresented by 32% on grand jury and 35% on petit jury); LaRoche v. Perrin, 718 F.2d 500 (1st Cir. 1983) (youth underrepresented by 27% on petit jury venires; 25.4% in grand jury); Partida v. Castaneda, 524 F.2d 481 (5th Cir. 1975) (Mexican-Americans underrepresented on grand juries by 40.2% over ten-year period to 33.7% over two and one-half-year period).

6.04 MOTION TO DISMISS INDICTMENT DUE TO MISCONDUCT OCCURRING BEFORE THE GRAND JURY

The Fifth Amendment to the United States Constitution guarantees that “[n]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury . . . .” U.S. Const., Amend. V. The framers of the Bill of Rights included the grand jury guarantee in the Fifth Amendment to protect wrongfully accused individuals against mistaken and vindictive prosecutions. U.S. v. Claiborne, 765 F.2d 784, 790 (9th Cir. 1985), overruled on other grounds in U.S. v. Alexander, 48 F.3d 1477, 1484 (9th Cir. 1995); see U.S. v. Dionisio, 410 U.S. 1, 16-17 (1973). Federal courts acknowledge that grand juries serve important investigative functions while also shielding individuals against unwarranted prosecutions. Because grand juries have broad investigative powers – in addition to their obligation to determine whether probable cause exists -- courts have sharply limited defendants’ ability to challenge grand jury indictments.

Counsel should be aware of the following potential motions when persons call seeking advice about what to do after receiving a grand jury subpoena or a “target identification” letter from a prosecutor. For example, according to a recent Supreme Court decision, federal courts have no authority to require federal
prosecutors to present exculpatory evidence to grand juries. *U.S. v. Williams*, 504 U.S. 36 (1992); *U.S. v. Estacio*, 64 F.3d 477, 481 (9th Cir. 1995). *But see Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993) (government failed to present exculpatory evidence to grand jury in violation of a Guam statute; court held failure was error). Likewise, the district court may not review the sufficiency of the evidence presented to the grand jury, and in general may not dismiss an indictment that is, in the court’s view, based on incompetent evidence. *See Costello*, 350 U.S. at 363. Compounding the problem, courts attach a presumption of regularity to grand jury proceedings. *Claiborne*, 765 F.2d at 791, *overruled on other grounds* in *U.S. v. Alexander*, 48 F.3d 1477, 1484 (9th Cir. 1995); *see U.S. v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976) (defendant bears burden of demonstrating misconduct due to presumption of regularity).

Despite the constraints on defendants’ ability to challenge the evidence presented to the grand jury, defendants can dispel the presumption of regularity attached to grand jury proceedings and obtain dismissal of an indictment upon a proper showing of abuse. Chapter 7, section 7.02, of this manual discusses the type of grand jury misconduct that may warrant dismissal of an indictment prior to trial. The following is a brief summary of the kinds of grand jury misconduct that may trigger a pretrial motion to dismiss.

### 6.04.01 Immutable Characteristic

A prosecutor may not deliberately charge the defendant because of race (or other immutable characteristics). *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986).

### 6.04.02 Perjured Testimony

The knowing presentation or use of perjured testimony before the grand jury should invalidate the indictment and merit a dismissal. *See U.S. v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978); *see U.S. v. Kennedy*, 564 F.2d 1329, 1335-38 (9th Cir. 1977); *U.S. v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974). However, when a motion to dismiss centers on the use of perjured testimony, the Ninth Circuit holds that the “perjured testimony must be material to support dismissal . . . .” *U.S. v. Evans*, 928 F.2d 858, 861 (9th Cir. 1991), *abrogated on other grounds* *U.S. v. Edwards*, 55 F.3d 428 (9th Cir. 1995). Thus, it appears that some perjury is acceptable so long as the court determines that it is “of no practical consequence.” *Id. See also U.S. v. Sitton*, 968 F.2d 947, 953-54 (9th Cir. 1992).

### 6.04.03 Improper Influence

Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior — even if unintentional — may cause improper influence and usurpation of the grand jury’s role. For example, one court dismissed the indictment because the prosecutor presented a transcript of a key witness’ prior grand jury testimony to a second grand jury without disclosing the witness’ lack of credibility. *U.S. v. Samango*, 607 F.2d 877, 881-82 (9th Cir. 1979). Other examples of prosecutorial misconduct include making prejudicial remarks, failing to control a witness’ irrelevant and inflammatory remarks, or vouching for a witness’ credibility. *U.S. v. De Rosa*, 783 F.2d 1401, 1405 (9th Cir. 1986); *see also U.S. v. Al Mudarris*, 695 F.2d 1182, 1185-88 (9th Cir. 1983) (prosecutor’s inflammatory comments); *U.S. v. Sears Roebuck & Co., Inc.*, 719 F.2d 1386 (9th
Cir. 1983) (prosecutor’s comment on witness’ credibility). Unfortunately, however, such misconduct does not always result in dismissal.
6.04.04 Failure to Present Certain Evidence

A prosecutor’s failure to present exculpatory evidence to the grand jury where there has been an implicit agreement to do so may also warrant a pretrial challenge to an indictment. See U.S. v. McClintock, 748 F.2d 1278, 1284-86 (9th Cir. 1984).3

When filing a motion to dismiss the indictment because of grand jury abuse, counsel should be cognizant of two separate theories upon which to base such a motion. First, a prosecutor may not circumvent the grand jury’s preventative function by engaging in overreaching conduct that impinges upon the grand jury’s autonomy and interferes with its unbiased judgment. See De Rosa, 783 F.2d at 1404. When such misconduct occurs, an indictment may be dismissed as an exercise of the court’s inherent supervisory powers. See Samango, 607 F.2d at 884; Basurto, 497 F.2d at 785. Second, the Due Process Clause mandates dismissal where the exercise of prosecutorial discretion in the presentation of the case to the grand jury was arbitrary and capricious. However, Constitutional grounds warrant dismissal of the indictment only if the misconduct has significantly infringed upon the grand jury’s ability to exercise its independent judgment. See De Rosa, 783 F.2d at 1405; Claiborne, 765 F.2d at 791, overruled on other grounds in U.S. v. Alexander, 48 F.3d 1477, 1484 (9th Cir. 1995); McClintock, 748 F.2d at 1285.

The court’s power to dismiss an indictment on the grounds of prosecutorial misconduct is frequently discussed in the case law but rarely invoked. See De Rosa, 783 F.2d at 1405 (prosecutor’s insinuations that defendant had made a fraudulent disability claim was not deemed a constitutional violation even though the prosecutor knew the defendant had been acquitted of such an accusation). But see Samango, 607 F.2d at 881-82 (finding prosecutor failed, inter alia, to present exculpatory evidence about credibility of witness whose transcript testimony was presented to grand jury; court dismissed the indictment).

In Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988), the Court severely restricted a trial court’s ability to dismiss an indictment absent some violation which substantially influenced the grand jury’s decision to indict. Although the prosecutor in Bank of Nova Scotia committed several acts of misconduct, the Supreme Court viewed these incidents “as isolated episodes in the course of a 20-month investigation involving dozens of witnesses and thousands of documents,” which did not prejudice the proceedings. Id. at 263. The Court suggested other remedies short of dismissing the grand jury indictment:

Errors of the kind alleged [here] can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished by contempt of court. See Fed. R. Crim. P. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion.

3 This situation differs from that of U.S. v. Williams, 504 U.S. 36 (1992). The Williams court held that there is no general affirmative duty to present such exculpatory evidence.
**6.05 MOTION TO DISMISS INDICTMENT DUE TO INSUFFICIENTLY CONSTITUTED GRAND JURY**

Fed. R. Crim. P. 6(a) authorizes district courts to summon citizens for a grand jury. The grand jury must have 16 to 23 members. A valid indictment requires a minimum of 16 grand jurors at every session, and 12 must vote to indict. Fed. R. Crim. P. 6(f). Replacement of a juror for cause is allowed at any time. Fed. R. Crim. P. 6(g); see also U.S. v. Lang, 644 F.2d 1232, 1235 (7th Cir. 1981) (indictment proper even when 15 of original 23 jurors replaced); U.S. ex rel. McCann v. Thompson, 144 F.2d 604, 607 (2d Cir. 1944).

Neither the Fifth Amendment nor Rule 6 requires that every juror voting to indict attend every session. U.S. v. Provenzano, 688 F.2d 194, 202-03 (3d Cir. 1982) (recommends review of transcripts by absent juror); U.S. v. Lang, 644 F.2d 1232, 1239 (7th Cir. 1981); U.S. v. Leverage Funding Systems, Inc., 637 F.2d 645 (9th Cir. 1980); U.S. ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944). Failure to form a grand jury quorum within the requisite period of time under the Speedy Trial Act does not warrant dismissal of the indictment. See U.S. v. Paschall, 988 F.2d 972, 974 (9th Cir. 1993).

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4 The prosecutor’s action in this regard was contrary to controlling First Circuit precedent and the U.S. Department of Justice requirement.

5 But cf. U.S. v. Goodwin, 57 F.3d 815 (9th Cir. 1995) (harmless error in failure to warn defendant that his statements could be used in future prosecution where no compunction to testify coupled with explicit instructions of his right to not answer questions that might incriminate him).

6 See also U.S. v. Gillespie, 974 F.2d 796, 800-01 (9th Cir. 1992) (failure to provide witness with oral target warning not sufficient to warrant dismissal of indictment); U.S. v. Perez-Reyes, 753 F. Supp. 723, 726 (N.D. Ill. 1990) (dismissal of indictment not warranted after altered documents were presented to grand jury where government decided not to pursue counts related to altered documents).
The Attorney General, a United States Attorney, or an authorized assistant Attorney General may conduct grand jury proceedings. 28 U.S.C. §515(a). The Attorney General may specially appoint an attorney to conduct a grand jury proceeding (28 U.S.C. §515(a)), although such appointments may provoke claims of impropriety. In re April 1977 Grand Jury Subpoenas (GM Corp. v. U.S.), 573 F.2d 936, 941 (6th Cir. 1978); see also U.S. v. Plesinski, 912 F.2d 1033, 1036-39 (9th Cir. 1990) (special counsel must be appointed by Attorney General or proper delegate). With the growing use of “Special” Assistant United States attorneys, counsel should determine whether that “Special” Assistant actually does have the proper authority to conduct grand jury proceedings. See U.S. v. Navarro, 160 F.3d 1254 (9th Cir. 1998) (holding that appointment of SAUSA for indefinite period of time was valid under statute). An appeal concerning the authority of the attorney obtaining the indictment is made following a final judgment, not by interlocutory appeal. Plesinski, 912 F.2d at 1036. See also U.S. v. Davis, 932 F.2d 752, 763 (9th Cir. 1991).

6.06 MOTION TO DISMISS FOR A VIOLATION OF GRAND JURY SECRECY

Fed. R. Crim. P. 6(d) sets forth who may be present during a grand jury session. If persons not listed in Rule 6(d) are present, a violation of the grand jury’s secrecy requirements has occurred; such violation may provide grounds for a motion to dismiss. U.S. v. Fowlie, 24 F.3d 1059, 1065 (9th Cir. 1994). In U.S. v. Mechanik, 475 U.S. 66 (1986), two FBI agents testified in tandem at a grand jury proceeding. Id. at 67. The defendants did not discover the violation of Rule 6(d) until they were provided Jencks Act material during trial. Id. at 68. Thereafter, the defendants moved for dismissal of the indictment because the simultaneous presence of the two agents violated Rule 6(d). Id. Justice Rehnquist, writing for the majority, held that defendants’ conviction by a 12-member petit jury constituted an implicit finding of probable cause and superseded any errors regarding the grand jury’s finding of probable cause. Id. Justice O’Connor (with whom Justices Brennan and Blackmun joined, concurring) persuasively argued that the harmless error doctrine should focus on the effect of the violation of Rule 6(d) on the return of the indictment, rather than upon what the petit jury did. Id. at 78 (O’Connor, J., concurring). See also Plesinski, 912 F.2d at 1038 n. 9 (holding that it was harmless error to have unauthorized prosecutor in the room when he “did not say or do anything nor did anyone make any reference to him in front of the grand jury”).

After Mechanik, the appellate courts are undecided whether the Supreme Court intended to forbid post-conviction review of alleged violations of Rule 6(e). In Midland Asphalt Corp. v. U.S., 489 U.S. 794 (1989), a unanimous Court specifically refused to resolve the split in the circuits. Midland Asphalt held that a district court’s order denying a defendant’s motion to dismiss an indictment under Rule 6(e) is not immediately appealable. However, Midland Asphalt does not expressly hold the argument that post-conviction review of alleged Rule 6(e) violations is permissible, see id. at 802 (“fundamental” defect in indictment or grand jury process gives rise to “the constitutional right not to be tried”), and some circuits do allow post-conviction review of alleged Rule 6(e) violations. See, e.g., U.S. v. Spillone, 879 F.2d 514, 521-22 & n.4 (9th Cir. 1989) (distinguishing between ordinary post-conviction “harmless error” standard of Mechanik and “fundamental fairness” requirement of grand jury proceedings set forth in Bank of Nova Scotia); U.S. v. Giorgi, 840 F.2d 1022, 1029-33 (1st Cir. 1988) (Mechanik bar to post-conviction appeal inapplicable when prosecutorial misconduct affects fundamental fairness of proceeding); U.S. v. Hooker, 841 F.2d 1225, 1231 (4th Cir. 1988) (en banc) (same).
Therefore, while *Mechanik* makes post-conviction review of prosecutorial misconduct unavailable regarding harmless errors in the charging process, post-conviction review remains available under *Midland Asphalt* where the misconduct implicates substantial rights protected by the Due Process Clause and calls into question the criminal charge itself. *See U.S. v. Eccles*, 850 F.2d 1357, 1364 (9th Cir. 1988); *see also Spillone*, 879 F.2d at 522 n.4.

Rule 6(e)(2) provides that grand jury material may not be disclosed to persons other than governmental personnel deemed necessary to help a prosecutor perform his or her duty to enforce federal criminal law. Disclosure of grand jury material to persons not within this group may give rise to a motion to dismiss the indictment under Rule 6(e)(3)(A)(ii). If an indictment has not yet been returned, the target of the grand jury investigation may seek equitable and declaratory relief. *See Barry v. U.S.*, 865 F.2d 1317, 1321 (D.C. Cir. 1989) (availability of civil equitable or declaratory relief “generally understood”). The target of a grand jury investigation may also file a complaint for civil contempt. *Blalock v. U.S.*, 844 F.2d 1546, 1551 (11th Cir. 1988); *Barry*, 865 F.2d at 1322. An emerging view encourages victims of Rule 6(e) violations who have already been indicted to seek criminal contempt charges against the offending prosecutor. *See Barry*, 865 F.2d at 1326 (Sentelle, J., dissenting); *Blalock*, 844 F.2d at 1558 (Tjoflat, J., specially concurring). For an informative discussion of grand jury secrecy requirements, *see U.S. v. Deffenbaugh Industries, Inc.*, 957 F.2d 749 (10th Cir. 1992).

Finally, the unauthorized disclosure of grand jury material is closely related to the issue of whether a grand jury indictment may be dismissed because of employment of grand jury agents. Although the Federal Rules of Criminal Procedure do not authorize the use of “grand jury agents,” the practice by grand juries or prosecutors of designating certain persons as “grand jury agents” is on the rise. These “agents” ostensibly assist the grand jury in its investigation of a case. While the case law in this area is limited, several reported district court opinions are chronicled in *U.S. v. Claiborne*, 765 F.2d at 794-95, *overruled on other grounds in U.S. v. Alexander*, 48 F.3d 1477, 1484 (9th Cir. 1995). *See also U.S. v. Kilpatrick*, 821 F.2d 1456, 1472 (10th Cir. 1987) (must show that grand jury agents were “over-reaching” or usurped grand jury independence for dismissal of indictment).

### 6.07 MOTION FOR GRAND JURY TRANSCRIPTS

A criminal defendant may move for pretrial disclosure of grand jury transcripts. In fact, it is a good idea to include such a motion in all standard discovery requests. *See Chapter 3, section 3.05.04, of this manual.* Counsel preparing such a motion should refer to that section specifically. A motion for grand jury transcripts is warranted in cases: (1) when a defendant can show grand jury misconduct, or (2) where a defendant shows a particularized need for the transcript, and failing to provide the transcripts merits a motion to dismiss. *See Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 400 (1959) (production of transcripts proper for purposes of cross-examination); *U.S. v. Fowlie*, 24 F.3d at 1066 (district court should order disclosure and allow defendant to brief issue of prejudice); Fed. R. Crim. P. 6(e)(3)(C)(ii). The Federal Rules of Criminal Procedure provide the grounds on which counsel may move for disclosure of grand jury transcripts. *Fed. R. Crim. P. (6)(e)(3). However, district courts retain discretion to order disclosure of grand jury transcripts for reasons beyond those listed under Rule 6(e)(3). *Craig v. U.S.*, 131 F.3d 99, 102 (2d Cir. 1997); *In Re Hastings*, 735 F.2d 1261, 1268 (11th Cir. 1984); *In Re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973).
6.08 MOTION TO DISMISS AN UNCONSTITUTIONAL PENAL STATUTE

The following is a general outline of several Constitutional attacks on criminal statutes and the cases that may support a motion to dismiss.
6.08.01 Overbreadth

The doctrine of facial overbreadth is normally associated with constitutional attacks based on First Amendment violations. See Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). Under the doctrine, a law may be facially overbroad if its existence may cause individuals to refrain from engaging in forms of constitutionally protected speech or conduct. Id. A statute is generally considered overbroad if it sweeps within its prohibitions activities that are constitutionally protected. Simon & Schuster v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991); Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972).

The basic approach to challenging any statute as constitutionally overbroad was set forth in Hoffman Estates v. Flipside, 455 U.S. 489, 494-95 (1982). “A court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications.” Id. at 494. See infra section 6.08.02, below (Vagueness challenges).

If the statute under which a defendant is convicted is struck down as being overbroad, defendant's conviction is automatically overturned, even if the statute in question is subsequently amended in a manner enabling it to pass Constitutional muster. Massachusetts v. Oakes, 491 U.S. 576 (1989). In Oakes, the defendant challenged a Massachusetts pornography statute as overbroad. After the time of the alleged crime, the state legislature amended the statute, curing the problem of overbreadth. In separate opinions, five justices agreed that the state legislature could not cure the potential overbreadth problem through subsequent legislation. See Oakes, 491 at 585-86 (Scalia, J., concurring). Thus, Oakes’ conviction was overturned despite the fact that the conduct in which he engaged would have been prohibited under the new, permissible statute.

However, Oakes does not preclude a state supreme court from relying on a narrowed judicial construction of an existing statute when faced with an overbreadth challenge. See Osborne v. Ohio, 495 U.S. 103, 115-22 (1990). In Osborne, the state supreme court narrowed the statute so that it passed Constitutional muster, thus enabling defendant’s conviction to be upheld. Id. at 122.

6.08.02 Vagueness

If a statute is not overbroad, the court should then examine the statute for vagueness. Flipside, 455 U.S. 489. Generally, a statute is void for vagueness under the Due Process Clause if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. Colautti v. Franklin, 439 U.S. 379, 390 (1979).

The standards for evaluating vagueness were enunciated in Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted):

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary
intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (emphasis added).

In Smith v. Goguen, 415 U.S. 566, 574 (1974), the Court noted that the more important aspect of the vagueness doctrine “is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.”

A criminal statute is void for vagueness if it encourages arbitrary and discriminatory enforcement of the law. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Chalmers v. City of Los Angeles, 762 F.2d 753, 757 (9th Cir. 1985). However, the trend in modern case law is that a statute -- even a criminal statute -- must violate both prongs of vagueness in order to be found unconstitutional. U.S. v. Ayala, 35 F.3d 423, 424-25 (9th Cir. 1994). Under Ayala, a statute is unconstitutionally vague only if a defendant can show that the statute “(1) does not define the conduct it prohibits with sufficient definitiveness, and (2) does not establish minimal guidelines to govern law enforcement.” Id. at 424. In addition, if the defendant’s claim does not implicate First Amendment values, the defendant must show that the statute is vague as applied. Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

In short, counsel should always bear in mind that laws may be void for vagueness for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. U.S. v. Wunsch, 84 F.3d 1110 (9th Cir. 1996).

When the terms of a statute and the words defining them are of general usage, commonly known and understood by the public, they are sufficient to meet constitutional requirements. Panther v. Hames, 991 F.2d 576, 579 (9th Cir. 1993) (citations omitted). However, in U.S. v. Weitzenhoff, 35 F.3d 1275, 1289 (9th Cir. 1993) the court held that if the statutory prohibition:

involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered and a court may uphold a statute which “uses words having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them.”

In Weitzenhoff, defendants challenged as vague an environmental statute that prohibited dumping sewage in the ocean. Id. at 1289. In rejecting defendants’ vagueness argument, the court held the defendants to a higher standard than a ‘reasonable person’ because they were knowledgeable in the wastewater field and should have known that they were prohibited from dumping thousands of gallons of partially treated sewage into the ocean. Id.
Once a court determines that a statute is unconstitutionally vague, the entire statute is stricken. See *Kolender v. Lawson*, 461 U.S. 352 (1983). The Supreme Court has invalidated a criminal statute on its face even when the statute could conceivably have had some valid application. See *Kolender*, 461 U.S. at 358-59 n.8; *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); see also *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984) (court determined that *Kolender* did not change the analytical approach to attacking criminal statutes on vagueness grounds).

The degree of vagueness that is constitutionally permissible, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the statute in question. Economic regulations are subject to a less strict vagueness test and courts have permitted greater tolerance of enactments with civil rather than criminal penalties “because the consequences of imprecision are qualitatively less severe.” *Hoffman Estates v. Flipside*, 455 U.S. at 498-99. Where a statute imposes criminal penalties, however, the standard of certainty required is higher. *Kolender v. Lawson*, 461 U.S. at 358-59 n.8; *Winters v. New York*, 333 U.S. 507, 515 (1948). In *Flipside*, which involved a commercial regulation statute, the Supreme Court noted that a scienter requirement may mitigate a law’s vagueness with respect to the adequacy of notice. *Flipside*, 455 U.S. at 498-99; see also *Amusement Devices Association v. State of Ohio*, 443 F. Supp. 1040, (S.D. Oh. 1977) (observing that the Supreme Court has never held that a scienter element alone necessarily renders the statute’s prohibitions sufficiently precise to withstand a vagueness challenge); *State v. Young*, 406 N.E. 2d 499, 504 n.4 (1980); *U.S. v. Corrow*, 119 F. 3d 796, 804 n. 11 (10th Cir. 1997).

Courts have struck down criminal statutes where they were devoid of a scienter or *mens rea* requirement. See *Colautti v. Franklin*, 439 U.S. 379, 394-97 (1979); *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 434-46 (1978); *Lambert v. California*, 355 U.S. 225 (1957); *Morissette v. U.S.*, 342 U.S. 246 (1952). However, a “statute is not presumptively vague because it does not have a specific intent requirement.” *U.S. v. Wicker*, 933 F.2d 284, 288 (5th Cir. 1991).

Further, a criminal statute or the phrasing of an indictment must not shift or lessen the prosecution’s burden of proof. A reduction of the scienter requirement of penal statutes to one of mere negligence violates the defendant’s rights to the presumption of innocence and the proof of *mens rea*. See *Speiser v. Randall*, 357 U.S. 513, 525-29 (1958) (tax statute in purported civil context must not place burden of persuasion on defendant thereby putting defendant in a position of facing what are truly criminal sanctions).

## 6.09 MOTION TO DISMISS THE INDICTMENT DUE TO DUPlicity/MULTIPlicity

### 6.09.01 Duplicity

An indictment is duplicitous when it joins two or more distinct crimes in a single count. *U.S. v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980); *U.S. v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997) (a duplicitous indictment is one in which a jury could find the defendant guilty without ever having reached a unanimous verdict on the commission of a particular offense). This problem occurs with greater frequency than defense counsel may be aware. When reviewing charges, counsel should always look to see if a “duplicity” (or “multiplicity”) issue exists. If a duplicity issue does exist, counsel should file a pretrial
motion. Under Rule 12(b)(2), a court will deem the defendant to have waived the issue if counsel fails to do so.\(^7\) *Klinger*, 128 F.3d at 708.

“The ban against duplicitous indictments derives from four concerns: (1) prejudicial evidentiary rulings at trial; (2) the lack of adequate notice of the nature of the charges against the defendant; (3) prejudice in obtaining appellate review and prevention of double jeopardy; and (4) risk of a jury's non-unanimous verdict.” *U.S. v. Cooper*, 966 F.2d 936, 939 n.3 (5th Cir. 1992) (citations omitted). Duplicitous indictments may prevent jurors from acquitting on a particular charge by allowing them to convict on another charge that is improperly lumped together with another offense in a single count. “A duplicitous indictment precludes assurance of jury unanimity, and may prejudice a subsequent double jeopardy defense.” *U.S. v. Morse*, 785 F.2d 771, 774 (9th Cir. 1986) (citing *U.S. v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976)).

A duplicitous charge further prejudices the defendant at trial because evidentiary rulings permitting evidence to come in as to one of the separate offenses may be inadmissible as to the other. *U.S. v. Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978); *UCO Oil Co.*, 546 F.2d at 835.

Counsel should be aware that an indictment is not duplicitous if it merely alleges various means of committing the same crime in a single count. *U.S. v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992). Where a single count in an indictment encompasses two or more distinct and separate offenses, counsel may move to dismiss the faulty count or may request that the trial court require the government to elect the count or offense on which it intends to present proof. *U.S. v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985) (government may use election to cure duplicitous indictment); *see also* Fed. R. Crim. P., Rule 14; *Thomas v. U.S.*, 418 F.2d 567, 568 (5th Cir. 1969) (government need not put narrative incriminating statements in evidence).

However, the Second Circuit in *Aracri*, 968 F.2d at 1518, allowed acts that could be charged in separate counts of an indictment to instead be charged in a single count if those acts could be characterized as parts of a single continuing scheme. *See also U.S. v. Canas*, 595 F.2d 73, 78 (1st Cir. 1979). This is contrary to the Fifth Circuit which dictates that “any acts capable of being charged as separate offense must be alleged in separate counts.” *Bins v. U.S.*, 331 F.2d 390, 393 (5th Cir. 1964); *U.S. v. Schlei*, 122 f.3d 944, 979 (11th Cir. 1997). The case law varies; counsel is encouraged to check the law of the relevant circuit on this point.

A duplicitous indictment is not fatally defective. Rather, duplicity can be harmless error where the prosecution is required to select one count upon which to proceed. *Reno v. U.S.*, 317 F.2d 499, 502 (5th Cir. 1963). Failure to order an election of offenses would in effect deny the defendant the right to a unanimous verdict on each offense charged. *U.S. v. Warner*, 428 F.2d 730, 735 (8th Cir. 1970). It goes without saying, counsel should make a motion pretrial when appropriate.

\(^7\) The application of Rule 12(b)(2) to multiplicity issues is discussed below at footnote 8.
Election to cure duplicity occurs by the government’s amendment of form (i.e., deleting surplusage) or of substance (i.e., altering the nature of the charge). U.S. v. Aguilar, 756 F.2d 1418 (9th Cir. 1985).

Counsel should be aware that an election to cure duplicity differs from a Rule 14 election in that choosing one offense within the count to prosecute and treating the rest as surplusage can be challenged on the grounds that it is an improper amendment of the indictment. “Substantive amendment of an indictment, particularly if the amendment broadens or alters the offense charged, is reversible error since it violates the defendant’s Fifth Amendment right to stand trial only on the charges made by a grand jury in its indictment.” Aguilar, 756 F.2d at 1423. In other words, correction of clerical errors, such as “reading out” of surplusage, is permitted. Nevertheless, a defendant may still be prejudiced by a reading out if it results in the charge of a lesser offense for which the grand jury may never have indicted. Id.

Where neither count is duplicitous on its face, the issue of whether the government has proved a single count or multiple counts is an issue for the jury to decide. U.S. v. Greer, 956 F. Supp. 520 (D. Vt. 1997).

Duplicity and multiplicity issues often arise in conspiracies, as the government will allege one large conspiracy where in fact multiple separate conspiracies exist. When such a situation occurs, counsel should consider whether or not to challenge the duplicitous conspiracy count prior to trial. Failure to do so will result in a finding of waiver to the form of the indictment but not necessarily to the right to a unanimous jury verdict under Article III, sec. 2 and the Sixth Amendment. U.S. v. Gordon, 844 F.2d 1397 (9th Cir. 1988). It is improper for the government to charge a single conspiracy when multiple conspiracies are in fact involved. See U.S. v. Durades, 607 F.2d 818, 819-20 (9th Cir. 1979); U.S. v. Griffin, 464 F.2d 1352, 1355-56 (9th Cir. 1972); Barnard v. U.S., 342 F.2d 309, 313 (9th Cir. 1965). In the Ninth Circuit, the test for determining whether a single conspiracy exists “is whether there [is] one overall agreement to perform various functions to achieve the objectives of the conspiracy.” U.S. v. Otis, 127 F.3d 829, 835 (9th Cir. 1997).

The rationale for dismissing a single conspiracy count which, in fact, encompasses multiple conspiracies is based on the concept of impermissible variance of proof at trial. See Stirone v. U.S., 361 U.S. 212 (1960). A defendant asserting a claim of variance from an indictment charging a single conspiracy will succeed in obtaining reversal of his conviction only if he establishes that evidence presented at trial was insufficient to support the jury’s finding of a single conspiracy, and that he was prejudiced by the evidence. U.S. v. Magana, 118 F.3d 1173 (7th Cir. 1997). In determining whether a single conspiracy charge is duplicitous or really just a multi-conspiracy charge for which the client may not be responsible, factors such as the nature of the scheme, identities of the parties, and the commonality of time and goals should be considered. U.S. v. Zemek, 634 F.2d 1159, 1168 (9th Cir. 1980).

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8 Generally, the government must charge in one count a conspiracy which contemplates the violation of two different statutes. U.S. v. Licciardi, 30 F.3d 1127, 1131 (9th Cir. 1994). Thus, an indictment that contains a single count allegation of a conspiracy to commit several crimes is not duplicitous. The conspiracy itself may be the crime, and it may have multiple objectives. See U.S. v. Dale, 178 F.3d 429, 431 (6th Cir. 1999) (upholding a single charge of conspiracy to distribute two different drugs against a challenge on grounds of duplicity). However, an indictment is duplicitous if it alleges in a single count both a primary conspiracy and a secondary conspiracy to conceal the primary conspiracy. See U.S. v. Gordon, 844 F.2d 1397, 1400 (9th Cir. 1988); U.S. v. Licciardi, 30 F.3d at 1130.
In reviewing an indictment for duplicity, the court will look to the indictment itself to determine whether it may fairly be read to charge only one crime in each count. In other words, the court “does not review the evidence presented at trial to determine whether it would support charging several crimes rather than just one, but rather solely to assess whether the indictment itself can be read to charge only one violation in each count.” *U.S. v. Mastelotto*, 717 F.2d 1238, 1244 (9th Cir. 1983).

Notably, the Ninth Circuit has held that the language in 18 U.S.C. §371, directed at persons who “conspire either to commit any offense against the United States, or to defraud the United States” does not create two separate offenses. *U.S. v. Smith*, 891 F.2d 703, 711 (9th Cir. 1989). Instead, the language is interpreted to establish alternative means of committing a single offense. *Id.* at 712. This approach was affirmed in another area in *U.S. v. Mal*, 942 F.2d 682 (9th Cir. 1991). Following the Fifth and Seventh Circuits, the Ninth Circuit held in *Mal* that 26 U.S.C. §7201 “charges only the single crime of tax evasion, and that an individual violates the statute either by evading the assessment or the payment of taxes.” *Id.* at 688-89 (emphasis added). *Mal* is contrary to the Supreme Court’s previous holding that 26 U.S.C. §7201 included “the offense of willfully attempting to evade or defeat the assessment of tax as well as the offense of willfully attempting to evade or defeat the payment of a tax.” *Sansone v. U.S.*, 380 U.S. 343, 345 (1965) (emphasis in original).

*Smith* should be challenged -- the government relies heavily on conspiracy counts to obtain convictions. If counsel is unsuccessful pretrial, a unanimity instruction will preserve the record for appeal. See infra section 6.09.02, Multiplicity.

### 6.09.02 Multiplicity

Multiplicity in an indictment occurs when one crime or act has been divided into more than one count. *Gerberding v. U.S.*, 471 F.2d 55, 58 (8th Cir.1973). An indictment that charges a single offense in several counts violates the rule against multiplicity. *U.S. v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976); *but see U.S. v. Kennedy*, 726 F.2d 546 (9th Cir. 1984) (holding indictment charging defendant with three counts of making false statements to federally insured bank was not multiplicitious even though all documents submitted to bank repeated the same false statement and were submitted for the same purpose).

The rationale behind the rule is that an indictment that divides an act into several criminal charges allows multiple punishments for what is in essence only a single illegal act. *U.S. v. Jewell*, 827 F.2d 586, 588 (9th Cir. 1987); *U.S. v. Carter*, 576 F.2d 1061, 1064 (3d Cir. 1978). A multiplicitious indictment, therefore, violates the Double Jeopardy Clause of the Fifth Amendment by subjecting a defendant to

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9 A specific unanimity instruction is appropriate when there exists a genuine possibility of jury confusion or a possibility that a conviction may occur as the result of jurors concluding that the accused committed different acts. *U.S. v. Feldman*, 853 F.2d 648, 653 (9th Cir. 1988) (citation omitted). See, e.g., *U.S. v. Gordon*, 844 F.2d 1397 (9th Cir. 1988); *U.S. v. Payseno*, 782 F.2d 832, 835 (9th Cir. 1986); *U.S. v. Echeverry*, 698 F.2d 375, 377 (9th Cir. 1983); *U.S. v. Mastelotto*, 717 F.2d 1238 (9th Cir. 1983). Failure to give a specific unanimity instruction deprives an accused of his right to a unanimous jury verdict under art. III, §2 of the Sixth Amendment and Fed. R. Crim. P. 31. *Id.*
punishment for the same crime more than once.\textsuperscript{10} \textit{U.S. v. Chacko}, 169 F.3d 140, 145 (2d Cir. 1999) (citing \textit{U.S. v. Dixon}, 509 U.S. 688, 696 (1993)). Multiplicitous indictments also create a psychological effect on the jury at trial by suggesting that the alleged criminal activity is of greater scope and gravity than it actually is. \textit{Id.}; see also Wright,\textit{ Federal Practice and Procedure Criminal} 2d §142, at 475 (2d ed. 1982 & Supp. 1994). Similarly, an indictment is multiplicitous if the same offense and the same underlying facts that form the basis for that offense are used to support more than one charge. \textit{But see U.S. v. Castaneda}, 9 F.3d 761 (9th Cir. 1993), \textit{overruled on other grounds in U.S. v. Nordby}, 225 F.3d 1053 (9th Cir. 2000) (multiple charges of using a firearm were upheld where the elements of the predicate offenses were different).

In \textit{U.S. v. Molinaro}, 11 F.3d 853 (9th Cir. 1993), the indictment charged 32 counts of bank fraud. The government argued that each paper filed by the defendant with the bank constituted bank fraud. The court disagreed and reduced the number of counts from 32 to four. Each execution or attempted execution of a scheme to defraud constitutes bank fraud. However, each act in furtherance of a scheme is not bank fraud. \textit{Id.} at 860 (bank fraud does not allow punishment for each act in execution of a scheme to defraud); see also \textit{U.S. v. Heath}, 970 F.2d 1397, 1401-02 (5th Cir. 1992). The \textit{Heath} Court held that whether other counts are multiplicitous depends on the facts of the case in question. Relevant facts include chronological and substantive independence of acts and schemes and the function and purpose of each act. \textit{Id.}

In \textit{U.S. v. Olsowy}, 836 F.2d 439 (9th Cir. 1988), the indictment charged three separate counts of making false statements to a federal agent. These counts alleged that the defendant had, on three separate occasions, made precisely the same denials in response to the same questions posed to him by a Secret Service agent. The defendant was convicted of all three counts. On appeal, he argued that the government should not be able to “pile on” multiple convictions by repeatedly asking the same question of a criminal suspect. \textit{Id.} at 442. The court of appeals agreed, and held that where identical false statements, in either oral or written form, are made in response to identical questions, the declarant may be convicted only once. \textit{Id.} at 443.

The proper remedy for a multiplicitious indictment is an election or consolidation of the offending counts, and dismissal of the surplus counts. \textit{U.S. v. Universal Corp.}, 344 U.S. 218, 224 (1952). The entire indictment need not be dismissed. \textit{U.S. v. Smith}, 591 F.2d 1105, 1108 (5th Cir. 1979); \textit{U.S. v. Sue}, 586 F.2d 70, 71 (8th Cir. 1978). If a challenge to the multiplicity of an indictment is sustained on appeal, the proper remedy is generally re-sentencing. \textit{See e.g.}, \textit{U.S. v. Nash}, 115 F.3d 1431, 1438 (9th Cir. 1997). However, courts have not foreclosed the remedy of a new trial. \textit{Id.}

\textsuperscript{10} Rule 12 dictates that counsel raise all defenses and objections based on defects in the indictment prior to trial. Fed. R. Crim. P. 12(b)(2). However, the Advisory Committee Notes to Rule 12 indicate that a double jeopardy objection is not waived under Rule 12 if it is not made prior to trial. Thus, in \textit{Chacko}, the Second Circuit held that the defendant did not waive his right to challenge the multiplicity of the indictment, even though he first asserted the challenge following the return of the jury’s verdict. \textit{U.S. v. Chacko}, 169 F.3d at 145-46. Duplicity challenges do not implicite the Fifth Amendment’s prohibition against double jeopardy. Thus, as noted above, challenges to the duplicity of an indictment must comply with the requirements of Rule 12(b)(2).
In a situation where the government has charged criminal activity under both a specific statute governing the conduct alleged and a general offense covering the same conduct, the Supreme Court has indicated that the specific statute must take precedence over the general one. See Busic v. U.S., 446 U.S. 398 (1980); Simpson v. U.S., 435 U.S. 6 (1978). See also Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973), abrogated on other grounds, Heck v. Humphrey 512 U.S. 477 (1994); but see U.S. v. Steward, 16 F.3d 317, 319-20 (9th Cir. 1994) (defendant was charged with violations of both 21 U.S.C. §§841(a)(1) and 846; although one statute was more specific and both encompassed attempt, the court held the indictment was not duplicitous). The preferable course is to discourage multiplicitious indictments by filing pretrial motions for consolidation. See Fed. R. Crim. P. 7(c), advisory committee notes.

6.09.03 Bill of Particulars

Some indictments are so lacking in substance that neither counsel nor client can identify the conduct for which the government instituted the prosecution. The function of a bill of particulars is to notify the defendant of the precise nature of the charges against him and thereby give him an opportunity to prepare his defense. U.S. v. Robertson, 15 F.3d 862, 873 (9th Cir. 1994) (defendant failed to demonstrate surprise, prejudice, or greater double jeopardy concerns; bill of particulars properly denied), overruled on other grounds, 514 U.S. 669 (1995); U.S. v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993). The bill also helps protect against a second prosecution on the same facts. See Robertson, 15 F.3d at 864. The bill requires the government to particularize the matters charged in the indictment, thus elucidating the theory of its prosecution. Yeargain v. U.S., 314 F.2d 881, 882 (9th Cir. 1963); U.S. v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965). However, the grant or denial of a bill of particulars is within the court’s discretion. Will v. U.S., 389 U.S. 90 (1967).

While the bill of particulars is not intended to allow the defendant to preview the government’s evidence, several district court decision have held that a defendant should not be deprived of information he needs to prepare a defense simply because the defendant requests information that might be used by the government as evidence. U.S. v. Bailey, 689 F. Supp. 1463 (N.D. Ill. 1987); U.S. v. DeGroote, 122 F.R.D. 131 (W.D.N.Y. 1988) (both involving §7206(1) cases); U.S. v. Crisona, 271 F. Supp. 150 (S.D.N.Y. 1967).

6.10 MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY

There are three sources for a defendant’s right to a speedy trial: the Due Process Clause of the Fifth Amendment, the Sixth Amendment Speedy Trial provision, and the Speedy Trial Act. If a pre-accusation delay has harmed a defendant, s/he may move for a dismissal under the Fifth Amendment Due Process Clause. To prevail on this claim, a defendant must show either that he has suffered actual prejudice from the delay, or that the prosecution intentionally or recklessly delayed the indictment for strategic advantage. U.S. v. Lovasco, 431 U.S. 783, 788-90 (1977); U.S. v. Marion, 404 U.S. 307, 325-26 (1971); U.S. v. Loud Hawk, 816 F.2d 1323, 1324 (9th Cir. 1987); U.S. v. Carruth, 699 F.2d

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11 If the defendant is a juvenile, there is a fourth source of the defendant’s right to a speedy trial: The Federal Juvenile Delinquency Act, 18 U.S.C. § 5036.
Typically, the Ninth Circuit deems lost testimony "to have been adequately protected when the government brings charges within the applicable statutes of limitation." U.S. v. Doe, 149 F.3d at 948. When the government does bring charges within the applicable statute of limitation, to prevail, the defendant must show that "the lost testimony actually impaired meaningfully his ability to defend himself." Id. Importantly, the Ninth Circuit has held that "claims of prejudice based on failed or post-event witness memories lack merit where a defendant can effectively cross examine the witness about the event." Id. at 949 (citing U.S. v. Bracy, 67 F.3d 1421, 1427 (9th Cir. 1995)).
The constitutional speedy trial protection of the Sixth Amendment does not attach before a defendant is “indicted, arrested, or otherwise officially accused.” *MacDonald*, 456 U.S. at 6. No speedy trial rights attach to the following instances: detention and search of a defendant, coupled with *Miranda* warnings, *Fagan v. U.S.*, 545 F.2d 1005, 1007-08 (5th Cir. 1977); *U.S. v. Costanza*, 549 F.2d 1126, 1131-32 (8th Cir. 1977); *U.S. v. Vispi*, 545 F.2d 328, 331 (2d Cir. 1976); when an individual is required to appear before a grand jury, *U.S. v. Kopel*, 552 F.2d 1265, 1276 (7th Cir. 1977); or when a warrant is issued for the person’s arrest, *U.S. v. Ramos*, 586 F.2d 1078, 1079 (5th Cir. 1978).

In *MacDonald*, 456 U.S. at 8-9 n.1, the Supreme Court held that if the government voluntarily dismisses pending charges, the Sixth Amendment Speedy Trial Clause is inapplicable to the delay occurring after charges were formally dismissed and before the charges were re instituted. For example, in *U.S. v. Gonzalez-Sandoval*, 894 F.2d 1043 (9th Cir. 1990), the Court rejected constitutional claims under the Sixth Amendment Speedy Trial Clause and the Fifth Amendment Due Process Clause. In *Gonzalez-Sandoval*, police arrested the defendant in 1986, but all charges were dropped. In 1988, he was indicted. The court held that, because no charges were pending, the two year delay did not violate the Speedy Trial Clause. *Id.* at 1049-50.

Traditionally, a defendant moving to dismiss an indictment based on a Sixth Amendment speedy trial claim must show some kind of actual prejudice. See *U.S. v. Lovasco*, 431 U.S. 783 (1977); *U.S. v. Marion*, 404 U.S. 307 (1971). But in *Doggett v. U.S.*, 505 U.S. 647, 655-56 (1992), a deeply divided Supreme Court held that a defendant need not always show actual prejudice if the delay is sufficiently long.\(^{13}\)

In evaluating the motion to dismiss the indictment, the Court undertook a four part inquiry: (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as the delay’s result. *Doggett*, 505 U.S. at 651 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). After conducting the four-part analysis, the Court stated that “[w]hen the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief.” *Id.* at 658. But see *U.S. v. Manning*, 56 F.3d 1188 (9th Cir. 1995) (seven year delay did not violate speedy trial where defendant was living in Israel and not extradited for five years; defendant’s assertions of lost witnesses and exculpatory evidence were speculative).

In *U.S. v. Loud Hawk*, 474 U.S. 302 (1986), the Supreme Court analyzed two periods of pretrial delay, the first being the time from the court’s dismissal of the indictment to its reinstatement after appeal.

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\(^{13}\) In *Doggett*, the defendant was indicted in February 1980, but he fled to Columbia before Drug Enforcement Agency (DEA) agents could arrest him. Later, the defendant was arrested on drug charges in Panama; the DEA requested his expulsion, but did not pursue the request. In 1982, the defendant returned to the U.S., but the DEA did not notice because it was not tracking its request. Without using an alias, the defendant moved to Virginia, earned a college degree, got married, and found a job. In 1988, the DEA learned of the defendant’s return and arrested him, eight and a half years after the indictment was filed, and six years since he had returned to the United States. *Doggett* at 654.
The Court held this time should be excluded because the district court judge did not require the defendants to post bond or otherwise restrict their freedom after dismissal and appeal of the dismissal. *Id.* at 310-12. While the defendants argued that since they were still the subject of a criminal investigation after dismissal, that time should be included in the speedy trial calculation, the Court was not persuaded. *Id.* However, if the defendants had been required to post bond, as provided in 18 U.S.C. §3142(e), then that period of time may have counted as delay for Speedy Trial purposes. *Id.*

The *Loud Hawk* Court then analyzed the delay resulting from a series of interlocutory appeals. Since, at the time of the interlocutory appeals, the indictment in *Loud Hawk* had been reinstated, the Supreme Court applied the four-part test, *supra*, described in *Doggett* and first established in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the defendants’ Sixth Amendment speedy trial rights had been violated. *U.S. v. Loud Hawk*, 474 U.S. at 314. The Court found that the delays asserted by defendants in support of their speedy trial claim did not violate the Speedy Trial Clause.

Lower courts have held that the *Barker v. Wingo* test applies to delays between arrest and indictment as well as to delays between indictment and trial. *U.S. v. Edwards*, 577 F.2d 883, 888 (5th Cir. 1978). However, a court may refuse to apply the *Barker v. Wingo* balancing test altogether where the length of the delay is very short. *U.S. v. Parker*, 586 F.2d 422, 430 (5th Cir. 1978).
6.12 MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT

Title 18 U.S.C. §3161 provides for specific time limits in which federal criminal cases are to be prosecuted and brought to trial. Section 3161(h) delineates specific excludable time periods. Before filing a motion to dismiss for Speedy Trial Act violations, counsel should study the specific provisions of the Act. Section 3162 provides specific sanctions for failure to comply with the time limits including dismissal, with or without prejudice. Section 3161 sets out specific time limits; when those limits are not honored, section 3162 requires dismissal. The provisions of section 3161 apply when a suspect is either formally charged when arrested or thereafter, or is subject to some continuing restraint imposed from the charge on which he is eventually tried. U.S. v. Hoslett, 998 F.2d 648, 652 (9th Cir. 1993); see also U.S. v. Contreras, 63 F.3d 852 (9th Cir. 1995).

The reported opinions dealing with motions to dismiss under the Speedy Trial Act focus on four separate areas: (1) the requirement that a defendant be indicted or charged in an information within 30 days from the date of the arrest (18 U.S.C. §3161(b)); (2) the requirement that the defendant be brought to trial within 70 days from the filing of the indictment or information (18 U.S.C. §3161(c)); (3) the failure to provide a defendant with a mandatory 30 days preparation time before trial (18 U.S.C. §3161(c)(2)); and (4) the propriety of the district court’s findings of excludable time under the enumerated sections, 18 U.S.C. §3161(h), which toll the 70-day time limit.

6.12.01 Arrest to Indictment

Title 18 U.S.C. §3161(b) provides:

Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

An “arrest” is the actual charging of a federal offense, not simply a detention or charge by state or military authorities. U.S. v. Bloom, 865 F.2d 485, 490-91 (2d Cir. 1989) (filing complaint without the person actually being taken into federal custody not enough to trigger speedy trial clock); U.S. v. Johnson, 815 F.2d 309, 312 (5th Cir. 1987); U.S. v. Maruska, 717 F.2d 1222 (8th Cir. 1983); U.S. v. Candelaria, 704 F.2d 1129, 1131 (9th Cir. 1983); U.S. v. Sayers, 698 F.2d 1128, 1130-31 (11th Cir. 1983); U.S. v. Shahryar, 719 F.2d 1522, 1524, (11th Cir. 1983). Speedy trial rights for federal charges do not attach until a federal arrest occurs, even if the accused is in the custody of another authority. U.S. v. Mills 964 F.2d 1186 (D.C. Cir. 1992); U.S. v. Simmons, 923 F.2d 934, 955 (2d Cir. 1991); U.S. v. Charles, 883 F.2d 355 (5th Cir. 1989); U.S. v. Manuel, 706 F.2d 908, 914 (9th Cir. 1983); U.S. v. Lai Ming Tanu, 589 F.2d 82, 88-89 (2d Cir. 1978); U.S. v. Burkhalter, 583 F.2d 389, 392 (8th Cir. 1978). The clock starts with the filing of a complaint and taking the accused into federal custody. U.S. v. Bagster, 915 F.2d 607 (10th Cir. 1990); U.S. v. Bloom, 865 F.2d 485 (2d Cir. 1989); U.S. v. Shahryar, 719 F.2d 1522 (11th Cir. 1983).

In U.S. v. Soto, 1 F.3d 920, 923 (9th Cir. 1993), the court held that the defendant’s speedy trial rights did not arise until the date of the federal indictment and that the Speedy Trial Act was not violated.
by the defendant’s federal indictment issuing more than 30 days after his state arrest. If, however, a federal detainer is lodged against an inmate at a state or local institution and the inmate signs the demand for speedy resolution and gives it to the prison authorities to mail, the federal prosecuting authorities must bring the inmate to trial in federal court within 180 days. See Interstate Agreement on Detainers, 18 U.S.C. App. III. See also Fax v. Michigan, 507 U.S. 43 (1993) (180-day time period does not commence until prisoner’s disposition request had actually been delivered to the court and the prosecutor of the jurisdiction that lodged the detainer against him); U.S. v. Collins, 90 F.3d 1420 (9th Cir. 1996). Cf. New York v. Hill, ___ U.S. ___, 120 S.Ct. 659 (2000) (right to trial within 180 days under IAD held waived by defendant’s agreement to trial date outside 180-day limit).

If a defendant is unable to stand trial, then under the Interstate Agreement on Detainers, 18 U.S.C. App. III, the 180 day clock is tolled. The circuits are split about when a defendant is unable to stand trial. The Second, Fourth, and Ninth Circuits apply the tolling provisions of the Speedy Trial Act, 18 U.S.C. §3161(h)(1)-(9). See U.S. v. Collins, 90 F.3d 1420, (9th Cir. 1996); U.S. v. Cephas, 937 F.2d 816, 819 (2d Cir. 1991); U.S. v. Odum, 674 F.2d 228, 231 (4th Cir. 1982). The Fifth Circuit considers only the defendant’s physical and mental incapacity. Birdwell v. Skeen, 983 F.2d 1332, 1340-41 (5th Cir. 1993). The Seventh and Eighth Circuits consider whether defendant is legally or administratively unavailable. U.S. v. Roy, 830 F.2d 628, 635 (7th Cir. 1987); Young v. Mabry, 596 F.2d 339, 343 (8th Cir. 1979).

The Speedy Trial Act is not implicated when a defendant is detained on civil charges by the Immigration and Naturalization Service (INS), unless the detention by INS is merely a ruse to detain the defendant for later criminal prosecution. U.S. v. Cepeda-Luna, 989 F.2d 353 (9th Cir. 1993). This is often the case and counsel is warned to challenge all statements taken by INS officers allegedly used for entry purposes which are in fact the basis of a criminal prosecution.

18 U.S.C. §3162(a) provides for sanctions where the government fails to charge an individual within the time limits of §3161(b):

If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by §3161(b) as extended by §3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

Sections 3161(b) and 3162(a) require that where an individual is charged in a criminal complaint and an indictment is filed beyond the 30-day time limit, all charges in the indictment that were originally contained in the complaint but were not brought before the court within the 30-day limit must be dismissed. U.S. v. Napolitano, 761 F.2d 135, 138 (2d Cir. 1985); U.S. v. Reme, 738 F.2d 1156, 1164 (11th Cir. 1984); U.S. v. Heldt, 745 F.2d 1275, 1279-80 (9th Cir. 1984); U.S. v. Pollock, 726 F.2d 1456, 1459-63 (9th Cir. 1984); see also U.S. v. Antonio, 705 F.2d 1483, 1486 (9th Cir. 1983).

However, the court may only dismiss federal criminal charges that are either stated in the complaint or already in existence at the time of the arrest. U.S. v. Mills, 964 F.2d 1186 (D.C. Cir. 1992); U.S. v. Gonzalez-Sandoval, 894 F.2d 1043, 1049-50 (9th Cir. 1990); U.S. v. Robinson, 767 F.2d 765, 768
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(11th Cir. 1985); but see U.S. v. DiGregorio, 795 F. Supp. 630 (S.D.N.Y. 1993) (appropriate remedy for government’s failure to bring arrestees before a judicial officer is not dismissal of indictment, but suppression of any prejudicial statements made during period of prearraignment delay); see also U.S. v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) (30-day period from arrest to indictment cannot be waived by defendant because interests protected by Speedy Trial Act belong to society at-large, not just to the individual defendant).

6.12.02 Defense Preparation Period

Title 18 U.S.C. §3161(c)(2) provides a mandatory 30-day time period from the date when defendant first appears through counsel to the commencement of trial. This section is meant to insure that defendant has adequate time for pretrial preparation. U.S. v. Mers, 701 F.2d 1321, 1333 (11th Cir. 1983). In U.S. v. Rojas-Contreras, 474 U.S. 231, 234-37 (1985), the Court held that the Speedy Trial Act does not require that the defendant be granted another 30-day preparation period upon the filing of a superseding indictment. The Court noted, however, that the district court had broad discretion to grant a continuance under §3161(h)(8) if further preparation time was necessary following a superseding indictment. U.S. v. Rojas-Contreras, 474 U.S. at 234-37.

In U.S. v. Adu, 770 F.2d 1511 (9th Cir. 1985), the Ninth Circuit similarly held that when a superseding indictment merely corrects a clerical error in the original indictment, the 30-day trial preparation period is not required. See also U.S. v. Bogard, 846 F.2d 563, 566 (9th Cir. 1988) (defendant not entitled to continuance because of delays in connection with discovery and unavailability of his local counsel where the difficulties stemmed from defendant’s principal counsel’s failure to anticipate and prepare adequately for the procedural and logistical challenges of remote representation), superceded on other grounds in Simpson v. Lear Astronics Corp., 77 F.3d 1170 (9th Cir. 1996); see also U.S. v. Punelli, 892 F.2d 1364, 1369 (8th Cir. 1990) (speedy trial clock does not restart when superseding indictment is filed, even though it is materially different from first indictment and the defendant suffered prejudice).

However, if an indictment is dismissed on defendant’s motion, and the defendant is thereafter reindicted, both the 30-day trial preparation period and the 70-day speedy trial time period start over. U.S. v. Karsseboom, 881 F.2d 604, 606 (9th Cir. 1989). This rule applies only if the indictment is dismissed in its entirety. If the district court dismisses some but not all counts of an indictment and a defendant is reindicted on the dismissed counts, the retained counts and the superseding indictment both inherit the 70-day clock applied to the original charge. Also, if a superseding indictment is used only to make a “minor” correction -- leaving the gravamen of the charges the same and the evidence unaffected -- the defendant will still be expected to go to trial within the original 70-day period. Id. at 607. The mere fact that a subsequent indictment overlaps with a prior one does not automatically make the subsequent indictment superseding. U.S. v. Duque, 62 F.3d 1146 (9th Cir. 1995) (court granted defendants’ motion for new indictment to move trial to Arizona; court found no speedy trial violation when 70-day period exceeded because subsequent indictment given to accommodate defendants and not to clarify or remedy defects in existing charges).

6.12.03 Indictment to Trial
Under 18 U.S.C. §3161(c)(1), a defendant must be brought to trial within 70 days of either the filing of the indictment or information, or the defendant’s first appearance before a judicial officer of the court in which the charge is pending, whichever occurs last. Continuances due to general congestion of courts’ calendars are forbidden by the Act. §3161(h)(8)(C); U.S. v. Engstrom, 7 F.3d 1423, 1427 (9th Cir. 1993). Dismissal of the indictment is mandatory when the 70-day statutory period is exceeded. This dismissal may be with or without prejudice. U.S. v. Taylor, 487 U.S. 326, 332-33 (1988). If the dismissal is made without prejudice, the charges may be brought again. The day of indictment does not count in the 70-day calculation. U.S. v. Jurn, 766 F.2d 465, 466 (11th Cir. 1985). Moreover, the Act provides for nine specific periods of “excludable time” which toll the running of the 70-day time period. §1361(h)(1).

Under 18 U.S.C. §3161(c)(1), the defendant must appear in the charging district before the time period begins to run. U.S. v. Palomba, 31 F.3d 1456 (9th Cir. 1994), on appeal after remand, 182 F.3d 1121 (1999); U.S. v. Wilson, 720 F.2d 608 (9th Cir. 1983). When the defendant is arrested prior to indictment and appears before a magistrate who orders the defendant held to answer the charges, the 70-day period runs from the date of the indictment, rather than the appearance before the magistrate. U.S. v. Perez-Revereles, 715 F.2d 1348, 1350 (9th Cir. 1983); U.S. v. Haiges, 688 F.2d 1273, 1274 (9th Cir. 1982). The defendant’s first appearance means his first appearance through counsel. Courts have construed this to mean appearance through counsel retained or appointed for trial, and not merely appearing with an attorney at the initial court date. U.S. v. Daly, 716 F.2d 1499, 1505 (9th Cir. 1983). In U.S. v. Darby, 744 U.S. 1508 (1984), the court held that the Speedy Trial Act was not violated where retained counsel subsequently withdrew and was replaced by appointed counsel and the defendant was brought to trial less than 30 days after counsel was appointed. Id. at 1520. The court found the phrase “first appears through counsel” did not anticipate subsequent appearances or any particular type of counsel, such as trial counsel. Id.

Under 18 U.S.C. §3162(h)(7), if a defendant is joined for a trial with a co-defendant whose time for trial has not run and no motion for severance has been granted, there is excludable time for a “reasonable period of delay.” See U.S. v. Theron, 782 F.2d 1510 (10th Cir. 1986); U.S. v. Zielie, 734 F.2d 1447, 1454 (11th Cir. 1984). Typically, courts determine what constitutes a “reasonable period of delay” on a case by case basis. See U.S. v. Hall, 181 F.3d 1057, 1062 (9th Cir. 1999); U.S. v. Franklin, 148 F.3d 451, 457 (5th Cir. 1998); U.S. v. Theron, 782 F.2d 1510, 1514 (10th Cir. 1986); U.S. v. Darby, 744 F.2d 1508, 1518-19 (11th Cir. 1984); and U.S. v. Dennis, 737 F.2d 617, 621 (7th Cir. 1984). In cases where multiple defendants are joined for trial, the 70-day time period begins to run on the date the last co-defendant is indicted or arraigned. U.S. v. Baker, 10 F.3d 1374, 1400 (9th Cir. 1993) (citing Henderson v. U.S., 476 U.S. 321, 323, n. 2 (1986)); U.S. v. Blackmon, 874 F.2d 378, 380 (6th

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14 If the court dismisses the indictment with prejudice, the government may still file a superseding indictment. Upon filing, the superseding indictment will begin a new speedy trial clock for all charges not contained in the original indictment. However, the government may not include in the superseding indictment charges that (1) it included in the original indictment or (2) the Double Jeopardy Clause required the government to include in the original indictment. U.S. v. Alford, 142 F.3d 825, 829 (5th Cir. 1998); U.S. v. Kelly, 45 F.3d 45, 48 (2d Cir. 1995); U.S. v. Lattany, 982 F.2d at 872 n. 7. Counsel should also note that following a dismissal with prejudice, the government may file a superseding indictment charging the defendant with offenses arising out of the same facts underlying the charges listed in the original indictment. U.S. v. Brown, 183 F.3d 1306, 1310 (11th Cir. 1999).

The district court may exclude time based on the “ends of justice” under §3161(h)(8)(A) before the expiration of the 70-day term. U.S. v. Lattany, 982 F.2d 866 (3d Cir. 1993); U.S. v. Theron, 782 F.2d 1510 (10th Cir. 1986); U.S. v. Gallardo, 773 F.2d 1496, 1504-05 (9th Cir. 1985). In two circuits, district courts must specifically limit in time each “ends of justice” continuance they grant. U.S. v. Jordan, 915 F.2d 563, 565 (9th Cir. 1990); U.S. v. Gambino, 59 F.3d 353, 358 (2d Cir. 1995). Five other circuits permit district courts to grant open-ended “ends of justice” continuances. U.S. v. Rush, 738 F.2d 497, 508 (1st Cir. 1984); U.S. v. Lattany, 982 F.2d at 868; U.S. v. Jones, 56 F.3d 581, 585 (5th Cir. 1995); U.S. v. Spring, 80 F.3d 1450 (10th Cir. 1996); U.S. v. Twitty, 107 F.3d 1482 (11th Cir. 1997).

Despite this conflict, all circuits require district courts to make findings supported by the record to justify their grants of “ends of justice” continuances. See 18 U.S.C. §3161(h)(8)(A). However, some circuits permit district courts to delay articulating on the record the reasons for granting an “ends of justice” continuance so long as the order granting the continuance is entered before the Act’s seventy-day time limit expires. U.S. v Stackhouse, 183 F.3d 900, 901 (8th Cir. 1999); U.S. v. Lattany, 982 F.2d at 887. But see Ramirez-Cortez, 213 F.3d at 1154-55 (magistrate judge’s failure to make findings not cured by district court’s post-hoc evaluations of reasons for exclusion of time).

In Theron, 782 F.2d 1510, the Tenth Circuit declined to find justification for a district court’s grant of an “ends of justice” continuance for which eleven of twelve co-defendants moved. Pending trial, the government released the moving co-defendants and detained the non-moving co-defendant. Id. at 1512. The district court justified its decision to grant the continuance on three grounds: “(1) the co-defendants’ need for preparation time; (2) the complexity of the case; and (3) the desirability of trying all defendants at once.” Theron, 782 F.2d at 1512-13. As to the first ground, the court held that 18 U.S.C. §3161(h)(8) does not permit courts to weigh the interest of co-defendants in determining whether or not to grant an “ends of justice” continuance. The court noted that subsection (h)(7) addresses exclusions of time “because co-defendants are in the case, not subsection (h)(8).” Id. at 1513. As to the second and third grounds, the court held that the coincidence of a complex case and multiple defendants, without more, constitutes an insufficient basis on which to grant an “ends of justice” continuance. Id. The court wrote, “holding that a complex multiple defendant case is enough to toll the Act under subsection (h)(8) would emasculate the specific separate provision in subsection (h)(7), which excludes from the seventy-day limitation ‘a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.’” Id. at 1513-14. Accordingly, the court found that “the government and the court must look to subsection (h)(7) to protect their interests in trying complex conspiracy cases in a single trial.” Id. at 1514. See also U.S. v. Miranda, 986 F.2d 1283, 1285 (9th Cir. 1993) (court held Speedy Trial Act was not violated by the exclusion of a 106-day period during which the defendant’s mental competency evaluation report was under preparation); U.S. v. Tanner, 941 F.2d 574, 583 (7th Cir. 1991) (speedy trial clock did not begin to run until date on which co-defendant completed consent to transfer case to district of her arrest, which effectively severed her co-defendants).

If either party files a pretrial motion (even if oral), the time from filing to ruling is excluded from the 70-day period. Henderson v. U.S., 476 U.S. 321, 330 (1986); U.S. v. Aviles, 170 F.3d 863, 869 (9th
Cir. 1999) (holding calculation of seventy-day time limit does not include day on which motion is filed or heard). Under §3161(h)(1)(J), a motion may be taken under advisement for up to 30 days. But see U.S. v. Bufalino, 683 F.2d 639, 641-46 (2d Cir. 1982) (pretrial motions taken under advisement for 210 days). See also U.S. v. Long, 900 F.2d 1270-75 (8th Cir. 1990) (magistrate’s filing of report and recommendation with the district court on motions served to re-file the motions and began a new excludable 30-day time period). A delay resulting from a pretrial motion is excludable whether or not the motion was necessary to an effective or vigorous defense. U.S. v. Morales, 875 F.2d 775, 777 (9th Cir. 1989). See also U.S. v. Aviles-Alvarez, 868 F.2d 1108 (9th Cir. 1989). Unless the district court rules that a superseding indictment moots pending motions regarding the prior indictment, motions continue to toll the speedy trial clock for both the original and new charges. U.S. v. Gonzales, 897 F.2d 1312, 1321 (5th Cir. 1990).

Notably, the Act does not exclude all pretrial delay that merely coincides with the pendency of a motion. U.S. v. Clymer, 25 F.3d 824, 830 (9th Cir. 1994). The Clymer Court stated:

According to its plain terms, §3161(h)(1)(F) applies only when the delay in bringing the case to trial is the result of the pendency of a pretrial motion . . . . Congress did not intend to allow district courts to render the time limits in the Act a nullity by setting motions for hearing at the time of trial or after trial and thereby making all time prior to trial excludable. Id. (citations omitted; emphasis in original).

In Clymer, the court ruled that it was improper for the district court to exclude time from a pending motion to dismiss when the trial court continued a ruling on the motion until after trial. Id. The court reasoned that the time was not excludable because the delay was not related to consideration of the motion. Id. Following Clymer, the court in U.S. v. George, 85 F.3d 1433 (9th Cir. 1996), concluded that where there were government pretrial motions after the jury was impaneled, but before presentation of evidence, it was not error to exclude 85 day pendency of motion from speedy trial calculation as long as the trial court ruled on the motion before trial. See also U.S. v. Hardeman, 206 F.3d 1320 (9th Cir. 2000) (where all pre-trial rulings had been made and most discovery matters had been informally resolved, simply leaving a discovery motion pending was insufficient to toll speedy trial clock).

Delay based on an interlocutory appeal is excludable under §3161(h)(1)(E). The time is measured from the filing of the appeal to the appellate court’s resolution of the appeal. U.S. v. Davenport, 935 F.2d 1223 (11th Cir. 1991); U.S. v. Rivera, 844 F.2d 916 (2d Cir. 1988). Where there is an interlocutory appeal, the period of excludable delay provided for under 18 U.S.C. §3161(h)(1)(E) ends with the issuance of the mandate, and not with its receipt by the district court. U.S. v. Rivera, 844 F.2d at 920; U.S. v. Ross, 654 F.2d 612 (9th Cir. 1981). Under the “ends of justice” exception, when the government appeals a court’s denial of a prosecutor’s motion to transfer a juvenile for adult prosecution, a defendant may be brought to trial beyond the 30-day limit. U.S. v. Doe, 94 F.3d 532 (9th Cir. 1996). Likewise, delay resulting from a psychiatric examination to determine sanity at the time of the offense or competency to stand trial is excludable under the mental competency provisions under §3161(h)(1)(A). U.S. v. Stone, 813 F.2d 1536 (9th Cir. 1987); U.S. v. Crosby, 713 F.2d 1066 (5th Cir. 1983).
The government bears the burden of “stating and validating” the reasons for prosecutorial delay. U.S. v. Miller, 23 F.3d 194, 197 (8th Cir. 1994). Where intentional or repetitive disregard for the dictates of the Speedy Trial Act is found, a court of appeal is more likely to dismiss with prejudice. U.S. v. Wright, 6 F.3d 811, 814 (D.C. Cir. 1993) (collecting cases); U.S. v. Saltzman, 984 F.2d 1087, 1093-94 (10th Cir. 1993). Also relevant is the prejudice that results from extensive pretrial detention. U.S. v. Clymer, 25 F.3d 824, 832 (9th Cir. 1994). When a Speedy Trial violation is found on appeal, the matter is generally remanded for a determination of whether or not the dismissal should be with prejudice. U.S. v. Alford, 142 F.3d 825, 830 (5th Cir. 1998). However, in appropriate circumstances and when the record contains all the relevant facts, an appellate court may make the determination. Clymer, 25 F.3d at 831. Note that the time period is tolled when a defendant is a fugitive. U.S. v. Taylor, 821 F.2d 1377, 1380 (9th Cir. 1987) (overturned on other grounds in U.S. v. Taylor, 487 U.S. 326 (1988)). But see U.S. v. Studnicka, 777 F.2d 652, 657 n.16 (11th Cir. 1985) (rejecting government argument that upon becoming a fugitive, a defendant waives his right to a speedy trial upon recapture; 70-day period simply runs anew upon recapture).

In denying a motion to dismiss for violation of the Speedy Trial Act on the ground that the court erred in granting an “ends of justice” exclusion, the court must make specific findings concerning the reasons for the denial. U.S. v. Clymer, 25 F.3d 824, 828 (9th Cir. 1994); U.S. v. Bryant, 726 F.2d 510 (9th Cir. 1984). These findings need not be made contemporaneously with the granting of a continuance for the government. U.S. v. Brooks, 697 F.2d 517 (3d Cir. 1982); U.S. v. Clifford, 664 F.2d 1090 (8th Cir. 1981); U.S. v. Edwards, 627 F.2d 460 (D.C. Cir. 1980). A court may not designate a continuance “in the ends of justice” nunc pro tunc upon hearing a motion to dismiss. U.S. v. Lattany, 982 F.2d at 877; U.S. v. Jordan, 915 F.2d 563, 566 (9th Cir. 1990); U.S. v. Richmond, 735 F.2d 208 (6th Cir. 1984).

6.12.04 Dismissal With or Without Prejudice

Title 18 U.S.C. §3162(a)(1) provides for the dismissal of charges not brought within the 30-day time limit. Title 18 U.S.C. §3162(a)(2) provides for the dismissal of charges when the government fails to bring a defendant to trial within seventy days of indictment. 18 U.S.C. §3161(c)(1). Both provisions permit courts to dismiss charges either with or without prejudice. Neither provision prefers one form of dismissal to the other. U.S. v. Taylor, 487 U.S. 326, 335 (1988). In U.S. v. Caparella, 716 F.2d 976, 978-81 (2d Cir. 1983), the court found that the legislative history of the Act shows that the aim of 18 U.S.C. §3161 is to make speedy trial a reality, and that §3162(a)(1) is integral in doing so. The court stated, “[w]e view a violation of any of the act’s time limitations as negatively impacting on the administration of the act.” Id. at 981; see also U.S. v. Tertrou, 742 F.2d 538, 539-40 (9th Cir. 1984); U.S. v. Antonio, 705 F.2d 1483, 1487 (9th Cir. 1983).

In Taylor, 487 U.S. 326, the Supreme Court reversed the Ninth Circuit’s affirmance of the district court’s dismissal with prejudice for a violation of the Speedy Trial Act. Taylor’s trial was scheduled one day prior to the expiration of the 70-day period in which a defendant must be tried. Taylor failed to appear for trial and was arrested approximately three months later. However, by the time he was returned to trial, the court concluded that the Act had been violated. Taylor, 487 U.S. at 343-344. The question before the Supreme Court was whether the district court abused its discretion under the Act in dismissing the indictment with prejudice rather than permitting re-prosecution. Taylor, 487 U.S. 326. The Supreme
Court held that §3162(a)(2)’s language established that, in determining whether to dismiss with or without prejudice, courts must consider at least the three factors specified in that section: first, the seriousness of the offense; second, the facts and circumstances of the case that lead to dismissal; and third, the impact of re-prosecution on the administration of this chapter and the administration of justice. *Taylor*, 487 U.S. at 343-44. The Court went on to state that the Act’s legislative history indicated that prejudice to a defendant should also be considered before re-prosecution is barred, and that the decision to dismiss with or without prejudice is left to the district court's guided discretion, with neither remedy having priority. *Id.* The Court held that the district court abused its discretion in this particular case because it did not explain how it factored in the seriousness of the offenses with which the respondent was charged. *Id.*

One issue left unresolved by *Taylor* is whether or not the district court must hold a hearing before determining whether the dismissal will be with or without prejudice. The circuits are divided on this issue. *See, e.g., U.S. v. Delgado-Miranda*, 951 F.2d 1063 (9th Cir. 1991) (since the decision to dismiss with or without prejudice impacts on the defendant’s liberty interest, the district court must hold a hearing); *but see U.S. v. Pena-Carrillo*, 46 F.3d 879 (9th Cir. 1995) (no error where district court made factual findings at hearing for other Speedy Trial motions, though district court’s original denial violated *Delgado-Miranda*); *U.S. v. Tunnessen*, 763 F.2d 74 (2d Cir. 1985) (no need for a hearing on remand because the decision to dismiss with or without prejudice would be an abuse of discretion); *U.S. v. Russo*, 741 F.2d 1264 (11th Cir. 1984) (district court determined issue of prejudice on remand without a hearing, although evidentiary hearing was later conducted following grant of petition for reconsideration).

A second issue the Supreme Court has not addressed is what should happen when charges are ordered dismissed pursuant to §3162(a)(2), but the order of dismissal fails to specify whether the dismissal was with or without prejudice. The Eleventh Circuit addressed this issue in *U.S. v. Brown*, 183 F.3d 1306 (11th Cir. 1999). The court determined that the charges should be dismissed with prejudice only if, under the factors set forth in §3162(a)(2), the initial indictment should have been dismissed with prejudice. *Id.* at 1314. Thus, lower courts that confront this issue must resolve it by applying the analysis that should have been applied by the court that initially dismissed the charges.

### 6.13 MOTION TO DISMISS UNDER RULE 48

Federal Rule of Criminal Procedure 48 states:

(a) The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing the defendant to trial, the court may dismiss the indictment, information or complaint.

*Fed. R. Crim. P. 48(b).* This rule affords the court discretion to dismiss an indictment due to unnecessary delay even where no Sixth Amendment violation has occurred. *U.S. v. DeLuna*, 763 F.2d 897, 923 (8th
The Ninth Circuit expressly limits Rule 48(b) dismissals to cases where the district court has forewarned the government that dismissal is imminent. *U.S. v. Hattrup*, 763 F.2d 376, 377 (9th Cir. 1985). Though courts have discretion about when to dismiss, it should employ this power only in rare circumstances. *U.S. v. Talbot*, 51 F.3d 183, 186 (9th Cir. 1995) (citing *U.S. v. Huntley*, 976 F.2d 1287, 1291 (9th Cir. 1992)). Additionally, the district court must exercise “caution” in granting a dismissal under the Rule, and this requirement is generally held satisfied when there is a finding of prosecutorial misconduct and prejudice or a threat of prejudice. *U.S. v. Sears, Roebuck & Co.*, 877 F.2d 734, 738-39 (9th Cir. 1989). See *U.S. v. Huntley*, 976 F.2d at 1287, 1291-93 (9th Cir. 1992) (error to grant Rule 48 dismissal due to preindictment delay where no misconduct found or forewarning given).

Prior to the enactment of Rule 48(a), a prosecutor generally had a common-law based unrestricted authority to enter a *nolle prosequi* without the consent of the court. See *U.S. v. Gonzalez*, 58 F.3d 459, 460 (9th Cir. 1995). The primary purpose of the “leave of the court” requirement incorporated into Rule 48(a) is to prevent “prosecutorial harassment” through the government’s use of its discretionary power to dismiss charges. *Id.* at 461 (citing *Rinaldi v. U.S.*, 434 U.S. 22, 29 n.15 (1977)). In light of the history and purpose of Rule 48(a), courts have “closely scrutinized” decisions to deny leave to dismiss, and has required district judges evaluating such requests to grant “considerable deference” to the prosecutor. *Gonzalez*, 58 F. 3d at 460. See also *U.S. v. Wallace*, 848 F.2d 1464, 1468 (9th Cir. 1988). Separation-of-powers concerns generally require a district court to defer to the government’s decision to seek a dismissal of a criminal charge because a denial of the motion would represent an intrusion upon prosecutorial prerogative. *Gonzalez*, 58 F.3d at 462; See also *U.S. v. Hayden*, 860 F.2d 1483, 1487 (9th Cir. 1988).

District courts do possess a second, very limited, area of discretionary authority in this context to protect against dismissals that are “clearly contrary to the public interest.” See *Rinaldi v. U.S.*, 434 U.S. 22, 29 (1977); *U.S. v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975); see also 48 A.L.R. Fed. 635 (1980) (and cases collected therein). A district court has minimal discretion to refuse a Rule 48(a) request, absent “extremely limited circumstances in extraordinary cases . . . when the prosecutor’s actions clearly indicate a ‘betrayal of the public interest.’” *Id.* (quoting *U.S.v. Welborn*, 849 F.2d 980, 983 n.2 (5th Cir. 1988)). This is an extremely limited power, and is intended to apply to rare situations, where the dismissal is occasioned by clearly improper motives such as “a bribe to a prosecutor or the prosecutor’s desire to attend a social event instead of appearing in court.” *U.S. v. Weber*, 721 F.2d 266, 268 (9th Cir. 1983); *U.S. v. Hamm*, 659 F.2d 624, 630 (5th Cir. 1981).

The plain language of Rule 48(a) requires only the consent of a defendant when the government’s motion comes after trial has commenced and jeopardy has attached. See *U.S. v. Valencia*, 492 F.2d 1071, 1074 (9th Cir. 1974) (lack of consent of defendant not relevant before trial has commenced). Dismissal by the government does not bar reinstitution of prosecution, except where defendant has been

6.14 MOTION TO DISMISS PURSUANT TO THE PETITE POLICY

Clients should be informed that another sovereign may possibly prosecute them for the same conduct underlying the pending charges against them. Counsel is advised, however, that Department of Justice policy “precludes the initiation or continuation of a federal prosecution following a state prosecution or a prior federal prosecution based on substantially the same act, acts or transaction unless there is a compelling federal interest supporting the dual or successive federal prosecution.” 7 *Department of Justice Manual* §9-2.142. The United States Attorney must obtain the approval of the Assistant Attorney General before initiating such a prosecution. *Id.* This policy is known as the Petite policy and is based upon the Supreme Court’s decision in *Petite v. U.S.*, 361 U.S. 529 (1960). Courts have held it to be an abuse of discretion for a trial court to deny the government’s motion to dismiss a charge filed in violation of the Petite policy. *Thompson v. U.S.*, 444 U.S. 248 (1980); *Rinaldi v. U.S.*, 434 U.S. 22 (1977); *U.S. v. Bernhardt*, 831 F.2d 181, 183 (9th Cir. 1987) (stating that simultaneous prosecutions are duplicative and expensive and should be avoided as a matter of policy) (citing *Petite*, 361 U.S. at 530).

However, because the Petite policy is an internal administrative policy, it is unenforceable against the government. *U.S. v. Meade*, 110 F.3d 190, 201 (1st Cir. 1997); *U.S. v. Basile*, 109 F.3d 1304, 1308 (8th Cir. 1997); *U.S. v. Beard*, 41 F.3d 1486, 1489-90 (11th Cir. 1995); *U.S. v. McCoy*, 977 F.2d 706, 712 (1st Cir. 1992) (collecting cases); *U.S. v. Renfro*, 620 F.2d 569 (6th Cir. 1980); *U.S. v. Solano*, 605 F.2d 1141 (9th Cir. 1979); *see also U.S. v. Howard*, 590 F.2d 564 (4th Cir. 1979); *U.S. v. Snell*, 592 F.2d 1083 (9th Cir. 1979); *U.S. v. Valenzuela*, 584 F.2d 374 (10th Cir. 1978). Prior to moving to dismiss pursuant to the Petite policy, counsel should send a letter to the Attorney General requesting dismissal on the basis of the Petite policy. Another suggestion is to have a clause in the plea agreement stating that the government (1) will not request that the state press charges, and (2) will advise the state of the federal prosecution in the event that the state attempts to prosecute the client for the same conduct.

6.15 MOTION TO DISMISS PURSUANT TO THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

6.15.01 General Principles

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” *See Abney v. U.S.*, 431 U.S. 651 (1977); *U.S. v. Dinitz*, 424 U.S. 600 (1976); *Hartley v. Neely*, 701 F.2d 780 (9th Cir. 1983). The Supreme Court has determined that jeopardy attaches (1) when the jury is impaneled and sworn; or (2) when the first witness takes the stand in a bench trial. *Crist v. Bretz*, 437 U.S. 28 (1978); *Serfass v. U.S.*, 420 U.S. 377, 388 (1975). This protects the interest of the accused in retaining a chosen jury, an
integral part of the Fifth Amendment guarantee against double jeopardy. *See Crist v. Bretz*, 437 U.S. at 35; *but see U.S. v. Trigg*, 988 F.2d 1008 (9th Cir. 1993) (replacement of jurors and re-swearing of panel did *not* violate prohibition against double jeopardy).

**6.15.02 Rule 29 Judgments of Acquittal**

Counsel must make three written or oral Rule 29 motions during a trial: (1) after the close of the government’s case-in-chief; (2) after the defense rests; and (3) after an unfavorable jury verdict.

Under double jeopardy principles, a judgment of acquittal pursuant to Fed.R.Crim.P. 29 bars an appeal by the government. *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *see also Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (same effect after granting of demurrer in state court). This holds even if the basis for the acquittal -- such as a ruling excluding certain evidence -- is erroneous. *Sanabria v. U.S.*, 437 U.S. 54 (1978); *U.S. v. Baptiste*, 832 F.2d 1173 (9th Cir. 1987). A holding on appeal that the evidence was legally insufficient to sustain the conviction will also bar retrial. *Burks v. U.S.*, 437 U.S. 1 (1978). However, when a Rule 29 acquittal follows a jury verdict of guilty, the government may appeal, because a reversal merely reinstates an existing verdict. *U.S. v. Wilson*, 420 U.S. 332 (1975); *U.S. v. Martinez*, 122 F.3d 1161 (9th Cir. 1997).


**6.15.03 Mistrials**

Where there is “manifest necessity” for terminating a trial prior to verdict, the defendant may *not* invoke double jeopardy to ward off a retrial. A hung jury is the “prototypical example” of manifest necessity. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982); *see Richardson v. U.S.*, 468 U.S. 317, 324 (1984). Where a defendant seeks termination of the trial, as with a motion for mistrial, there is no double jeopardy protection unless the prosecutor engaged in misconduct aimed at provoking the mistrial request. *Oregon v. Kennedy*, 456 U.S. at 673-79. *See also U.S. v. McKoy*, 78 F.3d 446 (9th Cir. 1996) (after seeking a mistrial due to Jencks Act violations, defendants argued second trial barred by double jeopardy; court held that because the violations were not in bad faith, retrial was permissable); *but see Weston v. Kernan*, 50 F.3d 633 (9th Cir. 1995) (trial court abused its discretion in granting a mistrial over defense’s objection; double jeopardy barred second trial); *U.S. v. Sammaripa*, 55 F.3d 433 (9th Cir. 1995) (double jeopardy barred second trial where prosecutor alleged *Batson* error after jury sworn -- he could have done so before -- no manifest necessity existed and jeopardy attached).

**6.15.04 Included Offenses**

Under the Double Jeopardy Clause, a criminal defendant who is tried on a greater offense, but found guilty of a lesser included offense, may *not* be retried for the greater offense if the lesser included conviction is later reversed on appeal. *Price v. Georgia*, 398 U.S. 323 (1970). However, a conviction
for a lesser-included offense precludes retrial for the greater offense only if the first conviction “actually represents a resolution (in the defendant’s favor) . . . of some or all of the factual elements” of the greater offense. *Haynes v. Cupp*, 827 F.2d 435, 438 (9th Cir. 1987).\(^\text{15}\) A double jeopardy violation may be cured on appeal by modifying the conviction to one of a lesser included offense not jeopardy-barred, unless the defendant can show that he would not have been convicted of the non-barred offense absent conviction of the barred offense. *Morris v. Mathews*, 475 U.S. 237 (1986).

### 6.15.05 Separate Sovereigns

As stated previously, prosecutions by separate sovereigns for the same offense are not precluded by the Double Jeopardy Clause. *Heath v. Alabama*, 474 U.S. 82 (1985) (successive prosecutions by different states do not violate double jeopardy); *Abbate v. U.S.*, 359 U.S. 187 (1959) (federal prosecution following state prosecution was barred); see *U.S. v. Sanchez*, 992 F.2d 1143, 1149-53 (11th Cir. 1993); see also *U.S. v. Juvenile Female*, 869 F.2d 458 (9th Cir. 1989). Note that although cooperation between state and federal authorities is not forbidden, defendants in some circuits may invoke double jeopardy on a showing that a subsequent prosecution is a sham meant to vindicate the interests of the first sovereign. *Bartkus v. Illinois*, 359 U.S. 121 (1959); see *U.S. v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994) (collecting cases but declining to address validity of exception); *U.S. v. Figueroa-Soto*, 938 F.2d 1015, 1018-19 (9th Cir. 1991); *U.S. v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *U.S. v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979).

### 6.15.06 Plea Agreements

Jeopardy does not bar a trial following a lawfully withdrawn or vacated plea. *Klobuchir v. Pennsylvania*, 639 F.2d 966 (3d Cir. 1981). Further, a person who pleads guilty to a lesser offense pursuant to a plea agreement, and then breaches the agreement, can be prosecuted on the original charges, where the plea agreement provided that the parties would be returned to the status quo in the case of a breach by the accused. *Ricketts v. Adamson*, 483 U.S. 1 (1987).

### 6.15.07 Dismissals

In *U.S. v. Castiglione*, 876 F.2d 73 (9th Cir. 1989), the court decided the effect that the dismissal of the original indictment with prejudice has upon a superseding indictment with identical counts. The court said the trial judge’s use of the term “with prejudice” did not mean he intended the dismissal to bar prosecution on charges pending in the superseding indictment. A judge’s ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the charged offense. *Id.* at 76. See also *Thomas v. Municipal Court of Antelope Valley, Judicial District of California*, 878 F.2d 285 (9th Cir. 1989).

\(^{15}\) Double Jeopardy also encompasses the closely related doctrine of collateral estoppel. *U.S. v. Romeo*, 114 F.3d 141 (9th Cir. 1997) (collateral estoppel bars subsequent prosecution of importation of marijuana, once jury acquitted in prior trial on possession with intent to distribute; court reasoned that jury’s verdict centered on defendant’s knowledge, thus government would be precluded from proving intent in subsequent prosecution); *U.S. v. McLaurin*, 57 F.3d 823, 827 (9th Cir. 1995); *Ashe v. Swenson*, 397 U.S. 436 (1970).
6.15.08 Conspiracies

The Double Jeopardy Clause precludes the government from dividing a single conspiracy into multiple charges and pursuing successive prosecutions against a defendant. *Braverman v. U.S.*, 317 U.S. 49 (1942); *U.S. v. Lorenzo*, 995 F.2d 1448, 1457-59 (9th Cir. 1993); *U.S. v. Guzman*, 852 F.2d 1117, 1120 (9th Cir. 1988); *U.S. v. Vaughan*, 715 F.2d 1373, 1375 (9th Cir. 1983), *see supra* section 6.09.02, Multiplicity. To sustain a claim of double jeopardy, a defendant must show that the two conspiracies are indistinguishable in law and in fact. *Guzman*, 852 F.2d at 1120. A single conspiracy exists where there is one overall agreement to perform a variety of functions to achieve the objectives of the conspiracy; it may include sub-groups or sub-agreements. *U.S. v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997).

The Ninth Circuit has adopted a five factor test to determine whether two conspiracy counts which allege a violation of the same statute charge the same offense and violate double jeopardy. *Stoddard*, 111 F.3d at 1454; *U.S. v. Guzman*, 852 F.2d at 1120. Under this test the court compares (1) the differences in the periods of time covered by the alleged conspiracies; (2) the places where the conspiracies were alleged to have occurred; (3) the persons charged as co-conspirators; (4) the overt acts alleged to have been committed; and (5) the statutes alleged to have been violated. *Id.* The time period of a conspiracy is determined not by the dates alleged in the indictment, but by the evidence adduced at trial.

In *U.S. v. Broce*, 488 U.S. 563 (1989), the defendants pleaded guilty to two charges of conspiracy on the explicit premise of two agreements that started at different times and had separate objectives, thereby conceding guilt on two separate offenses. Defendants sought to attack their guilty pleas collaterally by presenting evidence outside the record to show that the two conspiracies were merely a single conspiracy and that double jeopardy precluded conviction for both. *Id.* at 576. The Supreme Court rejected defendants’ argument, stating that by pleading guilty, defendants had acknowledged guilt for two separate crimes. *Id.; see also Stoddard*, 111 F.3d 1450.

Conspiracy is a lesser included offense of maintaining a continuing criminal enterprise. *Rutledge v. U.S.*, 517 U.S. 292 (1996). In *Rutledge*, the Court vacated defendant’s conspiracy conviction because his conviction of the greater offense required a showing that he acted in concert with others -- conspiracy was one element of the greater offense. *Id. See also Robinson v. U.S.*, 196 F.3d 748 (7th Cir. 1999) (holding, in case of first impression, guilty plea does not bar *Rutledge* challenge to convictions for both conspiracy and CCE, so long as it is clear from the face of the record the court had no power to enter the conviction or impose the sentence). *See supra* section 6.16.08 of this manual.

6.15.09 Analyzing Subsequent Prosecutions

The Double Jeopardy Clause embodies three protections: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.”
North Carolina v. Pearce, 395 U.S. 711, 717 (1969). An accused may be prosecuted and punished under more than one criminal statute for the same actions if each statute requires proof of at least one fact that the other does not. Blockburger v. U.S., 284 U.S. 299 (1932). Where proof of an additional fact for either offense is required, double jeopardy will not apply. Ciucci v. Illinois, 356 U.S. 571 (1958); U.S. v. Wolfswinkel, 44 F.3d 782 (9th Cir. 1995) (bank fraud and misapplication of bank funds each required proof of an element that the other did not, hence no double jeopardy violation); Colley v. Sumner, 784 F.2d 984 (9th Cir. 1986); U.S. v. Frady, 607 F.2d 383 (D.C. Cir. 1979).

An overlap of proof between two prosecutions does not establish a double jeopardy violation. U.S. v. Felix, 503 U.S. 378 (1992). The defendant in Felix was involved in methamphetamine manufacture in both Oklahoma and Missouri. He was prosecuted first in Missouri for attempting to buy precursor chemicals there, and evidence of the Oklahoma activity came in under Fed. R. Evid. 404(b) to prove intent. After his conviction in Missouri, he was charged with conspiracy and substantive offenses in Oklahoma. In holding that the prosecutions did not violate Double Jeopardy, the Court pointed out that “the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.” Id. at 387. A substantive offense and conspiracy to commit that offense are separate offenses for purposes of jeopardy. Id. at 388.

Finally, withholding good time credits from a prisoner involved in a prison riot is an administrative sanction, not a first prosecution or punishment. Thus, the prisoner may subsequently be charged for the same conduct. U.S. v. Brown, 59 F.3d 102 (9th Cir. 1995). Double jeopardy does not bar prosecution for conduct that also supported a prior revocation of parole or probation. U.S. v. Soto-Olivias, 44 F.3d 788 (9th Cir. 1995).
6.15.10 Sentencing

Following the reasoning of Blockburger, 284 U.S. 299, consecutive sentences may be imposed for separate crimes stemming from a single transaction, where each crime requires proof of a fact not necessary for the other. Albernaz v. U.S., 450 U.S. 333 (1981); Whalen v. U.S., 445 U.S. 684 (1980). Courts generally have held (1) that congressional intent is the controlling factor, and (2) that the Blockburger test will be applied in construing congressional intent. Illinois v. Vitale, 447 U.S. 410 (1980); see U.S. v. Gonzalez, 800 F.2d 895 (9th Cir. 1986) (the defendant may be given consecutive sentences for armed bank robbery and use of a firearm to commit a crime of violence: 18 U.S.C. §§2113(a) and 2113(d) and 18 U.S.C. §924(c)); see also U.S. v. Hunter, 887 F.2d 1001 (9th Cir. 1989); U.S. v. Johnson, 886 F.2d 1120 (9th Cir. 1989).

Where it is clear that Congress intended to apply separate punishments for crimes arising from a single transaction, the Blockburger test will not be applied, and cumulative punishment may be imposed. Missouri v. Hunter, 459 U.S. 359 (1983); see also U.S. v. LaFromboise, 105 F.3d 512 (9th Cir. 1997) (consecutive sentences for having an unregistered firearm and using it in a drug offense allowed); U.S. v. Martinez, 49 F.3d 1398 (9th Cir. 1995) (congressional intent authorized cumulative punishment for carjacking and carrying a firearm in a crime of violence); U.S. v. Booth, 673 F.2d 27, 29 (1st Cir. 1982); U.S. v. Dean, 647 F.2d 779 (8th Cir. 1981); U.S. v. Barton, 647 F.2d 224 (2d Cir. 1981); U.S. v. Boylan, 620 F.2d 359 (2d Cir. 1980); U.S. v. Brunk, 615 F.2d 210 (5th Cir. 1980).

The Sixth Circuit has found a violation of the Double Jeopardy Clause where (1) the same set of facts formed the basis for prosecutions under two separate acts of Congress, and (2) the court imposed consecutive sentences. Pandelli v. U.S., 635 F.2d 533 (6th Cir. 1980). In U.S. v. Palafox, 764 F.2d 558 (9th Cir. 1985) (en banc), where the defendant was convicted of both possessing heroin with intent to distribute and distribution of heroin, the court held that only one punishment could be imposed because Congress did not intend to authorize punishment for both possession and possession with intent to distribute where “each offense [was] committed at virtually the same time, in the same place, and with the same participants.” Id. at 562. However, when the proof of possession is not limited to the same time and place that the additional offense was committed, separate punishments for possession and the other offense is permitted. U.S. v. Wolf, 813 F.2d 970, 977 (9th Cir. 1987); U.S. v. Rodriguez-Ramirez, 777 F.2d 454 (9th Cir. 1985); Pandelli v. U.S., 635 F.2d 533 (6th Cir. 1980).

In U.S. v. Sanchez-Vargas, 878 F.2d 1163 (9th Cir. 1989), the court held the defendant’s conduct in smuggling aliens and transporting them only a few miles from the border was not sufficient to support multiple punishments or two convictions for violation of 8 U.S.C. §1324(a)(1). After a lengthy analysis, the Court concluded that Congress did not intend multiple punishments for violations of §§1324(a)(1)(A) and 1324(a)(1)(B). Id. at 1171.

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16 This is why it is common for persons charged with importation and possession with intent to distribute to receive concurrent sentences.
In *U.S. v. Halper*, 490 U.S. 435 (1989), the Court held that a defendant who had been criminally prosecuted could not be subjected to an additional civil sanction to the extent that the civil sanction could not fairly be characterized as remedial, but rather as a deterrent or retribution (*i.e.*, as a form of punishment). Under the *Halper* analysis, a civil penalty imposed subsequent to a criminal penalty constituted a “punishment” under the Double Jeopardy Clause if the civil penalty served either of the traditional goals of punishment, *i.e.*, retribution or deterrence. *Id.* Under *Halper*, any civil penalty that bore no proportion to the loss suffered by the government was, therefore, suspect *ab initio*.

However, in 1997, the Court disavowed the *Halper* analysis. See *Hudson v. U.S.*, 522 U.S. 93 (1997). In its stead, the Court reinstituted the analysis developed in *Ward*. *Id.* at 491; *U.S. v. Ward*, 448 U.S. 242, 248-49 (1980). Under that analysis, “[a] court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Hudson*, 522 U.S. at 99 (quoting *Ward*, 448 U.S. at 248). “[W]here the legislature ‘has indicated an intention to establish a civil penalty, [a court must further inquire] whether the statutory scheme[ is] so punitive either in purpose or effect as to transform what is clearly intended as a civil remedy into a criminal penalty.’” *Id.* (citations omitted). The Court held that in making this determination, courts should refer to the following seven factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as a punishment; (3) whether the sanction can be imposed only upon a finding of scienter; (4) whether the operation of the sanction will promote the traditional aims of punishment, *i.e.*, retribution and deterrence; (5) whether the behavior to which the sanction applies is already criminal; (6) whether an alternative purpose to which the sanction may be rationally connected is assignable for it; and (7) whether the sanction appears excessive to the alternative purpose assigned. *Hudson*, 522 U.S. at 99-100 (citations omitted). In referring to these seven factors, courts must bear in mind that they must consider them “in relation to the statute on its face.” *Id.* (citations omitted). “Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* at 100.

Double jeopardy does not bar a state from instituting involuntary civil commitment against a repeated child molester. *Kansas v. Hendricks*, 521 U.S. 346 (1997). During a thirty-five year period, defendant Hendricks repeatedly molested children, and was jailed several times as a consequence. After finishing his last term in 1994, Kansas civilly committed him against his will. *Id.* at 355-56. Hendricks argued that this violated double jeopardy because he had already served his jail term, and this amounted to more punishment. In support of this argument, Hendricks pointed out that he would not be treated during his commitment. *Id.* at 360-61. The Court upheld the civil commitment, reasoning that the purpose of Hendrick’s commitment was to protect community safety, and was not intended as punishment, retribution, or deterrence. *Id.* at 361-63. Thus, Hendrick’s case did not implicate double jeopardy

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17 Counsel should note that multiple punishment problems typically arise in drug cases where the government has become overly zealous and instituted forfeiture proceedings against any and all property remotely used to assist in the offense. Under *Bennis v. Michigan*, 516 U.S. 442 (1996), innocent owners lose their property just as easily as those involved in the offense.
concerns because his civil commitment was not a “punishment” for double jeopardy purposes. *Id.* at 369.  

In cases involving enhancements or “sentencing factors,” the standard of proof employed at the initial disposition can also be important. This is particularly true when attempting to determine whether two sentencing enhancements constitute the same offense for Double Jeopardy purposes. *Durosko v. Lewis*, 882 F.2d 357 (9th Cir. 1989). The defendant in *Durosko* faced a statutory enhancement for having a prior felony and a sentencing enhancement for committing the current crime while on release status. Both enhancements were based on the same Texas conviction. Since two different standards of proof existed for the two enhancement proceedings, acquittal under one enhancement did not implicate the Double Jeopardy Clause, and, thus, did not preclude an enhancement on the other ground. *Id.* at 361.

Finally, the government may use uncharged conduct to enhance a sentence and then prosecute the defendant for that same conduct. *Witte v. U.S.*, 515 U.S. 389 (1995).

### 6.15.11 Effect of Appeals

In cases in which the defendant has already had one trial, and is facing another trial on a separate matter, or in cases in which a mistrial has been declared, counsel must consider which motions, if any, to file. There are many other Supreme Court decisions dealing with the application of the Double Jeopardy Clause. In *Burks v. U.S.*, 437 U.S. 1 (1978), the Supreme Court held that the Double Jeopardy Clause precludes a second trial once a reviewing court has found the evidence insufficient to sustain the jury’s verdict of guilty in the district court. See also *Hudson v. Louisiana*, 450 U.S. 40 (1981); *Greene v. Massey*, 437 U.S. 19 (1978). However, the Court has refused to extend the *Burks* holding to require an appellate court to rule on the sufficiency of the evidence following a hung jury. *Richardson v. U.S.*, 468 U.S. 317 (1984). The Court has also refused to require that a defendant, convicted at a first tier bench trial, be accorded a judicial determination of sufficiency prior to the second tier *de novo* trial. *Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) (first-tier trial is bench trial, appeal from which results in new, “second-tier” trial and not in legal ruling).

In *Lockhart v. Nelson*, 488 U.S. 33 (1988), the Supreme Court held that double jeopardy bars a second trial only where the all the evidence — whether erroneously admitted or not — is insufficient to support a guilty verdict. The Double Jeopardy Clause does not preclude retrying a defendant who

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18 State legislatures throughout the country are enacting statutes similar to the Kansas statute. Counsel is advised to warn clients of this possibility and to work with county and state public defenders who generally are assigned to assist the defendants, even though they are nominally in civil proceedings.

19 Although the factual scenario that existed in *Durosko* does not appear to implicated by the Supreme Court’s recent decision in *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), *Apprendi* represented a watershed regarding the proper standards of proof to employ in cases involving certain sentencing enhancements. Counsel should always be on the look-out for a possible *Apprendi* issue. See also *U.S. v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (applying *Apprendi* to 18 U.S.C. §841 and holding that drug quantity and amount are elements of the offense, not sentencing factors).
succeeds in getting his conviction set aside for the incorrect receipt or rejection of evidence. See *U.S. v. James*, 109 F.3d 597 (9th Cir. 1997) (defendant convicted of three counts and hung on fourth, defendant appeals and wins because of insufficient evidence; proper to retry on unappealed fourth count); *U.S. v. Cote*, 51 F.3d 178 (9th Cir. 1995) (second trial not barred when conviction reversed for erroneous jury instruction); *Wigglesworth v. Oregon*, 49 F.3d 578, 582 (9th Cir. 1995).

In *Massie v. Hennessey*, 875 F.2d 1386 (9th Cir. 1989), in a case of first impression, the Ninth Circuit held that double jeopardy did not prevent the retrial of a defendant whose conviction was overturned as a result of a statutorily mandated appeal. Cal. Pen. Code §1239(b), provides for an automatic appeal in death penalty cases. Ordinarily, a defendant’s appeal from a judgment of conviction constitutes a waiver of the double jeopardy defense. The court rejected Massie’s argument that because he objected to the mandatory appeal, he did not waive the double jeopardy defense. The court reasoned that because the mandatory appeal benefits the defendant, the double jeopardy guarantee “imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside.” 875 F.2d at 1389 (quoting *U.S. v. DiFrancesco*, 449 U.S. 117, 131 (1980)).

Finally, it should be noted Double Jeopardy appeal may be taken interlocutorially. See, e.g., *U.S. v. Sardone*, 94 F.3d 1233, 1234 (9th Cir. 1996).

### 6.15.12 Waiver

The defense of double jeopardy will be deemed waived unless raised by the defendant prior to trial. See Fed. R. Crim. P. 12(b)(1); *People v. Gill*, 59 F.3d 1010 (9th Cir. 1995) (jeopardy did not bar the second trial of defendant who opposed the government’s motion to consolidate the second trial with a prior related one); *U.S. v. Lorenzo*, 995 F.2d 1448, 1457 (9th Cir. 1992). Where the defense of double jeopardy is raised in a timely manner, the trial court is to decide the issue before trial. *U.S. v. Stricklin*, 591 F.2d 1112 (5th Cir. 1979). If a court aborts a criminal trial before its conclusion, in the absence of the defendant’s motion for mistrial or manifest necessity for granting a mistrial, the defendant has a valid double jeopardy claim to preclude any subsequent prosecution. *Illinois v. Somerville*, 410 U.S. 458 (1973). Even where the defense moves for a mistrial, jeopardy may bar a second prosecution if the prosecutor intended to goad the defense into moving for mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982); see also *U.S. v. Zielie*, 734 F.2d 1447, 1449 (11th Cir. 1984); *Jones v. Hogg*, 732 F.2d 53 (6th Cir. 1984).

### 6.16 MOTION TO DISMISS FOR SELECTIVE PROSECUTION

Government officials may not enforce criminal statutes in a discriminatory or selective fashion. The basic principle was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886): “Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.” The city ordinance which Defendant Wo was convicted of violating made it unlawful for any person to maintain a laundry in the city of San Francisco, without first obtaining the permission of the board of supervisors, unless the laundry was located in a building constructed of brick...
or stone. Although the statute, on its face, was a fair and reasonable exercise of the police power, the facts showed that it was enforced predominantly against individuals of Chinese origins. In a landmark decision, the Supreme Court held that such selective prosecution of an otherwise lawful ordinance was unconstitutional. See also Two Guys from Harrison-Allentown, Inc. v. McGinley, District Attorney, 366 U.S. 582 (1961).

Generally, courts are reluctant to second-guess a prosecutor’s discretion in choosing which cases to prosecute. U.S. v. Armstrong, 517 U.S. 456, 464-65 (1996). Therefore, the defendant bears the burden of showing through “clear evidence” that (1) other persons similarly situated are not being prosecuted; and (2) that the prosecution is based on an impermissible motive, such as invidious discrimination or the violation of a constitutional right. Id.; see also Wayte v. U.S., 470 U.S. 598, 608-09 (1985) (holding that it is appropriate to judge selective prosecution claims according to ordinary equal protection standards). Where the allegation is that certain defendants are being improperly selected for federal rather than state prosecution, a mere showing that federal penalties are higher does not meet the required threshold. U.S. v. Davis, 15 F.3d 526, 530 (6th Cir. 1994). See also U.S. v. Reyes, 966 F.2d 508 (9th Cir. 1992).

To establish entitlement to discovery on a claim of selective prosecution based on race, the defense must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not. Armstrong, 517 U.S. at 465. In Armstrong, the defense cited to a study dealing with the rates at which defendants of various races were charged in federal, rather than state, court. Id. at 459. However, the Court held that the study did not constitute sufficient evidence to support defendants’ claim that blacks were being unconstitutionally singled out for prosecution on crack offenses. Id. at 470-71.

6.17 MOTION TO DISMISS FOR VINDICTIVE PROSECUTION


The cases pertaining to motions to dismiss for vindictive prosecution fall into three basic categories. The first category occurs generally in state practice and involves the prosecution’s attempt to increase charges after the defendant has been convicted of misdemeanor or petty offenses and attempts to appeal. See Thigpen v. Roberts, 468 U.S. 27 (1984) (Court held that where defendant is indicted on more serious charges while pursing collateral relief on original charges, a presumption of prosecutorial vindictiveness arises). To support a vindictive prosecution claim in such cases, both the original and subsequent offenses must arise from same incident. Humphrey v. U.S., 888 F.2d 1546, 1549 (11th Cir. 1989).

20 In addition to these three categories, there is a fourth scenario exemplified by the case of U.S. v. Hooton, 662 F.2d 628 (9th Cir. 1981). Hooton held that if the defendant can establish an appearance of vindictiveness by those who made the decision to prosecute, the mere filing of the original indictment can support a claim of vindictive prosecution. Id. at 634.
1989). Moreover, prosecution by different sovereigns, e.g., by federal and state prosecutors, tends to negate the question of vindictiveness. *U.S. v. Dickerson*, 975 F.2d 1245, 1251-52 (7th Cir.1992).

The second category of cases involves defendants who have successfully appealed their first conviction and, after retrial and a second conviction, receive a harsher penalty than originally imposed. *Alabama v. Smith*, 490 U.S. 794 (1989) (no vindictiveness when the first sentence was based upon a guilty plea, and the second sentence followed a trial).

The third category involves a pretrial threat by the prosecution to increase charges if the defendant insists on exercising a constitutional right, such as the right to a jury trial. *See Goodwin* 457 U.S. at 368. In examining whether there have been independent and intervening circumstances, courts have traditionally looked at whether the second indictment is based upon facts and circumstances known to the prosecution at the time it filed the first indictment. *See U.S. v. Esposito,*
Because plea bargaining is established as a legitimate practice and because prosecutors make pretrial decisions based on a variety of factors, however, it is difficult to raise a presumption of vindictiveness in the pretrial setting. See, e.g., Goodwin, 457 U.S. at 381.

6.18 MOTION TO DISMISS FOR LOSS OF EVIDENCE/TESTIMONY

The prosecution must disclose any exculpatory material or witnesses to the defense. Brady v. Maryland, 373 U.S. 83 (1963). However, what remedies are available to defendant when potentially exculpatory evidence is lost or destroyed? The Supreme Court has offered guidance in three cases: U.S. v. Valenzuela-Bernal, 458 U.S. 858 (1982), California v. Trombetta, 467 U.S. 479, 484 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988). As discussed below, the lynchpin to each holding is that the defendant must show bad faith on the part of the government.

Where the government deports or otherwise makes unavailable a material witness to a crime, counsel may file a motion to dismiss under U.S. v. Valenzuela-Bernal, 458 U.S. 858 (1982). Again, the essential hurdle is proving bad faith. Because of its duty to execute the immigration policy, the government may deport undocumented alien witnesses upon a good-faith determination that they possess no information favorable to a criminal defendant. Id. To establish a due process violation, defendant must make a “plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.” Id. at 873. The sanction of dismissal is warranted “only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.” Id. at 873-74. See also U.S. v. Perez, 217 F.3d 323, 326 (5th Cir. 2000).

With respect to the loss of evidence, the courts have established a tripartite test. The defense must show that, in failing to preserve the evidence, the government: (1) acted in bad faith when it destroyed evidence, (2) the evidence possessed an apparent exculpatory value, and (3) the evidence is to some extent irreplaceable. Trombetta, 467 U.S. at 488-89; Youngblood, 488 U.S. at 58; U.S. v. Dumas, 207 F.3d 11, 15 (1st Cir. 2000).

Remedies for destruction of evidence include dismissal, U.S. v. Cooper, 983 F.2d 928 (9th Cir. 1993), or, in less egregious cases, an adverse inference instruction where evidence is lost or destroyed. See Youngblood at 51; U.S. v. Wise, 221 F.3d 140, 156 (5th Cir. 2000) (district court has discretion to admit evidence of spoliation and to instruct the jury on adverse inferences).

In assessing the government’s conduct, the court should examine the following factors: (1) whether the evidence was lost or destroyed while in the government’s custody; (2) whether the government acted without regard for the accused; (3) whether the government was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions; (4) whether the acts leading to the destruction of evidence were deliberate or in good faith or with a justification; (5) whether, and to what degree, federal officers were involved; and (6) whether the prosecuting government attorneys participated in the events leading to the loss or destruction of the evidence. U.S. v. Loud Hawk, 628 F.2d 1139, 1152-53 (9th Cir. 1979) (en banc).
With respect to the destruction of rough notes by the witness whose testimony is given in court, counsel can move to strike the witness’ testimony pursuant to the statute and the Federal Rules. See 18 U.S.C. §3500 (Jencks Act); U.S. v. Riley, 189 F.3d 802, 806 (9th Cir. 1999) (destruction, even in good faith, of notes is “manifestly unreasonable”).

6.19 MOTION TO PRODUCE DISCOVERY AND PRESERVE EVIDENCE

Defense counsel should make explicit, written requests for discovery in every case. Whether the defense attorney wishes to move for discovery or merely put the request in letter form is a question that should be answered on a case-by-case basis. In most instances, a formal discovery motion should be made. In cases where the defense does not want to stop the Speedy Trial clock, a series of letters should suffice. The letter will serve to notice the prosecutor and make a record for appeal. See supra Chapter 3.

6.20 MOTION TO DISMISS FOR BRADY VIOLATION

The government has a duty to disclose all evidence favorable to the defendant which is “material either to guilt or punishment.” Brady v. Maryland, 373 U.S. 83, 87 (1963); U.S. v. Agurs, 427 U.S.97 (1976). Defense counsel should always make a motion or written request for production of Brady evidence. If the government fails to provide such evidence, due process is violated “irrespective of the good faith or bad faith of the prosecution.” Id. The government’s suppression of exculpatory evidence can serve as a basis for dismissal, reversal on appeal, or other appropriate relief, such as striking a witness’ testimony or declaring a mistrial. See Agurs, 427 U.S. 97; Brady, 373 U.S. 83.

In Agurs, the Court addressed the withholding of exculpatory evidence in a case in which the defendant had not specifically requested the evidence at issue.21 427 U.S. at 99. The Court acknowledged that “there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.” Id. at 110. With regard to the materiality standard, the Agurs Court held that “the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in reversal.” Id. at 111. Instead, the omission must be evaluated in the context of the entire record. Id. at 112. If the withheld evidence “creates a reasonable doubt that did not otherwise exist, constitutional error has been created.” Id. at 112.

In U.S. v. Bagley, 473 U.S. 667, 676 (1985), the Court held that the government’s duty of disclosure includes impeachment evidence. The Court also clarified the materiality standard, stating that constitutional error results from the government’s suppression of evidence favorable to the defense “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Id. at 682.

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21 In Brady, unlike Agurs, the defendant specifically requested the material in question. Brady, 373 U.S. at 83.
In *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the Court explained the *Bagley* standard as follows:

Bagley’s touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would
more likely than not have received a different verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”

The Court emphasized that in applying the materiality standard, the evidence must be considered collectively, not item by item. Kyles, 514 U.S. at 436. Once Brady/Bagley error has been found, by definition, the error cannot be treated as harmless. Id. at 435. However, although evidence need not be admissible at trial to be “material,” it must at least lead to admissible evidence or be useful for impeachment purposes. See U.S. v. Dimas, 3 F.3d 1015, 1018 (7th Cir. 1993); U.S. v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991); U.S. v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989).

In addition, the Kyles Court further broadened the scope of the government’s obligations under Brady to disclose to the defense evidence known only to police investigators. Kyles, 514 U.S. at 438; see also Strickler v. Greene, 527 U.S. 263, 279 (1999). Counsel should also be cognizant that federal prosecutors’ Brady obligations do not stop at the district line. For example, if a prosecutor has knowledge of exculpatory material in the hands of any federal agency in another district, he has control over it and, therefore, is obligated to disclose it. U.S. v. Bryan, 868 F.2d 1032, 1037 (9th Cir. 1989).

An important subcategory of Brady law involves the failure to disclose impeachment information about government witnesses. See Bagley, 473 U.S. at 676 (impeachment evidence showing witness’ bias or interest must be disclosed); Giglio v. U.S., 405 U.S. 150 (1972) (consideration given to witness); Napue v. Illinois, 360 U.S. 264 (1959) (same). The more central the witness to the government’s case, the greater the likelihood that undisclosed impeachment information will be held to be “material” on appeal. See U.S. v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) (remanding for inquiry whether informant lied at trial with government's knowledge); U.S. v. Williams, 954 F.2d 668, 672 (11th Cir. 1992); Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991) (affirming grant of habeas relief where State failed to disclose witness’s criminal record). Finally, counsel should also raise a Confrontation Clause argument when failure to disclose impeachment information threatens to impair cross-examination. See Davis v. Alaska, 415 U.S. 308 (1974).

With respect to Brady claims based on the government’s loss or destruction of evidence, see supra section 6.18.

6.21 MOTION TO ISSUE A SUBPOENA FOR WITNESSES OR EVIDENCE OUT OF THE DISTRICT

Fed. R. Crim. P. 17(b) provides that the court shall order the issuance of a subpoena for service upon any witness on the ex parte application of a defendant if the defendant makes two showings. The defendant must: (1) make a satisfactory showing of financial inability to pay the fees of the witness, and (2) demonstrate that the presence of the witness is necessary to an adequate defense.

If the defendant avers facts which, if true, would be relevant to any issue in the case, the requests must be granted unless the stated facts are inherently incredible or the government shows, either by the introduction of evidence or from other matters already on the record, that they are untrue or the request
is otherwise frivolous. *U.S. v. Sims,* 637 F.2d 625 (9th Cir. 1980). In *Sims,* the court reversed the trial judge’s refusal to issue a subpoena under Rule 17(b) and remanded the case for a new trial. See also *U.S. v. Cruz-Jiminez,* 977 F.2d 95, 103 (3d Cir. 1992) (collecting cases); but see *U.S. v. Link,* 921 F.2d 1523, 1527-28 (11th Cir. 1991); *U.S. v. Greschner,* 802 F.2d 373, 377-78 (10th Cir. 1986).

Because there is nationwide service of process in federal criminal cases, counsel for an indigent criminal defendant may, upon an appropriate showing, serve a subpoena on a witness located outside the district of prosecution. It should be noted that the rule provides for an *ex parte* application for service of such a subpoena. See *Thor v. U.S.,* 574 F.2d 215 (5th Cir. 1978). As a strategic matter, it is very important that the application also be made *ex parte* to avoid divulging the existence of defense witnesses.

The trial court has broad discretion to grant a 17(b) request, and a defendant does not have an absolute right to subpoena witnesses at the government’s expense. For example, a judge may refuse a request on grounds that the request was untimely made, or the testimony would be cumulative, or is an abuse of the court’s process. Therefore, counsel must always reiterate for the court that the Sixth Amendment Compulsory Process Clause and the Fifth Amendment Due Process Clause should not burden one’s right to a fair trial. *U.S. v. Sims,* 637 F.2d 625 (9th Cir. 1980).

**6.21.01 Rule 17(c) Subpoena Procedure**

Fed. R. Crim. P. 17(c) provides that a subpoena may command a person to whom it is directed to produce books, papers and/or documents. Rule 17(c) further provides that the court may direct that the books, papers, documents, or objects designated in the subpoena be produced prior to the time when they are to be offered in evidence. It is imperative that counsel also look to local rules in his or her district to ensure that the prosecution cannot subvert a subpoena request based on a technicality.

In *U.S. v. Nixon,* 418 U.S. 683 (1974), the Court announced four prerequisites to the pretrial production of documents: (1) the documents must be evidentiary and relevant; (2) the documents must not be otherwise procurable reasonably in advance of trial through due diligence; (3) the defendant must show that he is unable to properly prepare for trial without such production and inspection in advance of trial, and the failure to obtain such inspection may tend to unreasonably delay the trial; and (4) the application must be made in good faith and not as a “fishing expedition.” *Id.* at 699-700. In *Nixon,* the Court held that the president’s general interest in confidentiality, which was unsupported by his claim to protect military and national security interests, did not prevail over the prosecutor’s subpoena request. *Id.*

Rule 17 is not intended to be used as a discovery device, but rather as a means of obtaining evidence. *U.S. v. Arditti,* 955 F.2d 331, 345-46 (5th Cir. 1992); *Martin Marietta Corp. v. Pollard,* 856 F.2d 619, 621 (4th Cir. 1988). Counsel is advised to file an *ex parte* declaration and documents that show the court the significant facts and the need for the documents subpoenaed.

To justify a subpoena for production prior to trial, the defense should also be prepared to demonstrate that the subpoenaed materials are not available from any other source and that their examination and processing should not await trial. The determination of whether a Rule 17(c) subpoena
will issue is committed to the discretion of the trial court. See U.S. v. Arditti, 955 F.2d at 345; U.S. v. Eden, 659 F.2d 1376, 1381 (9th Cir. 1981); Martin Marietta Corp., 856 F.2d at 621.

The Nixon standard does not apply in the context of grand jury proceedings. U.S. v. R Enterprises, 498 U.S. 292 (1991). In R Enterprises, the Court held that the government did not need to show relevancy to enforce a grand jury subpoena which sought a variety of corporate books and records and copies of video tapes. Id. at 302. The grand jury's investigatory powers are, however, subject to the limit imposed by Rule 17(c). A court may therefore quash or modify a subpoena “if compliance would be unreasonable or oppressive.” Id. at 299 (quoting Rule 17(c)).

Rule 17(b) expressly provides an indigent defendant with the right to make an ex parte request to a district court to subpoena witnesses. Fed. R. Crim. P. 17(b). Rule 17(c) contains no similar provision. Fed. R. Crim. P 17(c). However, in an apparent case of first impression, the Eighth Circuit held that the linguistic structure of Rule 17 dictates that courts interpret Rule 17(c) in accordance with the provisions of Rule 17(a) and (b). U.S. v. Hang, 75 F.3d 1275, 1281-82 (8th Cir. 1996). Accordingly, the Eighth Circuit held that an indigent defendant may make an ex parte request to a district court for issuance of a Rule 17(c) subpoena. Id. at 1282.

6.22 MOTION TO STRIKE ALIASES

Counsel should attempt to strike an alias included in an indictment to prevent inadmissible information about the defendant’s prior criminal record or prior law enforcement contacts from reaching the jury. This motion should be made prior to trial, Fed. R. Crim. P. 12(b)(2), or the court may deem the objection waived. U.S. v. Lerma, 657 F.2d 786, 789-90 (5th Cir. 1981).

Courts have upheld the inclusion of aliases in indictments either to identify a defendant or to connect a defendant to the acts charged. U.S. v. Candelaria-Silva, 166 F.3d 19, 33 (1st Cir. 1999) (holding use of defendant’s alias, translated as “trigger man,” probative to distinguish defendant); U.S. v. Hines, 955 F.2d 1449, 1454 (11th Cir. 1992) (holding use of alias permissible to connect defendant to acts charged); U.S. v. Moya-Gomez, 860 F.2d 706, 762 (7th Cir. 1988) (holding use of alias permissible either to identify defendant or to otherwise connect defendant to acts charged).

6.23 MOTION FOR RECUSAL

A defendant has a constitutional and statutory right to an impartial and fair judge at all stages of the proceedings. See generally Liteky v. U.S., 510 U.S. 540 (1994); see also Marshall v. Jerrico, Inc., 446 U.S. 238 (1980); In re Murchison, 349 U.S. 133 (1955); U.S. v. Serrano, 607 F.2d 1145, 1150 (5th Cir. 1979). The requirements for recusal of a judge for bias have been codified in 28 U.S.C. §§144 and 455(a). Section 144 provides in part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

In *Liteky v. U.S.*, 510 U.S. 540 (1994), the Supreme Court addressed recusal for bias under these two sections. Although *Liteky* reaffirmed the “extrajudicial source” doctrine which required that judicial bias stem from a source independent of the criminal proceedings in order to require recusal, it vastly expanded the scope of the doctrine to the extent that there is no longer “much doctrine to the doctrine.” *Id.* at 554. “The fact that an opinion held by a judge derives from a source outside judicial proceedings the bias may, but need not necessarily, stem from an ‘extrajudicial source’ in order to require recusal, since predispositions developed during the course of the trial will sometimes, albeit rarely, suffice.” *Id.* The Court emphasized two factors which shape the doctrine: (1) judicial rulings alone will provide the basis for recusal only if they evidence such a degree of favoritism or antagonism as to make fair judgment impossible; and (2) opinions formed by the judge on the basis of facts introduced or events occurring during the present proceeding or prior proceeding will serve as a basis for recusal only if they display this same level of favoritism or antagonism. *Id.* at 555.

The language of §455(a) creates a reasonable person standard under which the judge’s personal opinion as to his or her ability to impartially decide the issue is irrelevant. *See* H.R. Rep. No. 1453, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S.C.C.A.N. 6351. “Since the goal of section 455(a) is to avoid even the appearance of impropriety, *see* Liljeberg v. Health Svcs. Acquisition Corp., 486 U.S. 874, 860 (1988), recusal may well be required.” *U.S. v. Bremers*, 195 F.3d 221, 226 (5th Cir. 2000). Recusal is also required where: (1) defendant or counsel’s contumacious conduct so provokes a judge that the judge becomes personally embroiled in the controversy, (2) there is a likelihood of bias or appearance of bias such that the judge is unable to maintain the balance between vindicating the interests of the court and the interests of the accused, or (3) defendant or counsel’s conduct involves an insulting attack on the integrity of the judge. *In re Jafree*, 741 F.2d 133, 137 (7th Cir. 1984). In *Jafree*, the defendant in a contempt proceeding accused the Chief Judge of the Northern District of Illinois and other judges of corruption, drunkenness, and taking bribes. Appellant’s motion for recusal was found to be proper.

Whether a judge must recuse himself due to possible bias towards either the prosecutor or defense counsel depends on the circumstances of the case. In *U.S. v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991), a judge failed to recuse himself despite the fact that the prosecutor had served as the judge’s law clerk at the time of the defendant’s motion for new trial and continued to have a close relationship with the judge. The Ninth Circuit held that the district court’s failure to recuse itself was not plain error, because the defendant failed to demonstrate real bias or that such bias resulted in “actual prejudice.” *Id.* at 1549.

Counsel may also move to recuse the United States Attorney because of a conflict of interest. 28 C.F.R. §45.2 defines when a person has a personal or political relationship which constitutes a conflict of interest:

no employee [of the Department of Justice] shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:
(1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

(2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

A “personal relationship” means “a close and substantial connection of the type normally viewed as likely to induce partiality.” 28 C.F.R. §45.2(c)(2).

It should be noted that the conflict of interest rules do not create substantive rights for litigants. The rules are for the internal management of the Department of Justice. 28 C.F.R. §45.2(d). See U.S. v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir. 1992) (holding that the United States’ Attorneys Manual does not create substantive rights for litigants on very similar conflict of interest language).


Counsel may also try to recuse co-counsel for conflicts of interest. First, counsel may argue that under Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980), the possibility of a breach of confidence, rather than an actual breach, is the key consideration for disqualification. To prove the possibility of a breach, counsel should examine whether any former matters represented by co-counsel are substantially related to the current representation. Id. Substantial relationship is presumed when there is a reasonable probability that the client provided the attorney with confidences which could be later used against client. Id. The district court is accorded substantial latitude in deciding whether counsel should be disqualified. Wheat v. U.S., 486 U.S. 153 (1988).

In U.S. v. Baker, 10 F.3d 1374 (9th Cir. 1993), the government moved to disqualify co-counsel because of his prior representation of a government witness. The court held that co-counsel could be disqualified because a reasonable probability existed that confidences were disclosed by the witness which could later be used against her.

6.24 MOTION TO PROCEED IN PRO PER

A defendant in a criminal case has both a statutory and a constitutional right to proceed without the assistance of counsel. See 28 U.S.C. §1654; Faretta v. California, 422 U.S. 806 (1975); see also Moore v. Calderon, 108 F.3d 261 (9th Cir. 1997). Often, as a matter of custom, if a Faretta motion is granted by the district court, appointed counsel will be asked to serve as advisory counsel to assist the defendant in the presentation of the defense. However, the unwanted, unsolicited participation of standby counsel in the presence of the jury may interfere with a defendant’s Faretta rights. See McKaskle v. Wiggins, 465 U.S. 168 (1984).
An improper denial of a defendant’s request to represent himself is never harmless because although such denial may not effect the outcome of a trial, it is a violation of a defendant’s right under the Sixth Amendment. \textit{Id.}

Under \textit{Faretta}, there are only three instances in which a defendant’s right to proceed \textit{pro se} may be overridden: (1) where the defendant’s waiver of the right to counsel is not knowing and intelligent, \textit{Id.} at 807; (2) where the defendant is unable or unwilling to abide by rules of procedure and courtroom protocol; and (3) where a defendant makes an untimely request or does so just for the purpose of delay. \textit{Id.} at 834; \textit{Armant v. Marquez}, 772 F.2d 552, 558 (9th Cir. 1985).

The defendant must control the case presented to the jury in a manner that allows the jury to see the defendant is in such control. \textit{McKaskle}, 465 U.S. 168; see also \textit{U.S. v. Kimmel}, 672 F.2d 720 (9th Cir. 1982) (hybrid representation allowed by court). In \textit{Savage v. Estelle}, 908 F.2d 508 (9th Cir.), \textit{op. amended and superseded}, 924 F.2d 1459 (9th Cir. 1990), the defendant elected to proceed \textit{pro se} but had a severe speech impediment which made it difficult for him to articulate his defense. The Ninth Circuit held that the trial court’s denial of Savage’s request to represent himself was proper, in that his speech impediment rendered him physically incapable of doing so. \textit{Id.} at 513. Lack of library access and allegedly obstructionist conduct are not grounds for denying the defendant the right to represent himself. \textit{Bribiesca v. Galaza}, 215 F.3d 1015 (9th Cir. 2000).

A defendant’s request to proceed \textit{pro se} must be made in a timely fashion. \textit{U.S. v. Smith}, 780 F.2d 810 (9th Cir. 1986); see also \textit{U.S. v. Jones}, 938 F.2d 737 (7th Cir. 1991) (request to proceed \textit{pro se} denied because it was untimely). Once a defendant is allowed to proceed \textit{pro se}, it is error to deny a continuance for the \textit{pro se} defendant to prepare his defense. \textit{Armant v. Marquez}, 772 F.2d 552, 558 (9th Cir. 1985).

A request for self-representation need not be granted if it is intended merely as a tactic for delay. \textit{U.S. v. Flewitt}, 874 F.2d 669, 674-75 (9th Cir. 1989) (citing \textit{U.S. v. Smith}, 780 F.2d at 812); see also \textit{U.S. v. Schaff}, 948 F.2d 501 (9th Cir. 1991). A court “may consider events preceding a motion for self-representation to determine whether the request is made in good faith or merely for delay.” \textit{Flewitt}, 874 F.2d at 675 (citing \textit{Fritz v. Spalding}, 682 F.2d 782, 784 (9th Cir. 1982)).

The waiver of the right to counsel must be made knowingly and intelligently. \textit{Faretta v. California}, 422 U.S. at 807; see also \textit{U.S. v. Rylander}, 714 F.2d 996, 1005 (9th Cir. 1983). Before a waiver of counsel can be deemed to have been made knowingly and intelligently, an accused first must be made aware of the nature of the charges and the possible penalties, as well as the dangers and disadvantages of self-representation. \textit{See U.S. v. Harris}, 683 F.2d 322, 324 (9th Cir. 1982).

In determining whether a waiver was made knowingly and intelligently, the district court should discuss with the accused, on the record, the nature of the charges, the possible penalties, and the dangers of self-representation prior to granting the request to waive representation. \textit{Id.} at 324. If a defendant requests an attorney at the time of the motion for a new trial, absent bad faith, he is entitled to have one appointed even though he waived his right to counsel and represented himself at the original trial. \textit{Williams v. Turpin}, 87 F.3d 1204 (11th Cir. 1996); \textit{Menefield v. Borg}, 881 F.2d 696 (9th Cir. 1989).
6.25 MOTION FOR RECONSTRUCTION OF THE EVIDENCE TO ITS ORIGINAL FORM

In a case in which the evidence against a defendant, such as a controlled substance, has been changed from its original condition, defense counsel may move, pursuant to Fed. R. Crim. P. 16(a)(1)(C) and (d)(2), for reconstruction of the evidence to its original form. See U.S. v. Loud Hawk, 628 F.2d 1139, 1151 (9th Cir. 1979) (Kennedy, J., concurring). For example, the defendant may want to move for the drugs to be packaged as they were when they were discovered to demonstrate that the drugs were not visible.

6.26 MOTION TO TAKE THE DEPOSITION OF A WITNESS PRIOR TO TRIAL

Fed. R. Crim. P. 15(a) provides the procedure for obtaining a pretrial deposition. See also Fed. R. Crim. P. 30(e); 18 U.S.C. §3503. Exceptional circumstances, within the meaning of the Rule, ordinarily are found “when the prospective deponent is unavailable for trial and the absence of the testimony would result in an injustice.” U.S. v. Sanchez-Lima, 161 F.3d 545, 548 (9th Cir. 1998).

In Sanchez-Lima, the government deported a number of witnesses whose testimony supported the defendant’s self-defense theory. Id. at 547. Although the district court denied the defendant’s motion to depose these witnesses under Rule 15(a), the defense traveled to Mexico and took sworn videotaped statements of the witnesses. Id. The government was invited to participate in taking these statements, but it declined to do so. Id. at 547-48. The district court refused to admit the videotaped statements. Id. at 547. The Ninth Circuit reversed. Id. at 548. The Court held that the witnesses were unavailable and, because their testimony supported the defendant’s self-defense theory, it was in the interest of justice to allow the defendant to conduct depositions. Id. The videotaped statements were admissible under the catch-all exception to the hearsay rule, and the district court’s refusal to admit the videotaped statements after denying the defendant the opportunity to depose the witnesses prevented the defendant from exercising his Sixth Amendment right to present a defense. Id. at 547-48.

When the government moves to introduce deposition testimony pursuant to Rule 15, defense counsel may argue that the government has failed to meet the requirements of the Rule, and that the introduction of the evidence violates the Confrontation Clause. In U.S. v. King, 552 F.2d 833, 841 (9th Cir. 1976), defense counsel raised a number of defects in the taking of the videotapes. Although, there, the court held that the use of the videotaped deposition adequately preserved the demeanor evidence of

22 Federal Rule of Criminal Procedures 15(a) provides in relevant part: 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 . . . ."

23 Any continuance of the trial necessitated for the purpose of deposing a witness is excludable for Speedy Trial Act purposes. U.S. v. Hutchison, 22 F.3d 846 (9th Cir. 1993).
the witness, and that it allowed a fair finding of credibility by the trier of fact, the case illustrates a number of the weaknesses of videotaped testimony.

The use of prior recorded testimony in a criminal case requires that the proponent of the evidence show the present unavailability of the witness pursuant to Fed. R. Evid. 804(a)(5). Ohio v. Roberts, 448 U.S. 56, 74-75 (1980); U.S. v. Steele, 685 F.2d 793 (3d Cir. 1982). In U.S. v. Provencio, 554 F.2d 361 (9th Cir. 1977), the government’s introduction of the depositions of alien witnesses at trial was found to violate the Confrontation Clause of the Sixth Amendment because there was no proof or stipulation that the witnesses whose depositions were taken were unavailable. Even if witnesses are beyond the court’s jurisdiction and subpoena power at trial, a deposition of a material witness may be inadmissible either (1) because there were no extraordinary circumstances justifying the deposition, or (2) because the government has not made a diligent effort to secure the witnesses’ voluntary return to testify. U.S. v. Thomas, 62 F.3d 1332 (11th Cir. 1995); U.S. v. Mann, 590 F.2d 361, 366 (1st Cir. 1978); Government of the Virgin Islands v. Aquino, 378 F.2d 540, 551-52 (3d Cir. 1967).

However, depositions under Rule 15 must not be used merely as a tool for discovery. U.S. v. Edwards, 69 F. 3d 419, 437 (10th Cir. 1996); U.S. v. Steele, 685 F.2d 793, 809-10 (3d Cir. 1982).

Defense attorneys in cases involving material witnesses should be aware of 18 U.S.C. §3144 and §1324, which provides that no material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition, and further detention is not necessary to prevent a failure of justice. See Torres-Ruiz v. United States District Court, Southern District of California, 120 F.3d 933 (9th Cir. 1997) (district court committed clear error by not allowing videotape depositions of two material witnesses in alien smuggling trial). Defense counsel, therefore, should attempt to make a “failure of justice” argument to prevent a videotaped deposition. Id. Although no case has defined a “failure of justice,” counsel may argue that a videotaped deposition will derogate defendant’s right to a fair trial by denying confrontation, compulsory process, and/or exculpatory evidence.

6.27 MOTION TO PROVIDE THE DEFENDANT WITH PRETRIAL HEARING OR MISTRIAL TRANSCRIPT

An indigent defendant in a federal criminal case can move the court to order the production of transcripts of testimony from a pretrial hearing or prior mistrial, without cost to the defendant, to allow counsel to prepare for a trial and to impeach critical government witnesses. In Brit v. North Carolina, 404 U.S. 226, 227 (1971); U.S. v. Devlin, 13 F.3d 1361, 1363 (9th Cir. 1994); U.S. v. Pulido, 879 F.2d 1255, 1256 (5th Cir. 1989). In Brit, the Court identified two factors relevant to determining whether an indigent defendant is entitled to receive a free transcript: (1) the value of the transcript to the purpose for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. Brit, 404 U.S. at 227. As to the first factor, the Brit Court refused to require defendants to

24 In a case of first impression, the Fifth Circuit held that Brit’s logic indicates that indigent defendants do not have a constitutional right to transcripts of prior trials or proceedings on charges unrelated to those currently pending. Fisher v. Hargett, 997 F.2d 1095, 1098-99 (5th Cir. 1993).
show a particularized need for a transcript. *Id.* at 228. Indeed, in cases involving a prior mistrial, the Court held that the value of a transcript to the defendant can be assumed. *Id.* In *Devlin*, the Ninth Circuit extended the permissibility of this assumption to requests for transcripts from pretrial proceedings. *U.S. v. Devlin*, 13 F.3d at 1364. As to the second factor, the Ninth Circuit has implied that the government bears the burden to prove that the defendant had alternative devices available. *Id.* at 1364.

The question that appears unanswered is what available alternative devices to a transcript are acceptable. In one case, the Fifth Circuit intimated that an alternative device to a transcript must provide the substantial equivalent of a transcript. *Tague v. Puckett*, 874 F.32 1013, 1014 (5th Cir. 1989). In a second case, the Fifth Circuit indicated that an adequate alternative is all that is constitutionally required under *Brit. Fisher v. Hargett*, 997 F.2d at 1099. The court further noted that a bare minimum appears to fulfill the “adequate alternative” requirement. *Id.*

A second question that remains open is whether a defendant who is denied a transcript must show actual prejudice to prevail, or whether the court should presume prejudice. *Brit* left this question open. In *U.S. v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980), however, the Ninth Circuit determined that the harmless error analysis of *Chapman v. California* should apply.25 *See also U.S. v. Pulido*, 879 F.2d 1255, 1258-59 (5th Cir. 1989). Applying that standard, the court held that the denial of the defendant’s request for a transcript of a suppression hearing was harmless beyond a reasonable doubt. *Rosales-Lopez*, 617 F.2d at 1356. In *Rosales-Lopez*, the defendant requested the testimony of two Immigration and Naturalization Service agents at the suppression hearing for impeachment purposes. This request was denied by the trial court. On appeal, the Ninth Circuit held that since the agents’ lengthy testimony at the suppression hearing and the trial was strongly consistent overall, any error was harmless. *Id.; see, e.g.*, *U.S. v. Kirk*, 844 F.2d 660 (9th Cir. 1988); *U.S. v. Bamberger*, 482 F.2d 166 (9th Cir. 1973); *see also U.S. v. Zamora-Hernandez*, 222 F.3d 1046 (9th Cir. 2000) (affirming district court’s denial of defendant’s request for a continuance to obtain a transcript for a mistrial because defendant could not demonstrate prejudice).

However, in *U.S. v. Devlin*, 13 F.3d 1361, 1365 (9th Cir. 1994), the Ninth Circuit found actual prejudice to the defendant in the denial of the suppression hearing transcript because the inconsistencies in the testimony between the two court proceedings were more than trivial. Moreover, the court noted that the government attorneys regarded the transcript as sufficiently important to have requested a copy for themselves.

### 6.28 MOTION TO ADMIT POLYGRAPH RESULTS

To admit scientific expert testimony, the district court must determine whether the evidence constitutes scientific knowledge that will assist the trier of fact to understand or determine a fact in issue.

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25 The Fourth Circuit has also applied harmless error analysis to the denial of a request for a transcript from a prior mistrial. *U.S. v. Tyler*, 943 F.2d 420, 423 (4th Cir. 1991). However, the Fourth Circuit did not apply the harmless error analysis of *Chapman*. Rather, it applied the harmless error analysis of *Kotteakos v. U.S.*, 328 U.S. 750, 765 (1946). Thus, the Fourth Circuit viewed the matter as one solely of federal criminal procedure. *U.S. v. Tyler*, 943 F.2d at 423, compare *U.S. v. Devlin*, 13 F.3d 1361, 1365 (9th Cir. 1994); *U.S v Pulido*, 879 F.2d 1255, 1258-59 (5th Cir. 1989).
Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 593 (1993). Under Daubert, courts generally refer to four factors to determine whether a theory or technique constitutes scientific evidence: (1) the degree to which the theory or technique may be subject to testing; (2) the extent to which the theory or technique has been subjected to peer review; (3) the known or potential rate of error of the theory or technique; and (4) the degree to which the theory or technique has achieved general acceptance in the relevant scientific community. Id. at 593.

In U.S. v. Cordoba, 104 F.3d 225 (9th Cir. 1997), the Ninth Circuit overruled its pre-Daubert per se ban on the admission of unstipulated polygraph evidence. See also U.S. v. Posado, 57 F.3d 428 (5th Cir. 1995) (eliminating per se rule against admissibility); but see U.S. v. Sanchez, 118 F.3d 192, 197 (4th Cir. 1997) (affirming per se ban on admissibility of polygraph evidence to impeach witnesses); U.S. v. Messina, 131 F.3d 36, 42 (2d Cir. 1997) (stating court has “not decided whether polygraphy has reached a sufficient state of reliability to be admissible”). Under Daubert’s approach to scientific evidence, the trial court must weigh the probative value of admitting polygraph evidence against its prejudicial effect. The Ninth Circuit has also recognized that Daubert also overruled any per se rule barring the admission of polygraph evidence under Rule 403. Cordoba, 104 F.3d at 228.

While the Fifth and Sixth Circuits disfavor the admission of unstipulated polygraph evidence to bolster credibility, both circuits still require the trial judge to weigh the evidence under Rule 403 before rendering a decision to admit or exclude. See U.S. v. Pettigrew, 77 F.3d 1500, 1515 (5th Cir. 1996); U.S. v. Sherrill, 67 F.3d 1208, 1216-17 (6th Cir. 1995); Conti v. Commissioner, 39 F.3d 658, 663 (6th Cir. 1994). Some courts require only a balancing under Fed.R. Evid. 403. U.S. v. Williams, 95 F.3d 723, 729-30 (8th Cir. 1996); U.S. v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995); U.S. v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989).

A criminal defendant does not have a Sixth Amendment right to present favorable polygraph evidence to a trier of fact. In Scheffer, the United States petitioned the Court to reverse the United States Court of Appeals for the Armed Services’ holding that a per se exclusion of polygraph evidence offered by an accused to rebut an attack on credibility violates a defendant’s constitutional right to put on a defense. U.S. v. Scheffer, 523 U.S. 303 (1998). The Court granted cert and reversed. The Court observed that the right to present relevant evidence is subject to reasonable restrictions. Id. at 1264. Rules that operate to restrict evidence are reasonable so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. Id. The three purposes offered in support of the Military’s ban, concluded the Court, were neither arbitrary nor disproportionate to the purposes they were designed to serve. Id. at 1265-67. The purposes offered were as follows: (1) ensuring that reliable evidence alone is presented to the trier of fact, (2) preserving the jury’s core function of rendering credibility determinations, and (3) avoiding litigation of issues other than the guilt or innocence of the accused. Id.

In reaching its conclusion, the Court also distinguished three important precedents: Rock v. Arkansas, 483 U.S. 44 (1987); Washington v. Texas, 388 U.S. 14 (1967); and Chambers v. Mississippi, 410 U.S. 284 (1973). Scheffer, 523 U.S. at 314-16. The court noted that in each of these three cases the exclusion of evidence significantly undermined fundamental elements of the accused’s right to put on a defense. Id. at 315-17. In Rock, Arkansas’ exclusion of all hypnotically refreshed testimony deprived the defendant of the opportunity to present to the jury the testimony of the only eyewitness to the underlying events. Id. at 315. In Washington, Texas’ statute absolutely prohibited the defendant from
presenting to the jury the testimony of a co-defendant who would have admitted to committing the crime with which the defendant was charged. *Id.* at 315-16. In *Chambers*, Mississippi’s statute prevented the defendant from impeaching his own witness. *Id.* In addition, the state’s hearsay rules prevented the defendant from presenting the testimony of three witnesses to whom the witness the defense sought to impeach had confessed. *Id.* In contrast, the *Scheffer* Court observed, the Military’s bar to the introduction of polygraph evidence did not implicate any similarly significant interest of the accused. *Id.* In particular, the Court noted, (1) the trier of fact heard all relevant details of the charged offense from the accused’s perspective, (2) the rule did not prevent the accused from presenting any factual evidence, and (3) the rule did not prohibit the accused from testifying. *Id.* On these facts, the court determined that it could not conclude that the accused’s defense had been significantly impaired by the exclusion of the polygraph evidence he sought to introduce. *Id.* at 317. The Court held the military’s rule constitutional. *Id.*

6.29 MOTION FOR APPOINTMENT OF EXPERT WITNESS

The Criminal Justice Act provides that counsel for an indigent defendant may make an *ex parte* request to obtain investigative, expert, or other services necessary for an adequate defense. 18 U.S.C. §3006A(e)(1). The Act requires the district judge to authorize the defense expert services, consultative or investigative, when a reasonably competent attorney would engage such services for a client having independent financial means to pay for them. *U.S. v. Fields*, 722 F.2d 549, 551 (9th Cir. 1983); *U.S. v. Sims*, 617 F.2d 1371 (9th Cir. 1980). The burden is on the defense to prove necessity. *U.S. v. Nichols*, 21 F.3d 1016 (10th Cir. 1994); *see also U.S. v. Labansat*, 94 F.3d 527 (9th Cir. 1996) (defense failed to prove necessity for eyewitness expert or that prejudice resulted from the failure to appoint). If, after appropriate inquiry, the court is satisfied that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that a state must provide access to expert psychiatric services where the defendant makes an *ex parte* preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial.

The Criminal Justice Act allows the application for expert services to be made *ex parte*. It is reversible error for the court to deny a defendant an *ex parte* hearing for a request for appointment of an expert. *U.S. v. Theriault*, 440 F.2d 713 (5th Cir. 1971). It is error for the court to allow the prosecution to be present at a hearing for authorization to hire an expert witness if it impinges upon the defendant’s right to confidentiality in the preparation of his case. *U.S. v. Sutton*, 464 F.2d 552 (5th Cir. 1972). For the same strategic reasons that an application for a 17(b) subpoena should be made *ex parte*, counsel should make any application for expert services *ex parte*

6.30 UNKNOWING DRUG COURIERS

In drug cases, the government will often try to admit “expert” testimony from its agents about the activities of drug smuggling organizations. Under the guise of “expertise,” agents will be allowed to testify that drug smuggling organizations do not employ blind mules (*i.e.*, that the drug couriers, the “mules,” are always informed about what they are carrying, and thus are not “blind”). The point of this testimony is always to prove that the defendant *knew* he possessed narcotics. Counsel should move, *in limine*, to
It should be noted that Morales was an en banc opinion handed down after the cases admitting expert testimony on blind mules were decided; therefore, counsel should argue that Morales overruled them sub silencio. Preclude any such testimony under Fed. R. Evid. 704(b). Rule 704(b) generally permits experts to testify to their opinions on ultimate issues; however, the Rule is limited in criminal cases:

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 issues are for the trier of fact alone.

Fed. R. Evid. 704(b); accord, U.S. v. Morales, 108 F.3d 1031 (9th Cir. 1997) (en banc).

In Morales, the defendant, accused of falsifying entries in a union ledger, sought to introduce expert testimony that she had a weak grasp of bookkeeping principles. The trial court excluded the testimony. The Ninth Circuit reversed, holding the exclusion erroneous because the expert was only to testify regarding defendant’s skills, not whether she willfully made false entries. The Ninth Circuit reasoned that, since the expert was not opining on an ultimate issue in violation of Fed.R.Evid. 704(b), the relevant test for admission was the Winters test: (1) the subject matter at issue is beyond the common knowledge of the average layman; (2) the witness has sufficient expertise; and (3) the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion. Id. at 1038.

Morales recognizes the clear rule of Rule 704(b): all experts are precluded from testifying about whether defendant had a particular mental state when that mental state is part of the crime charged. Morales, 108 F.3d at 1035. Given the mandate of Rule 704(b), the government should be prohibited from providing expert testimony about whether unknowing mules are used. Such testimony constitutes an opinion about defendant’s mental state, when mental state is an issue -- in fact, usually the only issue -- in the case.

Unfortunately, the case law has yet to recognize Rule 704(b)'s prohibition of expert testimony on defendant’s mental state. In U.S. v. Gomez-Norena, 908 F.2d 497, 501-02 (9th Cir. 1990), the trial court did not err by admitting a DEA agent’s opinion testimony that $200,000 worth of cocaine was consistent with an intent to distribute, rather than personal use; the court reasoned that his testimony did not necessarily compel the inference that defendant had the mens rea for intent to distribute. Also see In Re Sealed Case, 99 F.3d 1175 (D.C. Cir. 1996) (finding expert testimony on whether amount and packaging of drugs found in home was consistent with personal use not prohibited by Rule 704(b)); but see U.S. v. Smart, 98 F.3d 1379, 1385-89 (D.C. Cir. 1996) (finding testimony that behavior exactly mirroring defendant’s alleged behavior met elements of drug operation involvement violated Rule 704(b), even though expert never uttered the word “intent”). More distressingly, in U.S. v. Cordoba, 104 F.3d 225 (9th Cir. 1997), the trial court allowed expert testimony that sophisticated drug traffickers do not entrust 330 kilograms of cocaine to an unknowing courier. See also U.S. v. Alatorre, 222 F.3d 1098 (9th Cir. 2000). Counsel should attempt to distinguish Cordoba because of the great amount of cocaine involved. Cordoba, 104 F.3d at 229-30. Additionally, an argument should be made that Cordoba\textsuperscript{26} testimony circumvents the prohibition of 704(b), and, at the very least, counsel should get a limiting instruction telling

\textsuperscript{26} It should be noted that Morales was an en banc opinion handed down after the cases admitting expert testimony on blind mules were decided; therefore, counsel should argue that Morales overruled them sub silencio.
the jury that this opinion evidence is not directly probative of defendant’s mental state. Counsel should also seek experts to testify that drug dealers do, in fact, entrust loads to unwitting couriers.

6.30.01 Drug Courier Profiles

Counsel should also always move to preclude “drug courier profile” testimony (i.e., the defendant’s pager, cell phone, mode of dress, demeanor, etc., were consistent with those of a drug dealer). U.S. v. Lui, 941 F.2d 844, 847 (9th Cir. 1991). The government may also seek to admit the methods employed by drug dealers (i.e., the use of “lead cars,” having people watch the cars bringing the drugs, etc.). Drug courier testimony is inherently prejudicial and admissible only in limited circumstances. U.S. v. Lim, 984 F.2d 331, 334-35 (9th Cir. 1993); Cordoba, 104 F.3d 229-230; but see U.S. v. Foster, 939 F.2d 445, 450-51 (7th Cir. 1991). See Chapter 12 for more on drug courier profiles.

6.31 MOTION TO VIEW THE SCENE OF THE CRIME

Defense counsel may wish to move the court to allow the jury to view the scene of the crime or other places relevant to the trial. See Harris v. U.S., 261 F.2d 792, 798 (9th Cir. 1958) (jurors may visit sites located away from the courthouse). The decision whether to allow the jury to view the scene of the crime falls within the discretion of the trial court. In re Application to Take Testimony in Criminal Case Outside District, 102 F.R.D. 521 (E.D.N.Y. 1984). Should the government move to permit the jury to view the scene of the crime, the court should conduct the view in the presence of defense counsel. Arnold v. Evatt, 113 F.3d 1352, 1361 (4th Cir. 1997).

6.32 MOTION TO REVEAL THE IDENTITY OF THE INFORMANT

Fed. R. Crim. P. 12(b)(1) allows defense counsel to move for pretrial disclosure of an informant’s identity. The Supreme Court has held that the government must disclose an informant’s identity where the informant actively participated and/or was a percipient witness to the acts underlying the prosecution. Roviaro v. U.S., 353 U.S. 53 (1957); U.S. v. Ramirez-Rangel, 103 F.3d 1501, 1505 (9th Cir. 1997); Devose v. Norris, 53 F.3d 201, 206 (8th Cir. 1995). Like many circuits, the Ninth Circuit has held that the government must reveal the informant’s identity if the defendant meets his burden of proving that disclosure would be helpful to his defense or essential to the fair determination of the case. U.S. v. Ramirez-Rangel, 103 F.3d 1501, 1505 (9th Cir. 1997); U.S. v. Rutheford, 175 F.3d 899, 901 (11th Cir. 1999); U.S. v. Gordon, 173 F.3d 761 (10th Cir. 1999); U.S. v. Fairchild, 122 F.3d 605, 609 (8th Cir. 1997).

Disclosure of an informant’s identity is not required in a case where the informant’s involvement is limited to providing information related to probable cause. McCray v. Illinois, 386 U.S. 300 (1967); U.S. v. Gordon, 173 F.3d 761, 785-86 (10th Cir. 1999); U.S. v. Hickman, 151 F.3d 446., 458-59 (5th Cir. 1998); U.S. v. Moore, 129 F.3d 989, 992-93 (8th Cir. 1997); U.S. v. Skeens, 449 F.2d 1066 (D.C. Cir. 1971). However, disclosure may be required at trial if the informant was present during events forming the basis of the offense(s) charged, even if he did not participate in the underlying transaction. U.S. v. Bonilla, 615 F.2d 1262 (9th Cir. 1980). Similarly, courts should require disclosure of a tipster’s identity when disclosure is vital to preserving a fair trial. U.S. v. Lewis, 40 F.3d 1325, 1335 (1st Cir. 1994).
In *U.S. v. Ordonez*, 737 F.2d 793, 808-09 (9th Cir. 1984), the trial court’s decision not to reveal the identity of an informant was reversed. The court held that *Roviaro* involved a balancing test and that the lower court’s comments on the record were so brief that the appellate court could not determine whether the trial court had properly weighed the various factors. Absent stated reasons to the contrary, it is error of constitutional dimension to deny disclosure where disclosure would be “highly relevant and might have been helpful to the defense.” *Id.* at 809 (citing *Roviaro*, 353 U.S. at 63-64). However, in *U.S. v. Cutler*, 806 F.2d 933 (9th Cir. 1986), the court upheld the trial court’s denial of the defendant’s request for specific information regarding the informant’s role in a prior, unrelated investigation where the government disclosed both the nature of the prior investigation and the fact that cash payments were made to the informant.

*In camera* hearings to reveal the identity of an informant may be appropriate in certain circumstances. In the Ninth Circuit, an *in camera* hearing is required when the defendant makes a minimal threshold showing that disclosure of a confidential informant’s identity would be relevant. *U.S. v. Spires*, 3 F.3d 1234, 1238 (9th Cir. 1993); *U.S. v. Amador-Galvan*, 9 F.3d 1414, 1417 (9th Cir. 1993). It is an abuse of the court’s discretion to fail to hold such a hearing where the defendant has made a threshold showing of need. *U.S. v. Amador-Galvan*, 9 F.3d at 1417. The government has the duty to produce the informant or to show that despite reasonable efforts it was not able to do so. *U.S. v. LaRizza*, 72 F.3d 775, 779 (9th Cir. 1995). In the Second Circuit, “an *in camera* interview of informants that finds no inconsistency with police testimony can mitigate any concern that the informant’s testimony would in fact be useful to the defense.” *U.S. v. Fields*, 113 F.3d 313, 324 (2d Cir. 1997).

### 6.33 MOTION TO SUPPRESS SUGGESTIVE PRETRIAL IDENTIFICATION

Where identity is at issue, the Due Process Clause enables the defendant to suppress any in-court identification testimony tainted by out-of-court prosecutorial error. *Foster v. California*, 394 U.S. 440 (1969). Counsel may also move for suppression of any out-of-court identification secured by violating defendant’s rights. *Neil v. Biggers*, 409 U.S. 188 (1972). In *U.S. v. Wade*, 388 U.S. 218 (1967), the Supreme Court held that the Sixth Amendment guarantees an accused the right to counsel at his trial and any critical stage in the prosecution. This includes any proceeding which might either determine the accused’s fate or impair his right to a fair trial. Post-charge lineups are such critical stages. *U.S. v. LaPierre*, 998 F.2d 1460 (9th Cir. 1993).

Any in-court identification by a witness who has been shown the accused before trial, where the accused was unable to have counsel present, must be excluded unless it can be established that the identification had an independent origin or that the error in its admission was harmless. *U.S. v. Wade*, 388 U.S. 218; *U.S. v. Simoy*, 998 F.2d 751 (9th Cir. 1993). However, the right to counsel during pretrial identification procedures does not extend to photographic displays. *U.S. v. Ash*, 413 U.S. 300 (1973); *Allen v. Rhay*, 431 F.2d 1160 (9th Cir. 1970). *See also U.S. v. Barker*, 988 F.2d 77 (9th Cir. 1993) (where witness unable to identify defendant at lineup, court properly admitted witness’s subsequent identification of defendant from a photo array).

Many cases involve pre-accusation show-ups or the use of photographic displays. Counsel should always move to suppress in-court identification evidence that is the fruit of the out-of-court display if the
display was overly suggestive or unfair. *Simmons v. U.S.*, 390 U.S. 377 (1968); *Williams v. Lockhart*, 736 F.2d 1264, 1266 (8th Cir. 1984).

In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Court delineated standards for use in a motion to suppress due to suggestive pretrial identification. The Court held that "reliability is the linchpin" in determining the admissibility of identification testimony, and applied the "totality of the circumstances" standard of *Stovall v. Denno*, 388 U.S. 293 (1967), to determine the reliability of the factors to be weighed. The *Stovall* factors are: (1) the opportunity of the witness to view the criminal at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of any prior description by the witness; (4) the level of certainty demonstrated by the confrontation; and (5) the time between the occurrence of the crime and the confrontation. *Manson*, 432 U.S. at 104.

The Court in *Manson* further held that while the identification procedure in that case was suggestive because only one photograph was used, this procedure was unnecessary because there were no exigent circumstances requiring the single photographic display, and, under the totality of the circumstances, there was not a substantial likelihood of irreparable misidentification.

*U.S. v. Crews*, 445 U.S. 463 (1980), involved a motion to suppress testimony based on a photographic identification. The photographs used had been taken after defendant was illegally arrested. Immediately after being robbed, the victim notified police and gave a description of her assailant. *Id.* at 471. Several days later the defendant, who matched the description, was seen by police near the scene of the crime. After unsuccessful attempts to photograph the defendant, he was taken into custody on a pretext, detained, briefly questioned, photographed and released. *Id.* at 467. Thereafter, the victim identified the photograph as depicting her assailant. *Id.*. The witness identified the defendant in a subsequent court-ordered lineup. *Id.*

The trial court found that the arrest of the defendant violated the Fourth Amendment, but allowed the admission of the in-court identification on the basis that it was reliable. *Id.* at 476. The District of Columbia Court of Appeals disagreed. However, a unanimous Supreme Court reversed the court of appeals and held that the in-court identifications did not need to be suppressed as the fruit of the unlawful arrest because the police's knowledge of the defendant's identity and the victim's independent recollection of him both antedated the unlawful arrest and were untainted by the constitutional violation. *Id.* at 477. Further, the identity and presence of the defendant at trial were not the result of any illegal police conduct. The Court held that the illegal arrest itself did not infect the victim's ability to give accurate identification testimony. *Id.*

The case law indicates that relief for suggestive identification claims is dwindling. In *U.S. v. Carbajal*, 956 F.2d 924 (9th Cir. 1992), the court held that a photo spread including a photograph of the defendant as the only person in the line-up in a wig and with bruises on his face was not impermissibly suggestive. Rather, the court felt that "[i]f anything, the bruises may have made identification more difficult because they distorted his features." *Id.* at 929. In *U.S. v. Davenport*, 753 F.2d 1460 (9th Cir. 1985), a photo spread which included defendant was shown to bank tellers shortly after a robbery. Four days before trial, the prosecutor conducted a lineup without court permission, and defendant was identified by a number of tellers. *Id.* at 1462. The defendant was the only person who appeared in both the photo
spread and the lineup. *Id.* Despite these factors, the court determined "from the totality of the circumstances" that the procedure was not unduly suggestive, and affirmed the trial court's denial of the defendant's motion to suppress the tellers' in-court identification. *Id.* This case suggests the defendant must make an increased showing of "taint" of the in-court identification to have the identification suppressed. *See also* *U.S. v. Portillo*, 633 F.2d 1313, 1324 (9th Cir. 1980).

Counsel should carefully scrutinize the identification procedure used in an alien smuggling trial. Material witnesses may tell Border Patrol agents something different from what they say to defense counsel. It is not uncommon for material witnesses to blame your client at the urging of the real alien smuggler who is in their midst. Material witnesses are, additionally, a rich source of information regarding identification procedures of the Border Patrol.

Voice identifications were addressed in *U.S. v. Duran*, 4 F.3d 800, 803 (9th Cir. 1993). The court held that the factors to be considered were the same as those in the eyewitness context identified in *Neil v. Biggers*, 409 U.S. at 199 (1972). These include the opportunity of the witness to hear the voice at the time of the offense, the witness' degree of attention, the accuracy of the witness' prior description, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the incident and the confrontation. In *Duran*, the Ninth Circuit also held that a voice identification in a prior trial does not amount to a pretrial identification in a second trial. *Duran*, 4 F.3d 800.

In the Ninth Circuit, the standard of review from motions based on tainted out-of-court pretrial photo identifications is unresolved. *See U.S. v. Dring*, 930 F.2d 687 (9th Cir. 1991); *U.S. v. Nash* 946 F.2d 679 (9th Cir. 1991) (employing totality of surrounding circumstances analysis). In any case, counsel should consult the growing body of information available from experts in eyewitness identification. *See* Elizabeth Loftus, *Ten Years in the Life of an Expert Witness, Law and Human Behavior*, Vol. 10, No. 3 (1986). Subsequent to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Ninth Circuit held that it is an abuse of discretion if the court refuses to consider whether the proffered testimony of an expert on eyewitness identification is relevant, trustworthy, and scientifically valid. *U.S. v. Amador-Galvan*, 9 F.3d 1414 (9th Cir. 1993); *see also* *U.S. v. Rincon*, 28 F.3d 921 (9th Cir. 1994) (*Rincon II*).

**6.34 MOTION FOR SEVERANCE**

The rules by which a prosecutor may combine offenses and defendants in a single indictment are articulated in Rule 8 of the Federal Rules of Criminal Procedure. Any form of joinder not explicitly permitted under Rule 8 is "misjoinder." However, even where joinder is proper under Rule 8, it may, nevertheless, be "prejudicial," entitling a defendant to relief under Rule 14.

**6.34.01 Joinder of Offenses: Rule 8(a)**

**6.34.01.01 Rule 8(a)**

Rule 8(a) of the Federal Rules of Criminal Procedure provides that:
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.

Under Rule 8(a) there must be a separate count for each offense in order to prevent duplicity (i.e., the charging of multiple offenses in a single count).^{27} U.S. v. Aguilar, 756 F.2d 1418, 1422 (9th Cir. 1985); see also U.S. v. Sharpe, 193 F.3d 852, 870 (5th Cir. 1999). The Rule provides for three circumstances under which offenses may be joined against the defendant: (1) where they are of the same or similar character, (2) where they are based on the same act or transaction, or (3) where they are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

In order to challenge a duplicitous indictment, the defendant should file a pretrial severance motion to compel the prosecution to elect the charges on which it chooses to proceed, with the remaining charges either charged separately or dismissed. Aguilar, 756 F.2d at 1422-23; Thomas v. U.S., 418 F.2d 567 (5th Cir. 1969). The standard for joinder, however, is low, as the policy is designed to favor judicial economy. U.S. v. Duzac, 622 F.2d 911, 913 (5th Cir. 1980); U.S. v. Forrest, 623 F.2d 1107, 1114 (5th Cir. 1980); U.S. v. Park, 531 F.2d 754, 761 (5th Cir. 1976).

### 6.34.01.02 Same or Similar Offenses

For cases dealing with the joinder of same or similar offenses, see U.S. v. Woody, 55 F.3d 1257 (7th Cir. 1995); U.S. v. DeBordez, 741 F.2d 182 (8th Cir. 1984) (bank robberies); U.S. v. Harris, 635 F.2d 526 (6th Cir. 1980) (joinder of mail offenses); U.S. v. Lewis, 626 F.2d 940 (D.C. Cir. 1980) (possession, possession with intent to distribute, and distribution of drugs); U.S. v. Werner, 620 F.2d 922, 926 (2d Cir. 1980) (theft of foreign currency and violation of Hobbs Act); U.S. v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980) (bank robberies); U.S. v. Shearer, 606 F.2d 819 (8th Cir. 1979) (armed robberies in same locale over two week period); U.S. v. Bronco, 597 F.2d 1300, 1301 (9th Cir. 1979) (conspiracy to sell counterfeit money, possession and passing of counterfeit money); U.S. v. Tillman, 470 F.2d 142, 143 (3d Cir. 1972) (sale of cocaine with sale of heroin).

### 6.34.01.03 Common Scheme or Plan

For cases where offenses were deemed to constitute part of "a common scheme or plan," see U.S. v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994) (charges against all defendants required showing that they acted in furtherance of their positions in Mexican drug cartel); U.S. v. Raineri, 670 F.2d 702, 708-09 (7th Cir. 1982) (offense violating Travel Act with perjury); U.S. v. Eades, 615 F.2d 617, 624 (4th Cir. 1980) (entry upon military base with intent to commit theft with two assault charges); U.S. v. Jordan, 602 F.2d 171, 172 (8th Cir. 1979) (possession of stolen mail counts).

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27 See section 6.09 above for a discussion of duplicity.
6.34.01.04 Felon in Possession of a Firearm Tried with Other Offenses

Counsel should obviously seek severance or bifurcation of felon in possession of firearm counts to avoid having the jury learn that defendant is a felon. In *U.S. v. Jones*, 16 F.3d 487 (2d Cir. 1994), the Second Circuit reversed when a felon in possession count was joined with other offenses reasoning that the “presumption that a jury will adhere to a limiting instruction evaporates where there is an overwhelming probability that the jury will be unable to follow the court’s instructions and the evidence is devastating to the defense.” *Id.* at 493 (citing *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987)). The Third Circuit believes that bifurcation is the appropriate remedy for trying a felon in possession count with other counts. *U.S. v. Joshua*, 976 F.2d 844 (3d Cir. 1992). The D.C. Circuit held that the trial court erred by not considering all of the nonprejudicial alternatives for trying a felon in possession count with other counts. *U.S. v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992).

Similarly, the Seventh Circuit held that the trial court erred when it denied defendant’s motion to sever his firearm possession charge from his narcotics conspiracy and possession charges. *U.S. v. Hubbard*, 61 F.3d 1261, 1269-72 (7th Cir. 1995). The court noted that a significant amount of time, approximately one and one-half years, separated the discovery of the firearm from the conduct underlying the narcotics charge. *Id.* at 1271. The court, however, deemed the misjoinder harmless. *Id.* at 1272.

In a troubling decision, the Ninth Circuit found no error where the trial court allowed consolidation of a felon in possession of a firearm count with a conspiracy count. *U.S. v. Nguyen*, 88 F.3d 812 (9th Cir. 1996). The *Nguyen* court recognized that trying these counts together risks undue prejudice because the jury learns that defendant is a felon, evidence that would probably be excluded under Fed R. Evid. 404(b) if the court severed the conspiracy charge or bifurcated trial. *Id.* at 815. While explaining that it may be beyond human ability to ignore the prior conviction when evaluating defendant’s guilt on the conspiracy offense, the court, nonetheless, affirmed because the jury instructions were good, jurors are presumed to follow instructions, and there was strong evidence of defendant’s guilt. *Id.* at 816-818 n.5; see *Zafiro v. U.S.*, 506 U.S. 534, 540 (1993).28

28 Counsel could try to distinguish *Nguyen* as a harmless error case because of the overwhelming evidence of defendant’s guilt.
6.34.01.05 Prejudice

A violation of Rule 8(a) is subject to harmless error review, requiring a showing of actual prejudice which affected the jury's verdict. *U.S. v. Terry*, 911 F.2d 272, 277 (9th Cir. 1990); see also *U.S. v. Edgar*, 82 F.3d 499, 503 (1st Cir. 1996). The First Circuit has identified three types of possible prejudice which may arise from improper joinder of offenses:

(1) the defendant may become embarrassed or confounded in presenting separate defenses; (2) proof that defendant is guilty of one offense may be used to convict him of a second offense, even though such proof would be inadmissible in a separate trial for the second offense; and (3) a defendant may wish to testify in his own behalf on one of the offense but not another, forcing him to choose the unwanted alternative of testifying as to both or testifying as to neither.

*U.S. v. Jordan*, 112 F.3d 14, 16 (1st Cir. 1997) (quoting *U.S. v. Scivola*, 766 F.2d 37, 41-42 (1st Cir. 1985)). For cases addressing the showing of prejudice, see *U.S. v. Lewis*, 787 F.2d 1318 (9th Cir.) (admission of other crimes in one count prejudiced defendant on other joined count, where evidence weak on second charge), *modified*, 798 F.2d 1250 (9th Cir. 1986); *U.S. v. Massa*, 740 F.2d 629 (8th Cir. 1984); *Drew v. U.S.*, 331 F.2d 85 (D.C. Cir. 1964). Where a defendant is charged in two counts and wishes to testify at trial on one count, but desires not to testify on the second count, the joinder of the counts for trial prejudices the defendant, and a request for severance of the counts should be granted. *Cross v. U.S.*, 335 F.2d 987 (D.C. Cir. 1964); but see *U.S. v. Hutchison*, 22 F.3d 846 (9th Cir. 1994) (district court did not abuse its discretion by refusing to sever in same circumstance), *abrogated on other grounds by U.S. v. Nash*, 115 F.3d 1431 (9th Cir. 1997).

6.34.02 Joinder of Defendants: Rule 8(b)

6.34.02.01 Rule 8(b)

Fed. R. Crim. P. 8(b) provides that:

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.

Under Rule 8(b) joinder of multiple defendants is proper “only if all of the offenses charged in the indictment arose out of the same series of transactions.” *U.S. v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1977). In determining whether this standard is met, there must be a logical connection shown between the offenses. *U.S. v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999). In *Sarkisian*, the Ninth Circuit wrote:
‘[T]ransactions’ has a flexible meaning and...the existence of a ‘series’ depends upon the
degree to which the events are related. Mere factual similarity of events will not suffice.
Rather, there must be some greater ‘logical relationship’ between the occurrences. Such
a logical relationship may be shown by the existence of a common plan, scheme, or
conspiracy.

*Id.* at 976 (quoting *U.S. v. Ford*, 632 F.2d 1354, 1371-72 (9th Cir. 1980)). “A ‘logical relationship’
may also be shown if ‘the common activity constitutes a substantial portion of the proof of the joined
charges.’”  *Id.* (quoting *U.S. v. Vasquez-Velasco*, 15 F.3d 833, 844 (1994)).

### 6.34.02.02 Showing Prejudice Under 8(b)

Reversal will only result from misjoinder where the error results in "actual prejudice" to the
defendant and is subject to the harmless error rule. *U.S. v. Lane*, 474 U.S. 438 (1986). For additional
discussion of prejudice in the context of severance of defendants, see *infra* at subsection C.3. It is not
necessary to renew a Rule 8 motion for misjoinder at the close of evidence -- unlike a Rule 14 motion for
severance which must be renewed -- because misjoinder under Rule 8 is a question of law. *U.S. v. Terry*,
911 F. 2d 272 (9th Cir. 1990).

### 6.34.03 Prejudicial Joinder: Rule 14

#### 6.34.03.01 Rule 14

Federal Rule of Criminal Procedure 14 provides:

> 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 the court for
inspection *in camera* any statements or confessions made by the
defendants which the government intends to introduce in evidence at the
trial.

Rule 14 allows for severance of offenses or defendants in an indictment or information which is otherwise
proper under Rule 8. Under Rule 14 the defendant must show that joinder of offense or defendants is so
prejudicial that it outweighs the interests of judicial economy and efficiency. *U.S. v. Douglass*, 780 F.2d
1472, 1478 (9th Cir. 1986). A district court's refusal to grant severance under Rule 14 is reviewed for
abuse of discretion. *U.S. v. Mariscal*, 939 F.2d 884 (9th Cir. 1991); *U.S. v. Wellington*, 754 F.2d 1457
(9th Cir. 1985). Where counts are severed, the district court does not lose jurisdiction over the remaining
count when the defendant appeals his conviction of the first tried count. *U.S. v. Powell*, 24 F.3d 28 (9th Cir. 1994).
6.34.03.02  Waiver of Rule 14 Motion

Failure to renew a Rule 14 motion to sever at the close of evidence at trial constitutes a waiver of the right to appellate review of a denial of the motion. *U.S. v. Woody*, 55 F.3d 1257, 1267 (7th Cir. 1995); *U.S. v. Davis*, 932 F.2d 752 (9th Cir. 1991); see also *U.S. v. Plache*, 913 F.2d 1375, 1378-89 (9th Cir. 1990) (motion made before trial, early in trial and at close of government's case in chief waived because not made at close of all trial evidence). In *U.S. v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991), the court found no waiver, even though the motion was not made at close of trial, finding that severance was "diligently pursued." In *Felix-Gutierrez*, however, the defendants sought both Rule 8(b) and Rule 14 severance so the case will likely not be helpful where the motion is not renewed at the close of all of the evidence. Cf. *U.S. v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994) (no waiver because motion diligently pursued prior to and during trial and at conclusion of government's case).

6.34.03.03  Prejudice Under Rule 14

By its very terms, Rule 14 requires a showing of prejudice. In the context of severance of defendants, the Ninth Circuit has defined the prejudice burden in this way:

The moving party must show more than that a separate trial would have given him a better chance for acquittal. He must also show violation of one of his substantive rights by reason of the joint trial: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to each defendant. In other words, the prejudice must have been of such magnitude that the defendant was denied a fair trial.

_Douglass_, 780 F. 2d at 1478 (quoting *U.S. v. Escalante*, 637 F.2d 1197 (9th Cir. 1980)). The following sections discuss prejudice in the context of Rule 14 severance of defendants. For a discussion of prejudice under Rule 14 severance of offenses, see _supra_ at subsection (A).

6.34.03.04  Confessions

In *Bruton v. U.S.*, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment forbids the admission of a non-testifying co-defendant's confession in a joint trial, even where the jury has been given a limiting instruction. The Court later extended this ruling to include the situation where the defendant's own confession is admitted against him. *Cruz v. New York*, 481 U.S. 186, 192-93 (1987).

In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court held that the Confrontation Clause is not violated by the admission in evidence of a non-testifying co-defendant's confession with a proper limiting instruction where the confession is redacted to eliminate not only the defendant's name, but any reference to the defendant's existence. _Id._ The Court declined to extend *Bruton* to confessions that are not "facially incriminating." _Id._ *U.S. v. Hoac*, 990 F.2d 1099, 1107 (9th Cir. 1993). However, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court held that redactions that simply replace a name with an obvious black
space, a word such as "deleted," or a symbol, so closely resemble Bruton’s un-redacted statements as to require exclusion.

In Lee v. Illinois, 476 U.S. 530 (1986), the Supreme Court found that the co-defendants' confessions in a murder case, while consistent in some respects, were not identical in all material respects. The Court held that the confessions did not "interlock" and were presumptively unreliable. Thus the introduction of the confessions at a joint bench trial violated the Confrontation Clause of the Sixth Amendment.

The Supreme Court "[has] made clear that limiting instructions are necessary to reduce the prejudicial effects of joinder." U.S. v. Sauza-Martinez, 217 F.3d 754, 760 (9th Cir. 2000) (citing Zafiro v. U.S., 506 U.S. 534, 539 (1993)). Failure to give a limiting instruction may be ground for reversal. Id. (failure by district court to sua sponte give limiting instruction at time it admitted hearsay evidence regarding incriminating post-arrest statement by codefendant which implicated codefendant and defendant was plain error).

6.34.03.05 Inconsistent Defenses

The Zafiro v. U.S., 506 U.S. 534 (1993), decision resolved a split in the circuits on whether multiple defendants are entitled to separate trials when they have mutually antagonistic defenses. The Court held that mutually exclusive defenses are not prejudicial per se and severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence. Zafiro leaves the determination of the risk and the tailoring of the remedy to the sound discretion of the trial court. At a minimum, the defendant must show that acceptance of his co-defendant's defense would preclude his acquittal. U.S. v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993); U.S. v. Sherlock, 962 F.2d 1349 (9th Cir. 1989); see also U.S. v. Throckmorton, 87 F.3d 1069 (9th Cir. 1996) (devastating testimony of co-defendant not prejudicial without showing that evidence would be inadmissible without severance motion). Severance should be granted where defendants present mutually exclusive defenses necessarily requiring the conviction of one to acquit the other. U.S. v. Tootick, 952 F.2d 1078 (9th Cir. 1991). See also U.S. v. Freeman, 6 F.3d 586 (9th Cir. 1993). Limiting instructions by the court and the jury's ability to compartmentalize the evidence by failing to convict all defendants on all counts are critical factors in assessing the prejudicial effect of a joint trial. U.S. v. Baker, 10 F.3d 1374 (9th Cir. 1993).

A defendant may also be able to obtain a severance if co-defendants have mutually inconsistent defenses which cause one attorney to suggest to the jury that they may infer guilt from a co-defendant's silence. De Luna v. U.S., 308 F.2d 140 (5th Cir. 1962). In De Luna, the court pointed out that it is an attorney's duty to his client to comment on the failure of the co-defendant to testify when the defendant's interest requires such comment. This course of action would violate the Fifth Amendment right of the non-testifying co-defendant not to have adverse inferences drawn from his silence at trial. See also U.S. v. Benz, 740 F.2d 903 (11th Cir. 1984); U.S. v. De La Cruz-Bellinger, 422 F.2d 723 (9th Cir. 1970) (no per se rule of severance; defendant must demonstrate probable prejudice in presentation of his defense and show that defense would have benefitted by commenting on co-defendant's refusal to testify).
**6.34.03.06 Fair Trial Rights**

In *U.S. v. Echeles*, 352 F.2d 892 (7th Cir. 1965), the court held that a single joint trial of several defendants may not be had at the expense of one defendant's right to a fundamentally fair trial. In a case in which a joint trial prevents a defendant from calling to the witness stand a co-defendant who would otherwise provide testimony exculpatory as to the first defendant because the co-defendant will seek to exercise the privilege against self-incrimination, the court should grant a severance to allow the co-defendant's exculpatory testimony to be adduced at a severed trial. *Id.* at 897; see also *U.S. v. Gay*, 567 F.2d 916 (9th Cir. 1978); *U.S. v. Hernandez-Berceda*, 572 F.2d 680 (9th Cir. 1978). When the reason for severance is the asserted need for a co-defendant's testimony, the defendant must show (1) that he would call the co-defendant at a separate trial, (2) that the co-defendant would, in fact, testify, and (3) that the testimony would be "substantially exculpatory." *U.S. v. Mariscal*, 939 F. 2d 884, 886 (9th Cir. 1991); *U.S. v. Leichtman*, 742 F.2d 598, 605 (11th Cir. 1984); *U.S. v. Vigil*, 561 F.2d 1316 (9th Cir. 1977); *U.S. v. Cruz*, 536 F.2d 1264 (9th Cir. 1976); *U.S. v. Wood*, 550 F.2d 435 (9th Cir. 1976).

**6.35 MOTION FOR CHANGE OF VENUE**

**6.35.01 Prejudicial Venue: Fed. R. Crim. P. 21(a)**

A defendant may move the court for a change of venue due to prejudice or inconvenience for parties and witnesses. A change of venue because of prejudice is governed by Rule 21(a), which states:

The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

The district court has discretion when deciding a motion to change venue or delay the trial because of prejudicial pretrial publicity. *Ehrlichman v. Sirica*, 419 U.S. 1310, 1312 (1974). The federal courts have devised two tests for a change of venue motion based upon prejudicial pretrial publicity: "actual prejudice" as discussed in *Irwin v. Dowd*, 366 U.S. 717 (1961), or "inherent prejudice" as enunciated in *Murphy v. Florida*, 421 U.S. 794, 799 (1975). Actual prejudice focuses on the results of voir dire whereas inherent prejudice considers the amount and prejudicial impact of pretrial publicity.

**6.35.01.01 Actual Prejudice**

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29 There is the suggestion in *U.S. v. Tham*, 948 F.2d 1107, 1112 (9th Cir. 1991), *op. amended and superseded*, 960 F.2d 1391 (9th Cir. 1991), that the trial of the exculpating co-defendant should be held first where the only reason for the severance is to facilitate that co-defendant’s testimony, since to do otherwise would be to grant a severance in form alone only to take it away in substance. In *Tham*, however, the defendant failed to prove the court’s primary purpose in granting a severance was to facilitate the co-defendant’s testimony.
Actual prejudice requires a showing that a sufficient number of veniremen “admit to disqualifying prejudice.” *Murphy v. Florida*, 421 U.S. 794, 803 (1975). In *Murphy*, the Court found no inference of prejudice where 25.64% of the veniremen admitted to being prejudiced against defendant. *Id.* In *Irwin*, the High Court found prejudice when 268 of the jury panel’s 430 members were excused for cause, which demonstrated “a pattern of deep and bitter prejudice” against the defendant. *Id.* at 727. In *U.S. v. Collins*, 109 F.3d 1413, 1416-17 (9th Cir. 1997), the appellate court found no prejudice when only 9.27% of the members of the jury panel held fixed opinions about defendant’s guilt.

6.35.01.01 Prejudicial Pretrial Publicity

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court stated that "[w]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363.

While the *Murphy* Court did not find prejudice because of 25.64% of biased veniremen, the Court did hold -- without even discussing the reasonable likelihood standard of *Sheppard* -- that the level of publicity there was so prejudicial as to create a conclusive presumption of prejudice, which the Court called "inherent prejudice." *See also U.S. v. Capo*, 595 F.2d 1086 (5th Cir. 1979); *Pamplin v. Mason*, 364 F.2d 1, 4-5 (5th Cir. 1966). Excessive involvement by the press in a criminal proceeding is not to be tolerated when it impinges upon the defendant's right to due process; however, where the jury has solely been exposed to "publicity [which is] largely factual, not emotional or accusatory," impartiality may still exist. *U.S. v. Flores-Elias*, 650 F.2d 1149, 1150 (9th Cir. 1981). Recent Ninth Circuit cases have applied the standards set forth in *Sheppard* and *Murphy* to determine if there has been prejudice. *See U.S. v. Collins*, 109 F.3d 1413, 1416-17 (9th Cir. 1997); *U.S. v. Rewald*, 889 F.2d 836 (9th Cir.1989), amended, 902 F.2d 18 (9th Cir. 1990).

The factors relevant to determining jury prejudice from pretrial publicity are: (1) whether the pretrial publicity referred specifically to the defendant in a direct way, *U.S. v. Suchman*, 206 F. Supp. 688 (D. Md. 1962); (2) whether the media coverage mentioning the defendant referred to the subject matter of the indictment or the evidence to be produced against the defendant, *U.S. v. Malinsky*, 20 F.R.D. 300 (S.D.N.Y. 1957); (3) whether the contents of the media coverage were of a particularly "inflammatory" character, *U.S. v. Barber*, 297 F. Supp. 917, 921 (D. Del. 1969); (4) whether the media coverage was extensive when compared with the normal level of media coverage in the community, *U.S. v. Bletterman*, 279 F.2d 320 (2d Cir. 1960); (5) whether the media coverage in question occurred long before trial, *Reynolds v. U.S.*, 225 F.2d 123 (5th Cir. 1955); (6) whether defendant is responsible for bringing the publicity upon herself, *Id.* at 129; (7) whether the prosecution was responsible for the release of any damaging information to the media, *U.S. v. Bonanno*, 177 F. Supp. 106 (S.D.N.Y. 1959); (8) whether, due to the wide distribution of publicity outside the district of trial, no fair trial could be had in any other district by transfer of venue, *U.S. v. Cohn*, 230 F. Supp. 589 (S.D.N.Y. 1964); and (9) whether the passage of time has greatly diminished prejudicial publicity or softened community sentiment, *Patton v. Yount*, 467 U.S. 1025, 1032 (1984) (veniremen remembering widely publicized case four years after event insufficient to prove prejudice; trial court did not commit ‘manifest error’ by holding that jury panel was impartial).
6.35.02 Convenience of Parties and Witnesses

Another basis for a change of venue is the convenience of the parties and witnesses. Rule 21(b) provides that:

For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

This provides for a motion which is similar to a motion for transfer of venue on the ground of *forum non conveniens* in a civil case. Considerations are: (1) the location of defendants and witnesses; (2) location of the events in issue in the case; (3) location of pertinent documents and records; (4) disruption of defendants’ or witnesses’ businesses or personal lives; (5) expense to the parties or witnesses; (6) location of counsel; (7) relative accessibility of the place of trial; and (8) docket conditions in each of the respective districts. *U.S. v. Gruberg*, 493 F. Supp. 234, 241-42 (S.D.N.Y. 1979). Basically, the test prescribed by the rule, as interpreted by the courts, involves weighing the inconvenience to the defendant or witnesses against any inconvenience or prejudice resulting to the government. *U.S. v. Calabrese*, 645 F.2d 1379 (10th Cir.1981). At least one court has held that the government's convenience is a factor given little weight when other considerations of convenience suggest transfer under the rule; thus, expense to the government would not prevent a transfer where there is manifest inconvenience to the parties or witnesses. *U.S. v. Gruberg*, 493 F. Supp. at 236.

6.35.03 Improper Venue

The basis for venue in federal court derives from four sources. First, Article III of the Constitution requires that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, §2, cl. 3. Second, the Sixth Amendment requires that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Third, Fed. R. Crim. P. 18 provides that "prosecution shall be had in a district in which the offense was committed." Finally, 18 U.S.C. §3237(a) attempts to alleviate the burden of determining the locale in which a crime occurred by permitting venue wherever a continuing crime began, continued, or was completed.

The "locus delicti of the charged offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *U.S. v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (quoting *U.S. v. Cabrales*, 524 U.S. 1, 6-7 (1998)). "In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *Id.*

In *U.S. v. Meyers*, 847 F.2d 1408 (9th Cir. 1988), defendant petitioned the court for a change of venue pursuant to Fed. R. Crim. P. 18. The defendant wanted venue changed from the district court in Montana to the district court in Florida. Defendant alleged "that (1) there was no involvement in a conspiracy to distribute cocaine in Montana, and (2) his only overt acts, if any, occurred in Florida." *Id.* at 1411. The motion was denied on the grounds that so long as overt acts in furtherance of the conspiracy
occurred within Montana, venue was proper. See also U.S. v. Childs, 5 F.3d 1328 (9th Cir. 1993); U.S. v. Naranjo, 14 F.3d 145 (2d Cir. 1994) (venue proper in Manhattan, N.Y. district when defendant, residing in Queens district, telephoned agent’s beeper in Manhattan; the government did not induce the phone call to create venue); see also U.S. v. Al-Talib, 55 F.3d 923 (4th Cir. 1995) (venue in eastern district of Virginia proper when one defendant had his car registered in Virginia, traveled through Virginia as part of conspiracy, defendant’s distributors’ operated in Virginia; defendant’s contacts allowed Virginia to be proper venue for coconspirators also).

In Angotti, defendant, who was charged with making false statements to a bank officer, argued that venue was proper in the Northern District of California where he made the statements, but not in the Central District of California where officials received the statements. U.S. v. Angotti, 105 F.3d 539 (9th Cir. 1997). The court held that venue was proper in the Central District, where the statements were received, a result consistent with the Second Circuit’s analysis of venue. Id. (citing U.S. v. Candella, 487 F.2d 1223 (2d Cir. 1974). The court also stated that venue could be proper in two forums. Id.

In U.S. v. Jensen, 93 F.3d 667 (9th Cir. 1997) defendants faced charges in the Western District of Washington for sending an unseaworthy vessel onto the high seas. Id. at 669. Defendants moved to dismiss, arguing that at the time the crime were alleged to have occurred the vessel was either in Alaskan waters or on the high seas. Id. The court noted first that, because the motion to dismiss for improper venue is a pretrial motion, the truth of the allegations in the charging document is presumed. Id. Under 18 U.S.C. §3238, venue is proper in the district where the offender is arrested, brought, or -- if the first two fail -- where offender last resided. The charging document, alleging defendants’ last known address was in Washington, was presumed correct. Id. at 679-70.

If one aids and abets a crime, venue extends to the place where the crime occurred, not just where the aiding and abetting occurred. U.S. v. Mendoza, 108 F.3d 1155 (9th Cir. 1997). In Mendoza, defendants were held to answer aiding and abetting the distribution of cocaine in Washington even though their criminal acts all occurred within California. Id. (citing U.S. v. Jensen, 93 F.3d at 669) (should presume allegations in charging documents true).

Recently, the Ninth Circuit held that, under 18 U.S.C. §3237 (the continuing offense venue statute), venue lies against aliens charged with being “found in” the United States only in those locales where the alien commenced, continued, or completed the crime. U.S. v. Hernandez, 189 F.3d 785, 790 (1999). An alien completes this crime when the alien is discovered and identified by immigration authorities. Id. at 791. The court also held that 8 U.S.C. §1329, the immigration venue statute, does not permit venue in a district other than the one in which the alien committed the crime of being “found in” in the United States. Id. at 791-92. Pursuant to these rulings, the court prevented the government from trying in Washington State an alien “found in” Oregon. Id. at 792. The government at no time contended that the alien either entered the United States through or continued his crime in Washington. Id. at 788.

In Rodriguez-Moreno, the Supreme Court defined the parameters of proper venue in a prosecution for carrying a firearm during and in relation to any crime of violence in violation of §924(c)(1). U.S. v. Rodriguez-Moreno, 526 U.S.275 (1999). In Rodriguez, the defendant's kidnaping scheme moved through Texas, New York, New Jersey, and Maryland. Id. at 277. The defendant, however, carried a
firearm only in Maryland. *Id.* The government indicted the defendant in New Jersey. *Id.* at 277-78. In an opinion authored by Justice Thomas (with Justice Scalia dissenting), the Court held that venue in New Jersey was proper. The Court wrote:

> The kidnaping . . . was committed in all of the places that any part of it took place, and venue for the kidnaping charge against respondent was appropriate in any of them . . . Where venue is appropriate for the underlying crime of violence, so too is it for the 9245(c)(1) offense.

*Id.* at 282. (citations omitted). In dissent, Justice Scalia noted, “§924(c) is violated only so long as, and where, both continuing acts are being committed simultaneously. That is what the word ‘during’ means.” *Id.* at 284 (Scalia, J., dissenting).

### 6.36 MOTION FOR PRETRIAL CONFERENCE

Fed. R. Crim. P. 17.1 provides that the court may, upon motion of any party or upon its own motion, order one or more conferences to consider such matters as would promote a fair and expeditious trial. Fed. R. Evid. 104 states that preliminary questions of admissibility of evidence shall be determined by the court. These two rules provide the basis for making motions *in limine* to the trial court. During the *in limine* motions, counsel will be able to litigate the admissibility of evidence prior to trial and outside the presence of the jury. Often major evidentiary issues can be anticipated well in advance of trial. The resolution of these issues before trial will allow counsel to plan a coherent strategy of defense. Two of the most significant items generally considered by *in limine* motions are evidence of prior similar acts offered by the government under Fed. R. Evid. 404(b) and prior criminal convictions offered under Rule 609.

### 6.37 MOTION FOR JURY TRIAL

Defendant has the right to a jury trial for "serious" offenses, but petty offenses may be tried without a jury. *See, e.g.*, *Bloom v. Illinois*, 391 U.S. 194, 210 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). An offense is presumed “petty” if it carries a maximum sentence of six months or less. *Lewis v. U.S.*, 518 U.S. 322, 324-28 (1996); *U.S. v. Nachtigal*, 507 U.S. 1 (1993) (offense carrying maximum of 6 months imprisonment, $5000 fine, or less than 5 years probation in lieu of imprisonment is petty). Even if a defendant is tried on multiple petty offenses, which aggregate to more than 6 months, there is still no right to a jury trial. *Lewis*, 518 U.S. at 324-25.

In *U.S. v. Craner*, 652 F.2d 23 (9th Cir. 1981), the Ninth Circuit held that collateral consequences, if sufficiently severe, may transform a “petty” offense into a “serious” one.\(^\text{30}\) *Id.* However, the Supreme Court’s unanimous opinion in *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), makes *Craner* weak precedent. In *Blanton*, the Court held there is no constitutional right to jury trial on

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\(^\text{30}\) In another Pre-*Blanton/Nachtigal*, *infra* case, the Ninth Circuit held that the defendant in a misdemeanor illegal entry case was not entitled to a jury trial. *U.S. v. Rodriguez-Rodriguez*, 742 F.2d 1194 (9th Cir. 1984). The *Rodriguez-Rodriguez* court did not address whether collateral consequences of an illegal entry conviction, *i.e.*, subsequent deportation as well as preclusion from lawful entry, were sufficient to warrant a jury trial.
a drunk driving charge where the maximum penalty is six months imprisonment and a $1,000 fine. The defendant argued that because he was also subject to significant collateral penalties -- mandatory community service work, loss of his driver's license, the expense of an alcohol abuse education program, and higher automobile insurance rates -- the charged offense was ‘serious’ and he should receive a jury trial. The Court held that non-statutory consequences are “speculative in nature” and that only penalties resulting from state action (i.e., those mandated by statute or regulation) should be considered in assessing a constitutional claim. Id. at 543 & n.8.

In U.S. v. Nachtigal, 507 U.S. 1 (1993), the district court applied the Craner collateral consequences test to a drunk driving conviction, reasoning that Blanton did not expressly overrule Craner. Id. at 2. In a per curiam opinion, the Supreme Court reversed, stating that district court erred by applying Craner and that Blanton is controlling precedent. Id. at 3. The High Court stated that while it is possible for collateral consequences to transform a petty offense into a serious one, this would be unlikely because any offense which carried sufficiently severe collateral consequences would most likely also exceed the six-month line separating petty and serious offenses. Id at 4-5.

6.38 MOTION TO COMPEL PERFORMANCE OF PLEA BARGAIN

When, in the course of sentencing proceedings, a prosecutor reneges on a plea agreement previously made with the defendant, a motion to compel performance of the agreement is appropriate. Santobello v. New York, 404 U.S. 257, 263 (1971); see also U.S. v. Hayes, 946 F.2d 230 (3d Cir. 1991) (whether Government conduct violated terms of plea agreement was question of law, to be reviewed under plenary power of appellate court).

The key issue before the court on a motion to compel performance is whether the defendant's guilty 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" for the plea. Id. at 262. Any false misrepresentation during the plea bargaining process is improper. Brady v. U.S., 397 U.S. 742 (1970).

Examples of a breach of the bargain are failure to make a sentence recommendation as promised, id., or statements or gestures by the prosecution which indicate distaste for the bargain, U.S. v. Grandinetti, 564 F.2d 723 (5th Cir. 1977). The government's failure to enthusiastically recommend a lenient sentence pursuant to a plea bargain agreement will not result in a breach of the agreement unless the level of enthusiasm is part of the agreement. U.S. v. Benchimol, 471 U.S. 453 (1985) (per curiam). For example, if the government agrees to recommend a lenient sentence if the defendant cooperates, but does not make the level of cooperation known or adopt the defense's recitation of acts of cooperation, the agreement is breached. U.S. v. Fisch, 863 F.2d 690 (9th Cir. 1988).

Additionally, a plea bargain may be breached by failure of the government to take actions promised in another collateral proceeding. See, e.g., In re Geisser, 554 F.2d 698, 704 (5th Cir. 1977) (breach of promise by government to do everything possible to prevent defendant's extradition to Switzerland on other charges). Where the government promised to take no position at sentencing yet revealed alleged criminal activity which occurred after the plea, the government did not breach the plea agreement. U.S. v. Read, 778 F.2d 1437 (9th Cir. 1985).
A plea agreement is a contract. *U.S. v. Schuman*, 127 F.2d 815 (9th Cir. 1997). Contract principles are regularly employed to "ensure the defendant what is reasonably due him in the circumstances." *U.S. v. McGovern*, 822 F.2d 739, 743 (8th Cir. 1987). See also *U.S. v. Jureidini*, 846 F.2d 964 (4th Cir. 1988); *U.S. v. Baldacchino*, 762 F.2d 170 (1st Cir. 1985) (applying contract principles to plea bargains). In determining whether a breach of the bargain has occurred, the courts hold prosecutors to "the literal terms of the agreement." *U.S. v. Garcia*, 519 F.2d 1343, 1344-45 (9th Cir. 1975). See also *U.S. v. Travis*, 735 F.2d 1129, 1132 (9th Cir. 1984). Moreover, the government must ordinarily bear the responsibility for any lack of clarity in the plea agreement. *U.S. v. Anderson*, 970 F.2d 602 (9th Cir. 1992), amended 990 F.2d 1163 (9th Cir. 1993); and see *U.S. v. De La Fuente*, 8 F.3d 1333 (9th Cir. 1993). Even oral promises may be enforceable. *Augustine v. Brewer*, 821 F.2d 365, 368-69 (7th Cir. 1987); *In re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986). Note, however, that the contract notions of "offer" and "acceptance" do not apply. *Mabry v. Johnson*, 467 U.S. 504, 511 (1984) (defendant not entitled to have withdrawn offer specifically enforced).

Where a written plea agreement refers to a maximum sentence of three years or less and is silent as to probation and restitution, the imposition of these terms is a material alteration of the agreement. *U.S. v. Kamer*, 781 F.2d 1380 (9th Cir. 1986). An immediate objection must be made, however, or the court may conclude that the defendant understood that probation was within the terms of the plea agreement. *U.S. v. Norgaard*, 959 F.2d 136 (9th Cir. 1992). A breach may exist notwithstanding mere error or a good faith mistake by the prosecutor, *Santobello v. New York*, 404 U.S. at 262, and the district court may not vacate a plea based on the mistake of the prosecutor in forming the plea agreement. *U.S. v. Partida-Parra*, 859 F.2d 629 (9th Cir. 1988). The court will not inquire into consideration for the sentence imposed, but will enforce the bargain whether or not the prosecutor's recommendation would have reduced the sentence. See *Correale v. U.S.*, 479 F.2d 944, 949 (1st Cir. 1973).

Ineffective counsel may also induce enforcement of a plea bargain. *U.S. v. Blaylock*, 20 F.3d 1458, 1467 (9th Cir. 1994). As a result of defense counsel's failure to advise Blaylock of the government's plea offer, the defendant opted to go to trial, not knowing that the government intended to file enhanced penalties under the Armed Career Criminal statute. The Ninth Circuit held that the appropriate remedy was to put Blaylock back in the position he would have been had his Sixth Amendment right to effective counsel not been violated.

Relying in part on Supreme Court precedent, and a wealth of other circuits, the *Blaylock* Court granted specific performance of the original offer. "Several courts have recognized that where the ineffective assistance occurred before trial, as in cases where the harm consisted of defense counsel's failure to communicate a plea offer to defendant, [granting a] subsequent fair trial does not remedy this deprivation. *Id.* at 1468 (citations omitted). See also *Alvernaz v. Ratelle*, 831 F. Supp. 790, 796 (S.D.Cal. 1993) (district judge reinstated original plea agreement because defense attorney failed to warn defendant of possible life sentence). See also *Mabry v. Johnson*, 467 U.S. 504 (1984); *U.S. v. Day*, 969 F.2d 39 (3d Cir. 1992).

Counsel should note that, in the Ninth Circuit, a defendant may receive a downward departure at sentencing where there is evidence of prosecutorial misconduct. This is in lieu of enforcing a plea agreement. *U.S. v. Lopez*, 106 F.3d 309 (9th Cir. 1997).
A plea entered under 11(e)(1)(A) or (C) of the Federal Rules of Criminal Procedure trumps the discretion afforded a district court under §5K1.1 of the Federal Sentencing Guidelines. Such a plea must either be accepted or rejected by the court at the time of the taking of the plea. *U.S. v. Mukai*, 26 F.3d 953 (9th Cir. 1994).

### 6.39 KASTIGAR HEARINGS

If the government brings an indictment after having previously granting immunity, a heavy burden rests upon the government to prove that all evidence to be admitted was derived from sources independent of the testimony given pursuant to the immunity grant. *Kastigar v. U.S.*, 406 U.S. 441, 461-62 (1972). To make a *Kastigar* claim, the defense must show that the prior testimony was compelled. *U.S. v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996). Once that showing is made, *Kastigar* requires a hearing where the government must demonstrate, through affidavits, that the evidence has independent sources. *U.S. v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1996).

### 6.40 THE SCOPE OF APPRENDI

No recent case has generated as much controversy or litigation as the Supreme Court’s decision in *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000). In order to understand its impact, some history and a brief explanation of its possible implications is in order.

In *Jones v. U.S.*, 526 U.S. 227, 119 S. Ct. 1215 (1999), the Supreme Court confronted the question of whether the “serious bodily injury” component of the federal car-jacking statute\(^{31}\) was an element of the offense or merely a sentencing factor. If it was an element of the offense, then, of course, it would have to be pled in the indictment and proven to a jury beyond a reasonable doubt. If it was a sentencing factor, then the judge at sentencing could simply find the factor by a preponderance of the evidence. The Supreme Court explained that the doctrine of constitutional doubt\(^{32}\) allowed the Court to construe the statute such that “serious bodily injury” was an element of the offense. A year later, the Supreme Court would be forced to confront the question it chose to avoid in *Jones*: whether it is constitutional for a statute to have sentencing enhancements which increase the statutory maximum without having to be pled in an indictment or proven to a jury beyond a reasonable doubt.

In *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), the Supreme Court answered the question left open in *Jones* as follows:

> our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction,\(^{31}\) 18 U.S.C. §2119.

\(^{32}\) The Court explained the doctrine of constitutional doubt in the following quotation: “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *Jones*, 526 U.S. at 239.
any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S., at 252-53, 119 S. Ct. 1215 (opinion of Stevens, J.); see also id., at 253, 119 S. Ct. 1215 (opinion of Scalia, J.)

Apprendi, at 2362-63.

Although there currently exists much debate about the exact contours of Apprendi’s scope, what appears to be clear from the foregoing is that the Fifth and Sixth Amendments require that a fact which increases a statutory maximum be pled and proven to a jury beyond a reasonable doubt. The federal circuit Courts of Appeal are in a state of flux at present, deluged with Apprendi litigation, and until the Supreme Court speaks again on this issue, it is difficult to discern the decision’s impact on federal criminal law.

It is the position of the authors of this volume that Apprendi establishes a constitutional rule applicable to the drafting of statutes, requiring any fact increasing the maximum possible punishment for a crime to be pled and proven to a jury beyond a reasonable doubt. With this starting point, there are several attacks possible in the form of pre-trial motions.

Counsel may choose to mount a facial attack on the constitutionality of a statute. Statutes which offer increased punishment based on judicially-noticed facts present Apprendi issues. Drug offenses under Title 21 present an obvious example of this because many of these statutes offer increased punishment based on type and quantity of drugs – facts the statutes require be found by the court, not the jury. 33

33 The drug offenses in Title 21 have spawned an enormous amount of Apprendi litigation. Even prior to Apprendi, and Jones, supra, similar challenges were common. The circuit Courts of Appeal, prior to Apprendi, spurned such attacks, insisting that drug type and quantity (and their attendant statutory increases in punishment) were not factors for the jury. See U.S. v. Hester, 199 F.3d 1287 (11th Cir. 2000); U.S. v. Alerta, 96 F.3d 1230 (9th Cir. 1996); U.S. v. Williams, 194 F.3d 100, 104 (D.C. Cir. 1999). In the wake of Apprendi, these same courts have done an about-face, reversing these decisions. See U.S. v. Rogers, 228 F.3d 1318 (11th Cir. 2000) (reversing Hester); U.S. v. Nordby, 225 F.3d 1053 (9th Cir. 2000) (reversing Alerta); Williams, 194 F.3d 100 (rehearing held in abeyance, February 24, 2000). However, there currently exists little uniformity to the approach taken by the different federal circuits. The most common approach, however, has been to treat Apprendi as granting a judicial license to modify statutes such that courts can reject Congressional design and redesignate facts as elements which the jury must find in order to justify a higher set of penalties. See, e.g., U.S. v. Angle, 230 F.3d 113, 2000 WL 1515159, *11 (4th Cir. Oct. 12, 2000) ("In light of Apprendi, drug quantity is an element"); U.S. v. Doggett, 230 F.3d 160, 2000 WL 1481160, *3 (5th Cir. Oct. 6, 2000) (drug quantity is an element when the government seeks an enhanced sentence); U.S. v. Aguayo-Delgado, 220 F.3d 926, 932-33 (8th Cir. 2000) (same as Doggett). The courts that have adopted that approach, however, have never identified the basis of the purported power to designate particular facts as elements on some occasions. Because there is no judicial authority to create federal common law crimes, U.S. v. Hudson, 11 U.S. 32 (1812), because of the limitations placed on courts’ abilities to construe statutes to avoid constitutional doubt, see §6.40.01, these cases are highly suspect because they intrude on Congressional authority to define crimes. The Supreme Court’s expression of its view regarding Title 21 has so far been limited to vacating drug convictions with remands to the respective Courts of Appeal to reconsider in light of Apprendi (at the time of publication there are roughly a dozen such remands). In the wake of this judicial confusion over
statutes, not merely drug statutes, which contain these types of sentencing enhancements are arguably facially unconstitutional because \textit{Apprendi}’s constitutional rule requires that such facts be elements.

\textbf{6.40.01 The Doctrine of Constitutional Doubt}

The next inquiry is whether the statute can be judicially saved by interpreting it constitutionally, \textit{i.e.}, by finding that Congress intended the fact at issue to be an element. The doctrine of constitutional doubt applies where a statute is susceptible of two interpretations, one of which has grave constitutional questions and the other does not. However, the doctrine of constitutional doubt applies only when Congressional intent is unclear or indiscernible: "court[s do not enjoy] the prerogative to ignore the legislative will in order to avoid constitutional adjudication; 'although the [Supreme] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute,' ... or judicially rewriting it." \textit{Commodity Futures Trading Comm’n v. Schor}, 478 U.S. 833, 841 (1986) (quoting \textit{Aptheker v. Secretary of State}, 378 U.S. 500, 515 (1964) and \textit{Scales v. U.S.}, 367 U.S. 203, 211 (1961)) (internal quotations omitted); \textit{accord Almendarez-Torres v. U.S.}, 523 U.S. 224, 237-38 (1998) (finding no judicial authority to contravene Congressional intent to create one offense, not three, in 8 U.S.C. §1326 even if that construction makes the statute constitutionally doubtful). \textit{See also U.S. v. X-Citement Video, Inc.}, 513 U.S. 64, 86 (1994) (Scalia, J., dissenting) ("Not every construction, but only 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting \textit{Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council}, 485 U.S. 568, 575 (1988) and \textit{Hooper v. California}, 155 U.S. 648, 657 (1895) (internal quotations omitted)).\textsuperscript{34} Thus far, the courts interpreting \textit{Apprendi} have ignored the limitations on the constitutional doubt doctrine. \textit{See, e.g., Doggett}, 230 F.3d 160, 2000 WL 1481160, *3 (acknowledging that Congress intended that drug quantity be a sentencing factor but nonetheless finding that it is an element without discussing \textit{Schor}); \textit{but see Castillo v. U.S.}, 120 S. Ct. 2090, 2092 (2000) (analyzing Congressional intent to determine whether the type of firearm in a prosecution under 18 U.S.C. §924(c)(1) is an element or a sentencing factor).

When faced with this question, counsel is encouraged to research the statute’s legislative history. If Congressional intent is clear, the judiciary may not reconstruct the statute to save it in a manner inconsistent with Congressional intent. However, if the court does attempt to rehabilitate the statute through a saving construction, other issues arise.

\textbf{6.40.02 Interpreting Enhancements as Elements}

If Congressional intent is not clearly to the contrary, a court may attempt to re-cast a statute’s penalty enhancements as new elements. This raises two separate issues. The first of these issues is mens rea. Federal statutes presumptively require mens rea. \textit{See, e.g., Morissette v. U.S.}, 342 U.S. 246, 251 (1952). But when courts construe statutes that already contain mens rea requirements to comply with

\textsuperscript{34} In the case of Title 21 offenses, Congressional intent had been divined by dozens of published appellate decisions. \textit{See U.S. v. Nordby}, 225 F.3d 1053 (9th Cir. 2000); \textit{U.S. v. Rogers}, 228 F.3d 1318 (11th Cir. 2000).
Apprendi, counsel should argue that the general rule is that a person “is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.” Model Penal Code §2.02(1) (emphasis added). In drug cases, for example, the type and quantity of the controlled substance are obviously “material element[s] of the offense” if the statutes are constitutional. “When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.” Model Penal Code §2.02(4); accord U.S. v. King, 122 F.3d 808, 811 (9th Cir. 1997) (Farris, J., concurring) (citing U.S. v. X-Citement Video, 513 U.S. 64 (1994) and §2.02(4) in stating that “[w]hen a statute prescribes a level of culpability, that mens rea requirement applies to all other material elements, unless a contrary purpose plainly appears”); 1 W. LaFave & A. Scott, Substantive Criminal Law, §3.11.


36 Under the Model Penal Code, a “‘material element of an offense’ means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct . . . .” Model Penal Code §1.13(10).

37 Congress is presumptively familiar with scholarly writing in mens rea issues. See Holloway v. U.S., ___ U.S. ___, 119 S. Ct. 966, 970 (1999) (observing that “it is reasonable to presume that Congress is familiar with the scholarly writing” on conditional intent issue and citing authors of the Model Penal Code and Professor LaFave).
Justice Stevens has expressed a similar view. In *X-Citement Video*, he opined that the most appropriate reading of the statute at issue in that case was to read the adverb "knowingly," which was placed at the beginning of the statute, as modifying all of the elements in the statute. 513 U.S. at 79-80 (Stevens, J., concurring) ("In my opinion, the normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense in the remainder of the subsection."). Thus, regardless of whether the source is the Model Penal Code or Justice Stevens' concurrence, the most appropriate analysis is to consider the adverbs "knowingly or intentionally" to modify all of the elements of an offense which contains a requirement that it be committed "knowingly." at 389, §5.1 at 582-83 (1986). Such issues may arise with frequency when the courts struggle to reinterpret statutes to bring them into compliance with *Apprendi*.

It is also important to bear in mind the significance of the change in the defendant's exposure caused by the factual finding at issue. At least one court has indicated that the issue of whether mens rea attaches to an element that dramatically increases the defendant's exposure is of constitutional dimension. *See U.S. v. Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000) (fact that could increase the maximum sentence from 20 years to life).

Second, when a court reconstructs a statute to add elements, it is almost a certainty that the grand jury was not instructed in line with the court’s new reading of the statute’s elements. A criminal defendant has a right to a Grand Jury determination on each element. *See U.S. v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) "The Fifth Amendment . . . requires that a defendant be convicted only on charges considered and found by a grand jury"; *see also id.* (reversing because the Ninth Circuit could "only guess whether the grand jury received evidence of, and actually passed on, Du Bo's intent.") (emphasis added). Thus, even if a court finds new elements, counsel should move to dismiss the indictment on this ground (and seek grand jury transcripts to buttress the motion).39

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38 Mens rea is not, however, generally required as to "jurisdictional fact[s]." *See X-Citement Video*, 513 U.S. at 73 n.3. A jurisdictional fact, however, is one that serves to provide a basis for federal jurisdiction, such as the interstate commerce element of a firearms offense. *see, e.g., 18 U.S.C. §922(g)(1) (felon in possession), or the F.D.I.C. insurance requirement in a bank robbery case. See 18 U.S.C. §2113(f).*

Indeed,*X-Citement Video* itself relied upon *U.S. v. Feola*, 420 U.S. 671, 685 (1975), as authority for its view that jurisdictional facts do not require mens rea. *X-Citement Video*, 513 U.S. at 72 n.3. *Feola* held that an assault victim’s status as a federal officer was a "jurisdictional fact" which did not require mens rea. 420 U.S. at 676-77 & n.9. The passage from *Feola* upon which *X-Citement Video* relied makes it clear that *Feola’s* discussion of the limits of mens rea applied only to such jurisdictional facts: "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequences for the choice of judicial forum" *Id. at 685*(emphasis added). Thus, the Supreme Court’s treatment of “jurisdictional facts” should not be extended to “material elements.”

39 In such a case, the government may argue that the only violation complained of is one based on the indictment’s Sixth Amendment guarantee of notice. However, it should be noted that the grand jury also serve an often forgotten Fifth Amendment function to act as the conscience of the community. *See In re Kittle*, 180 F. 946, 947 (C.C.N.Y. 1910) (L. Hand, J.); *U.S. v. Knowles*, 147 F. Supp. 19, 25 (D.D.C. 1957).
6.40.03 Severability

When a Court finds a statute unconstitutional, it must confront the question of severability and determine whether sections of the statute can nonetheless be upheld. See, e.g., Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987) (“[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.”) (citation omitted).

A two-part inquiry governs the determination of whether unconstitutional provisions are severable. The first inquiry is “whether the Act which remains after the unconstitutional provisions are excised is ‘fully operative’ [or] whether the unconstitutional provisions are ‘functionally independent’ from the remainder of the Act.” Board of Natural Resources v. Brown, 992 F.2d 937, 948 (9th Cir. 1993). “Second, if the Act, absent the unconstitutional provisions, is fully operative as law, [the Court] then inquire[s] whether Congress would have enacted the constitutional provisions of the Act independently of the unconstitutional provisions.” Id.

In many cases, the first prong of the severability inquiry cannot be satisfied. Many criminal statutes are not “fully operative” or “functionally independent” from their penalty sections. In such a case, the statute would constitute a crime without a punishment. Not only would such a statute be inoperative, it would be unconstitutional. See, e.g., U.S. v. Batchelder, 442 U.S. 114, 123 (1979) (“[I]t is a fundamental tenet of due process that ‘no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes . . . . [V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.”) (citations omitted).

A statute proscribing certain conduct but calling for no specific penalty is unconstitutional and cannot be enforced. U.S. v. Evans, 333 U.S. 483 (1948).40 If the statute contains an initial penalty baseline, a court may conclude that the objectionable increased penalty provisions may be severed to save the statute’s constitutionality. See U.S. v. Jackson, 390 U.S. 570 (1968).41 In such a case, counsel

40 In Evans, the Supreme Court was confronted with a similar circumstance. Evans was arrested for harboring aliens. He was prosecuted under a statute, which penalized the bringing in and harboring of aliens. The punishment provision stated that each violation “shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in.” Evans, at 484 (emphasis in original). Evans argued that his crime of harboring aliens had no punishment provision so the indictment should be dismissed. Id. The government argued that Congressional intent to punish the harboring of aliens was apparent from the statute so the same punishment should inhere. Id. at 487. The Court disagreed reasoning even though Congress may have “intended to authorize punishment,” the Court could not divine what exactly the Congress intended and to attempt to do so would intrude upon the legislative function of assigning penalties for crimes. Id. at 490-491.

41 The statute at issue in Jackson provided that whoever transported a kidnapped person in interstate commerce “shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.” Id. at 571. The Supreme Court held that the death penalty provision of the statute was unconstitutional but “that the provision [was] severable from the remainder of the statute [and thus] there [was] no reason to invalidate the law in its entirety simply because its capital punishment clause violate[d] the Constitution.” Id. at 572; see id. at 585-91. In Jackson, however,
might argue that the initial baseline is the maximum possible punishment allowed because the other judicially-noticed penalty increasing penalties are unconstitutional and thus, must be severed.

In conclusion, at the time of this writing, the law is in flux. Perhaps the Supreme Court will soon address this issue more fully, perhaps not. In the meantime, counsel is encouraged to aggressively litigate this new area of advocacy. The issues presented by Apprendi do not confine themselves to the subject of pre-trial motions; they implicate everything from discovery requests to jury instructions to sentencing objections.

6.41 CONCLUSION

The foregoing represent a sampling of pretrial motions that counsel should consider in the course of representing an accused in federal court. Pretrial motions are limited only by counsel's creativity and ingenuity and may be used to both substantive and strategic advantage.
The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.


Like the Hydra slain by Hercules, prosecutorial misconduct has many heads.


7.01 INTRODUCTION

This article addresses prosecutorial misconduct in grand jury proceedings, trial, plea bargaining and sentencing. These specific areas will be addressed: (1) examination of witnesses; (2) suppression of evidence; (3) subpoena process; (4) use of inflammatory and inadmissible evidence; (5) witness impeachment; (6) coercion of defense witnesses; (7) exculpatory evidence; (8) summation; (9) reference to or characterization of defense counsel; (10) unsworn testimony; (11) vouching; (12) the defendant’s Fifth Amendment privilege; (13) forensic violation; (14) plea bargaining; and (15) sentencing. Unfortunately, as prosecutorial misconduct rises, successful claims for relief diminish.

Generally, to obtain any relief for prosecutorial misconduct, one must demonstrate to the court that — individually or cumulatively — the conduct: (1) rendered the proceeding fundamentally unfair; or (2) violated a clear rule of the court and affected its integrity (necessitating action pursuant to the supervisory powers of the court); and (3) the misconduct was harmful. The courts are more likely to find reversible misconduct when there is cumulative error. Remedies for prosecutorial misconduct include: (1) dismissal of the indictment; (2) order for new trial (reversal of conviction and remand); (3) specific performance of a plea agreement; (4) sentencing departure; (5) remand for resentencing; (6) reimbursement of attorney fees; and (7) other institutional relief based on the supervisory power of the court.
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7.02  GRAND JURY MISCONDUCT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

U.S. Const. amend V.

Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination.

_U.S. v. Remington_, 208 F.2d 567, 573 (2d Cir. 1953) (Hand, J., dissenting).

The grand jury “is a constitutional fixture in its own right.” _Nixon v. Sirica_, 159 U.S. App. D.C. 58, 74, n. 54 (1973). At least in theory, the grand jury exists as a buffer between the government and the people and is charged with the twin duties of bringing to trial those justly accused, while shielding the innocent from unfounded accusations and prosecution. _See Stirone v. U.S._, 361 U.S. 212, 218 n.3 (1960). An independent and informed grand jury functions to discern innocence as well as guilt, to protect citizens from governmental persecution and to prosecute those who may have broken the law. _See U.S. v. Dionisio_, 410 U.S. 1, 16-17 (1973).

Because of the grand jury's unique status in the criminal process, certain constitutional protections afforded defendants in criminal proceedings have no application before that body. For example, the Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has failed to do so. _See Ex parte U.S._, 287 U.S. 241, 250-51 (1932). In addition, the Supreme Court has thrice suggested, though not explicitly held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of an investigation. _See Conn v. Gabbert_, 526 U.S. 286, 292-93 (1999); _U.S. v. Mandujano_, 425 U.S. 564, 581 (1976) (plurality opinion); _In re Groban's Petition_, 352 U.S. 330, 333 (1957). Moreover, although the grand jury may not force a witness to answer questions in violation of the Fifth Amendment's guarantee against self incrimination, an indictment obtained through the use of such evidence is nonetheless valid. _See U.S. v. Williams_, 504 U.S. 36, 49-50 (1992); _U.S. v. Calandra_, 414 U.S. 338, 346 (1974). _See also U.S. v. Sherlock_, 887 F.2d 971, 973 (9th Cir. 1989); _U.S. v. Busk_, 730 F.2d 129, 130 (3d Cir. 1984) (indictment procured through Fourth Amendment violation valid because Exclusionary Rule inapplicable prior to the time a suppression order has been entered).\(^1\)

The grand jury allegedly remains independent “to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.” _Dionisio_, 410 U.S. at 17-18. _See Note, "Preserving the Autonomy and Function of the Grand Jury: U.S. v. Williams," _43 Cath. U. L. Rev. 311 (1993). The prosecutor, however, dominates the grand jury

\(^1\) For further information concerning the peculiarities of the grand jury process, please consult Chapter 2: _Representing the Federal Grand Jury Witness_.

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process. Throughout its session, the prosecutor is with the grand jury, presenting evidence at her discretion, calling and questioning witnesses, and explaining the relevant law. If the grand jurors have any questions, the prosecutor answers them. Because no right to an attorney exists at this level, no other attorneys are present. Judges are also not directly involved in the functioning of the grand jury, except to call the grand jurors together and administer their oaths of office. See Calandra, 414 U.S. at 343; Fed. R. Crim. P. 6(a). Additionally, no right to fair or objective grand jury deliberation exists. See also U.S. v. Williams, 504 U.S. 36, 51-53 (1992).

The grand jury is the prosecutor’s tool, and “[a]ny experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.” Dionisio, 410 U.S. at 23 (Douglas, J., dissenting). The traditional requirement of secrecy and the ex parte nature of the proceedings allows for improper manipulation of a grand jury by the prosecutor. See U.S. v Remington, 208 F.2d 567, 572 (2d Cir. 1953); Fed. R. Crim. P. 6(e). Because of the ample opportunity for prosecutorial misconduct in these secret proceedings, defense counsel must be vigilant in unearthing it. Potential prosecutorial misconduct in these proceedings may take the form of: (1) improper examination of witnesses; (2) improper suppression of evidence; (3) use of unreliable evidence; (4) use of misleading jury instructions; (5) intrusion into grand jury deliberation; and (6) abuse of subpoena power.

7.02.01 Standards for Dismissing an Indictment

Defense counsel may base a motion to dismiss an indictment on two main theories: constitutional or supervisory powers. Under the constitutional theory, counsel must show that “the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice.” See Bank of Nova Scotia v. U.S., 487 U.S. 250, 257 (1988). Under the supervisory powers theory, federal courts “may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.” U.S. v. Hasting, 461 U.S. 499, 505 (1983). A federal court, however, may not invoke supervisory power to circumvent the harmless error inquiry of Fed. R. Crim. P. 52(a) in instances not affecting substantial or fundamental rights. See Bank of Nova Scotia, 487 U.S. at 254; see also U.S. v. Derrick, 163 F.3d 799 (4th Cir. 1998)(court may not invoke its supervisory powers to dismiss indictment, based on prosecutorial misconduct, absent finding that defendants were prejudiced).

Defense counsel must show prejudice for an indictment if dismissal of an indictment is based on prosecutorial misconduct in grand jury proceedings. See Bank of Nova Scotia, 487 U.S. at 254-55, 263. Prejudice may be established in two ways: (1) when there is a violation that “substantially influenced the grand jury’s decision to indict;” or (2) “if there is ‘grave doubt’ that the decision to indict was free from substantial influence of such violations.” Id. at 256 (quoting U.S. v. Mechanik, 475 U.S. 66, 78 (1986)). Unfortunately, prejudice is difficult to prove. See, e.g., U.S. v. McDonald, 61 F.3d 248, 253 (4th Cir. 1995) (although comment that coconspirators had undergone polygraph tests constituted misconduct, it was not prejudicial), overruled on other grounds U.S. v. Wilson, 205 F.3d 720 (4th Cir. 2000); U.S. v.

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2 For a discussion on how to uncover prosecutorial misconduct before the grand jury, see Joseph F. Lawless, Jr., Prosecutorial Misconduct, sections 2.19 through 2.24 (1985).
In 1992, the Supreme Court decided that the courts’ supervisory powers may not be used to prescribe standards of prosecutorial conduct since the grand jury is an institution independent from the courts. See Williams, 504 U.S. at 46-47. The Court concluded that, generally, “no such 'supervisory' judicial authority exists.” Id. The Court will only allow use of supervisory power where the misconduct amounts to a violation of those “few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.” Id. at 46, (quoting Mechanik, 475 U.S. at 74 (O’Connor, J., concurring in judgment)). Thus, the supervisory power of the court would appear to be limited to violations of the Constitution, statutes and Federal Rules of Criminal Procedure. See U.S. v. Gillespie, 974 F.2d 796, 801 (7th Cir.1992).

In the Ninth Circuit, interlocutory review of a motion to dismiss the grand jury indictment must be made available where a defendant claims prosecutorial misconduct before the grand jury. See U.S. v. Larrazolo, 869 F.2d 1354, 1355 (9th Cir. 1989). But see U.S. v. Storey, 2 F.3d 1037, 1040-41 (10th Cir. 1993) (orders denying motion to dismiss indictment for violations of grand jury secrecy and giving inflammatory, prejudicial and improper statements to grand jury were not immediately appealable). Such review is no longer available on post conviction appeal. See Larrazolo, 869 F.2d at 1355 (citing U.S. v. Benjamin, 812 F.2d 548, 549 (9th Cir. 1987)). A supervening guilty jury verdict renders any error in the grand jury proceeding harmless. See U.S. v. Mechanik, 475 U.S. 66, 70 (1986). See also U.S. v. Console, 13 F.3d 641, 670 (3d Cir. 1993). If the government’s involvement in a criminal endeavor shocks the "universal sense of justice," then the Due Process Clause bars prosecution, but the outrageous conduct defense is generally unavailable where the criminal enterprise was already in progress before the government became involved or where the defendant was involved in a continuing series of similar crimes during the government conduct at issue.

Where a right secured by the first ten amendments is directly implicated, the courts apply the harmless error standard established by Chapman v. California, 386 U.S. 18, 24 (1967). Under this standard there is a presumption of unconstitutionality, and the state must show that any errors were harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 24. This requires a reviewing court to decide that "the error did not influence the jury" and that "the judgment was not substantially swayed by the error." Brecht v. Abrahmson, 507 U.S 619, 642 (1993).

The harmless error rule applies to all trial misconduct where proper objection is made at trial. Neder v. U.S., 527 U.S. 1, 8 (1999). In the Ninth Circuit, where defense counsel objected to acts of alleged prosecutorial misconduct at trial, the Court of Appeals reviews for harmless error; absent such an objection, it reviews for plain error. U.S. v. Cabrera, 201 F.3d 1243, 1246 (9th Cir. 2000). Similarly, absent timely objections, the Third Circuit reviews for an abuse of discretion. See, e.g., U.S. v. Ismaili, 828 F.2d 153, 163 (3d Cir. 1987). The Fourth and Fifth Circuits review for clear error. See, e.g., U.S. v. Ellis, 121 F.3d 908, 927 (4th Cir. 1997); U.S. v. Bourgeois, 950 F.2d 980, 984 (5th Cir. 1992).
7.02.02 Dismissal and Other Sanctions for Prosecutorial Misconduct

One remedy for a successful motion to dismiss an indictment is dismissal without prejudice, which allows the prosecutor to return to the grand jury and obtain an untainted indictment. In addition to dismissal, however, counsel should also urge the court to admonish the prosecutor regarding the misconduct, with a warning that continued misconduct will result in the dismissal of the indictment with prejudice. See U.S. v. Birdman, 602 F.2d 547, 561 n.61 (3d Cir. 1979).

Where evidence used before the grand jury is irrevocably tainted or where the misconduct involved is continuous and widespread within the jurisdiction, counsel should urge dismissal with prejudice. See U.S. v. Fields, 592 F.2d 638, 648 (2d Cir. 1978). Additional sanctions to consider include: (1) suppression of testimony given before the grand jury, (2) disqualification of the involved prosecutor; and (3) disciplinary proceedings against the prosecutor. See Bank of Nova Scotia, 487 U.S. at 263; In re April 1977 Grand Jury subpoenas, General Motors Corporations, 573 F.2d 936 (6th Cir. 1978).

If the government's involvement in a criminal endeavor shocks the "universal sense of justice," then the Due Process Clause bars prosecution (the indictment should be dismissed), but the outrageous conduct defense is generally unavailable where the criminal enterprise was already in progress before the government became involved or where the defendant was involved in a continuing series of similar crimes during the government conduct at issue. See U.S. v. Haynes, 216 F.3d 789 (9th Cir. 2000).

7.02.03 Improper Witness Examinations

The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.


The Fifth Amendment guarantees the right to indictment in federal criminal proceedings by an unbiased jury. See Costello v. U.S., 350 U.S. 359, 362 (1956). The federal courts have found various kinds of witness examinations before the grand jury to be improper because they bias the grand jury. For example, a prosecutor may not: (1) ask a series of questions designed solely to destroy the character of the accused in the eyes of the grand jury; see U.S. v. Samango, 607 F.2d 877, 883 n.10 (9th Cir. 1979) (citing U.S. v. DiGrazia, 213 F. Supp. 232, 234 (N.D. Ill. 1963)); (2) deprive a grand jury the opportunity to evaluate the credibility of a witness, see U.S. v. Al Mudarris, 695 F.2d 1182, 1187-88 (9th Cir. 1983); or (3) intentionally or negligently mislead the grand jury by either fashioning an examination which suggests that testimony which the prosecutor knows to be true is untrue or by presenting testimony to the grand jury as true that which the prosecutor knows is partially based on perjured testimony. See U.S. v. Adamo, 742 F.2d 927, 940 (6th Cir. 1984) (prosecutor must avoid knowingly using perjured testimony); U.S. v. Udziela, 671 F.2d 995, 1001 (7th Cir. 1982) (where perjured testimony is discovered before trial, the prosecutor has a duty to withdraw the indictment and seek a new one or appear before
the court with defense counsel to determine if other evidence exists to support the indictment. See infra section 7.02.05 for additional discussion on the use of perjured testimony.

A prosecutor has no duty to present to the grand jury all matters bearing on witness credibility. See Al Mudarris, 695 F.2d at 1185; U.S. v. Smith, 552 F.2d 257, 261 (8th Cir.1977); U.S. v. Gardner, 516 F.2d 334, 339 (7th Cir. 1975); Jack v. U.S., 409 F.2d 522, 524 (9th Cir. 1969). For example, a prosecutor does not violate the Constitution by omitting to advise the grand jury that the only witness presented to them has already been convicted of the crime under consideration. See Hochman v. Rafferty, 831 F.2d 1199, 1203-204 (3d Cir. 1987).

7.02.04 Failure to Present Exculpatory Evidence

A prosecutor is under no affirmative or constitutional duty to present exculpatory evidence to a grand jury absent a statutory or Supreme Court rule. See Williams, 504 U.S. at 51-52; see also Baylson v. Disciplinary Board of Pennsylvania, 975 F.2d 102, 110 (3d Cir.1992); Gillespie, 974 F.2d at 800 (7th Cir.1992); Isgro, 974 F.2d at 1096 (9th Cir.1992); U.S. v. Orjuela, 809 F. Supp. 193, 198 (E.D.N.Y. 1992). Omission of exculpatory evidence does not violate one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." Williams, 504 U.S. at 46, (quoting Mechanik, 475 U.S. at 74 (O'Connor, J., concurring in judgment)). The prosecutor is, however, required to present to the grand jury evidence bearing on each element of the offense. See U.S. v. Levin, 973 F.2d 463, 470 (6th Cir. 1992).

7.02.05 Presenting Unreliable Evidence

"Unreliable evidence" includes hearsay evidence and perjury. Generally, an indictment will not be dismissed simply because unreliable evidence was presented to the grand jury. Nonetheless, courts have created rules with respect to unreliable evidence which defense counsel should ensure the prosecutor follows.

A prosecutor may present a certain quantum of hearsay evidence to a grand jury in order to obtain an indictment. See Ismaili, 828 F.2d at 163-64. In fact, a prosecutor may secure an indictment based on hearsay alone. Costello, 350 U.S. at 363. "Hearsay evidence is a sufficient basis for an indictment," and the mere fact that the government chooses to rely on hearsay evidence in presenting its case before a grand jury raises "no hint of government misconduct." U.S. v. Houlihan, 92 F.3d 1271, 1289 n.18 (1st Cir. 1996) (citing U.S. v. Font-Ramirez, 944 F.2d 42, 46 (1st Cir. 1991)). The Second Circuit has held that hearsay evidence is admissible so long as the grand jury is not mislead into believing that it is eyewitness testimony. See U.S. v. Estepea, 471 F.2d 1132, 1136-37 (2d Cir. 1972).

The Fifth Circuit has interpreted the Estepea court’s holding to mean that an indictment is invalid if it is based on hearsay when: (1) non-hearsay was readily available; (2) the prosecutor misleads the grand jury into believing that the testimony was from an eyewitness; and (3) there is a high probability that had the grand jury heard the eyewitness account, it would not have indicted. See U.S. v. Cruz, 478 F.2d 408, 410 (5th Cir. 1973). Thus far, the Third Circuit stands alone in adopting the Estepea rule. See U.S. v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979) (using the Cruz summary of Estepea, the court ruled the
defendant failed to meet the last two requirements). The Fifth, Sixth and Ninth Circuits have rejected the rule. See *U.S. v. Barone*, 584 F.2d 118, 125 (6th Cir. 1978) (“[w]e are not disposed to follow . . . *Estepa*.”); *U.S. v. Chanen*, 549 F.2d 1306, 1311 (9th Cir. 1977) (court is not inclined to follow Second Circuit’s rule regarding the use of hearsay); *Cruz*, 478 F.2d at 411 (*Estepa* “serves simply as a supervisory guideline to be employed by courts within their sound discretion”).

Another issue regarding hearsay is summaries of grand jury testimony. Prosecutors may present summaries of grand jury testimony to a subsequent grand jury. See *Wander*, 601 F.2d at 1260; *Barone*, 584 F.2d at 123. Just because an indictment was partly based on a summary of a report does not render the indictment vulnerable to a successful attack. See *U.S. v. Gaskill*, 491 F.2d 981, 985 (8th Cir.1974). Extensive reliance on hearsay testimony is disfavored, however. See *U.S. v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983). Some courts have dismissed indictments where prosecutors have abused this hearsay privilege. See *id.* at 761 (prosecutor presented extensive hearsay and double hearsay as evidence); *U.S. v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975) (prosecutor failed to inform grand jurors of hearsay quality of evidence they received even though the grand jury knew it was hearsay).

A prosecutor may not procure an indictment with perjured testimony or false evidence. See *U.S. v. Bracy*, 566 F.2d 649 (9th Cir. 1977). The prosecutor must avoid the knowing use of perjured testimony as well. See *Adamo*, 742 F.2d at 940; see also *U.S. v. Sager* 227 F.3d 1138 (9th Cir. 2000). Courts, however, are reluctant to dismiss indictments, usually finding such testimony to be irrelevant or immaterial. See *U.S. v. Rodriguez*, 765 F.2d 1546, 1559 (11th Cir. 1985) (“the alleged perjury is [not relevant to the crime for which the defendant was convicted]’’); *U.S. v. Flaherty*, 668 F.2d 566, 584 (1st Cir.1981) (“[e]ven were we to adopt *Basurto*, these falsehoods are not sufficiently material’’); *Talamante v. Romero*, 620 F.2d 784, 791 (10th Cir. 1980) (“[w]e consider the perjured testimony immaterial’’); *U.S. v. Cathey*, 591 F.2d 268, 272 (5th Cir.1979) (absent a finding that perjury was committed, there is no basis for dismissing an indictment).

How prosecutors should handle discovered perjured testimony differs slightly among the circuits. The Ninth Circuit requires the prosecutor to notify all parties, the court and the grand jury if the evidence might be material. See *U.S. v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974). In the Seventh Circuit, if the prosecutor discovers perjured testimony before trial, the prosecutor has to withdraw the indictment and seek a new one or appear with defense counsel to determine if other evidence exists to support the indictment. See *Udziela*, 671 F.2d at 1001. The Sixth Circuit holds the prosecutor is not required to seek a superseding indictment if jeopardy has not attached. See *Adamo*, 742 F.2d at 940. Additionally, the prosecutor must personally decide whether sufficient untainted evidence exists. See *id.*

### 7.02.06 Misleading Grand Jury Instructions

A prosecutor is not obligated to provide legal instructions. See *U.S. v. Larrazolo*, 869 F.2d 1354, 1359 (9th Cir. 1989); *U.S. v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988) (no dismissal though prosecutor did not instruct on law of obscenity). Thus, a court may not allow an attack even though an instruction was erroneous. See also *U.S. v. Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986). Nonetheless, a prosecutor may not give “flagrantly misleading” instructions. See *Larrazolo*, 869 F.2d at 1359. Additionally, all elements must at least be implied. See *id.*
7.02.07 Prosecutorial Intrusion Into Grand Jury Deliberation

The grand jury must dispatch its duties freely, without coercion and with no one else present in the jury room as the grand jury deliberates and votes. See Fed. R. Crim. P. 6(d). Since the prosecutor is the only attorney present and spends a lot of time with the grand jury, the prosecutor may not abuse his position by exerting undue influence. Consequently, courts condemn prosecutorial overreaching designed to procure an indictment coercively.

A prosecutor may not give a grand jury a pre-signed indictment before the grand jury hears or deliberates on the evidence. See U.S. v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979). But see U.S. v. McKenzie, 678 F.2d 629, 632 (5th Cir. 1982) (although improperly suggestive, pre-signed indictment exerted no undue influence over grand jury). Thus, while pre-signing is not encouraged, pre-signing alone may not mandate dismissal of an indictment. See U.S. v. Singer, 660 F.2d 1295, 1302 (8th Cir. 1981). Coupled with other misconduct, however, counsel may succeed in arguing cumulative error warranting dismissal.

A prosecutor may also not hasten the procuring of an indictment by testifying as a witness before the grand jury in a case he is prosecuting. See U.S. v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978). See Samango, 607 F.2d at 883 (testimony by the prosecutor in the form of questions along with other improprieties “served no other purpose than calculated prejudice”). Additionally, a prosecutor may not enter the grand jury room and demand an indictment. See also U.S. v. Wells, 163 F. 313, 314-15 (D. Idaho 1908). A prosecutor is allowed to go into the grand jury room, however, to explain a principle of law. See Larrazolo, 869 F.2d at 1359.

7.02.08 Abuse of Subpoena Power

The most common form of prosecutorial abuse of process is using a grand jury subpoena to obtain a private interview with a material witness. This is prohibited by Fed. R. Crim. P. 17(a) which authorizes a subpoena to compel the attendance of witnesses only at trial or at a grand jury session. Using a subpoena to force a private interview is clearly improper and not sanctioned by the rule. See U.S. v. Keen, 509 F.2d 1273, 1274-75 (6th Cir. 1975); U.S. v. Standard Oil Co., 316 F.2d 884, 897 (7th Cir. 1963). But see U.S. v. LaFuente, 54 F.3d 457, 462 (8th Cir. 1995) (no showing of impropriety in ex parte communication). Likewise, other branches of the Department of Justice, such as the Federal Bureau of Investigation, may not use a subpoena in a similar fashion to force a material witness to speak with them. See U.S. v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976).

Most courts, nonetheless, require a showing of prejudice to the defendant before dismissing the indictment or granting other relief on this ground. See, e.g., LaFuente, 54 F.3d 457, 460; U.S. v. Hedge, 462 F.2d 220, 223 (5th Cir. 1965) (government violated Rule 17(a) but court refused to reverse because no prejudice demonstrated). Where such prejudice is found: (1) the subpoena may be quashed if it has not yet been honored; (2) evidence obtained thereby may be suppressed if it has been honored; or (3) a new trial may be granted if a verdict has been reached. See Standard Oil Co., 316 F.2d at 884.

While neither the prosecutor nor federal investigative agencies may use a subpoena to circumvent the appropriate grand jury proceedings to obtain information, courts have generally allowed prosecutors
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to serve grand jury subpoenas duces tecum, allowing the witness to voluntarily comply with documentary or other requests, in lieu of attendance. See U.S. v. Smith, 687 F.2d 147, 148 (6th Cir. 1982); cf., In re Grand Jury Proceedings, 42 F.3d 876, 878 (4th Cir. 1994) (documentary requests are mandatory where they possess reasonable possibility of discovering material relevant to the grand jury investigation). The dispositive question is whether there is any "reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." U.S. v. R. Enterprises, Inc., 498 U.S. 292, 293 (1991). The Third Circuit has held that issuing a grand jury subpoena to an undercover agent in the pseudonym he used during the investigation was neither prosecutorial misconduct nor a due process violation where the grand jury was unaware of the subpoena and no prejudice to defendant was shown. See U.S. v. Martino, 825 F.2d 754, 762 (3d Cir. 1987), aff'd, 869 F.2d 592 (3d Cir. 1989).

Another example of abuse of process is the use of a subpoena for a collateral end in a criminal proceeding. Using a subpoena to obtain evidence which has been previously suppressed on constitutional grounds is prosecutorial misconduct. See U.S. v. Huberts, 637 F.2d 630, 638-39 (9th Cir. 1980). But see U.S. v. Puglia, 8 F.3d 478, 480 (7th Cir. 1993) (use of previously suppressed evidence in grand jury process does not warrant dismissal); In re Grand Jury Proceedings, 842 F.2d 1229, 1330 (11th Cir. 1988) (Exclusionary Rule is inapplicable to grand jury proceedings). Also, a prosecutor may not use a subpoena in a coercive fashion to compel a friend or relative of the defendant into cooperating with the government or to compel a guilty plea from the defendant. See In re Grand Jury Proceedings, 42 F.3d 876 (4th Cir. 1994); U.S. v. (Under Seal), 714 F.2d 347 (4th Cir. 1983).

Other forms of civil process may also constitute misconduct, depending on the purpose for their issuance. For example, administrative inspection warrants used by a prosecutor to gather evidence for a criminal prosecution are clearly improper. See U.S. v. Russo, 517 F. Supp. 83, 86 (E.D. Mich. 1981); U.S. v. Lawson, 502 F. Supp. 158, 165 (D. Md. 1980). These administrative inspection warrants may take various forms, e.g., Immigration and Naturalization Service warrants, Internal Revenue Service warrants. If the basic purpose of the administrative warrant is one related to criminal proceedings and not to a civil investigation, its use in a criminal investigation is an improper subterfuge and should be challenged by counsel. See U.S. v. LaSalle Nat'l Bank, 437 U.S. 298, 314 (1978). An exception to this general rule is a joint civil and criminal investigation by the Securities and Exchange Commission (SEC) and the U.S. Department of Justice wherein the SEC can turn over the fruits of administrative warrants to the FBI for purposes of criminal prosecution in its discretion. See SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir. 1980).

Unfortunately, courts view the dismissal of an indictment based on prosecutorial misconduct as “an extreme sanction which should be infrequently utilized.” U.S. v. Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983) (citing U.S. v. Owen, 580 F.2d 365, 367 (9th Cir. 1978)). Courts also apply a presumption of regularity to grand jury proceedings. See U.S. v. Torres, 901 F.2d 205, 232 (2d Cir. 1990). The overall secrecy surrounding these proceedings makes the situation even more difficult for defense attorneys trying to uncover prosecutorial misconduct before the grand jury. The courts, however:

do not protect the integrity and independence of the grand jury by closing [their] eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the
grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a ‘protector of citizens against arbitrary and oppressive governmental action.’ . . . It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor -- on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity, rely.


### 7.03 TRIAL MISCONDUCT

Most forms of prosecutorial misconduct occur at the trial level. Examples discussed in this section are: (1) the use of inflammatory and inadmissible evidence; (2) improper witness impeachment; (3) coercion of defense witnesses; (4) withholding exculpatory evidence; (5) misconduct during closing argument; (6) use of unsworn testimony; (7) improper targeting of defense counsel; and (8) commenting on the invocation of the Fifth Amendment privilege. Defense counsel should promptly object to misconduct at trial in order to bring it to the judge's and jury's attention and to preserve a record for appeal.

#### 7.03.01 Trial Misconduct Review

“A criminal conviction is not to be lightly overturned on the basis of the prosecutor’s comments standing alone.” *See U.S. v. Young*, 470 U.S. 1, 11 (1985). The circuits use similar tests to review claims of prosecutorial misconduct during trial. The analysis in the Sixth Circuit is the most detailed and structured. The Sixth Circuit asks two questions in determining prosecutorial misconduct during trial: (1) whether the prosecutor’s statements were improper; and (2) if they were improper, whether the impropriety was flagrant. *See U.S. v. Carroll*, 26 F.3d 1380, 1384-90 (6th Cir. 1994). This circuit then looks at four factors to determine flagrancy: (1) whether the remarks tended to mislead the jury or prejudice the accused, including whether cautionary jury instructions were given; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of evidence against the defendant. *See Carroll*, 26 F.3d at 1385. If the impropriety is not flagrant, the court will reverse only when: (1) the proof against the defendant was not overwhelming; (2) opposing counsel objected to the conduct; and (3) no curative instruction was given. *See id.* at 1384-90.

The Second Circuit looks at similar factors: (1) the severity of the misconduct; (2) whether curative measures were taken; and (3) the likelihood of conviction absent any misconduct. *See U.S. v. Locascio*, 6 F.3d 924, 945-46 (2d Cir. 1993). Ultimately, however, this circuit will reverse a conviction for prosecutorial misconduct only if the defendant was deprived of a fair trial. *See id.* at 945. *See also U.S. v. Blair*, 958 F.2d 26, 29 (2d Cir. 1992) (perjured testimony must have remained undisclosed throughout the trial to require a reversal of a conviction). Acquittal by jury on some counts may be evidence that the trial was not unfair. *See U.S. v. Myers*, 18 F.3d 153, 163 (2d Cir. 1994). The District of Columbia Circuit uses these same standards in its three-part test. *See U.S. v. Monaghan*, 741 F.2d 1434, 1443 (D.C. Cir. 1984).
The Seventh, Eighth, Ninth, and Eleventh Circuits use a more general analysis than the Sixth Circuit. In the Seventh Circuit, the courts ask: (1) is the remark in isolation proper, and (2) in light of the record, was the defendant deprived of a fair trial? See *U.S. v. Badger*, 983 F.2d 1443, 1450 (7th Cir. 1993). The same is true in the Eighth and Eleventh Circuits. See *U.S. v. Cannon*, 88 F.3d 1495, 1502 (8th Cir. 1996) (citations omitted) (court considers (1) whether the conduct or remarks were in fact improper; (2) whether the conduct or remarks affected the defendant’s substantial rights so as to deprive him or her of a fair trial); *U.S. v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995) (factors are: (1) whether the prosecutor’s remarks were improper and (2) whether the remarks prejudiced the defendant’s substantive rights). To obtain a reversal in the Ninth Circuit, the defendant needs to show he or she was prejudiced by the misconduct. See *U.S. v. Hinton*, 31 F.3d 817, 824 (9th Cir. 1994) (citing *U.S. v. Christophe*, 833 F.2d 1296, 1301 (9th Cir. 1987)). It must be more probable than not that the misconduct materially affected the verdict. See *Christophe*, 833 F.2d at 1301. The court will view the misconduct in the entire context of the trial. See id. at 1300.

Generally, if a prosecutor repeatedly disregards evidentiary rulings of the court, prejudicial error is more likely to be found based on the cumulative effect of the errors. See *Locken v. U.S.*, 383 F.2d 340, 341 (9th Cir. 1967); see also *U.S. v. Sanchez*, 176 F.3d 1214, 1215 (9th Cir. 1999) (court held the cumulative affect of the errors warranted a new trial); *U.S. v. Hands*, 184 F.3d 1322, 1334 (11th Cir. 1999) (introduction of irrelevant testimony and photographs indicating that defendant had physically abused his wife was not harmless, and under a cumulative analysis amounted to prosecutorial misconduct); *U.S. v. Tomblin*, 46 F.3d 1369, 1389 (5th Cir. 1995) (improper remarks alone insufficient to overturn a criminal conviction). A single error of prosecutorial misconduct may be deemed harmless. See *Locken*, 383 F.2d at 341.

### 7.03.02 Inflammatory, Irrelevant and Inadmissible Evidence

A prosecutor may not introduce testimony which is purely inflammatory, irrelevant and otherwise inadmissible. For example, a prosecutor may not attempt to delve into subjects in order to prejudice the jury. See *U.S. v. Millen*, 594 F.2d 1085, 1088 (6th Cir. 1979) (reversible error on homicide count, not drug count, where prosecutor asked about homosexual relationship between defendant and the homicide victim). See also *U.S. v. Bradley*, 5 F.3d 1317, 1321 (9th Cir. 1993) (“Nothing could be more unfairly prejudicial than the suggestive innuendos in this trial that [the defendants] were incompetent hired guns who could not even kill the right person”); *U.S. v. Cabrera*, 222 F.3d 590, 596 (9th Cir. 2000) (admitting lead witness’ improper references to the defendant’s national origin is plain error). The Ninth Circuit recently found that, “[i]t is evident under clearly established federal law that this very kind of conduct by a prosecutor (to the extent that it involves either race or ethnicity) violates a criminal defendant’s due process and equal protection rights.” *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir. 2000).

The prosecutor may not introduce evidence of other crimes irrelevant to the crime charged against the defendant. See *U.S. v. Mastrototaro*, 455 F.2d 802, 803 (4th Cir. 1972). See also Fed. R. Evid.

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3 Where counsel objected, the Ninth Circuit reviews for harmless error. See *U.S. v. Cabrera*, 201 F.3d 1243, 1246 (9th Cir. 2000) (citing *U.S. v. Sanchez*, 176 F.3d 1214, 1218 (9th Cir. 1999)). Absent objection, they review for plain error. See id.
404(b) and 609(a)(b). This includes attempts to ask questions without any factual basis which are designed to suggest that such a factual basis exists. See, e.g., U.S. v. Thomas, 114 F.3d 228 (D.C. Cir. 1997) (error found where government stated in its opening that it would present evidence that would implicate the defendant in certain specified criminal activities and then failed to produce any such evidence at trial, but harmless here); U.S. v. Elizondo, 920 F.2d 1308 (7th Cir. 1990). See also ABA Standards for Criminal Justice §3-5.7(d) (2d ed. 1982) (“[i]t is unprofessional conduct to ask a question implying the existence of a factual predicate which the examiner cannot support by evidence”).

Introduction of inadmissible evidence is improper. See Sanchez, 176 F.3d 1214 (prosecutor’s use of defendant’s wife’s alleged extrajudicial statement to impeach defendant was misconduct). See generally U.S. v. Bensimon, 172 F.3d 1121, 1129 (9th Cir. 1999) (defendant’s bankruptcy inadmissible as motive to selling drugs); U.S. v. Mitchell, 172 F.3d 1104, 1108-09 (9th Cir. 1999)(poverty is inadmissible and not relevant to motive in bank robbery); U.S. v. Kallin, 50 F.3d 689, 695 (9th Cir. 1995) (defendant’s silence, retention of counsel, and actively encouraging jury to draw an inference of guilt inadmissible); see also U.S. v. LaPage, ___F.3d___2000 WL 1638956 (9th Cir. Nov. 2, 2000) (court reverses conviction when prosecutor fails to correct testimony in its case in chief known to be false); U.S. v. Martino, 648 F.2d 367 (5th Cir. 1981) (a witness' willingness to take a lie detector test is inadmissible, but here, harmless due to curative instruction); U.S. v. Handly, 591 F.2d 1125, 1128-30 (5th Cir. 1979) (the convictions of the defendant's co-conspirators at separate trials by different juries are inadmissible, but harmless here); Kercheval v. U.S., 274 U.S. 220 (1927) (the defendant's withdrawal of a previously entered guilty plea).

When the judge sustains an objection to hearsay in answer to a question not phrased to elicit improper hearsay and instructs the jury not to consider the hearsay, however, there is no misconduct. See U.S. v. Sarkisian, 197 F.3d 966, 988 (9th Cir. 1999). As for admissible evidence, the prosecutor may not refer to it if it is not produced. See U.S. v. Molina, 934 F.2d 1440, 1446 (9th Cir. 1991)(mentioning that as many as nine other law enforcement officials would support testimony of law enforcement is improper, but found harmless here).

The defense must be careful not to cross-examine on certain subjects which the prosecutor will want to clean up in re-direct. The Ninth Circuit found no misconduct where prosecutor addressed an issue raised by the cross-examination. See Sarkisian, 197 F.3d at 989; see also U.S. v. Chu, 5 F.3d 1244, 1251 (9th Cir. 1993) (no misconduct where prosecutor attempts to clarify issues "muddled" by defense counsel on cross-examination). There is no misconduct if the defense attorney clears up an ambiguity caused by the prosecutor. See Cabrera, 201 F.3d at 1247 (no misconduct where court allowed prosecutor to cross-examine defendant with his prior convictions and defense counsel cleared up on redirect that the prior convictions were misdemeanors).

Finally, the prosecution may not knowingly use false evidence. See Miller v. Pate, 386 U.S. 1 (1967) (deliberate misrepresentation of stain in "bloody shorts" as blood when prosecutor knew it was paint invalidated conviction). When the government presents false evidence at trial, even unwittingly, a defendant is entitled to a new trial "if there is reasonable probability that without the evidence, the result of the proceeding would have been different." U.S. v. Young, 17 F.3d 1201, 1204 (9th Cir. 1994).

7.03.03 Impeachment of Witnesses
A prosecutor may impeach the defendant and witnesses pursuant to the Federal Rules of Evidence by asking questions in good faith, not to embarrass or frighten the witness or to make the witness look like a bad person. See Michelson v. U.S., 335 U.S. 469 (1948). A prosecutor must have some factual basis for an inquiry either into prior convictions (Fed. R. Evid. 609(a)) or prior bad acts not resulting in a conviction (Fed. R. Evid. 404(b)). See id. Additionally, counsel should demand a proffer when such questions are posed. See U.S. v. Albers, 93 F.3d 1469, 1480 (10th Cir. 1996); U.S. v. Crippen, 570 F.2d 535, 538 (5th Cir. 1978). The same rule of good-faith applies where a prosecutor cross-examines a defendant's character witnesses. See Michelson, 335 U.S. at 469.

The prosecution may not impeach a defense witness with illegally obtained evidence. See James v. Illinois, 493 U.S. 307 (1990). When the prosecution attempted to use the defendant's non-Mirandized statement to impeach a defense witness, the Supreme Court held that while such statements may be used to impeach a defendant's own testimony, it did not include all defense witnesses. See id. To do so would create incentives for defendants and law enforcement officers and might deter defendants from calling otherwise probative witnesses. See id.

In addition, there are other subjects a prosecutor may not broach. For example, the prosecutor may not force the defendant to give his opinion as to whether law enforcement testified truthfully. See Sanchez, 176 F.3d 1214, 1220 (9th Cir. 1999) (prosecutor’s questions compelled defendant to call a U.S. Marshal a liar). In the same vein, the prosecutor may not elicit the opinion of one witness about the truthfulness of another witness’s extrajudicial statements. See id. The prosecutor may not use statements the defendant made to the prosecutor in his counsel's absence to impeach the defendant during cross-examination. See U.S. v. Cardarella, 570 F.2d 264, 267-68 (8th Cir. 1978). In so doing, the prosecutor violates the advocate-witness rule which generally prevents an attorney from testifying in a case in which he is counsel to a party. See Birdman, 602 F.2d at 553-55. Similarly, a prosecutor may not use his own unsworn testimony to impeach the defendant as a witness by either misstating the defendant's prior record to the jury or by telling the jury about portions of the defendant's prior record which have been excluded by the court. See U.S. v. Labarbera, 581 F.2d 107, 109 (5th Cir. 1978). "[A] prosecutor may not use impeach[ment] as a guise for submitting to the jury substantive evidence that is otherwise unavailable." U.S. v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984).

7.03.04 Coercion of Defense Witnesses

A defendant in a criminal proceeding has the right to present testimony on his own behalf without undue interference by the government. See Washington v. Texas, 388 U.S. 14 (1967). A prosecutor may not threaten a defense witness to induce a that witness’ silence. See, e.g., U.S. v. Vavages, 151 F.3d 1185, 1192-93 (9th Cir. 1998)("thinly veiled threats to prosecute [a defense witness] for perjury [with no basis] and to withdraw her plea agreement," causing witness to invoke right to remain silence, constituted misconduct warranting a new trial); U.S. v. MacCloskey, 682 F.2d 468, 479 (4th Cir. 1982) (U.S. Attorney's statement to defense witness' attorney that the witness should "remember his Fifth Amendment privilege"); U.S. v. Hammond, 598 F.2d 1008, 1013-14 (5th Cir. 1979) (defense witness threatened by government agent with action in two other cases, actions which would not be taken if witness did not testify); U.S. v. Henricksen, 564 F.2d 197, 198 (5th Cir. 1977) (prosecutor entered into a plea agreement with defense witness on collateral case, a condition being that the defense witness not testify on behalf of
the defendant at any subsequent trial); *U.S. v. Morrison*, 535 F.2d 223, 227-28 (3d Cir. 1976) (defense witness repeatedly summoned to the U.S. attorney's office and threatened with prosecution for perjury); *U.S. v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) (defense witness told during recess of trial by government agent that he would be prosecuted for felony if he testified). *But see U.S. v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (evidence established that prosecution did not dissuade witness from testifying even though appearance of impropriety and failure to administer *Miranda* or have witness' counsel contacted or present is a professional responsibility violation); *Autry v. Estelle*, 706 F.2d 1394, 1403 (5th Cir. 1983) (no error in failure to grant defense witness immunity to get his testimony).

Nonetheless, a criminal defendant is not entitled to compel the government to grant immunity to a witness. *See U.S. v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991). There is an exception, however, where prosecutorial misconduct intentionally distorts the fact finding process resulting in an unfair trial. *See U.S. v. Young*, 86 F.3d 944 (9th Cir. 1996) (citing *U.S. v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983)). *See also Vavages*, 151 F.3d at 1193 (district court might have prevented misconduct from prejudicing defense by requiring government to grant witness immunity). To make out a claim for prosecutorial misconduct in this situation, a defendant must show: (1) that the evidence sought from the non-immunized witness was relevant; and (2) that the government distorted the judicial fact-finding process by denying immunity to the potential witnesses. *See Young*, 86 F.3d at 947; *Lord*, 711 F.2d at 892; *cf. Pinto*, 850 F.2d at 935 (test is subject to three factors: prosecutor's overreaching must force witness to invoke the privilege, witness's testimony must be material, exculpatory and not cumulative, and defendant must have no other way to obtain the evidence).

Prevailing on appeal when the prosecutor successfully, but wrongfully, induced a witness to invoke the right to remain silent, or destroyed a witness' credibility through intimidation, is another matter. The harmless error problem inevitably arises if the record is missing items of proof crucial to the analysis mandated by *Chapman v. California*, 386 U.S. 18 (1967) (defendant must prove a non-constitutional violation resulted in prejudice such that there is a substantial likelihood that the result would have been different absent the violation). For this reason, following *dicta* in *Chapman*, as well as the implicit holding of *Webb v. Texas*, 409 U.S. 95 (1972), the Third, Fourth, Fifth, and Sixth Circuits have held that this misconduct is inherently prejudicial to the defendant and thus harmful error per se. *See MacCloskey*, 682 F.2d 468; *Hammond*, 598 F.2d at 1014; *Morrison*, 535 F.2d at 228; *Thomas*, 488 F.2d at 336; *cf.*, *Young*, 86 F.3d 944 (must show the non-immunized testimony is relevant and that the government intended to distort the fact-finding process). This rule of prejudice per se has been rejected by the District of Columbia Circuit and the Eighth Circuit. *See Peeler v. Wyrick*, 734 F.2d 378 (8th Cir. 1984). The Fifth Circuit shows signs of wavering, and therefore, a circuit split seems to be developing. *See Young*, 86 F.3d 944; *U.S. v. Nixon*, 777 F.2d 958, 972 (5th Cir. 1985); *U.S. v. Teague*, 737 F.2d 378 (4th Cir. 1984); *U.S. v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982). The Seventh Circuit, in discussing governmental coercion of witnesses, noted that their "circuit has questioned the validity of the [entire] doctrine of outrageous government conduct and has yet to overturn a conviction on that ground." *See U.S. v. Hayward*, 6 F.3d 1241, 1256 (7th Cir. 1993).

7.03.05 Withholding Exculpatory Evidence

The government has a constitutional duty to inform the defense of material exculpatory evidence:
We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.


Failure to disclose such evidence requires convictions to be overturned unless prosecution shows that the misconduct is harmless beyond a reasonable doubt. *See U.S. v. Agurs*, 427 U.S. 97 (1976). Failing to disclose a material witness can result in mistrial for violation of the Sixth Amendment. *See U.S. v. Sterba*, 22 F. Supp.2d 1333 (M.D. Fla. 1998) (defendant immune from retrial under double jeopardy protection where initial mistrial resulted from prosecutorial misconduct). *But see U.S. v. Gonzales*, 164 F.3d 1285 (10th Cir. 1999) (government’s knowing and intentional withholding of material witness only merited sanctions, not suppression of witness statements). Moreover, the requested evidence must be "material" in that a "reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different" exists. *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

The prosecution may not withhold impeachment evidence of government witnesses. *See U.S. v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (prosecutor failed to disclose that a key government witness was threatened into testifying); *Singh v. Prunty*, 142 F.3d 1157 (9th Cir. 1998) (prosecutor failed to disclose an agreement to provide benefits to witness in exchange for testimony). *Brady*, however, does not obligate the government to provide a defendant with evidence the defendant could obtain from another source through the exercise of reasonable diligence. *See U.S. v. Perdomo*, 929 F.2d 967, 971-73 (3d Cir. 1991). There is also no *Brady* violation when the government exercises due diligence in investigating a witness’ criminal record. *See U.S. v. Young*, 20 F.3d 758 (7th Cir. 1994). Similarly, when exculpatory evidence not discussed before trial is revealed during trial and defense counsel has the opportunity to thoroughly cross-examine, the failure to turn over the evidence is harmless error. *See, e.g.*, *U.S. v. Valencia-Lucena*, 925 F.2d 506, 514 (1st Cir. 1991). *But see U.S. v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993) (material lie by informant about prior homicide convictions is discoverable information under *Brady* which government is under duty to disclose).

### 7.03.06 Misconduct in Use of Confidential Informants

As the use of informants in federal court increases, so do cases dealing with prosecutorial misconduct involving their use. The Ninth Circuit, noting that informants are cut from "untrustworthy cloth" and that the use of informants is a "dirty business," placed an affirmative duty on "prosecutors and investigators to take all reasonable measures to safeguard the system against treachery." *See Bernal-Obeso*, 989 F.2d at 333-34. The defense cannot always make sure the information has been given because most informants’ identities are kept confidential. Disclosure is not ordered unless it is vital to a fair trial. *See U.S. v. Curtis*, 965 F.2d 610, 614 (8th Cir. 1992). If disclosure is granted, however, defense counsel should request a continuance to prepare an adequate cross-examination. *See, e.g.*, *U.S. v. Flores-Mireles*, 112 F.3d 337, 341 (8th Cir. 1997).

Counsel should assure to the best of his or her ability that no potential conflicts of interest involving cooperating defendants arise. *See U.S. v. Marxhank*, 777 F. Supp. 1507 (N.D. Cal. 1991)(the
government arranged for some of a defense attorney’s clients from other cases to cooperate against the attorney’s client in the present case, violating the defendant’s right to due process and assistance of counsel and requiring dismissal). But see U.S. v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996) (even where the government may have employed the defendant’s lawyer as a confidential informant, whose information and testimony was used in the case against the defendant, the misconduct did not rise to the level of reversible error because the government did not possess an objective awareness of an ongoing attorney-client relationship). The Third Circuit uses a three-prong test to dismiss in these situations, placing the burden on the defendant to show that: (1) the government possessed an objective awareness of an ongoing attorney-client relationship; (2) the government deliberately intruded upon that relationship; and (3) actual and substantial prejudice resulted from the government’s conduct. See id.

7.03.07 Misconduct During Closing Argument

The Supreme Court condemns prosecutorial misconduct during argument, or “forensic misconduct.” See Berger v. U.S., 295 U.S. 78, 88 (1935). “[W]hile [prosecutors] may strike hard blows, [a prosecutor] is not at liberty to strike foul ones.” Id. An improper summation requires a new trial, however, only where the improper statement causes “substantial prejudice” to the defendant. See U.S. v. Eltayib, 88 F.3d 157, 173 (2d Cir. 1996) (citing U.S. v. Modica, 663 F.2d 1173, 1181-84 (2d Cir. 1981)). In determining whether the prosecutor's misconduct denied the defendant a fair trial, the Second Circuit requires a showing of substantial prejudice. Substantial prejudice is shown by: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of the conviction absent the misconduct. See U.S. v. Tocco, 135 F.3d 116, 130 (2d Cir. 1998); U.S. v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc). In the Ninth Circuit, the defense must prove that the summation was "so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge." U.S. v. Birges, 723 F.2d 666, 672 (9th Cir. 1984).

A prosecutor must not argue to a jury by appealing to their passion or prejudice. See ABA Standards for Criminal Justice §3-5.8(c) (2d ed. 1982). Inciting a jury at the sentencing phase by terming a particular case "a war against crime," representing to the jury that as jurors they are the protectors of public safety, and implying that the only alternative is "martial law," is reversible prosecutorial misconduct. See Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); see also U.S. v. Johnson, 968 F.2d 768, 770-72 (8th Cir. 1992)(improper to argue that if defendant is not convicted, defendant would continue the drug problem in the jury's community). Cf. U.S. v. Ghazaleh, 58 F.3d 240 (6th Cir. 1995) (closing statements not improper because they were directed at the actual activities of the defendant on trial, not the community conscience).

Similarly, a prosecutor may not argue to the jury that the defendant represents a personal threat to the jurors, their families, witnesses, or others if acquitted at trial. See U.S. v. McRae, 593 F.2d 700, 706 (5th Cir. 1979). References to jurors’ personal safety are improper. See Locasio, 6 F.3d at 946 (2d Cir. 1993). But see U.S. v. Gabriel, 125 F.3d 89 (2d Cir. 1997) (prosecutor’s improper statement that “no one in their right mind would put a loved one on an aircraft” using the type of case the defendant had prepared did not deprive defendant of a fair trial where this was an isolated incident in a six week trial). Furthermore, when referring to defendant’s criminal propensity, a prosecutor may not state that “society
doesn’t need it” because it “inflames the passions and prejudices of the jury.” See U.S. v. Procopio, 88 F.3d 21, 31 (1st Cir. 1996) (citing U.S. v. Machor, 879 F.2d 945, 956 (1st Cir. 1989)).

Some circuits have held that appeals to the jury to act as the "conscience of the community" are permissible unless designed to inflame the jury. See, e.g., U.S. v. Fields, 72 F.3d 1200, 1208 (5th Cir. 1996) (argument referencing drug activities in the community was not improper, and would be harmless); Monaghan, 741 F.2d at 1441-43; U.S. v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982). The meaning of "designed" seems to bear on the strength of the prosecution's case -- whether the prosecutor sought to arouse passion in the jury to make up for a lack of evidence. See U.S. v. Shirley, 435 F.2d 1076, 1079 (7th Cir. 1970). It is improper for the prosecutor to argue that it is the jury's duty to find the defendant guilty. See Sanchez, 176 F.3d at 1223.

Appeals to racial, ethnic, national, or religious prejudice are misconduct due to their severely prejudicial effect. See, e.g., U.S. v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996) (reference to African-Americans as bad people was improper, requiring new trial); U.S. v. Goldman, 563 F.2d 501, 504 (1st Cir. 1977) (reference to defendant's Jewish faith improper, but no error because judge gave curative instruction); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (improper to argue that black defendant accused of raping a little black girl might later rape someone who is white; cumulative error warranted reversal). In the same vein, a prosecutor commits misconduct by calling upon the jury's class bias, whether for or against wealth, to procure a conviction. See U.S. v. Stahl, 616 F.2d 30, 32 (2d Cir. 1980). See also U.S. v. Payne, 2 F.3d 706, 712 (6th Cir. 1993) (references to Christmas time and major layoffs was prejudicial error).

There are also limits to the epithets or names which a prosecutor may direct at the defendant during closing argument. These limits depend on how far the prosecutor departs from the evidence in the record in characterizing a particular defendant. See Cabrera, 201 F.3d at 1249 (no misconduct in saying "the defendant trafficked in human beings"); Darden, 477 U.S. at 187 (prosecutor's calling defendant "an animal" arguing that death is only effective penalty not fundamentally unfair); U.S. v. Wiley, 29 F.3d 345, 351 (8th Cir. 1994) (prosecutor’s calling drug defendant “criminal” and “drug dealer” was improper, but did not deprive defendant of a fair trial); U.S. v. Schepp, 746 F.2d 406, 411 (8th Cir. 1984) (prosecutor's reference to defendant as a criminal and a hoodlum offensive but did not require reversal); U.S. v. Markham, 191 F.2d 936, 939 (7th Cir. 1951) (prosecutor's reference to defendant as a trafficker in human misery not prejudicial). But see Martin v. Packer, 11 F.3d 613, 616 (6th Cir. 1993) (holding "fundamentally unfair" for prosecutor to attempt to suggest to jury through cross-examination and final argument a similarity between the defendant and Hitler).

Also, the prosecution may not comment on the invocation of the marital privilege. See Sanchez, 176 F.3d at 1222. Allowing the prosecution to reveal to the jury that a spouse could not be made to testify against the defendant improperly suggests that the spouse’s testimony would be adverse to the defense. See id. A prosecutor may, however, comment on the defendant's ability to listen to the witnesses before he testifies and his opportunity to tailor his own testimony according to what he heard. See Portuondo v. Agard, ___ U.S. ___, 120 S. Ct. 1119, 1128 (2000).
Unfortunately, courts usually find the misconduct harmless. See Darden v. Wainwright, 477 U.S. 168, 187 (1986) (offensive argument by prosecutor did not deprive defendant of fair trial); U.S. v. McAllister, 77 F.3d 387 (11th Cir. 1996) (comments by prosecutor were permissible and even if they were not permissible, they were harmless). The courts require that prejudicial remarks be rendered harmless by curative jury instructions. See U.S. v. Lichenstein, 610 F.2d 1272, 1282 (5th Cir. 1980). See also Portuondo v. Agard, ___ U.S. ___, 120 S. Ct. 1119, 1124 (2000) (citing Carter v. Kentucky, 450 U.S. 288, 305 (1981)) (the jury's counting the defendant's silence at trial against him should not impair the defendant's right to make the prosecution prove its case without his help, and upon request, court must instruct jury to that effect). Nonetheless, if the court finds that the misconduct appears more probable than not to have affected the jury's verdict, reversal may be granted. See U.S. v. Knapp, 113 F.3d 1015 (9th Cir. 1997); see also U.S. v. Rudberg, 122 F.3d 1199, 1206 (9th Cir. 1997); U.S. v. Zehrbach, 47 F.3d 1252, 1265-66 (3d Cir. 1995) (en banc); U.S. v. Sehnal, 930 F.2d 1420, 1426 (9th Cir. 1991); U.S. v. Simtob, 901 F.2d 799, 809-10 (9th Cir. 1990) (the court examined whether the trial court conveyed to the jury disapproval sufficient to neutralize the harm done by prosecutor's conduct).

7.03.08 Unsworn Testimony by the Prosecutor During Summation

Unsupported, improper remarks can fundamentally affect substantial rights so as to deprive the defendant a fair trial. See U.S. v. Wilson, 135 F.3d 291, 293 (4th Cir. 1998) (prosecutor's reference to defendant as a murderer was a significant diversion that was extraneous and unsupported by admissible evidence). It is reversible error for the prosecutor to make statements during closing argument that are not supported by evidence presented during trial. See U.S. v. Mastrangelo, 172 F.3d 288, 296-98 (3d Cir. 1999). Furthermore, the government may not misinform the jury as to the elements of the charged crime. U.S. v. Rodrigues, 159 F.3d 439 (9th Cir. 1998).

A prosecutor may, however, argue reasonable inferences based on the evidence. See U.S. v. Sayetsitty, 107 F.3d. 1405, 1409 (9th Cir. 1997) (citing Molina, 934 F.2d at 1445). See, e.g., Gochicoa v. Johnson, 118 F.3d 440, 447-48 (5th Cir. 1997) (if defendant does not object to hearsay and the hearsay is allowed into evidence, prosecutor may mention the hearsay in summation); U.S. v. Dean, 55 F.3d 640, 665 (D.C. Cir. 1995) (prosecutor may comment as many as thirty-one times about defendant lying, especially when the charge is perjury); U.S. v. Garner, 837 F.2d 1404, 1423-24 (7th Cir. 1987) (in bribery case, not plain error for prosecutor to mention second, uncharged record of bribes when that record is admitted in evidence). Further, the court permits and advises the prosecutor to refute meritless accusations by defense counsel. See U.S. v. Reed, 2 F.3d 1441, 1450 (7th Cir. 1993).

7.03.09 Vouching

For the government to say that the trial judge knows the witness is telling the truth is improper vouching. See U.S. v. Melendez, 57 F.3d 238, 240 (2d Cir. 1995); see also Molina, 934 F.2d at 1440 (prosecutor argued as many as ten other officers could have supported the testimony of the agent who testified). The prosecutor may not vouch for the credibility of a government witness. See U.S. v. Roberts, 618 F.2d 530, 533 (9th Cir.1980); see also Sanchez, 176 F.3d at 1220. "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness' veracity, or suggesting that information not presented to the jury supports the witness' testimony. U.S. v. Necoechea,
986 F.2d 1273, 1276 (9th Cir. 1993) (as amended); see also U.S. v. Young, 470 U.S. 1, 18-19 (1985). The factors used in determining whether defendant was prejudiced as result of improper prosecutorial vouching are: (1) scope of the comments and their relationship to proceeding, (2) extent of any curative instructions, and (3) strength of the evidence against defendants. See U.S. v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 286 (3d Cir. 1999).

The analysis of the harm caused by vouching depends on its effect on the case. See U.S. v. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992). Vouching in closing argument is plain error, reviewable even without objection. Roberts, 618 F.2d at 534. Where the prosecution improperly vouches for a government witness’ veracity, a new trial may not be warranted if there is overwhelming evidence of guilt. See U.S. v. Gallagher, 576 F.2d 1028 (3d Cir. 1978). But see U.S. v. Smith, 962 F.2d 923 (9th Cir. 1992) (vouching for court and government is plain error, and remaining evidence is insufficient to convict). In the Ninth Circuit, if the prosecutor's statement was improper vouching, the Court will reverse only if the error was not harmless. See Sarkisian, 197 F.3d at 990. See also U.S. v. Edwards, 154 F.3d 915, 923 (9th Cir. 1998) (in applying a harmless error analysis, court must determine whether it is more probable than not that the prosecutor's conduct materially affected the fairness of the trial).

It is impermissible for a prosecutor to give the jury a personal opinion about the reliability or truth of testimony or the defendant's guilt. See McKoy, 771 F.2d at 1211. A prosecutor may not opine that someone is completely truthful. U.S. v. Garza, 608 F.2d 659, 662 (5th Cir. 1979). See also U.S. v. Francis, 170 F.3d 546, 550 (6th Cir. 1999)(prosecutor may not illicit testimony about witness' plea agreement involving telling the truth). But see U.S. v. Dennis, 786 F.2d 1029, 1047 (11th Cir. 1986) (comment by prosecutor on the terms of a plea agreement which required witness to tell the truth was neither improper nor reversible error). A prosecutor also may not vouch for the credibility of a witness by offering immunization of that witness in the presence of a jury. See Simtob, 901 F.2d at 799.

Evidence inferring that the testimony of cooperating government witnesses has been independently verified by the government is not allowed. See U.S. v. Rudberg, 122 F.3d 1199, 1206 (9th Cir. 1997). Repeated reliance on testimony which allowed the jury to assume the government independently verified the veracity and truthfulness of the cooperating witnesses constitutes plain error. See id. at 1204. Where there exists no other evidence besides the vouched testimony and evidence, reversal of the conviction is required. See id. at 1205. Also, the former prosecutor may not testify as a witness that the case is strong. See U.S. v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1987).

The prosecutor cannot act as the witness of evidence which he discovered. See U.S. v. Edwards, 154 F.3d 915 (9th Cir. 1998)(prosecutor discovered during trial a crucial piece of evidence that linked defendant to the crime and re-enacted to the jury how this evidence was found). This not only constitutes improper vouching, but it also violates the advocate-witness rule. See id. at 922. The prosecutor cannot argue facts of which he has personal knowledge which are not contained in the record. See U.S. v. Flores-Chapa, 48 F.3d 156, 159-60 (5th Cir. 1995) (prosecutor’s reference to excluded evidence was plain error affecting substantial rights); Simtob, 901 F.2d at 799 (prosecutor indicated that extrinsic information not presented in court supports a witness' testimony).

7.03.10 Targeting Defense Counsel
Because defendants have a Sixth Amendment right to effective assistance of counsel, personally attacking defense counsel may rise to the level of constitutional error. See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). The prosecution should not impugn, either directly or by implication, the integrity or institutional role of defense counsel. See U.S. v. Bennett, 75 F.3d 40, 46 (1st Cir. 1996). A prosecutor may not suggest to the jury that the defense lawyer believes his client is guilty and is thus deceiving the jury. See U.S. v. Kirkland, 637 F.2d 654, 656 (9th Cir. 1980); see also U.S. v. McDonald, 620 F.2d 559, 563 (5th Cir. 1980). A prosecutor may not personally attack defense counsel as unethical or deceptive. See Berger, 295 U.S. 78; Cline v. U.S., 395 F.2d 138 (8th Cir. 1968). But see Procopio, 88 F.3d at 32 (“I’ve got news for defense counsel, this trial, isn’t a game either” was an empty cliche which could not have realistically affected the jury’s deliberations). The prosecutor may not denigrate defense counsel for making objections. See U.S. v. Hughes, 441 F.2d 12, 20 n.29 (5th Cir. 1971).

A prosecutor’s misconduct may be excused if defense counsel acted in the same manner. See Young, 470 U.S. at 8-9; U.S. v. Silva, 745 F.2d 840, 850 (4th Cir. 1984). Such misconduct will only be remedied on appeal if the comments "prejudice the defendant and that prejudice has not been remedied by the trial judge." U.S. v. Baker, 10 F.3d 1374, 1416 (9th Cir. 1993). See also U.S. v. Amlani, 111 F.3d 705, 711 (9th Cir. 1997) (where disparagement of defense counsel by the prosecutor causes the defendant to change counsel, prejudice to the defendant is automatic and a new trial is warranted).

7.03.11 Defendant's Invocation of the Fifth Amendment Privilege

Prosecutors must refrain from directly or indirectly commenting on a defendant's failure to testify. See Sehnal, 930 F.2d 1420, 1425 (9th Cir. 1991) (inviting jurors to ask the defendant questions). A prosecutor may not insinuate to the jury that the defendant's post-arrest silence, after being Mirandized (Miranda v. Arizona, 384 U.S. 436 (1966)), is probative of guilt. See U.S. v. Higgins, 75 F.3d 332 (7th Cir. 1996). See also Doyle v. Ohio, 426 U.S. 610, 618 (1976) (prosecutors may not ask defendant after he testifies why he did not explain the same at the time of arrest when he chose to remain silent); U.S. v. Bullard, 37 F.3d 765 (1st Cir. 1994) (prosecutorial comment on defendant’s refusal to cooperate in an identification is not a Fifth Amendment violation). A prosecutor may comment on silence if no Miranda warning given. See Fletcher v. Weir, 455 U.S. 603, 604 (1982).

Mentioning the right to remain silent is reversible error per se, and it is constitutional error which must be deemed "harmless beyond a reasonable doubt" before it will withstand appellate scrutiny. See Chapman v. California, 386 U.S. 18, 24 (1967). See also U.S. v. Branson, 756 F.2d 752, 757 (9th Cir. 1985). When a prosecutor comments on those rights and other misconduct was committed, the court is more likely to find the defendant was denied a fair trial. See U.S. v. Cotnam, 88 F.3d 487, 488 (7th Cir. 1996).

The Circuits are divided on whether mentioning pre-arrest silence infringes against the right of self-incrimination. The First, Sixth, Seventh, and Tenth Circuits hold that the Fifth Amendment privilege against self-incrimination is implicated. See Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000); U.S. v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); U.S. ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987); Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989). The Fifth, Ninth, and Eleventh Circuits
draw the opposite conclusion; mentioning pre-arrest, pre-Miranda silence does not violate the right of self-incrimination. See U.S. v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); U.S. v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); and U.S. v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998). The Fifth Circuit reasoned that the privilege does not "preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference." Zanabria, 74 F.3d at 593.

The Ninth Circuit later clarified that allowing the government to comment on "post-arrest, pre-Miranda silence . . . plainly infringe[s] upon [the defendant's] privilege against self-incrimination." U.S. v. Whitehead, 200 F.3d 634, 639 (9th Cir. 2000); but see U.S. v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995) (post-arrest, pre-Miranda silence admissible under facts of this case where the defendant testified he was trying to help police by turning drug dealers in but did not explain this at the arrest). Commenting on the post-arrest, pre-Miranda silence, even though a defendant waived the right to remain silent and made a statement, should not be admitted. See U.S. v. Velarde-Gomez, 224 F.3d 1062, 1071 (9th Cir. 2000), amended and superceded, No. 99-50602, 2000 WL 1514639 (9th Cir. Oct. 13, 2000); U.S. v. Hernandez, 948 F.2d 316, 323 (7th Cir. 1991). The defendant's demeanor between the arrest and reading of Miranda, however, is considered a physical characteristic- a mood- and is admissible. See Velarde-Gomez, 224 F.3d at 1070-71 (agent testified that defendant "didn't look surprised or upset or whatever" when he told him that drugs were found in his car, but harmless error). Post-arrest, post-Miranda silence where defendant waived right to remain silent is admissible in the Ninth Circuit. See U.S. v. Pino-Noriega, 189 F.3d 1089, 1098 (9th Cir. 1999).

7.03.12 The Harmless Error Escape Route

Unfortunately, since Hasting, 461 U.S. 499, lower appellate court decisions reversing based on forensic misconduct are diminishing, under the harmless error analysis. See e.g., Monaghan, 741 F.2d at 1443; U.S. v. Martinez-Nava, 838 F.2d 411, 415-16 (10th Cir. 1988). Under Hasting, even the blatant prosecutorial misstatement of evidence to a jury has been rejected as a basis for reversal. See U.S. v. Touloumis, 771 F.2d 235, 243 (7th Cir. 1985). Vouching by a prosecutor for his witness (see supra section 7.3.8) has also been held harmless under the same analysis. See U.S. v. Murphy, 768 F.2d 1518, 1535 (7th Cir. 1985). At least one court has permitted the government to use closing arguments as a means to shift the burden of proof onto the defendant. See U.S. v. Alvarez, 837 F.2d 1024, 1029 (11th Cir. 1988) (argument that defendant did not present fingerprint evidence to prove absence at scene of crime was found harmless). Some courts, however, are willing to limit Hasting in other areas. See, e.g., U.S. v. McClintock, 748 F.2d 1278, 1292 (9th Cir. 1984) (Brady violation not harmless error). See also U.S. ex rel. Miller v. Greer, 772 F.2d 293, 298 (7th Cir. 1985) (en banc) (Doyle violation not harmless error); Thompson v. Calderon, 120 F.3d 1045, 1055 (9th Cir. 1997) (employing two "fundamentally inconsistent theories" a violation of due process right to a fair trial).


In 1997, Congress enacted the “Hyde Amendment” which permits courts to award to a prevailing party, other than the United States, reasonable attorneys fees and other litigation expenses in a criminal action “where the court finds that the position of the United States [in bringing the criminal charges] was
vexatious, frivolous, or in bad faith.” 18 U.S.C. §3006A. In enacting the Hyde Amendment, Congress meant to sanction and deter prosecutorial misconduct, but not prosecutorial zealousness per se. See U.S. v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999). The Amendment states that awards "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act (EAJA)]." Under the EAJA, 28 U.S.C. §2412, the government bears the burden of proof. See Meinhold v. U.S. Dep't of Defense, 123 F.3d 1275, 1277 (9th Cir. 1997). By rejecting the EAJA's approach to burden of proof, the Hyde Amendment places the burden of proof on the movant. See In re 1997 Grand Jury, 215 F.3d 430, 436 (4th Cir. 2000); see also U.S. v. Truesdale, 211 F.3d 898, 908 (5th Cir. 2000); Gilbert, 198 F.3d at 1304; U.S. v. Lindberg, 220 F.3d 1120, 1124 (9th Cir. 2000).

Several courts have grappled with the issue of what a defendant must show under the vexatious, frivolous, or in bad faith standard. Lindberg, 220 F.3d at 1125 (collecting cases). The Eleventh and Fourth Circuits have relied on Black's Dictionary to illuminate these terms. “Vexacious,” for purposes of the Hyde Amendment means that the government’s position is unsupported by reason, probable cause, or excuse. See Gilbert, 198 F.3d at 1298-99; see also In re 1997 Grand Jury, 215 F.3d at 436. A “frivolous action,” for purposes of the Hyde Amendment is one that is groundless, with little prospect of success, and one that is often brought to embarrass or annoy the defendant. Id. “Bad faith” is not simply bad judgment or negligence but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it contemplates a state of mind affirmatively operating with furtive design or ill will. Id.

Even if the defendant is able to meet the burden of proving vexacious, frivolity, or bad faith, the court may still deny relief if it finds that special circumstances make such an award unjust. Gilbert, 198 F. 3d at 1305. Courts, however, have awarded fees under the Hyde Amendment when the prosecution “clearly violated the law or pursued baseless charges unjustifiably.” U.S. v. Pritt, 77 F. Supp 2d 743, 748 (S.D. W.Va. 1999).

In addition, a criminal defendant could bring a civil rights suit under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and 42 U.S.C. §1983 seeking damages for prosecutorial misconduct in a criminal matter resulting in a deprivation of the defendant’s right of due process. For example, the Second Circuit recently decided that a defendant could bring a section 1983 claim against an Assistant U.S. Attorney who allegedly assisted law enforcement in manufacturing false evidence to use against the defendant in criminal proceedings. Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000). While the court did not decide whether the prosecutor was protected by qualified immunity, this decision seems to leave open the door for litigation in this area.

7.04 MISCONDUCT IN PLEA BARGAINING

Approximately 80 to 90 percent of all criminal convictions result from guilty pleas.4 Because many accused enter into plea agreements, it is considered one of the most important phases of the criminal justice process for a defendant. See Santobello v. New York, 404 U.S. 257, 264 (1971). In the plea bargaining

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arena, a prosecutor wields enormous power. His discretion to pursue or reduce charges, or to recommend a particular sentence, is virtually unlimited. A prosecutor has ample opportunity to abuse this immense power.

Prosecutorial misconduct during plea bargaining can occur in many ways. In the negotiation process, a prosecutor may commit misconduct by: (1) inducing a defendant to plead guilty through deception; (2) intimidation; or (3) by breaching a plea agreement. To combat these abuses, defense counsel should understand the availability of remedies such as withdrawing a guilty plea and specific performance of a plea bargain.

7.04.01 Inducing a Guilty Plea through Deception

Disciplinary Rule 1-102(A)(4) states that a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Code of Professional Responsibility, DR 1-102(A)(4)(1994). A prosecutor must be completely honest during negotiations about the relative strength of the case against defense counsel's client. From a practical standpoint, prosecutors frequently exaggerate the quality of evidence at their disposal. If this occurs during a plea agreement, it may be grounds for withdrawal of the plea and even disciplinary sanctions against the prosecutor.

There are several representations a prosecutor cannot make. A prosecutor cannot use deception against a defendant. A defendant's guilty plea is invalid if it is induced by misrepresentations by the prosecution. See U.S. v. Cortez, 973 F.2d 764, 767-68 (9th Cir. 1992) (defendant was under the mistaken belief that he could make a selective prosecution appeal). A prosecutor cannot make false promises. See Dillon v. U.S., 307 F.2d 445, 449 (9th Cir. 1962) (prosecutor improperly induced a guilty plea when he offered to make a sentence recommendation "if asked," but knew the sentencing judge never asked). Additionally, a prosecutor may not threaten to charge a defendant with a crime not supported by the evidence. Brady v. U.S., 397 U.S. 742, 751 n.8 (1970).

The prosecutor must affirmatively disclose certain information, such as informing the defendant of all the charges she will be charged with during the plea bargaining process. Failure to do so would be a denial of due process. See Ammons v. King, 133 F.2d 270, 272 (8th Cir. 1943). In addition, the prosecutor must inform the defendant of the correct terms of a plea bargain offer. See Santobello, 404 U.S. at 261-62. But see U.S. v. Allen, 930 F.2d 1270, 1274 (7th Cir. 1991) (federal government not bound by plea agreement entered in state proceedings and defendant's failure to foresee that he also faced federal prosecution to no avail); U.S. v. Bouthot, 878 F.2d 1506, 1512 (1st Cir. 1989) (state prosecutor’s failure to inform defendant that his decision to drop some charges could pave the way for possible federal prosecution was not a violation of due process).

During negotiation, a prosecutor must also inform a defendant if her conviction is subject to mandatory time for parole. See Carter v. McCarthy, 806 F.2d 1373, 1376 (9th Cir. 1986). If the prosecutor fails to make such a disclosure, the defendant's sentence may be modified to allow for an earlier release. Id. at 1377. Further, if a defendant can show he provided substantial assistance to the government as his part of a plea bargain (e.g., §5K1.1 agreements) and that the government refused to allow a downward departure in exchange for that assistance because: (1) an "improper motive" existed (for
suspect class reasons such as race, religion, etc.); (2) the government breached a plea agreement; or (3) the refusal was not rationally related to any legitimate government end, then the defendant may be granted relief, including specific performance. See U.S. v. Treleaven, 35 F.3d 458, 461 (9th Cir. 1994) (citing Wade v. U.S., 504 U.S. 181, 184 (1992)).

7.04.02 Intimidating A Defendant To Plead Guilty

After adversarial proceedings against a defendant have begun, she has a Sixth Amendment right to counsel. Consequently, after indictment, a prosecutor has a duty to refrain from plea bargaining with a represented defendant unless counsel is present. See U.S. v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993). A plea bargain reached without defense counsel present is improper, unless the defendant specifically waives his right to counsel. See id. at 1462 (defendant did not waive his right to counsel when he informed prosecutor he didn't want his attorney to find out about the plea negotiations because the attorney had a policy not to negotiate pleas with the government, and the defendant was afraid his attorney would withdraw if he found out; the remedy was not to dismiss the indictment, however, because there was no "substantial prejudice" to the defendant; instead, the court stated that lesser sanctions such as contempt charges or disciplinary action against the prosecutor would be an adequate remedy). But see Trahan v. Estelle, 544 F.2d 1305, 1309 (5th Cir. 1977) (if the defendant meets with counsel after meeting privately with the prosecution, but before pleading guilty, the guilty plea is not open to collateral attack).

Although a defendant's plea must be voluntary, the interpretation of voluntariness usually does not favor the defendant. See Bontkowski v. U.S., 850 F.2d 306, 313 (7th Cir. 1988) (government's threat to incarcerate defendant's wife for a crime with which the defendant had been charged did not render the defendant's guilty plea involuntary); U.S. v. Crusco, 536 F.2d 21, 24 (3d Cir. 1976) (courts naturally look with a jaundiced eye upon any defendant who seeks to withdraw a guilty plea after sentencing on the ground that he expected a lighter sentence). Courts are split on whether a prosecutor can condition a guilty plea on the defendant's waiver of the right to appeal. A majority hold that a prosecutor may present the accused with the choice of going to trial or pleading guilty and waiving the right to appeal the plea and/or the resulting sentence. See e.g., U.S. v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992).

A prosecutor may bargain for a guilty plea by promising leniency to a defendant in exchange for either a guilty plea or cooperation, so long as she follows through on her agreement. See U.S. v. McCarthy, 433 F.2d 591, 592-93 (1st Cir. 1970). The prosecutor's arsenal includes options such as recommending a plea to a lesser charge, dismissing charges, or requesting a specific sentence. Defense counsel must make sure, though, that the defendant's decision to enter into the plea is voluntary and not coerced.

Courts will look at the "totality of the circumstances" to determine if the defendant's plea was indeed voluntary. See U.S. v. Clark, 931 F.2d 292, 294 (5th Cir. 1991) (seven factors used); U.S. ex rel. Miller v. McGinnis, 774 F.2d 819, 823 (7th Cir. 1985) (trial court didn't advise Miller of a mandatory supervised release term and this, combined with other errors, showed that Miller's guilty plea was not intelligent and voluntary); cf. U.S. v. Bell, 776 F.2d 965, 968-69 (11th Cir. 1985) (because the defendant was an educated person who was given several opportunities to discuss the charges and read the plea agreement during the proceeding, the court ruled the defendant could not have misunderstood the nature
of the charges against him). *See also U.S. v. Siegel*, 102 F.3d 477, 480 (11th Cir. 1996) (core concerns for the court: (1) the plea must be free of coercion; (2) defendant must understand the nature of the charges against her; and (3) the defendant must know and understand the consequences of the plea).

Prosecutors may not induce a plea by actual or threatened physical harm or by mental coercion which overcomes the will of the defendant. *See Brady*, 397 U.S. at 750. Some courts have held that threatening third parties, such as the defendants' friends, family members and loved ones, is coercive. *See Crow v. U.S.*, 397 F.2d 284, 285 (10th Cir. 1968) (guilty plea is void when threats or promises deprive it of the character of a voluntary act); cf., *U.S. v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992) ("only physical harm, threats of harassment, misrepresentation, or promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes) render a guilty plea legally involuntary"). In general, a guilty plea is not considered to be coerced, even if its sole purpose is to avoid a harsher sentence. *See Brady*, 397 U.S. at 752-53 (a defendant has not necessarily been coerced if he or she pleads guilty to a lesser charge).

Nonetheless, if the error or coercion is harmless, a remedy may not be available. *See Baker v. U.S.*, 781 F.2d 85, 92 (6th Cir. 1986) (error could have been corrected by the defendant, but counsel failed to make a timely objection). A trial court may also render the prosecution's errors harmless by personally questioning the defendant on whether he understands the nature of the charge and that there is a factual basis for the plea. *See U.S. v. Trott*, 779 F.2d 912, 914 (3d Cir. 1986). *See also U.S. v. Tunning*, 69 F.3d 107 (6th Cir. 1995). The trial court must, however, question the defendant in a manner which will bring out narrative answers and not mere "yes" or "no" responses. *See U.S. v. Fountain*, 777 F.2d 351, 356 (7th Cir. 1985).

### 7.04.03 Breach of a Plea Agreement

[I]f judges begin withholding “the benefits of the plea bargain to which defendants are entitled,” the plea bargaining process might break down and “the consequences for both the criminal and civil justice system might well be disastrous.”

*U.S. v. Lawton*, 193 F. 3d 1087, 1092 (9th Cir. 1999) (quotations omitted).

It is in the best interests of the government, as well as the system as a whole, that defendants be able to count on the government keeping the promises it makes in order to secure guilty pleas. Those broader interests, as well as each individual defendant's interest in receiving the benefit of his bargain, require that courts stand ready and willing to hold the government to its promises.


A defendant will not be willing to enter into a plea agreement with the government if he or she knows that the government will go ahead and support sentencing enhancements contrary to the negotiated agreement. Thus, if the prosecutor breaches a plea bargain agreement, the defendant may withdraw the plea or ask for resentencing and specific performance of the plea agreement. *See Santobello*, 404 U.S.
Whether the government has breached a plea agreement is a matter of law reviewed de novo. See United States v. Mondragon, ___F.3d___, No. 99-30329, 2000 WL 1459382, at *2 (9th Cir. Oct. 3, 2000). Courts consider what [the defendant] reasonably understood when he pleaded guilty to determine whether a violation occurred. See Anderson, 970 F.2d at 607 (citing United States v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988)); Taylor, 77 F.3d at 370 (same); Greenwood, 812 F.2d at 635 (citations omitted)(same). In the Fourth Circuit "the test . . . is an objective one -- whether the plea bargain agreement has been breached or not -- irrespective of prosecutorial motivations or justifications for the failure in performance." United States v. Brown, 500 F.2d 328, 378 (4th Cir. 1974).

"Both the government and the Parole Commission are agents of the Government and are therefore bound by what are, in effect, Government promises." United States v. Jureidini, 846 F.2d 964, 966 n.* (4th Cir. 1988) (citations omitted) (emphasis in original). See also United States v. Keller, 902 F.2d 1391, 1393 (9th Cir. 1990) (Parole Commission also bound by the prosecutor's promises); United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992) (government did more than simply make a general promise not to press for a particular sentence, which would have allowed it to include in the PSR an accurate portrayal of the defendant's actual criminal activity; government entered into a specific agreement to charge "a quantity of cocaine (less than five kilos)"). Thus, the government must follow the plea agreements through its agents, and defense should argue breach if the case agent or other government agent breaches the agreement.

The federal courts have developed a “common law” of plea agreements around the notion that the negotiated guilty plea represents a bargained for quid pro quo. See United States v. Partida-Parra, 859 F.2d 624, 632 (9th Cir. 1998); see also Mondragon, 2000 WL 1459382 at *2. Because plea agreements are contracts, the government is bound by the literal terms of the agreement. See United States v. Johnson, 187 F.3d 1129, 1134 (9th Cir. 1999)(citing United States v. Baker, 25 F.3d 1452, 1458 (9th Cir. 1994)). After a plea bargain is agreed upon, the prosecutor must perform his or her side of the bargain. See Taylor, 77 F.3d at 370 (prosecution cannot take position at sentencing inconsistent with plea agreement); United States v. Minnesota Min. & Mfg. Co., 551 F.2d 1106, 1111 (8th Cir. 1977) (a prosecutor cannot withdraw from an agreement following a defendant's guilty plea). In addition, the promise of one prosecutor is binding upon other prosecutors. See United States v. Van Thournout, 100 F.3d 590, 594 (8th Cir. 1996) (promise of prosecutor in Wyoming was binding on prosecutor in Iowa). But see United States v. Annabi, 771 F.2d 670, 672 (2d Cir. 1985) (plea agreement binds only the U.S. attorney's office for the district in which the plea is entered unless the agreement contains an affirmative broader restriction). When a prosecutor agrees to a plea bargain but makes ambiguous statements in the terms of the agreement, courts will construe these ambiguities against the prosecutor and consider such statements to be a breach of the bargain. See United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992) (quotations omitted); United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988); United States v. Harvey, 791 F.2d 294, 303 (4th Cir. 1986).

A prosecutor can breach the plea agreement without violating the agreement's explicit language. See Johnson, 187 F.3d at 1135. Even an inadvertent breach is grounds to vacate and remand for resentencing. See Santobello v. New York, 404 U.S. 257, 262 (1971)(prosecutor's unawareness of what previous prosecutor had promised did not excuse breach). If there was a "breach, there must be a
remand." *Santobello*, 404 U.S. at 262. The reasons for the breach are irrelevant. *See, e.g.*, *id.*; *Johnson*, 187 F.3d 1129; *Brown*, 500 F.2d 375. That the government violated the plea agreement by doing something it was obligated to do -- such as discussing greater drug quantities which were negotiated out of the plea agreement with the Parole Commission -- neither justifies the breach nor precludes a remand for resentencing. *See Anderson*, 970 F.2d at 608.

Although the government does not have to make the agreed recommendation enthusiastically, *see Johnson*, 187 F.3d at 1134 (citing *U.S. v. Benchimol*, 471 U.S. 453, 455 (1985)), it must make the recommendation. *See Johnson*, 187 F.3d at 1134 (citing *U.S. v. Meyers*, 32 F.3d 411, 413 (9th Cir. 1994)); *see also Brown*, 500 F.2d at 377 (a defendant is induced to accept the plea agreement and plead guilty by "not simply the prospect of a formal recitation of a possible sentence, but rather the promise that an Assistant United States Attorney would make a recommendation . . . .") (emphasis in original). In *Meyers*, "it was insufficient that the court, by reading the presentence report and the plea agreement, was aware that the government had agreed to recommend a sentence at the low end . . . ." *Meyers*, 32 F.3d at 413. Prosecutors cannot present evidence or say things to the court which will have the practical result of supporting a greater sentence than that which it is bound to recommend. *Johnson*, 187 F.3d at 1135 (prosecutor breached the plea agreement even though he said the words "recommending a low sentence" when he introduced a victim-impact statement which could only be viewed as an attempt "to influence the court to give a higher sentence"); *Greenwood*, 812 F.2d at 634 (prosecutor breached agreement to remain silent at sentencing when she commented on defendant's lack of remorse).

A prosecutor cannot support a fact or recommendation in a presentence report which contradicts the plea agreement. For example, defense counsel should argue breach of the plea agreement where the prosecutor supports a higher base offense level for a higher amount of drugs or sentencing enhancement mentioned in the presentence report which the parties negotiated out of the agreement. In *U.S. v. Boatner*, 966 F.2d 1575, 1577 (11th Cir. 1992), after negotiations, Boatner plead guilty to distributing less than 500 grams of cocaine. The presentence report, however, asserted that Boatner had been involved in dealing three kilograms of cocaine. *See id.* After explaining that it learned this information after entering into the plea agreement and supporting the allegation that the case actually involved three kilos, not two ounces, the government stated it "will stick to its stipulation [of two ounces]." *Id.* The Eleventh Circuit criticized the government for "attempting to hide behind [this] statement." *Id.* at 1579. That court found the government breached the plea agreement by supporting the presentence report's information which "was specifically precluded by the plea agreement." *Id.* *See also Taylor*, 77 F.3d 368, 369-71 (government breached the plea agreement by supporting presentence report's contentions that defendant was involved in dealing more cocaine). *But see U.S. v. Maldonado*, 215 F.3d 1046, 1051-52 (9th Cir. 2000) (under plain error review, no breach because prosecutor who incorrectly calculated the base offense level for the amount of drugs involved fulfilled his obligation by honestly answering the court's question about the correct offense level). Supplying truthful information to the probation office that might support an enhancement is not a breach according to the Eighth Circuit. *See U.S. v. Pompey*, 121 F.3d 381, 382 (8th Cir. 1997) (it would be contrary to public policy for the prosecutor to hide relevant information from the sentencing court).

Prosecutors may also commit breach during proffer sessions and by failing to make safety valve recommendations. The Fourth Circuit recently found breach of a plea agreement during a proffer session
where the government supported the presentence report’s allegation that the defendant had distributed 1,600 kilograms of marijuana by informing the court that defendant admitted to distributing 1,200 kilograms in the proffer session. *U.S. v. Lopez*, 219 F.3d 343 (4th Cir. 2000). The Fourth Circuit held that the district court’s consideration of the defendant’s proffer statement during sentencing violated the terms of his proffer agreement. *Id.* at 345. The agreement permitted the government to use the defendant’s statement under limited circumstances, none of which applied in this case. Thus, the government breached when it used his statements requiring resentencing. *Id.*

Similarly, the Ninth Circuit found that the government violated a plea agreement by actively opposing eligibility for safety-valve relief from a mandatory sentence. See *U.S. v. Nelson*, 222 F.3d 545, 549 (9th Cir. 2000). The government made oral and written promises regarding safety valve relief. *Id.* In the written agreement, the government stated that the defendant "may be eligible for §5C1.2 reduction," and promised that "[if he were] found to be §5C1.2 eligible a further reduction of two levels would result . . . ." In addition, the government stated at the defendant’s plea hearing that it had "a good faith belief that [Nelson] is in fact, §5C1.2 eligible." *Id.* The Ninth Circuit found that these statements were sufficient, at a minimum, to create a commitment not to oppose the defendant’s request for application of the safety valve. *Id.* When government opposed application of §5C1.2, it breached the plea agreement, entitling the defendant to resentencing. *Id.*

Answering a court’s question may sometimes breach the agreement. In *Brown*, after making the bargained-for sentencing recommendation, the court expressly inquired about the prosecutor's feelings regarding the sentence recommendation. See *Brown*, 500 F.2d at 377. Even in light of the court’s express questioning, the prosecutor was obligated to adhere to the agreement, and the Fourth Circuit remanded because the prosecutor was "halfhearted" in her recommendation. See *id.* The Second Circuit, however, found no government breach where the district judge instructed both the government and the defense to submit a memorandum of points and authorities on the sentencing issues. See *U.S. v. Goodman*, 165 F.3d 169, 173 (2d Cir. 1999) (emph. added) ("comment[ing] on the facts and the law did not violate the plea agreement"). See also *U.S. v. Merritt*, 988 F.2d 1298, 1313 (2d Cir. 1993) (no breach where the court "initiated and pursued the issue of upward departures" because the government was allowed "to raise any arguments relevant to the disputes of obstruction of justice and acceptance of responsibility" under the plea agreement). Nonetheless, "[T]he government might have been better advised to inform the Court that, because of the plea agreement, it would have to refrain from saying anything concerning these matters." *Goodman*, 165 F.3d at 173. Another party's response to a court's order to produce a particular document is not a government breach. See *U.S. v. Lewis*, 979 F.2d 1372, 1374-75 (9th Cir. 1986) (no breach where the probation office produces transcripts warranting a career offender finding and the government did nothing to find the transcripts and abided by its promise not to recommend a career offender status).

The harmless error rule does not apply to breach of contract cases. See *Santobello*, 404 U.S. at 262 (irrelevant whether the district court expressly renounced reliance upon the prosecutor's "recommendation"); *Johnson*, 187 F.3d at 1135 (though the district court stated it would have sentenced Johnson to the high end of the sentencing range even absent the government's breach, the error still warranted reversal); *Brown*, 500 F.2d at 378 ("the effect on the district court of the prosecutor's noncompliance with the plea bargain was . . . irrelevant").
7.04.04 Withdrawing a Guilty Plea

Generally, a criminal defendant has no absolute right to withdraw a guilty plea. See U.S. v. Martinez, 785 F.2d 111, 113 (3d Cir. 1986). See also Fed. R. Crim. P. 32(d). The exception is when there is a breach of the plea agreement, as stated above. See Santobello, 404 U.S. at 263; Taylor, 77 F.3d at 371-72; Greenwood, 812 F.2d 632, 637 (10th Cir. 1987) (citations omitted). Timing is crucial when deciding whether to request a plea withdrawal because a motion to withdraw the plea prior to sentencing is more likely to be successful than one after sentencing.

Rule 32(d)\(^5\) of the Federal Rules of Criminal Procedure covers both pre-sentence and post-sentence motions to withdraw a plea. Rule 32(d) states that prior to sentencing, the court may permit withdrawal upon a showing by the defendant of any "fair and just reason." See U.S. v. Carr, 740 F.2d 339, 343 (5th Cir. 1984). The withdrawal of the guilty plea is completely within the discretion of the court which accepted the plea. See id.; U.S. v. Benchimol, 738 F.2d 1001, 1003 (9th Cir. 1974). Thus, permission to withdraw is discretionary, and courts tend to treat a presentence motion to withdraw more permissively than a post-sentencing motion.

If the motion is filed after sentencing, relief is only granted to remedy cases of "manifest injustice." See Benchimol, 738 F.2d at 1001-02. Courts are very demanding in exercising their discretion when the defendant has already been sentenced. Most will permit the withdrawal of the plea only if the defendant was incompetent, lacked constitutionally effective counsel, or where the plea was not entered into knowingly, voluntarily, or intelligently. See Lee v. Hopper, 499 F.2d 456, 466 (5th Cir. 1974) (a decision to plead guilty can be intelligently made on less information than would be required to prepare a trial defense). There is no prosecutorial misconduct by allegedly being vindictive when a prosecutor seeks multiple felony convictions after the defendant withdrew his guilty plea to a misdemeanor. See U.S. v. Pemberton, 121 F.3d 1157 (8th Cir. 1997).

7.04.05 Specific Performance

In some situations, a defendant may obtain specific performance of a plea agreement when the prosecution breaches a promise with respect to an executed plea agreement, and the defendant pleads guilty in reliance on that promise. See Santobello, 404 U.S. at 263; Taylor, 77 F.3d at 371-72; U.S. v. Greenwood, 812 F.2d 632, 637 (10th Cir. 1987) (citations omitted). The Constitution, however, does not mandate specific performance for such a breach, and some courts have refused to order specific performance. See Mabry v. Johnson, 467 U.S. 504, 509-10 (1984) (unless guilty plea was induced by governmental deception--resting on an "unfulfilled promise" -- the plea could not be considered unintelligent or involuntary, so no due process violation existed).

As a safeguard, counsel should confirm all agreements in writing and/or prepare a contemporaneous file memo specifying the terms of the agreement. Without such written authorization, an evidentiary hearing will be necessary to establish the existence of the plea. See Walters v. Harris, 460 F.2d 988, 993 (4th

Cir. 1973). Even if the defendant has previously stated during plea discussions that no promises have been made, the defendant may offer evidence that a promise which induced the guilty plea existed. See Blackledge v. Allison, 431 U.S. 63, 78 (1977). The burden of this agreement, however, rests on the defendant. Additionally, a defendant has no constitutional right to specific performance of a plea bargain when a prosecutor withdraws an offer before the plea is actually entered. See U.S. v. Papaleo, 853 F.2d 16 (1st Cir. 1988). But see U.S. v. Savage, 978 F.2d 1136, 1138 (9th Cir. 1992) (there is no reliance until the court accepts the plea).

7.05 MISCONDUCT AT SENTENCING

Since a court may consider a much larger scope of matters at sentencing than at trial, the potential for prosecutorial abuse by submitting unduly prejudicial matters to the court at the sentencing stage is great. See U.S. v. Bergman, 416 F. Supp. 496, 502 (S.D.N.Y. 1976). The prosecutor must provide the court with accurate information in such a fashion that fundamental fairness to the defendant and counsel is not abrogated. See ABA Standards for Criminal Justice §3-6.2(a) (2d ed. 1982) (Prosecution Function); see also U.S. v. Williams, 499 F.2d 52 (1st Cir. 1974) (sentencing memorandum was given to defendant minutes before sentencing). The prosecutor may not violate the defendant's First Amendment rights by seeking severe punishment based on the defendant's political beliefs, see U.S. v. Bangert, 645 F.2d 1297, 1308 (8th Cir. 1981), or violate the defendant's Sixth Amendment rights by using post-indictment statements obtained from the defendant when unassisted by counsel. See U.S. v. Pineda, 692 F.2d 284, 287 (2d Cir. 1982).

Moreover, there is potential abuse in ex parte contacts by the prosecutor with the sentencing judge. See Haller v. Robbins, 409 F.2d 857, 858 (1st Cir. 1969). Relating to a judge ex parte unreliable and uncorroborated information pertinent to the defendant's sentence of which defense counsel is unaware is prosecutorial misconduct. See U.S. v. Huckins, 53 F.3d 276, 279-80 (9th Cir. 1994) (statements used for sentencing must have some indicia of reliability). A sentence may be vacated and a new sentencing hearing ordered before a different judge where the prosecution submits reports to the sentencing judge ex parte without defense comment. See U.S. v. Alverson, 666 F.2d 341 at 344 (9th Cir. 1982). Further, the prosecutor may not rely on unconstitutional reasons to refuse to file a substantial assistance motion to reduce a defendant's sentence below the United States Sentencing Guidelines or a mandatory minimum sentence. Wade v. U.S., 504 U. S. 181 (1992).

7.06 ARGUING MISCONDUCT AS BASIS FOR DEPARTURE

Even if a district court offers no relief for misconduct of government in terms of dismissal or suppression of evidence, such misconduct may be grounds for a reduction of sentencing. The Ninth Circuit granted a three level sentence reduction when the prosecutor negotiated a plea bargain with defense in absence of his counsel. See U.S. v. Lopez, 106 F.3d 309 (9th Cir. 1997). Thus, the Ninth Circuit went outside the guidelines because the case was “unusual enough for it to fall outside the heartland of cases in the Guidelines.” Id. at 311 (citing Koon v. U.S., 518 U.S. 81, 98 (1996)). Compare with U.S. v.

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Dockery, 965 F.2d 1112, 1116 (D.C. Cir. 1992) (holding that prosecutors’ misuse of authority of a lesser order than prosecutorial misconduct of constitutional dimension would not justify court’s disregard of statutory mandatory minimum or the guideline range applicable in that case).

7.07 CONCLUSION

Judge Frank, in response to pervasive prosecutorial misconduct and tacit court approval, issued a warning to his colleagues:

If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we had declared in effect “Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend rules. If the prosecutors win verdicts as a result of ‘disapproved’ remarks, we will not deprive them of their victories; we will merely go through a form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.” Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking.

U.S. v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946). Until judges heed such warnings, defense attorneys face an uphill battle in obtaining relief when prosecutors commit misconduct. There are victories, however. One well-known victory involved Gerry Blank, a criminal defense attorney in San Diego and former Deputy District Attorney Peter Longanbach. See Greg Moran, In Pursuit of a Prosecutor, California Lawyer, Oct. 2000, at 36-40. Blank opposed Longanbach in a murder trial in which Longanbach, through shady legal tactics, forced Blank’s withdrawal from the case. Id. The case went to trial and the defendant was found guilty. Id. The conviction was reversed, however, for ineffective assistance of counsel and a new district attorney was assigned to the case. Id. The new district attorney uncovered evidence that Longanbach had encouraged witnesses to lie and turned that evidence over to Blank. Id. Blank, who all along suspected Longanbach of questionable professional ethics, began preparing a motion to dismiss the case for prosecutorial misconduct. Id. Blank’s tenaciousness led him to discover solid evidence that Longanbach’s had encouraged witnesses to perjure themselves and had misused office resources. Id. While Blank’s motion failed, the evidence of Longanbach’s misconduct presented in his client’s retrial played a prominent role in his client’s favorable conviction for involuntary manslaughter. Id. at 79.

The Sixth Circuit, with unusually caustic words, also recently admonished a prosecutor and granted the defendant habeas relief for what it deemed “flagrant misconduct.” Boyle v. Million, 201 F.3d 711 (6th Cir. 2000). The prosecutor’s cross-examination of the defendant and nearly all of his closing argument was described by the court as “highly improper.” Id. at 717-18. The district attorney engaged in badgering, name-calling, and even predicted in front of the jury that the defendant would lie on the stand. Id. The Sixth Circuit found this conduct “deplorable” and affirmed the district court’s granting of a conditional writ of habeas corpus. Id.
The correct boundaries of prosecutorial advocacy were first set out Justice Sutherland, writing for a unanimous Court, "it is the prosecutor's duty to prosecute a case with earnestness and vigor, and while the prosecutor may strike hard blows, he is not at liberty to strike foul ones." Berger v. U.S., 295 U.S. 78, 88 (1935). As defenders of federal cases, we must keep a jaundiced eye on prosecutorial foul play. Although maintaining harmonious relations with opposing counsel is desirable, abuses by the prosecution of the Constitution, Federal Rules of Evidence and Criminal Procedure and Rules of Professional Conduct can and do result in severe injustice to the defendant. Defense counsel should be alert to improper prosecutorial tactics and should be aggressive in challenging them, making their nature clear for a motion for mistrial or record on appeal.

7.08 SUGGESTED READING


Brae Canlen, Prosecutorial Zeal, California Lawyer, March 1999 at 34.


CHAPTER 8

JURY SELECTION

updated by

Frank M. Mangan and Troy A. Britt

8.01 INTRODUCTION

A competent trial lawyer must be a competent jury selector. Not only does jury selection determine which persons will decide your client’s fate, it also sets the tone for the entire trial. Selecting a jury with an eye toward positively impressing the jury, laying the foundation of your case, and humanizing your client can be the difference between guilty and not.

The following chapter is analytically divided into two segments. The first is a review of the legal issues involved in jury selection. The second gives practical tips (and law where appropriate) for counsel to use in this important stage of trial.

8.02 LEGAL ISSUES INVOLVED IN JURY SELECTION

8.02.01 Jury Selection Procedure in the United States District Court

The Jury Selection and Service Act of 1968 (hereafter referred to as "the Act") appears at 28 U.S.C. §§1861-1871. Title 28 U.S.C. §1863 governs the procedures followed when selecting a federal jury. Section 1863 mandates that each district must formulate its own procedures, but also that the procedures must comply with the rest of the Act. The procedures must be designed to achieve a jury randomly selected from a cross section of the community. These procedures may not be discriminatory or contravene the other provisions of the Act. Section 1863 requires each district to establish a jury commissioner or court clerk to manage the jury selection process. Prospective jurors are to be selected from a master list.

Each district has certain classes or groups of people who can opt to be excused from jury service, while other people or classes may be completely barred from jury service. Section 1863 exempts from jury service: servicemen on active duty, fire and policemen, and public officers actively engaged in official
duty. The district court can exempt other groups or occupational classes so long as the exemption is in the public interest, is not inconsistent with the policy of the Act, and is not discriminatory.
8.03 THE JURY SELECTION PROCESS

The process of selecting a jury begins with the compiling of a master jury list of persons who may be summoned for duty. Most federal districts derive the master jury list by random selection from a computer drawn list of registered voters in the district. Many districts augment with Department of Motor Vehicle lists. Each person on the master list is sent a juror qualification form. 28 U.S.C. §1864. These questionnaires are used to determine whether a person is unqualified, exempt, or to be excused from jury service. To qualify, an individual must be a United States citizen, 18 years of age or older, and have resided in the judicial district for a period of at least one year. A juror must be able to read, write, and speak the English language with a degree of proficiency. A juror cannot be mentally or physically infirm such as to render the juror incapable. An individual who has a charge pending against him or her for the commission of a crime or who has been convicted of a crime punishable by imprisonment for more than one year and whose civil rights have not been restored is ineligible to serve on a jury. 28 U.S.C. §1865(b)(1-5).

A qualified jury list is pulled from the master list and consists of persons determined to be qualified and not exempt or excused according to the district court plan. These prospective jurors are sent a second questionnaire called the "juror information form." This questionnaire inquires as to the full name, address, phone number, place of birth, age, marital status, length of residence in the local county and state, occupation and employer, spouse's occupation and if employed by the U.S. government. It again asks about the jurors' past criminal record and physical or mental impairments.

Although the parties are not entitled to the jury qualification questionnaires or the juror information forms, some courts allow the attorneys to receive and inspect them. Attorneys may also request a copy of the juror information forms. When parties contemplate a challenge to the composition of the jury pool, the court is required to turn over the jury qualification or information form. 28 U.S.C. §1867(f); Test v. U.S., 420 U.S. 28 (1975) (there is "an unqualified right to inspect jury list"). For example, if the method by which the venire is selected from the pool is challenged, records of the jury clerk should be available for such a motion.

A trial jury is selected from a subset of the entire jury pool called the jury panel or venire, which is summoned to be available for trial in federal court. No one can be required to serve (or attend court for prospective jury service) for a total of more than thirty days within a two year period, except as may be necessary to complete service in a particular case. 28 U.S.C. §1866(e).

8.04 VOIR DIRE

Voir dire is meant to help ensure the selection of a fair and impartial jury. Voir dire in federal court is generally very restricted and is conducted by the trial judge. The right to conduct voir dire is derived from statute not the Constitution. Swain v. Alabama, 380 U.S. 202, 219 (1965). However, as the Court in U.S. v. Harris, 542 F.2d 1283, 1295 (7th Cir. 1976), recognized: "[T]he defendants must be permitted sufficient inquiry into the backgrounds and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges." As stated in U.S. v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977) "[P]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary
information upon which to base such strikes.” Moreover, “justice requires that each lawyer be given an
opportunity to ferret out possible bias and prejudice.” Id.

The goal of voir dire is to elicit information about the prospective jurors to uncover biases, opinions,
and attitudes as well as their life experiences. The amount of information that is considered necessary is
left to the broad discretion of the court. "Sound judicial discretion" means the judge should allow the parties
to obtain sufficient information about prospective jurors for an informed exercise of peremptory challenges
or motions to strike for cause based upon a lack of impartiality. U.S. v. Toomey, 764 F.2d 678, 682 (9th
Cir. 1985) (quoting U.S. v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979)). However, there is some
limit to judicial discretion. The Court's explanation of the selection procedure must not be confusing, which
prevents the intelligent exercise of strikes. U.S. v. Underwood, 122 F.3d 389 (2d Cir. 1998). The time
allotted to voir dire in federal court, is often extremely limited. Many seasoned attorneys believe the best
use of the time is to garner information about each juror rather than try to educate the jury on legal issues.

Voir dire must be conducted in public absent the most unusual circumstances. Press-Enterprise
proceeding, during which the defendant has a constitutional right to be present. Fed. R. Crim. P. 43(a);
amended, 872 F.2d 334 (9th Cir. 1989) (judge's release of venire persons in absence of defendant and
defense attorney prior to the beginning of official proceedings was error; however, the error was harmless
because those released would and should have been released as friends and supporters of the defendant).

Counsel should always fight for the opportunity to personally voir dire prospective jurors. The
attorney should file a motion pretrial requesting attorney conducted voir dire. The motion should be tailored
to the case and focus on areas of concern that may be important issues in your case. For example, a juror's
feelings about drugs, aliens, mules, drug couriers, guns, or gangs, are all volatile issues about which a jury
should be questioned. See infra sections 8.18, Potential Juror Biases.

8.05 CHALLENGES

8.05.01 Challenging the Composition of the Jury Venire

This section specifically addresses challenges to the composition of the jury venire. A discussion
of cause and peremptory challenges used to strike individual prospective jurors is found in section 8.08
and a discussion of challenging the jury that has been selected for trial is found in section 8.09.

“[T]he selection of a petit jury from a representative cross section of the community is an essential
component of the Sixth Amendment right to a jury trial.” Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
The right to a trial by a jury of one's peers contemplates that an impartial jury will be drawn from a fair
selected in an arbitrary and discriminatory manner violates the Due Process Clause and the Sixth
(1970); Leichman v. Secretary, Louisiana Dept. of Corrections, 939 F.2d 315 (5th Cir. 1991)

A defendant has an absolute right to the records of the local district that show the manner in which the jury pool was created if he is considering a challenge to the composition of the pool. The Act entitles a defendant to inspect old records from the master jury list. 18 U.S.C. §1868. Section 1867(f) entitles a defendant to the contents of records or papers used by the jury commissioner or clerk in connection with the jury selection process. The defendant is entitled to examine the records before filing a motion challenging the jury. Test v. U.S., 420 U.S. 28 (1975); U.S. v. Armstrong, 621 F.2d 951 (9th Cir. 1980). To view these records counsel need only allege that a motion challenging jury selection will be prepared. U.S. v. Alden, 776 F.2d 771 (8th Cir. 1985); U.S. v. Layton, 519 F. Supp. 946 (N.D. Cal. 1981). The judge may require that this motion be filed with other pretrial motions. U.S. v. Bogard, 846 F.2d 563 (9th Cir. 1988). The attorney should note the sources from which the names of prospective jurors are drawn, the criteria by which prospective jurors may be qualified or disqualified, the procedure by which prospective jurors are called for jury service, the determination of juror disqualification, excuses, exemptions, and exclusions and the manner in which the jurors are actually selected in the courtroom. Problems at any of these stages may lead to a non-random and unrepresentative jury. See U.S. v. Jackman, 46 F.3d 1240 (2d Cir. 1995) (selection procedure resulted in an underrepresentation of minorities in the jury pool); see also U.S. v. Ovalle, 136 F.3d 1092 (6th Cir. 1998) (plan which removed one of five blacks from the panel violated the Jury Selection and Service Act).

If the defendant can show a substantial failure to comply with the provisions of the Act in selecting the venire, the defendant may move to dismiss the indictment or stay the trial. Technical nonconformity with the Act that does not frustrate the Act's goals is not a substantial failure to comply with the Act. See U.S. v. Goodlow, 597 F.2d 159, 162 (9th Cir. 1979). This motion must be made before the voir dire examination begins, or within seven days after the defect was or could have been discovered, whichever is earlier. 28 U.S.C. §1867; U.S. v. Nelson, 718 F.2d 315, 318 (9th Cir. 1983). Failure to make a timely challenge to the jury panel constitutes a waiver of the objection. U.S. v. Tarnowski, 583 F.2d 903 (6th Cir. 1978); U.S. v. Silverman, 449 F.2d 1341 (2d Cir. 1971). However, a trial court should not be inflexible in allowing continuances or other modifications of trial procedures in order to allow the exploration of reasonable claims of improper jury selection procedures. U.S. v. Fernandez, 480 F.2d 726 (2d Cir. 1973).

Defendants challenging the jury panel under §1867 need not be a member of the excluded or under represented class. U.S. v. Gomez, 730 F.2d 475 (7th Cir. 1984); U.S. v. Musto, 540 F. Supp. 318 (D.N.J. 1982), aff'd, 715 F.2d 822 (3d Cir. 1983). In order to obtain an evidentiary hearing on the motion challenging the composition of the jury, counsel must file a sworn statement of facts which, if true, would demonstrate a failure to comply with the Act. 28 U.S.C. §1867(a), (d), (e); U.S. v. Kennedy, 548
F.2d 608, 613 (5th Cir 1977) (need not show prejudice but must move to dismiss or stay proceedings prior to voir dire), overruled on other grounds, U.S. v. Singleterry, 638 F.2d 122 (5th Cir. 1982).
8.06 FAIR CROSS SECTION REQUIREMENT


In order to establish a *prima facie* violation of the fair cross section requirement, the defendant must show: (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which jurors are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is the result of systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The Sixth Amendment fair cross-section claim does not require proof of discriminatory intent or proof of membership in the distinct group. *Campbell v. Louisiana*, 523 U.S. 392 (1998) (white defendant could challenge discrimination against black jurors); *U.S. v. Esquivel*, 75 F.3d 545 (9th Cir. 1996). The Supreme Court has refused to define the term "distinctive group" but suggested that "'distinctiveness' must be linked to the purposes of the fair cross-section requirement." *See Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986). The purposes of the fair cross-section requirement include: (1) "guard[ing] against the exercise of arbitrary power" and "ensuring commonsense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor"; (2) preserving public confidence in the fairness of the criminal justice system; and (3) implementing our belief that administration of justice is a phase of civic responsibility. *Id.*

The following classifications have been found to be "distinctive" for purposes of a fair cross section challenge based on the Sixth Amendment or the Equal Protection Clause: (1) *African Americans*, *Peters*
v. Kiff, 407 U.S. 493 (1972); Strauder v. State of West Virginia, 100 U.S. 303 (1879); (2) Mexican-Americans, Castaneda v. Partida, 430 U.S. 482 (1977); Hernandez v. State of Tex., 347 U.S. 475 (1954); (3) whites, Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987); but see Echlin v. LeCureux, 995 F.2d 1344 (6th Cir. 1993); (4) women, Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Leichman v. Secretary, Louisiana Dept. of Corrections, 939 F.2d 315 (5th Cir. 1991); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982); (5) religion or national origin, 28 U.S.C. §1862; and (6) economic status, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946). See generally Lockhart v. McCree, 476 U.S. 162 (1986). Age alone does not qualify as a cognizable group, Wysinger v. Davis, 886 F.2d 295 (11th Cir. 1989) (and cases cited therein); and young adults are not a cognizable group in at least the First, Seventh, and Ninth Circuits. U.S. v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987); U.S. v. Jackson 983 F.2d 757, 762-63, (7th Cir. 1993); U.S. v. Pichay 986 F.2d 1259, 1260 (9th Cir. 1993). Moreover, the Ninth Circuit recently held that “geography” did not make a group distinctive. U.S. v. Footracer, 189 F.3d 1058 (9th Cir. 1999).

If the first two elements of a prima facie violation are established, the third element systematic exclusion, is presumed. See generally Duren v. Missouri, 439 U.S. 357, 363-69 (1979); Berryhill v. Zant, 858 F.2d 633, 638 (11th Cir. 1988). After the defendant demonstrates a prima facie fair cross section violation, the burden shifts to the government to present a significant government interest supporting the jury selection process. Duren, 439 U.S. at 367-68. The government must show why the selection process is not unfair and unreasonable. For a successful cross section challenge based on under representation of women, see Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988); but see U.S. v. Rioux, 97 F.3d 648 (2d Cir. 1997) (for statistics alone to prove systematic exclusion of minority group, they must be overwhelmingly disparate and disparities of 1.58% or 2.14% for Blacks and Hispanics are not; under representation is from natural statistical deviation and not systemic exclusion).

8.07 RANDOM SELECTION


The randomness issue most frequently arises in the context of the "volunteer juror" who appears for jury service even though his or her name has not appeared on the usual lists. At least two circuits have held that it is error to use volunteer jurors. U.S. v. Branscome, 682 F.2d 484, 485 (4th Cir. 1982); U.S. v. Kennedy, 548 F.2d 608, 610-12 (5th Cir. 1977), overruled on other grounds, U.S. v. Singleterry, 683 F.2d 122 (5th Cir. 1982). But, two circuits have found the use of a "volunteer juror" to be a non-substantial violation of the Act. U.S. v. Nelson, 718 F.2d 315, 318-20 (9th Cir. 1983) (juror was summoned but appeared on wrong date and was conscripted for service, thus he was not a “volunteer” in the usual sense); U.S. v. Anderson, 509 F.2d 321-22 (D.C. Cir. 1974) (no violation to seek volunteers from the pool for lengthy trials). But see Anderson v. Frey, 715 F.2d 1304 (8th Cir. 1983) (selection of standby jurors by local sheriff deprived defendant of due process); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983); Henson v. Wyrick, 634 F.2d 1080 (8th Cir. 1980). Cf. Coury v. Livesay, 868 F.2d 842 (6th Cir. 1989), aff’d, 707 F. Supp. 961 (M.D. Tenn. 1986) (use of bystander jury selection by sheriff did not violate defendant's constitutional rights). To obtain an evidentiary hearing concerning a violation, a
defendant must show that: (1) he has alleged facts which, if proved, would entitle the defendant to relief; and (2) an evidentiary hearing is required to establish the truth of his allegations. *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989).

**8.08 JUROR EXCLUSION BY EXERCISE OF CHALLENGES**

The phrase "jury selection" is a bit of misnomer as the process is actually one of "jury exclusion" or "deselection." Counsel does not get the luxury of choosing particular jurors; rather, counsel can only exclude those who seem least able to consider the case fairly and impartially. The Sixth Amendment right to trial by jury guarantees the criminally accused a fair trial by a panel of impartial, indifferent jurors. *Turner v. State of La.*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The courts attempt to achieve this goal through jury selection which allows both parties to excuse jurors by one of two methods: challenges for cause and peremptory challenges.

**8.08.01 Challenging a Juror for Cause**

An attorney may challenge for cause any juror who states that he or she cannot be fair and impartial if he or she were to sit as a juror on the case. There are no limits to the number of challenges for cause. However, the legal standard for what constitutes the basis for a challenge for cause is vague. The judge has almost complete discretion to determine whether any prejudice brought to light is severe enough to demand removal of the prospective juror. *U.S. v. Wood*, 299 U.S. 123 (1936). Even where jurors have made a bald statement that they "could not be fair," denial of a challenge for cause has been upheld where the trial court rehabilitated the prospective juror through leading questions such as, "You can be fair, can't you?" *See Bashor v. Risley*, 730 F.2d 1228 (9th Cir. 1984). A statement from a juror that shows bias or prejudice against the defendant or the defense may be overcome if the juror nevertheless asserts an ability and willingness to reach a decision based solely on the evidence. *U.S. v. Martin*, 749 F.2d 1514, 1517 (11th Cir. 1985) (used all peremptories and court denied cause challenge thus severely affecting substantial right). Moreover, the juror's bias may be shown by "express admission of that fact, but, more frequently jurors are reluctant to admit actual bias and the reality of their biased attitudes must be revealed by circumstantial evidence." *U.S. v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). *See also Murphy v. Florida*, 421 U.S. 794, 800 (1975) ("the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights"). If a challenged juror qualifies his or her ability to disregard bias, the juror challenged for cause must be excused. *U.S. v. Martin*, 749 F.2d at 1517-18. "Doubts regarding bias must be resolved against the juror." *U.S. v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000) (citation omitted). Failure to discharge an unduly biased or prejudiced juror denies a defendant the constitutional right to an impartial jury. *U.S. v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979). *But see U.S. v. Guerrero*, 756 F.2d 1342 (9th Cir. 1984) (conviction affirmed for lack of "manifest error" in refusing challenges for cause).

**8.08.02 Peremptory Challenges**

Fed. R. Crim. P. 24(b) sets forth the federal rule for the exercise of peremptory challenges. Peremptory challenges require no legal basis. The only exception to counsel's unfettered right to exercise peremptory challenges is the limitation on counsel's arbitrary exercise of peremptory challenges to exclude
legally cognizable groups. At the outset of the trial, the judge should inform counsel of the number of peremptory challenges to which counsel is entitled. The normal number (for non-capital felonies) is 10 strikes for the defense and six for the prosecution. For offenses that carry a penalty of no more than one year in custody, and/or a fine, each side is entitled to three peremptory challenges. Fed. R. Crim. P. 24(b). The award of additional challenges is not mandatory, but permissive, and rests in the court's discretion. U.S. v. Springfield, 829 F.2d 860 (9th Cir. 1987); U.S. v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); U.S. v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976); U.S. v. Means, 409 F. Supp. 115 (D.N.D. 1976). Peremptory challenges are a creature of statute and are not a constitutional right; Gray v. Mississippi, 481 U.S. 648 (1987), as modified by Ross v. Oklahoma, 487 U.S. 81, 87 (1988); Stilson v. U.S., 250 U.S. 583, 586 (1919). The number, purpose, and manner in which peremptories are exercised are determined by statute. See Fed. R. Crim. P. 24(b).

Under Fed. R. Crim. P. 24(b), "[i]f there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." There is no right to additional peremptory challenges in multi-defendant cases. U.S. v. Vaccaro, 816 F.2d 443, 456 (9th Cir. 1987). Deadlock between co-counsel over the use of challenges does not mandate a grant of additional challenges unless it is demonstrated that the jury ultimately selected is not impartial or representative of the community. U.S. v. McClendon, 782 F.2d 785, 788 (9th Cir. 1986). A court may condition the grant of additional challenges on a stipulation for more challenges for the government. U.S. v. Bruno, 873 F.2d 555 (2d Cir. 1989) (harmless error); Vaccaro, 816 F.2d at 457; U.S. v. Hueftle, 687 F.2d 1305, 1309 (10th Cir. 1982); U.S. v. Haldeman, 559 F.2d 31, 79 (D.C. Cir. 1976); U.S. v. Tucker, 526 F.2d 279, 283 (5th Cir. 1976).

The Supreme Court has stated that the right to exercise peremptory challenges is "one of the most important of the rights secured to the accused," Swain v. Alabama, 380 U.S. 202, 219 (1965), reh'g denied, 381 U.S. 921, overruled in part by Batson v. Kentucky, 476 U.S. 79 (1986). An erroneous denial of a proper peremptory challenge requires automatic reversal. U.S. v. Annigoni, 96 F.3d 1132 (9th Cir. 1996). The Supreme Court has also held that the erroneous refusal to excuse a biased juror in a capital case does not necessarily violate the Sixth Amendment even if the defendant was forced to exercise a peremptory challenge to cure the error. Ross v. Oklahoma, 487 U.S. 81 (1988). In Ross, the trial court refused to excuse a juror who indicated that he would automatically vote for the death penalty if the defendant were found guilty. Under Witherspoon v. Illinois, 391 U.S. 510 (1968), the defendant should have been excluded for cause. Thus, the defendant had to exercise one of his peremptory challenges to remove the biased juror. Ross argued that the trial court's failure to remove the biased juror for cause and the consequential limitation on the defendant's peremptory challenges violated his Sixth Amendment right to an impartial jury, and his right to due process as guaranteed by the Fourteenth Amendment. The Supreme Court held that since the biased juror was in fact excused and did not sit on the jury, any claim of impartiality must focus on the jurors who ultimately sat and that there was no showing that any of the jurors were not impartial. In rejecting the defendant's argument, the Court limited its previous holding in Gray v. Mississippi, 481 U.S. 648 (1987). In Gray, the Court held that "the relevant inquiry is 'whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error.'" Gray, 481 U.S. at 665 (emphasis in original) (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir. 1982) (specially concurring opinion)). At trial, the court erroneously excluded a juror who indicated that although opposed to the death penalty, she could impose it under certain circumstances. Gray, 481 U.S. at 653.
The Supreme Court reversed the defendant’s death sentence. In *Ross*, the Court limited the rule in *Gray* to situations in which there is an erroneous *Witherspoon* exclusion of a qualified juror in a capital case. The *Ross* Court rejected the defendant's due process argument. The Court held that the defendant received the process due him under state law which required that the defendant use his peremptory challenges to cure erroneous refusals of the trial court to exclude for cause. *Ross*, 487 U.S. at 87.

If you have a viable appellate issue because the judge refused your challenge for cause, be certain to use all available peremptory challenges to preserve the issue for appeal. The defense may have to show prejudice from the judge's failure to discharge the juror who was properly challenged for cause. *See U.S. v. Hardy*, 941 F.2d 893 (9th Cir. 1991); *U.S. v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979). *But see U.S. v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (erroneous denial of criminal defendant’s right of peremptory challenge requires automatic reversal, and defendant’s conviction had to be reversed, based on erroneous denial of his peremptory challenge to juror); *U.S. v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989) (denial or impairment of the right to a peremptory challenge is reversible error per se). Prior to January 20, 2000, if the defense used all available peremptory challenges, the trial court's error in refusing to discharge a juror properly challenged for cause impaired the defendant's substantial right to his allotted number of peremptory challenges. *U.S. v. Martin*, 749 F.2d 1514, 1518 (11th Cir. 1985). However, it appears that reversible error will only occur if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him. *U.S. v. Martinez-Salazar*, 528 U.S. 304 (2000). In *Martinez-Salazar*, the Supreme Court decided that the denial of additional peremptory challenges did not violate the defendant’s statutory or constitutional rights, where the defendant used a peremptory challenge and struck an admittedly biased juror who should have been removed for cause. The Court suggested the only remedy would be to allow the biased juror to remain on the panel and if the jury convicted to appeal the violation of the defendant’s Sixth Amendment right to an impartial jury. *Id.*

### 8.08.03 Alternate Jurors

Under Fed. R. Crim. P. 23(b), "[j]uries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences." Even if there is no stipulation, under Rule 23, if there is "just cause" and the jury has retired to consider its verdict, a valid verdict may be returned "by the remaining 11 jurors." In *Patton v. U.S.*, 281 U.S. 276 (1930), the Supreme Court held that such a practice was constitutional. *See also U.S. v. Dischner*, 974 F.2d 1502 (9th Cir. 1992).

The judiciary committee notes on Rule 23(b) indicate that 23(b) was not intended for use in ordinary trials of a week or less. The notes state that Rule 23(b) should be used for cases where a juror becomes unavailable to continue deliberating and "the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense, and court resources." S. Rep. No. 354, 95th Cong., 1st Sess. (1977). In *U.S. v. Tabacca*, 924 F.2d 906 (9th Cir. 1991), the Ninth Circuit found no "just cause" for excusing an absent juror and proceeding with 11 jurors when the missing juror was certain to be available the next day and the trial had only lasted two and one half days. Counsel should vigorously fight a jury of less than 12.
The court can direct that up to six additional jurors be called and impaneled as alternate jurors. They should replace jurors, when appropriate, in the order in which they are called. Fed. R. Crim. P. 24(b). In Heath v. Cast, 813 F.2d 254 (9th Cir. 1987), the district court erred by selecting a replacement juror by lot, rather than following the procedure set forth by the Federal Rules. However, the error was deemed harmless.

Each side is entitled to one additional peremptory challenge if one or two alternate jurors are to be impaneled, two peremptory challenges if three to four alternates are to be impaneled, and three peremptory challenges if five or six alternates are to be impaneled. The additional challenges may only be used on the alternates, and the regular peremptory challenges may not be used against the alternates. Fed. R. Crim. P. 24(c).

8.09 CHALLENGING THE JURY AS CONSTITUTED

Challenges to the composition of the jury pool and challenges to individual jurors have already been discussed. There is an additional area for objection. After the individual jury members have been selected, and before the jury is sworn, counsel may object to the manner in which the jury was selected. Purposeful racial discrimination in selection of the jury violates a defendant's right to equal protection. This substantive right is discussed below in detail.

Counsel must be careful to preserve these objections. Title 18 U.S.C. §1862 prohibits the exclusion of citizens from juries on account of race. Section 1867(d) requires that a motion to dismiss an indictment or to stay a proceeding for violation of §1862 be in writing with a sworn statement of facts which, if true, would establish a substantial failure to comply with the statute. While a challenge under the Fifth Amendment is constitutional and not statutory, counsel should follow the requirements of §1867(d) out of an abundance of caution. In U.S. v. Kennedy, 548 F.2d 608, 610-12 (5th Cir.), overruled on other grounds, U.S. v. Singleterry, 683 F.2d 122 (5th Cir. 1982), the court upheld a conviction where there was a substantial failure to comply with the Jury Selection and Service Act of 1968. The defendant made an oral objection, not a written motion supported by affidavit. His objection was held to be insufficient. See also U.S. v. Young, 822 F.2d 1234 (2d Cir. 1987).

8.09.01 Equal Protection Challenge

In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that purposeful racial discrimination in the selection of an individual jury violates a defendant's right to equal protection because it denies him the protection a trial by jury is intended to secure. Thus, even a prosecutor's exercise of peremptory challenges may be examined where it appears that the prosecutor is excusing potential jurors solely on account of their race. In Georgia v. McCollum, 505 U.S. 42 (1992), the Supreme Court held that the Constitution likewise prohibits a white criminal defendant from using peremptory strikes to exclude black members of the venire from defendant's petit jury because of race. The Court thus extended the Batson prohibitions of striking for racial purposes to defendants as well as prosecutors.

Batson redefined the evidentiary burden placed on criminal defendants claiming an equal protection violation due to the prosecution's use of peremptory challenges. Under Batson, a defendant may establish
a *prima facie* case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Prior to *Batson*, defendants were foreclosed from making equal protection challenges to the methods by which juries were selected in individual cases. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court held that a prosecutor's use of peremptory challenges in a particular case would not be scrutinized; it would be presumed that the prosecutor properly exercised his challenges. A case of purposeful discrimination could only be shown by evidence that in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or victim might be, a prosecutor excused minorities from the jury. *Batson* overruled that portion of *Swain*’s holding. A *Swain* argument (pre-*Batson* claim) made prior to *Batson* can be sufficient to preserve a *Batson* claim. *Ford v. Georgia*, 498 U.S. 411 (1991).

In *Batson*, the prosecutor used his peremptory challenges to strike all four black persons on the venire and an all-white jury was selected. *Batson*, 476 U.S. at 79. The defendant's objections were overruled. The Court held that the state's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause and that clause forbids the prosecutor from challenging potential jurors solely on account of their race. *Id.* at 88-89. Nor can the prosecutor challenge potential jurors on the assumption that black jurors as a group will be unable to consider the state's case against the defendant impartially. *Id.* The Supreme Court reversed Batson's conviction and remanded the case for the trial court to establish whether *prima facie* purposeful discrimination had occurred and whether the prosecutor had a race neutral explanation for his/her actions. *Id.* at 100.

In *Hernandez v. New York*, 500 U.S. 352 (1991), the prosecutor offered a race neutral explanation for striking two Latino venirepersons. The prosecutor explained he was uncertain they would be able to follow the interpreter based on their demeanor and specific responses. The Court held the challenge did not violate *Batson* because the strikes were race neutral. *See U.S. v. Changco*, 1 F.3d 837 (9th Cir. 1993)

Strikes based solely on race are prohibited even if the defendant is of a race other than that of the juror being struck. The Court stated a defendant in a criminal case can raise a third party equal protection claim for jurors excluded because of their race. *Powers v. Ohio*, 499 U.S. 400 (1991). However, *Jones v. Gomez*, 66 F.3d 199, 203 (9th Cir. 1995), cert. denied, 517 U.S. 1143 (1996), holds that a *Powers* claim is a new rule under *Teague v. Lane*, 489 U.S. 288 (1989) and is unavailable to Habeas petitioners on collateral review. The Ninth Circuit also found impermissible a peremptory challenge based on a juror's residence in a poor, violent, black neighborhood. *U.S. v. Bishop*, 959 F.2d 820 (9th Cir. 1992); *but see U.S. v. Footracer*, 189 F.3d 1058 (9th Cir. 2000). The court distinguished *Hernandez v. New York*, 500 U.S. 352 (1991), where the Court found a nexus between juror's characteristics -- bilingualism and possible approach to specific trial -- but found no such nexus in *Bishop*. The reasons proffered in *Bishop* were generic, group based presumptions applicable to residents of poor, predominantly black neighborhoods and not specific to the juror. Race was impermissibly used as a surrogate for racial stereotypes. The conviction was reversed on the basis of the challenge as well as for insufficient evidence. In *U.S. v. Vasquez-Lopez*, 22 F.3d 900 (9th Cir. 1994), the only African-American on the jury panel was struck. The prosecutor said the juror was inattentive and was struck for that reason. The appeals court stated the prosecutor had supplied a race-neutral explanation for the challenge that supported the validity of the strike. *Id*; *see also Turner v. Marshall*, 63 F.3d 807 (9th Cir. 1995), overruled on other
grounds, Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) (question of whether established prima facie showing of prosecutorial discrimination is reviewed deferentially).

Unless discriminatory intent is inherent in prosecutor’s explanation for exercising peremptory challenge, however, the reason will be deemed race neutral by the court. U.S. v. Contreras-Contreras, 83 F.3d 1103 (9th Cir.) (district court judge did not err in accepting prosecutor’s explanation for peremptory challenge of African-American juror because she had been on another jury recently as race-neutral), cert. denied, 519 U.S. 903 (1996). See also U.S. v. Vasquez-Lopez, 22 F.3d 900 (9th Cir. 1994) (use of peremptory against only African American juror did not establish prima facie case of discrimination; defendant failed to show purposeful discrimination); U.S. v. Gibson, 105 F.3d 1229 (8th Cir. 1997) (government’s race-neutral reasons for its peremptory strikes shifted burden back to defendant to show pretext; claim that similarly situated white jurors not struck by government showed pretext was untimely and cannot be raised for the first time on appeal). U.S. v. Elliott, 89 F.3d 1360 (8th Cir. 1996) (peremptory challenges of two black venire members based on lack of community attachment, unresponsiveness during voir dire, and hostility towards prosecutor acceptable absent proof of purposeful discrimination; defendant’s attempt to show pretext was conclusory), cert. denied, 519 U.S. 1117 (1997).

Since Batson, however, the Supreme court has held that a race-neutral explanation given by the party exercising a peremptory challenge does not need to be persuasive, or even plausible. Purkett v. Elem, 514 U.S. 765 (1995) (where prosecutor proffered that an African American juror was struck because he had long, unkempt hair, a mustache, and a beard). See U.S. v. Bauer, 75 F.3d 1366, 1371 (9th Cir. 1996) (upheld under Purkett government strike of two Native American potential jurors because they came from an “anti-government” area where a government witness had been threatened). The burden would shift back to the party making the objection to prove purposeful discrimination and persuasiveness of justification becomes relevant. Id. at 768.

In Batson, the Court declined to assess the merits of the Sixth Amendment argument and relied solely on the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment does not apply in federal criminal cases. However, the Due Process Clause of the Fifth Amendment, which is applicable in federal criminal cases, incorporates essentially the same protections as the Equal Protection Clause of the Fourteenth Amendment. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976).

The Ninth Circuit has extended Batson, ruling that a prosecutor may object to a criminal defendant’s discriminatory peremptory challenge, because the United States has standing to assert the equal protection rights of a venire person. U.S. v. De Gross, 960 F.2d 1433 (9th Cir. 1992). In De Gross, the female defendant was exercising her peremptory challenges against male jurors, while the prosecutor struck the only Hispanic woman juror. The court found that both the defense and the prosecution established prima facie cases of gender discrimination. The defendant refused to offer an explanation and the court held that the peremptory challenge of one male juror was invalid. Moreover, the government’s justification for excluding a female juror was based on the desire to keep men on the jury despite the defendant’s challenges to male jurors. The court found the government’s explanation was an admission of purposeful gender discrimination in violation of the defendant’s Fifth Amendment equal protection rights. Therefore, the Ninth Circuit reversed the decision without reaching the racial discrimination issue. Id. at 1442-43.
In Griffith v. Kentucky, 479 U.S. 314 (1987), the Supreme Court held that Batson applies to cases in which convictions had not yet become final on direct appeal when the Batson decision came down. However, in Allen v. Hardy, 478 U.S. 255 (1986), the Court held that the decision in Batson should not be applied retroactively on collateral review of convictions that became final before the Batson opinion was announced. "Final," in this context, means that the judgment of conviction had been entered, all direct appeals had been exhausted, and the time for petition for writ of certiorari had expired. Allen, 478 U.S. at 258. See Davis v. Greer, 13 F.3d 1134, 1140 (7th Cir.), cert. denied, 513 U.S. 933 (1994).

8.09.02 New Batson Variations

Batson related challenges have also been made, with varying success. Appellate courts have ruled that Batson does not apply to prohibit peremptory strikes based on obesity. U.S. v. Santiago Martinez, 58 F.3d 422 (9th Cir. 1995), cert. denied, 516 U.S. 1044 (1996). However, the Supreme Court decided that gender-based discrimination in jury selection violates the Equal Protection Clause, and causes harm to litigants, the community, and the individual jurors who are excluded. J.E.B. v. Alabama, ex. rel. T.B., 511 U.S. 127 (1994) (intentional discrimination on the basis of gender violates the equal protection clause of the Constitution).

8.09.03 Establishing a Prima Facie Case

Initially, a party must establish a prima facie case of purposeful discrimination. Batson did not specify the showing necessary to establish a prima facie case of discrimination. Instead, the Supreme Court deferred to the trial judge to decide. Batson, 476 U.S. at 97. In determining whether a party has established the requisite showing of purposeful discrimination, the trial judge should consider the totality of the relevant facts including whether there is a pattern of strikes against jurors of a specific race or gender. In order to establish discriminatory use of peremptory challenges the defendant must show an inference of racial bias rather than a "strong likelihood" of such. Wade v. Terhune, 202 F.3d 1190 (9th Cir. 2000) (overruling California Wheeler test which required defendant to show "strong likelihood" of discrimination). The judge should also consider opposing counsel's questions and statements during voir dire. Batson, 467 U.S. at 96-97. The question is one of fact and the district court's findings are given deference upon review. Id. at 98 n.21. The court's findings will not be disturbed unless clearly erroneous. Deputy v. Taylor, 19 F.3d 1485, 1492 (3d Cir. 1994); U.S. v. Grandison, 885 F.2d 143, 146 (4th Cir. 1989); U.S. v. Ross, 872 F.2d 249, 250 (8th Cir. 1989); U.S. v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988).

For a party to establish a prima facie case of purposeful discrimination in the selection of the petit jury, the party must first show that the juror is a member of a cognizable racial or gender group. Batson, 476 U.S. at 97. To establish a cognizable group, counsel must show the following: (1) the group must be definable and limited by some clearly identifiable factor; (2) a common thread of attitudes, ideas or experiences must run through the group; and (3) there must exist a community of interests among the members such that the group interests cannot be adequately represented if the group is excluded from the jury selection process. U.S. v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987). See U.S. v. Angiulo, 847 F.2d 956 (1st Cir. 1988) (defendant failed to establish Italian Americans have been or are currently subject to discriminatory treatment). See also U.S. v. Cresta, 825 F.2d 538 (1st Cir. 1987). Hispanics are a cognizable group. U.S. v. Alvarado, 891 F.2d 439 (2d Cir. 1989), vacated on other grounds, 497 U.S.
The second requirement is that opposing counsel has executed a challenge to exclude a venire member of that cognizable group. The accusing party must show circumstances that raise an inference that opposing counsel used the challenges to exclude the venire member from the petit jury because of their race or sex. Prior to 1991, in order to establish a prima facie case the defendant had to be a member of the group excluded. U.S. v. Angiulo, 847 F.2d 956 (1st Cir. 1988); U.S. v. Townsley, 843 F.2d 1070 (8th Cir.); modified on other grounds, 856 F.2d 1189 (8th Cir. 1988); U.S. v. Chavez-Vernaza, 834 F.2d 1508 (9th Cir. 1987), amended, 844 F.2d 1368 (9th Cir. 1988). Cf. U.S. v. Brown, 817 F.2d 674 (10th Cir. 1989); U.S. v. Vaccaro, 816 F.2d 443 (9th Cir. 1987). However, the Supreme Court in Powers v. Ohio, held that the racial identity of defendant and venire person was irrelevant because the accusing party did not have to be a member of the group excluded. 499 U.S. 400 (1991).

In the following circuits, courts have held that the defendant established a prima facie showing that peremptory challenges were racially motivated. U.S. v. Hamilton, 850 F.2d 1038 (4th Cir. 1988) (all strikes exercised against blacks); U.S. v. Hughes, 880 F.2d 101 (8th Cir. 1989); U.S. v. Power, 881 F.2d 733 (9th Cir. 1989); U.S. v. Chinchilla, 881 F.2d 733 (9th Cir. 1989); U.S. v. Gordon, 817 F.2d 1538 (11th Cir. 1987), modified on other grounds, 836 F.2d 1312 (11th Cir. 1988) (exercise of six peremptory challenges on blacks effectively excluded all black venirepersons); U.S. v. Blake, 819 F.2d 71 (4th Cir. 1987) (exercise of seven of eight peremptory challenges on blacks); U.S. v. Williams, 822 F.2d 512 (5th Cir. 1987) (of first four peremptory challenges, three used to strike black venirepersons and one to strike a white venireperson); U.S. v. Battle, 836 F.2d 1084 (8th Cir. 1987) (government exercised five of six possible peremptory challenges to strike five of seven blacks on panel); Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986) (prosecutor used eight of ten peremptory challenges to exclude black venirepersons). For an excellent analysis of the types of evidence used to raise the inference of discrimination, see Ex parte Branch, 526 So. 2d 609 (1987). To insure a clear record for review of a Batson issue the record should include: (1) the racial composition of the initial group seated and the final jury panel sworn; (2) the number of peremptory strikes allowed each side; and (3) the race of those who were struck or excused from the jury panel throughout the voir dire (on whatever basis), the order of strikes, and who exercised the strikes.

8.09.04 Rebuttal

Once a party establishes a prima facie case of discrimination, Batson requires that the burden shift to the opposing party to advance a race or gender neutral explanation for its challenges. Batson, 476 U.S. at 96. The explanation must be specific to the particular case being tried. Id. The choice is not discretionary. U.S. v. Battle, 836 F.2d 1084 (8th Cir. 1987). Batson requires a concrete, nondiscriminatory basis for the challenge; intuitive judgment, denial of discriminatory motive, and affirmance of good faith are insufficient explanations. Batson, 476 U.S. at 97, 98. Concerns of partiality because the challenged jurors share the same race as the defendant will not withstand Batson scrutiny. Id. The reasons stated by the government must be reasonably specific, and they must be bona fide. U.S. v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987); see also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). Whether an evidentiary hearing in which witnesses are examined and cross-examined
is to be held is left to the discretion of the district court and is not required by Batson. U.S. v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988).

Generally, the rebuttal must take place in an adversary hearing. In U.S. v. Thompson, 827 F.2d 1254 (9th Cir. 1987), Thompson's attorney moved for a mistrial after the government used four of its peremptory challenges to exclude all blacks from the venire. The trial judge permitted the government to provide its rebuttal in camera out of the presence of the defendant and his attorney. The court then proceeded to rule on the objection without divulging the reasons to defense counsel. The Ninth Circuit held that the ex parte examination of the prosecutor's motive in challenging the prospective jurors violated the defendant's right to due process and the right to be personally present and represented by counsel at all critical stages of his case. However, the Thompson court held that an ex parte hearing may be justified when the prosecutor's motive for excluding potential jurors grows out of its case strategy so that divulging the reasons to opposing counsel would involve severe prejudice. Thompson, 827 F.2d at 1259. The Fifth and Sixth Circuits do not provide for an adversarial hearing. See U.S. v. Tucker, 836 F.2d 334 (7th Cir. 1988); U.S. v. Davis, 809 F.2d 1194 (6th Cir. 1987).

Once the party offers explanation for the challenges, the trial court then has the duty to determine if the opposing party has established purposeful discrimination. Batson, 476 U.S. at 98. In U.S. v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987), modified on other grounds, 836 F.2d 1312 (11th Cir. 1988), the court held that the trial court's failure to make any independent inquiry or allow the defendant an opportunity to challenge the government's rebuttal evidence was error. See also U.S. v. Davis, 816 F.2d 433, 434 (8th Cir. 1987) (the defendant must be given the chance to rebut the proffered explanation as a pretext); Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987). A trial court's finding concerning discriminatory intent is entitled to "great deference." Batson, 476 U.S. at 98 n.21. Under this standard, a trial court's finding concerning discriminatory intent will stand unless clearly erroneous. U.S. v. Lewis, 837 F.2d 415, 417 (9th Cir. 1988); Ex parte Branch, 526 So. 2d 609 (1987) (discussion of the types of evidence that can rebut the prima facie showing of discrimination).

At the hearing, the accusing party must be given the opportunity to: (1) point out that opposing party's claims about the particular juror are false; (2) point out that although the claims about an excluded juror are true, similar claims can be made about non-excluded jurors who are not minorities, and this should raise the suspicion of bad faith; and (3) argue that claims about the juror, although true, are so irrational as a reason for striking a juror that they may be pretext for some undisclosed discriminatory reason. U.S. v. Alcantar, 897 F.2d 436 (9th Cir. 1990) ("Alcantar II") (two year delay between allegation of racially charged challenges and hearing to determine validity of allegation, rendered Batson hearing meaningless and required reversal); see also McClain v. Prunty, 217 F.3d 1209 (9th Cir. 2000).

The proffered rebuttal must be carefully scrutinized. Consider the number of black venirepersons challenged for cause as well as peremptorily struck and the number of black venirepersons who remain after the challenges. Also examine the voir dire of the challenged jurors, i.e., was it perfunctory with regard to black venirepersons, and whether the factors the challenging party indicates motivated him/her to make the challenged peremptories apply to other jurors not challenged. See Ex parte Branch, 526 So. 2d 609 (1987), for a thorough discussion of the type of evidence that can be used to show that the rebuttal is a sham or pretext.
Under *McCollum*, when a defendant must explain the reasons for a peremptory challenge, an *in camera* discussion can be arranged, if the explanation for a challenge entails a confidential communication or would reveal trial strategy. *Georgia v. McCollum*, 505 U.S. 42 (1992). In *Burks v. Borg*, 27 F.3d 1424 (9th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995), the state struck five minority people. The prosecution conceded that the defense had made a *prima facie* showing of racial discrimination, but the strikes were made based on the jurors' opinions on the death penalty. The defense rebutted that white jurors who had expressed the same equivocation were not struck. The trial court gave great deference to the prosecutor's credibility. *Id.* at 1228. The appeal court stated *Batson* is not violated when jurors of different races provide similar responses and one is excused and another is not. The court relied on the prosecutor's subjective reasons, which the court found were not pretextual. *Id.* at 1229. *But see Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997). While the court must rely on justifications offered by the prosecutor, the court must not abdicate it's duty to make the ultimate determination on the issue of discriminatory intent. *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000).
8.09.05 Procedural Considerations

Counsel must preserve the record by contemporaneously raising *Batson* objections at trial. *Real v. Hogan*, 828 F.2d 58, 62 (1st Cir. 1987). Courts may limit raising issues for the first time on appeal, provided such limitations are not an attempt to thwart review which were justified by prior decisions. *Ford v. Georgia*, 498 U.S. 411 (1991). *Batson* objections cannot be raised for the first time on appeal. See *U.S. v. Parsee*, 178 F.3d 374 (5th Cir. 1999); *King v. Moore*, 196 F.3d 1327, 1336 (11th Cir. 1999); *U.S. v. Bedonie*, 913 F.2d 782, 794 (10th Cir. 1990). The objection must be raised before the jury is sworn in order to allow the judge to correct the error. *U.S. v. Sammaripa*, 55 F.3d 433 (9th Cir. 1999) (double jeopardy barred second trial where prosecutor alleged *Batson* error after jury sworn -- he could have done so before -- no manifest necessity existed and jeopardy attached). But see *U.S. v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). A *Batson* objection should be made immediately before the venire is dismissed and prior to the beginning of trial. *U.S. v. Romero-Reyna*, 867 F.2d 834, 836-37 (5th Cir. 1989). In *Thompson*, the court held that an objection made right after jury selection was not too late where the government could show no prejudice, and the pattern of the prosecutor's peremptory challenges might not have been apparent until after the jury was selected. However, the *Thompson* court did state that the better practice is to raise the *Batson* objection before the jury is sworn. *Thompson*, 827 F.2d at 1254.

8.10 JUROR MISCONDUCT

Generally, there are two types of juror misconduct—extraneous influences and internal misconduct. See generally *Tanner v. U.S.*, 483 U.S. 107, 117-20 (1987). Examples of internal influences include (1) behavior during deliberations, (2) ability to hear or understand testimony, and (3) physical or mental competence of the jurors. External examples include (1) juror in criminal case who had applied to district attorney’s office, (2) bribe attempt, and (3) pretrial or trial publicity. Internal influences are viewed as less serious than extraneous influences. *U.S. v. Sotelo*, 97 F.3d 782, 796 (5th Cir. 1996). A claim of juror misconduct must be raised at the time learned, otherwise the claim is waived. *U.S. v. Rowe*, 144 F.3d 15, 20 (1st Cir. 1998); *U.S. v. Brown*, 108 F.3d 863, 867 (8th Cir. 1997). If possible, it is best to raise such a claim prior to the verdict, otherwise review of the issue is limited by Federal Rule of Evidence 606(b). *U.S. v. Stafford*, 136 F.3d 1109 (7th Cir. 1998). Federal Rule of Evidence 606(b) prohibits jurors from testifying about deliberations unless testimony concerns extraneous prejudicial information or outside influences that were brought to bear on the jury, but not about the effect on the deliberations. Fed. R. Evid. 606(b).

The district court has discretion to hold a hearing on internal influences. *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). In deciding whether to have a hearing the “court must weigh the benefits of having a hearing, including the ability perhaps to ascertain more fully the extent and gravity of the possible prejudice, against the risks inherent in interrupting the trial and possibly placing undue emphasis on the challenged conduct.” *Id.* at 1187. Juror bias and misconduct required evidentiary hearing. *U.S. v. Tucker*, 137 F.3d 1016 (8th Cir. 1998). Juror’s lies during voir dire raised presumption of bias. *Dyer v. Calderon*, 151 F.3d 970 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998).
External influences require a hearing be held and requiring the district court adequately inquire in order to make a determination whether the alleged incident occurred and whether the incident was prejudicial. \textit{U.S. v. Cruz}, 156 F.3d 22, 28 (1st Cir. 1998); \textit{U.S. v. Martinez}, 151 F.3d 22, 28 (5th Cir. 1998); \textit{U.S. v. Herndon}, 156 F.3d 629, 636-37 (6th Cir. 1998) (citation omitted). A fundamental tenet of the criminal justice system requires that a conviction be based only on evidence presented during the trial. \textit{U.S. v. Noushfar}, 78 F.3d 1442, 1445 (9th Cir. 1996). The majority of jurisdictions find a presumption of prejudice where extraneous influences exist. See \textit{U.S. v. Keating}, 147 F.3d 895, 900 (9th Cir. 1998). Only the Sixth Circuit places the burden on the defendant to prove actual prejudice. \textit{U.S. v. Griffith}, 756 F.2d 1244, 1252 (6th Cir. 1985). Evidence is deemed “extrinsic” if it is not presented to the jury. \textit{U.S. v. Navarro-Garcia}, 926 F.2d 818, 820 (9th Cir. 1991). The introduction of extrinsic evidence creates a reasonable probability that the verdict was impacted when the evidence effects the reasoning of even one juror. \textit{Id.}

It is reversible error for inadmissible exhibits to go to the jury. \textit{U.S. v. Vasquez}, 597 F.2d 192, 194 (9th Cir. 1979). Experiments by jurors are typically reversible when the experiment results in new evidence. \textit{U.S. v. Beach}, 296 F.2d 153 (4th Cir. 1961). It is improper for one juror to conduct tests or experiments and report the results to the other jurors. \textit{U.S. v. Navarro-Garcia}, 926 F.2d 818, 820 (9th Cir. 1991). The fact that a juror read an article about the case does not prejudice a defendant, if the article did not provide extraneous information about the case. \textit{U.S. v. Klimavicius-Viloria}, 144 F.3d 1249, 1262-63 (9th Cir. 1998). “[T]he fact that at least [one juror] believed that it was necessary to obtain more evidence is, by itself, an indication that there may have been a need to resolve some lingering hesitation or uncertainty.” \textit{Gibson v. Clanon}, 633 F.2d 851, 855 (9th Cir. 1980).

District court decisions are reviewed for abuse of discretion. However, the review is limited to whether, in view of all the circumstances, the court abused it’s discretion which deprived defendant of Fifth Amendment Due Process or Sixth Amendment impartial jury guarantees. \textit{U.S. v. Olano}, 62 F.3d 1180, 1192 (9th Cir. 1995).

\textbf{8.11 PRACTICAL ASPECTS OF SELECTING A JURY}

\textbf{8.11.01 Introduction}

When preparing for jury selection, counsel must evaluate numerous factors that affect the performance of any criminal jury. Such variables include how different individuals may respond to specific evidence and a particular theory of the case, how the jurors will interact with one another, and the level of homogeneity of the jury. The attorney should create a juror profile, based on these and other relevant issues, to best identify those individuals who would tend to be either most receptive or adverse to the defense. Once counsel decides on the type of juror that is desirable, the next step is to determine how to elicit information from potential jurors which will allow counsel to properly assess their suitability.

Effective jury selection is about more than selecting a jury; it is counsel’s opportunity to make a favorable early impression on those who will decide his or her client’s fate. While counsel has the opportunity to present him or herself in a favorable light in virtually any jury selection process, attorney
conducted voir dire provides the best opportunity for counsel to create a rapport and a bond of credibility with the jurors.

8.11.02 Pretrial Efforts

To prepare adequately for trial, a defense attorney must always consider the audience that will hear the theory of defense. While a particular argument or defense may be persuasive either to counsel or those well versed in the law, jurors may be unmoved by the very same argument. Although some options may be more practical than others to gauge the practical effectiveness of a theory or argument, counsel may employ the following techniques to discover useful information about juror dispositions: (1) Informal Surveys; (2) Juror Questionnaires; (3) Focus Groups; and (4) Mock Trials.

8.11.03 Informal Community Attitude Surveys

Informal surveys may be conducted in-person, by telephone, or through short questionnaires. The surveys need not and should not be complicated, as their purpose is simply to probe the reactions of potential jurors to defense theories and other issues in the case. The ultimate goal, of course, is to find out which kinds of jurors are more likely to favor the defense; however, it is also important to learn whether any pretrial publicity has tainted the jury pool, and, in such instances, a survey may prove essential in a motion to transfer venue. See supra Chapter 6, Sample Motion.

8.11.04 Questionnaires

Jury questionnaires help the defense in a variety of ways. While courts do not allow the use of questionnaires in all criminal cases, they are essential in death penalty cases and are often granted in white collar, child pornography, and drug cases. Questionnaires represent a particularly important tool in cases that involve a potentially lengthy prison sentence, cases involving a great deal of pretrial publicity, cases located in regions known for discrimination or explosive ethnic relations, or cases which involve sensitive issues or other unusual circumstances.

With the privacy and time to individually and personally complete a written questionnaire, prospective jurors are likely to be more candid about their individual views. Furthermore, jurors’ responses to the questionnaires will be less influenced or biased if they are sheltered from the responses of other jurors. In all complex trials, counsel should request the use of jury questionnaires, arguing that the advantage of questionnaires in terms of both time saved and relevant information gathered justifies their inclusion in the voir dire process. If the court does allow questionnaires to be given to prospective jurors, counsel should suggest that the questionnaires be given prior to the jurors’ arrival at the courtroom (either at home or while waiting in the jury assembly room) or just after arriving in the courtroom for the voir dire.

Jury questionnaires should elicit all types of information about potential jurors, including demographic information, general experiences, case related experiences, awareness of the particular case, and opinions about the issues in the case. Obviously, the information elicited by the questionnaires should be used by defense counsel not only for voir dire, but for substantive trial preparation as well. A sample Questionnaire is included at the end of this chapter.
8.11.05 Focus Groups

A “focus group” is a group of 12 to 14 people from the local community who are assembled to address and discuss issues pertaining to any given case. These ‘jurors’ should be qualified to participate in federal jury service, but also screened to ensure that they are not part of the current venire. If possible, several separate focus groups from different areas should be employed to accurately assess the opinions of the community jury pool as a whole.

Traditionally, attorneys present both sides of the case to the focus group in a story-telling style, akin to an opening statement. Another method is to read a written summary of the case to the focus group. Focus group participants then question the attorneys, are instructed on the law, are given a verdict form, and are then left to deliberate. Deliberations should be monitored on video. After the jury’s decision, another question and answer session is useful to evaluate the persuasiveness of selected documents, evidence, theories, and arguments. Clearly, the focus group experience is most beneficial if the attorneys themselves participate in these post-deliberation interviews. Finally, the jurors complete post-deliberation questionnaires for future reference.

8.11.06 Mock Trials

“Mock Trials” are a more elaborate form of research than focus groups. In a mock trial, attorneys present both sides of a case to a mock jury in a realistic courtroom setting. The presentation simulates a trial in all respects, including:

- voir dire
- preliminary instructions
- opening statements
- direct and cross examination of witnesses
- presentation of evidence
- closing arguments
- jury instructions

As in an actual trial, mock jurors are sent to deliberate after the presentation of evidence and the charge from the “judge.” For educational purposes, these deliberations should be monitored on video. After the decision, counsel should conduct a question and answer session with the jury in order to probe the reasoning of the mock jurors and evaluate the persuasiveness of selected documents, evidence, theories, and legal arguments. Jurors also should complete post-deliberation questionnaires to memorialize their observations and opinions concerning the issues in trial. Ideally, mock trials should be done after a series of focus groups.

When presenting a case under these circumstances, a defense attorney should conservatively estimate the amount of evidence and witnesses he or she expects to be able to use at trial. Obviously, if the court is likely to exclude certain evidence at the actual trial, counsel should not rely upon such evidence during a mock rendition of the trial. Alternatively, the prosecutor’s case should receive the benefit of the doubt concerning the admissibility of evidence and expert testimony, as is often the case in the courtroom.
8.12 USING A JURY CONSULTANT

The role of the jury consultant is to assist, not appropriate, the role of the trial attorney in jury selection. Jury consultants give excellent assistance in conducting pretrial surveys, establishing focus groups and mock trials, and developing questions for voir dire or questionnaires. Jury consultants also can assist during the process of voir dire and jury selection. Counsel must ensure, however, that he or she does not place the jury selection process solely in the hands of a jury consultant; to the contrary, counsel must remain actively involved throughout the jury selection process, as he or she ultimately will be the person presenting the case to the jurors and will need a precise understanding of the makeup of the jury to do so.

8.13 PRETRIAL MOTIONS

Pretrial motions may cover an expansive range of subjects such as a motion for court, attorney, or individual voir dire, a request to employ a particular strike system, or a request to use a jury questionnaire.

8.13.01 Suggestions to the Court for Court-Conducted Voir Dire

A defendant may request the court, in writing, to ask questions during the court’s own general voir dire. Generally, a defendant is entitled to be tried by an unprejudiced and legally qualified jury, and the range of inquiry to the jury should be liberal. U.S. v. Napoleone, 349 F.2d 350, 353 (3d Cir. 1965); U.S. v. Daily, 139 F.2d 7, 9 (7th Cir. 1943). The court has an affirmative duty to pose questions which will elicit information beyond the level required to disqualify a juror for cause. U.S. v. Washington, 819 F.2d 221, 224 (9th Cir. 1987) (district judge’s failure to ask prospective jurors during voir dire whether any of them knew any of government’s witnesses was reversible error); Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (7th Cir. 1985) (voir dire must go beyond stock information about juror demographics). A defendant has the right to probe for the hidden prejudices of the jurors. Napoleone, 349 F.2d at 353. If a juror fails to answer a material voir dire question honestly, and a correct response would have provided a valid basis for a challenge for cause, the defendant is entitled to a new trial. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984); U.S. v. Collins, 972 F.2d 1385 (5th Cir. 1992).

It is also reversible error for the trial court to rely on a juror’s own assessment of his/her biases or preconceptions. U.S. v. Lewin, 467 F.2d 1132 (7th Cir. 1972). Moreover, a juror’s claim of impartiality is not dispositive. Murphy v. Florida, 421 U.S. 794, 800 (1975). In U.S. v. Jones, 722 F.2d 528 (9th Cir. 1983), three instances were recognized as presenting a real possibility of prejudice, requiring specific voir dire questioning: (1) the case carries racial overtones; (2) the case involves issues where the local community commonly harbors strong feelings short of presumptive bias in law, but significantly skew deliberations in fact; or (3) the case involves other forms of bias evident through experience with juries. Id. at 529-30 (citing U.S. v. Robinson, 475 F.2d 376, 381-82 (D.C. Cir. 1973)). Where the topic does not relate to one of these classes, the party requesting specific voir dire questions bears the burden of showing that each question “is reasonably calculated to discover an actual and likely source of prejudice.” Id. at 530 (quoting Robinson, 475 F.2d at 381); but see Perez v. Prunty, 139 F.3d 907 (9th Cir. 1998).
(refused to apply the same test to habeas review). See infra sample of proposed questions to the court at the end of this chapter.

8.13.02 Motions for Attorney-Conducted Voir Dire

Fed. R. Crim. P. 24(a) allows the court to conduct the voir dire itself, but gives the court discretion to permit the defendant or his attorney and opposing counsel to question the panel. In most federal districts the judge conducts voir dire. A district court judge cannot delegate the task of selecting a jury to a magistrate without the defendant's consent. Salazar v. U.S., 491 U.S. 902 (1989); Gomez v. U.S., 490 U.S. 858 (1989); Peretz v. U.S., 501 U.S. 923 (1991) (Court rejected defendant’s argument that magistrates simply lack the power to conduct voir dire and that any consent by the defendant was irrelevant).

If the court conducts the examination, it must permit the defense to supplement with further questions to ask the prospective jurors. Such questions should be submitted early and in writing when possible. However, there is no requirement that the court use those questions. U.S. v. Toomey, 764 F.2d 678, 682 (9th Cir. 1985). The judge can safely ignore or change any or all of counsel's input; nonetheless, a judge does not have unlimited discretion to ignore proposed questions, nor to arbitrarily refuse such questions. U.S. v. Lewin, 467 F.2d 1132, 1137 (7th Cir. 1972). On appeal, voir dire issues are reviewed for an abuse of discretion. Kanekoa v. City and County of Honolulu, 879 F.2d 607, 614 (9th Cir. 1989); see infra sample of attorney voir dire at the end of this chapter.

8.13.03 Motions for Individual Voir Dire

Counsel may request that voir dire be conducted individually in cases where there has been substantial pretrial publicity or in cases involving substantial prejudicial, sensitive, or potentially embarrassing facts. See Irvin v. Dowd, 366 U.S. 717, 723-24 (1961); U.S. v. Davis, 583 F.2d 190, 196 (5th Cir. 1978); Silverthorne v. U.S., 400 F.2d 627 (9th Cir. 1968). If counsel anticipates a prejudicial response from jurors, counsel should request that each prospective juror be examined individually and privately. See U.S. v. Colabella, 448 F.2d 1299, 1303-04 (2d Cir. 1971). If one juror's response may have tainted the panel, counsel should request that the panel be excused and a new panel seated. If denied, counsel should resubmit the request for individual voir dire based on these new circumstances.

8.14 MOTIONS TO USE A PARTICULAR “STRIKE” METHOD

Courts in the Southern District of California employ two methods of jury selection: the state court method and the Arizona method. Currently, the Arizona system is used more often. Because the Arizona method requires more prospective jurors, some judges will proceed by the state court method when the number of available jurors is limited. With both methods, the entire available panel is sworn in and then a certain subset of prospective jurors is called forth from the venire present.

8.14.01 The Arizona System
With the Arizona system, the number of prospective jurors called is the sum of both parties' peremptory challenges plus the number of jurors required for the jury. For example, in a criminal case requiring a 12-person jury where the defense typically gets ten peremptory challenges and the prosecution gets six, the number of prospective jurors initially seated will be 28. In a civil case with a six-person jury where the two sides typically get three peremptory challenges each, the number of prospective jurors seated will be 12. The number of prospective jurors called for the alternate field is similarly determined; that is, add the number of alternates to be chosen plus the number of peremptory challenges granted to each side for the alternates. The number of alternates is determined by the trial judge and it may vary depending on the estimated length of the trial.

If all peremptory challenges are used and if none overlap (i.e., neither side strikes the same juror), then the jurors who remain unchallenged will constitute the jury. If there is any overlap or if either side fails to use all its challenges, then the first 12 jurors remaining in a criminal case are sworn, or the first six in a civil case. Alternates are sworn from those remaining unchallenged from the alternate field. Some courts choose the jury first before even interviewing prospective jurors for alternates. Other courts will call enough prospective jurors initially to choose the jury from the first 28 in a criminal case, or 12 in a civil case, as well as the alternates from the last few.

The clerk begins calling the names of prospective jurors by randomly drawing names from a box (in some courts the jury list itself is pre-scrambled). Those persons called are seated first in the jury box starting with the back row seat closest to the judge. Once all the seats in the jury box are filled, jurors sit in the seats inside the well beginning nearest the wall by the jury box.

The judge usually begins by telling prospective jurors something about the case by either summarizing the allegations or by reading the indictment in a criminal case (some courts ask the Prosecutor to read the indictment to the jury panel). Then the court usually introduces the parties or has the parties introduce themselves, and asks if any of the prospective jurors know or recognize anyone involved in the case. Sometimes the parties are requested to read the names of possible witnesses to see if any jurors are familiar with any of those names. Some courts stop the questioning there; in others, the judge may inquire into other areas such as racial or ethnic prejudice, or bias relating to case-specific issues.

After the court's general questioning, the judge usually individually addresses, in the order called, each prospective juror seated before the court. In the Southern District of California, some judges merely ask the jurors to state their names, areas of residence, occupations, marital status and spouse's occupation. Others ask how long jurors have resided in the county, ages and occupations of children, any occupations other than those mentioned held in the last five years, prior jury experience, and any connections with law enforcement. One court hands out a written questionnaire to which individuals orally respond. A few of the courts spend a little more time with each juror asking about possible biases, etc.

If the court allows any attorney-conducted voir dire, it follows the court's inquiry. How long counsel is allowed to question the jurors and which side proceeds first is determined by the court. If no attorney-conducted voir dire is granted, then following the court's voir dire, the judge should ask counsel to approach sidebar and ask if either party has any additional questions or areas of inquiry.
At the conclusion of the juror questioning, the court will usually ask the attorneys, at sidebar, if there are any challenges for cause. If any jurors are successfully challenged, those jurors are excused by the court and additional names are drawn from those prospective jurors in the back of the courtroom. Those jurors are seated in the replaced jurors' positions. The jurors are questioned in the same manner as the previous jurors, and when voir dire of these additional jurors is completed, once again counsel should be asked if there are any challenges for cause.

When there are no more challenges for cause, the attorneys are allowed to exercise their peremptory challenges. Some courts prefer to have peremptory challenges made "in the blind," i.e. the two parties are each given a list of the prospective jurors' names in the order they are seated, and each side indicates their challenges on their list without seeing opposing counsel's strikes. Other courts have only one list which is passed back and forth between counsel who make their strikes in succession. How many strikes each side makes per turn and which side begins is left to the discretion of the court. Some courts have the prosecution exercise three strikes, then the defense five, then three for the prosecution, and five for the defense; others allow one for the prosecution, two for the defense, one for the prosecution, two for the defense, one for the prosecution, two for the defense, then one for the prosecution and one for the defense, and one for the prosecution and one for the defense, or "1-2, 1-2, 1-2, 1-2, 1-1, 1-1." If an attorney passes in exercising any of his/her peremptories in any turn, in most courts they are lost; i.e., one cannot "save them up," thus, counsel should ask about the court's policy on saving challenges before exercising them.

Attorneys indicate their peremptory challenges on the lists given to them by the court clerk by writing next to the challenged juror's name something identifying the party (e.g., "D" for defense or "P" for prosecution or plaintiff) and the number of the challenge. For example, the defense would make its first peremptory challenge by writing next to the name on the list "D-1"; the plaintiff's or prosecution's third challenge would be indicated by "P-3." The first twelve jurors in a criminal case left unchallenged comprise the jury.

Alternate jurors are chosen in an identical fashion. They may be chosen at the same time as the petit jury (by simply calling additional names and exercising peremptory challenges for alternates in the alternate field) or the alternates may be chosen after the petit jury has been sworn.

After the judge inspects the challenge lists, including Batson challenges, the clerk reads the names of those jurors and alternates, if any, chosen to hear the case. They are seated in the jury box and sworn. The remaining jurors are excused and with the jury selected, the trial commences.

8.14.02 The "State Court" Method

With the state court method, only the number of jurors needed are called forth from the panel and seated in the jury box (12 in a criminal case and six for a civil trial). As with the Arizona method, the judge may either choose to ask the entire group general questions before questioning them individually, or it may choose to conduct the individual questioning first. If the court allows attorney-conducted voir dire, such questioning would follow the court's voir dire.
After those in the jury box are questioned, counsel begins by making challenges for cause. Following the “for cause” challenges, peremptory challenges begin. Peremptory challenges are made in open court in front of the entire panel of prospective jurors. To exercise a challenge, the attorney stands and literally asks the court to thank and excuse the juror. The judge determines which side challenges first and how many challenges each side will take per turn. In a civil case, each side usually is allowed to exercise one challenge at a time; in a criminal case where the defense has ten peremptory challenges and the prosecution six, there will be some rounds in which the defense makes two challenges in one turn.

When a prospective juror is challenged and excused, another prospective juror is selected and seated in the chair vacated by the juror whom she is replacing. The newly seated juror subsequently is questioned in the same manner as the previous jurors in the jury box.

Peremptory challenges may be used to strike any of the prospective jurors seated in the box, not just the newly called jurors replacing those who are excused. An attorney may pass and not exercise any challenges during a particular turn. Whether he then loses that challenge (i.e., it is counted as one of his peremptories) or retains it for later use is left to the discretion of the court.

Jurors are challenged until either all allotted peremptory challenges are used or both parties pass in succession; i.e. as soon as one side passes and the other side passes as well, the twelve persons in a criminal trial or six persons in a civil case who are remaining in the jury box shall constitute the jury. If one side passes and opposing counsel exercises a challenge, the side which passed may still exercise remaining peremptories during its next turn.

Once the jury has been selected, a court normally will select alternate jurors. The court randomly selects a sufficient number of alternate jurors, and the alternates are questioned and challenged in the same manner as the seated jurors. The number of alternates and peremptory challenges afforded attorneys for the selection process is determined by the court.

8.15 POTENTIAL JUROR BIASES

8.15.01 Drugs

Drug use and crimes are sensitive issues to many potential jurors. Defense counsel should carefully consider whether to question the jurors collectively or individually on this topic. Potential jurors can harbor an infinite number of biases related to drug abuse, possession, or trafficking, but may not be willing to talk about such biases in front of others. Accordingly, voir dire must be sufficiently detailed and exhaustive to test the jurors for bias of any sort. *U.S. v. Jones*, 722 F.2d 528 (9th Cir. 1983) (a specific need for voir dire questioning arises when the case involves matters which the local community or the population at large is commonly known to harbor strong feelings that significantly skew deliberation of fact). The district court, however, is granted broad discretion in determining how to best conduct voir dire, and may refuse voir dire questions which test prejudice only speculatively. *Jones*, 722 F.2d at 529.

In *U.S. v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984), the defendants argued that they were unable to exercise their peremptory challenges rationally because the trial court failed to pursue two crucial areas
of inquiry on voir dire: juror bias toward marijuana, and juror prejudgment due to the large amount of marijuana involved in the case. *Id.* at 1351. During voir dire, the trial court informed the jury that the case involved the alleged importation of marijuana. The court stated that drug laws are controversial since some feel they are too strictly enforced, while others feel they are not enforced strictly enough. The court then asked if any of the prospective jurors had any opinions about illegal drugs which would influence their ability to act fairly and impartially. The Eleventh Circuit held that this general inquiry was sufficient to disclose relevant prejudices and that it was well within the trial court's discretion not to ask questions concerning the jurors' attitudes toward the quantity of marijuana at issue since the defendants never requested such a question to be asked. *Id.*

Appellate courts have been very reluctant to second-guess the district court's decisions related to the scope of questioning in voir dire. In *U.S. v. Casey*, 835 F.2d 148 (7th Cir. 1987), the defendant requested voir dire of the jurors' biases towards illegal drugs. The court asked randomly selected jurors how they felt about marijuana and cocaine and whether their negative opinion toward illegal drug use would impair their ability to evaluate the guilt or innocence of the defendant from the evidence. Two jurors expressed their disapproval of illegal drug use. The court then questioned the jurors as a group about their feelings concerning drugs. The defendant, on appeal, claimed that the inquiry should have been conducted individually, especially in light of the first two jurors' responses. The Seventh Circuit held that the defendant was not denied the right to trial by an impartial jury, due to the district courts refusal to strike jurors or to conduct individual examination of all venire persons. *Id.* at 152.

In *U.S. v. Dennis*, 786 F.2d 1029 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987), defendants were charged with a variety of narcotics offenses, including conspiracy to possess and distribute heroin, cocaine, and marijuana. During voir dire, the court questioned the prospective jurors as a group to determine whether any of them had an improper bias about illegal drugs; specifically, the judge asked about the jurors' life experiences with drugs. Five potential jurors stated that they might not be able to render an unbiased decision because of previous bad experiences. One juror stated that her oldest child was murdered in a drug related incident. Another juror stated that after "[seeing] what drugs do to people," she did not know whether she would be biased. A third juror stated that her daughter was presently taking illegal drugs. Another juror, without stating reasons, said it would be difficult to be impartial. Another juror's son died of a drug overdose. The court did not conduct further inquiry to determine whether the five jurors' responses biased the remaining jurors.

On appeal, the defendants claimed that the court's failure to examine the remaining jurors individually to determine whether any prejudice resulted from the five jurors' responses was an abuse of discretion. The Eleventh Circuit held that the jurors' responses did not require the court to conduct additional voir dire of the remaining jurors nor did they pose any threat to the fairness and legality of the defendant's trial. *Id.* at 1044. Instead, the court stated that the responses only heightened the jurors' awareness of the possible consequences of drug use. *Id.*

In *U.S. v. Anzalone*, 886 F.2d 229 (9th Cir. 1989), the defendant claimed that the court erred when the judge questioned prospective jurors collectively about their opinions and experiences with drugs because the jurors' responses in the presence of the other jurors were prejudicial. *Id.* at 235. Specifically, a juror stated that her son had been arrested for possession of marijuana but later “straightened out” and
was now married. Quoting from the *Dennis* case, the Ninth Circuit did not find an abuse discretion in questioning the jurors collectively. *See also* *U.S. v. Magee*, 821 F.2d 234 (5th Cir. 1987) (no abuse of discretion when district court declined to ask about juror’s attitudes toward the use of marijuana in drug smuggling cases).

### 8.15.02 Firearms

Courts should allow voir dire of jurors’ attitudes about and experiences with firearms, *U.S. v. Ford*, 19 F.3d 1271, 1273 (8th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995); *Stephan v. Marlin Firearms Co.*, 353 F.2d 819 (2d Cir. 1965); *Stripling v. State*, 261 Ga. 1, 6, 401 S.E. 2d 500, 505, (1991). Questions about juror membership in organizations are commonplace and appropriately include questions about membership in groups with positions on firearms. *U.S. v. Price*, 888 F.2d 1206, 1212 (7th Cir. 1989). The court may choose which proffered questions, if any, it wants to ask. In *Stephan*, one juror’s expertise with firearms was shown not to have influenced the jury to the prejudice of the plaintiff who had sued for injuries in a hunting accident. *Stephan*, 353 F.2d at 822.

In *Price*, the defendant proffered a question regarding an alleged admission, that defendant denied, regarding a gun. The court refused to ask the question because the court felt it was inappropriate to submit part of the evidence to the jury and ask them to assess its credibility prior to any testimony. 888 F.2d at 1210-11.
8.15.03 Racial Bias/Alienage

The failure to conduct voir dire regarding racial prejudice may violate due process. *Ham v. South Carolina*, 409 U.S. 524 (1973). Inquiry into possible racial prejudice, however, is not required in every case. For example, it is not required in every case in which there is a black defendant and a white victim. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). The inquiry is whether, under all the circumstances, there is a significant likelihood that racial prejudice might infect the trial. *Id.* at 598.

In *Rosales-Lopez v. U.S.*, 451 U.S. 182, 191 (1981), a four-Justice plurality held that a federal court's refusal to permit an inquiry into racial or ethnic bias will constitute reversible error only when the circumstances of the case indicate that there is a reasonable probability that such prejudice might have influenced the jury. In *Ristaino*, the Court held that even though a crime of racial violence was involved, absent special circumstances akin to those in *Ham v. South Carolina*, 409 U.S. 524 (1973), the trial judge's refusal to ask prospective jurors about racial prejudice was not constitutionally objectionable. *Ristaino*, 424 U.S. at 597. The *Ristaino* Court stated that the mere fact that a defendant is black and the victim white does not constitute a special circumstance. *Id.* at 597. A different situation is present, however, when the case involves interracial prejudice and the crime charged is a capital offense. See *Turner v. Murray*, 476 U.S. 28 (1986). The *Turner* Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial prejudice. The questioning need not be "a penetrating inquiry" of jurors' personal experiences but is sufficient if the judge asks "would have revealed juror's prejudices." *U.S. v. Boise*, 916 F.2d 497 (9th Cir. 1990) (questions about Native Americans and child abuse).

8.15.04 Insanity Defense/Diminished Capacity

If an insanity defense or an issue concerning mental competency may be introduced at trial, the defendant has the right to have prospective jurors questioned about their ability to examine their attitudes about a potential insanity or lack of mental capacity defense. See *U.S. v. Allsup*, 566 F.2d 68 (9th Cir. 1977) (a district court's refusal to ask jurors about insanity defense could not be justified by refusal of defendant's counsel to promise he would introduce evidence of insanity). This requirement applies even where sanity is not raised at trial. *Allsup*, 566 F.2d at 70-71. The court cannot require a commitment to produce evidence relevant to the insanity defense as a condition precedent to voir dire regarding possible insanity or lack of mental capacity. *Id.* See *U.S. v. Jackson*, 542 F.2d 403 (7th Cir. 1976) (describes a thorough and adequate voir dire on these issues).

8.15.05 Credibility of Law Enforcement Witness

The refusal to inquire whether prospective jurors would be more likely to believe or give greater weight to the testimony of a law enforcement witness is generally held to be harmless error. *U.S. v. Lancaster*, 96 F.3d 734 (4th Cir. 1996) (no per se rule that district court abuses its discretion in refusing to ask prospective jurors whether they would be biased in favor of testimony of law enforcement officers), *cert. denied*, 519 U.S. 1119 (1997); but see *U.S. v. Anagnos*, 853 F.2d 1 (1st Cir. 1988) (denial of request was not harmless).
Whether such refusal constitutes reversible error in any particular case will depend on four factors: (1) the importance of the government agent's testimony to the case as a whole; (2) the extent to which the question concerning the venire person's attitude toward government agents is covered in other questions in voir dire; (3) the extent to which the credibility of the government agent was put into issue; and (4) the extent to which the testimony of the government agent is corroborated by non-government agent witnesses. *U.S. v. Contreras-Castro*, 825 F.2d 185, 187 (9th Cir. 1987) (the court questioned prospective jurors regarding their relationship with law enforcement officers and general questions regarding impartiality; however, the court's refusal to question the entire panel about specific biases concerning the veracity of government-agent witnesses was reversible error); *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981) (abuse of discretion for the district court to refuse voir dire on law enforcement bias); *U.S. v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979); *but see U.S. v. Lancaster*, 96 F.3d 734 (4th Cir. 1996), cert. denied, 519 U.S. 1119 (1997) (no per se rule); see also *Paine v. City of Lompoc*, 160 F.3d 562 (9th Cir. 1998).

In *U.S. v. Powell*, 932 F.2d 1337 (9th Cir. 1991), the court held that the district court did not abuse its discretion in failing to question jurors regarding the credibility of law officers’ testimony where such testimony was not as important as in *Contreras-Castro* and was bolstered by other evidence and voir dire tested the venire for bias. See *U.S. v. Ward*, 878 F.2d 387 (9th Cir. 1989) (not reversible error where other evidence existed, other than law enforcement testimony). Bias will not be presumed just because a juror works in law enforcement or is a federal government employee or related to law enforcement. *Tinsley v. Borg*, 895 F.2d 520, 529 (9th Cir. 1990); *U.S. v. Caldwell*, 543 F.2d 1333, 1336 (D.C. Cir. 1974); *U.S. v. Le Pera*, 443 F.2d 810, 812 (9th Cir. 1971).

### 8.16 JURORS' BACKGROUNDS

#### 8.16.01 Political Attitudes and Moral Beliefs

If the parties are associated with political movements or if the case is politicized to some extent, some courts have required inquiry into the effect of a defendant's political beliefs or activities upon the impartiality of prospective jurors. A juror's right to privacy has been argued in opposition to the defendant’s Sixth Amendment rights in some cases. See *U.S. v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) (failure to conduct minimal inquiry into jurors' attitudes regarding the Vietnam protest and the youth culture was held to be error in a prosecution arising out of an anti-war demonstration); Cf. *U.S. v. Magee*, 821 F.2d 234 (5th Cir. 1987) (refusal to question jurors in a drug conspiracy case about their use of marijuana was not error where the court questioned jurors concerning their use and attitude regarding drugs in general); *U.S. v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987) (refusal to ask prospective jurors about their personal reaction to specified sex acts in a prosecution for interstate transportation of obscene films was not error); *U.S. v. Schmucker*, 815 F.2d 413 (6th Cir. 1987) (judge's voir dire sufficient in conscientious objector case); *U.S. v. Click*, 807 F.2d 847 (9th Cir. 1987) (court's refusal to ask proposed questions designed to explore prospective jurors' beliefs regarding homosexuals where the defendant had effeminate mannerisms was not error); *U.S. v. Ible*, 630 F.2d 389 (5th Cir. 1980) (questions concerning prospective jurors' moral or religious beliefs regarding alcohol was a "very appropriate" area for inquiry in a trial for possession of counterfeit currency where the government intended to introduce evidence that the defendant traded the currency for alcohol); *U.S. v. Napoleone*, 349 F.2d 350 (3d Cir. 1965) (reversible error to
refuse to inquire into whether jurors had a repugnance toward liars or lying where crux of defense to charge of false impersonation was that defendant had not presented himself as federal officer even though he lied regarding the purpose of his investigation).
8.16.02 Employment

Specific inquiries about a juror's employment should be made if it is likely to impact on that juror's impartiality. Morford v. U.S., 339 U.S. 258 (1950) (conviction was reversed because defendant was denied an opportunity to discover bias on the part of venire persons who were government employees); U.S. v. Segal, 534 F.2d 578 (3d Cir. 1976) (refusal to inquire about prospective jurors' past employment by prosecuting agency required reversal); U.S. v. Nell, 526 F.2d 1223 (5th Cir. 1976) (when a juror admitted to actual bias, it was error to deny the defendant a challenge for cause); U.S. v. Lewin, 467 F.2d 1132 (7th Cir. 1972) (refusal to examine prospective jurors about organizations employing chief government witness or contributions to those organizations was deemed error). But see U.S. v. Tibesar, 894 F.2d 317 (8th Cir. 1990); see also U.S. v. Allred, 867 F.2d 856 (5th Cir. 1989) (court was not required to strike all military base employees and their families in defense contract fraud case).

8.16.03 Juror's Experience as Crime Victim

In U.S. v. Poole, 450 F.2d 1082 (3d Cir. 1971), the court held that failure to voir dire as to whether any jurors have been prior victims of criminal activities constituted reversible error. See also U.S. v. Shavers, 615 F.2d 266 (5th Cir. 1980). But see Jacobs v. Redman, 616 F.2d 1251 (3d Cir. 1980); U.S. v. Jones, 608 F.2d 1004 (4th Cir. 1979), (need not ask about experience with unrelated crime). The Ninth Circuit stated recently that a district court does not abuse its discretion or commit manifest error when it fails to excuse a prospective juror for cause in a robbery prosecution, where the juror had been a robbery victim and stated unequivocally that he could put aside his own experience and act fairly. See U.S. v. Alexander, 48 F.3d 1477 (9th Cir.), cert. denied, 516 U.S. 878 (1995).

8.16.04 Prior Jury Service

Counsel is entitled to information regarding the nature and extent of a prospective juror's prior jury service. U.S. v. Jefferson, 569 F.2d 260 (5th Cir. 1978); U.S. v. Montelongo, 507 F.2d 639 (5th Cir. 1975). If there is a gap between the jury selection and the commencement of trial, the trial judge must permit inquiry concerning interim service. U.S. v. Franklin, 700 F.2d 1241 (10th Cir. 1983) (dismissal for cause may be necessary if juror served on interim jury with the same witnesses, legal theory or facts); Jefferson, 569 F.2d at 262; U.S. v. Mutchler, 559 F.2d 955 (5th Cir. 1977), modified on other grounds, 566 F.2d 1044 (5th Cir. 1978). Cf. Lett v. U.S., 15 F.2d 690 (8th Cir. 1926) (refusal to excuse jurors for cause who previously sat on trial of defendant's wife's related case was reversible error).

8.16.05 Relationship Between Jurors and Witnesses

worked for different branch of supermarket chain that had been robbed need not be excused from jury pool).

8.17 PRETRIAL PUBLICITY

Substantial pretrial publicity carries with it an inherent potential for prejudgment of the case. As stated in *Irvin v. Dowd*, 366 U.S. 717, 727 (1961), ("[T]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man"); *Lincoln v. Sunn*, 807 F.2d 805, 815 (9th Cir. 1987) ("jurors are objectionable if they have formed such deep and strong impressions that they will not listen to testimony with an open mind"). Accordingly, a judge must inquire into the area of possible prejudice from pretrial publicity. *See Marshall v. U.S.*, 360 U.S. 310 (1959) (exposure of some jurors during trial to newspaper articles concerning prior convictions of defendant when trial court had refused to permit prosecutor to introduce such evidence was so prejudicial as to require new trial). Focused voir dire is necessary to discover the impact of pretrial publicity on the juror. It is possible that pretrial publicity cannot be cured by voir dire. *U.S. v. Beckner*, 69 F.3d 1290 (5th Cir. 1995).

Appellate courts have been inclined not only to require questioning in the area, but also to require attorney-conducted voir dire as well. *U.S. v. Thomas*, 463 F.2d 1061 (7th Cir. 1972) (failure of trial judge to investigate claim that newspaper article containing many references to inadmissible evidence was in jury room and was used by several jurors to convince others of defendant’s guilt required a new trial); *Silverthorne v. U.S.*, 400 F.2d 627 (9th Cir. 1968) (high publicity criminal case where every juror had learned something about defendant’s case, trial court’s inadequate voir dire did not assure impartiality, and the subsequent refusal to interrogate jurors during trial was prejudicial); *but see U.S. v. Holman*, 680 F.2d 1340 (11th Cir. 1982) (no error by failing to make independent evaluation of juror bias towards law enforcement); *U.S. v. Flores-Elias*, 650 F.2d 1149 (9th Cir. 1981) (in high publicity case where illegal aliens died during smuggling, judge did not abuse discretion in denying defendant’s cause challenges of two jurors who had read or heard about the case; no contention that the jurors were biased or formed opinions on guilt and both assured that they could render an impartial verdict based on the evidence). While questions should be posed about pretrial publicity, there is no constitutional right to explore the content of that publicity. *Mu'Min v. Virginia*, 500 U.S. 415 (1991); *but see U.S. v. Keating*, 147 F.3d 895 (9th Cir. 1998).

"Mere exposure to pretrial publicity will not automatically render a juror partial. The defendant is still required to demonstrate the juror’s actual prejudice resulting from the publicity." *U.S. v. Beniach*, 825 F.2d 1207, 1213 (7th Cir. 1987). If a juror can set aside any impressions gained from pretrial publicity and render a fair verdict based upon the evidence, the impartiality requirement is satisfied. *U.S. v. Garza*, 664 F.2d 135, 138 (7th Cir. 1981) (citing *Dobbert v. Florida*, 432 US 282, 302 (1977)); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *see also U.S. v. Guerrero*, 756 F.2d 1342 (9th Cir. 1984) (extensive pretrial publicity did not create “inherent prejudice” so as to require change of venue); *Thompson v. Borg*, 74 F.3d 1571 (9th Cir.) (mere mention by venireman that he had read that defendant pled guilty and later withdrew the plea, did not amount to prejudicial pretrial publicity and was not a ‘structural error’ which would require retrial on petition of habeas corpus), *cert. denied*, 519 U.S. 889 (1996).

8.18 RELIGION
Counsel should request voir dire in cases either where religious issues are involved or the
139 F.2d 7, 9 (7th Cir. 1943), the court permitted voir dire regarding whether any of the venire were
prejudiced against Jehovah's Witnesses because the defendant was a Jehovah's Witness.

### 8.19 BURDEN OF PROOF, PRESUMPTION OF INNOCENCE

In *U.S. v. Blount*, 479 F.2d 650 (6th Cir. 1973), the Sixth Circuit held that, upon request, a
criminal defendant is entitled to voir dire examination about whether or not a potential juror could accord
the defendant his rights to the presumption of innocence and proof beyond a reasonable doubt. See *U.S. v. Hill*, 738 F.2d 152 (6th Cir. 1984). However, the Sixth Circuit appears to be in the minority. See *U.S. v. Sababu*, 891 F.2d 1308 (7th Cir. 1989); *U.S. v. Robinson*, 804 F.2d 280 (4th Cir. 1986); *U.S. v. Miller*, 758 F.2d 570 (11th Cir. 1985); *Jacobs v. Redman*, 616 F.2d 1251 (3d Cir. 1980); *U.S. v. Price*, 577 F.2d 1356, 1366 (9th Cir. 1978); *U.S. v. Cosby*, 529 F.2d 143 (8th Cir. 1976); *U.S. v. Gillette*, 383 F.2d 843 (2d Cir. 1967). Defense counsel may specifically request voir dire in these two areas. However, many experienced litigators have noted that unless artfully framed, it is often difficult to get a juror
to admit their prejudice. Some jurors feel a defendant is guilty by virtue of his arrest or indictment.
Inquiries that simply ask a juror if he can be fair and impartial or will honor the presumption of innocence
and standard of proof may be met with gratuitous and insincere responses. There are excellent articles and
seminars conducted yearly that offer specific approaches for dealing with these situations as well as other
voir dire issues.

### 8.20 SUGGESTED VOIR DIRE QUESTIONS

The following court conducted questions are intended to be used in the motion for the Court’s
General Voir Dire of the Jury.

#### 8.20.01 Background Questions

1. Each of you should state:
   (a) your name
   (b) where you live
   (c) your marital status (whether married, single, widowed or divorced)
   (d) your occupation, if retired, your previous occupation
   (e) your spouse's (former spouse’s) occupation, (if retired, his/her previous occupation)
   (f) the ages and occupations of your children

2. Have you ever served in the United States military? If so:
   (a) what branch?
   (b) when?
   (c) rank?
   (d) have you served on any military hearings?

3. Do you, or do any members of your family or friends know the Honorable ______________, the presiding judge in this case?
4. Do you, or do any members of your family or friends know the Assistant United States Attorney, ____________, who will be prosecuting this case?

5. Do you, or do any members of your family or friends know the defense attorney, ________________?

6. Do you know or recognize any other prospective jury panelist in the courtroom? If so, what is the basis of the relationship? Would such a relationship or acquaintance influence your judgment in this case?
8.20.02 Bias

1. Have you had any experiences with anyone of Mexican descent that may make it difficult for you to be impartial and fair to the defendant?
2. Do any of you feel that you possess any kind of personal prejudice with reference to this defendant or this case? *U.S. v. Baker*, 638 F.2d 198 (10th Cir. 1980).

8.20.03 Border Issues

1. How many of you speak Spanish?
2. How many of you are familiar with the ____ port of entry at _____?
3. Have any of you been referred to secondary inspection at the border?
4. How many of you have never driven or traveled through a port of entry?
5. What contacts have you had with people of Mexican (insert relevant group) heritage?
6. How many of you have had little or no contact with Hispanic people?
7. With the recent publicity about illegal immigration into the United States, how many of you feel our laws regarding immigration should be tougher?

8.20.04 Cars or Trucks

1. Have any of you ever driven an employers car or truck as part of your employment duties?
2. Have any of you ever borrowed a car or truck from a friend?
3. How thorough did you check that car or truck before driving it?
4. Would any of you feel uncomfortable driving someone else’s vehicle?
5. Have any of you ever worked in the trucking industry?

8.20.05 Defendant Testimony

1. (Defendant’s name) has already pled not guilty to this charge. How many of you feel you would like to hear his/her side of the story?
2. On a scale of 1-10, 10 being the strongest, how strongly do you feel about needing the defendant to testify?
3. What are your thoughts about whether or not a defendant should testify?

8.20.06 Drugs

1. Have you, any family members, or friends known anyone who has used or has been addicted to drugs? If so, please state:
   (a) who
   (b) what is their relationship to you? *U.S. v. Dennis*, 786 F.2d 1029 (11th Cir. 1986).
2. Do you have any opinions or have you had any experiences with regards to illegal drugs that would make it difficult for you to be an impartial juror on a case of this type? *U.S. v. Casey*, 835 F.2d 148 (7th Cir. 1987).
3. Are there any of you that feel you have such strong views about the drug laws that your opinions may influence your ability to be a fair and impartial juror in a drug case? *U.S. v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984).

4. Are there any of you that feel so strongly about the drug laws that you do not feel that you could base your verdict solely on the evidence? *Bascaro*, 742 F.2d at 1335.

5. Do any of you belong to support groups such as MADD, AA, ALANON, NA, or NARANON?

**8.20.07 Duress**

1. Do you feel that fear could cause a person to do something they normally wouldn’t do?
2. Can you think of a time when you have felt fear? Can you tell me about that?

**8.20.08 Eyewitness**

1. Have any of you ever been a witness to a crime?
2. Have any of you ever seen someone you thought you knew at a distance, but when you got closer you realized it was not who you thought it was?
3. Have any of you or someone you know ever had to identify or describe a person for a police report?
4. Do you feel you are especially good at remembering details of something or someone you have seen?

**8.20.09 Guns**

1. Do you or any members of your family belong to the National Rifle Association other pro-gun organizations or clubs?
3. How many of you, any members of your family or close friends have guns in the home?
4. Would any of you support the banning of handguns?
5. How do you feel about gun control?
6. Why do you keep a gun in your home?
7. How would you feel about a woman using a gun as protection?
8. Have you, any family members or close friends ever been involved in a crime involving a gun or had a gun pointed at you?

**8.20.10 Informants**

1. Do any of you believe the police should be able to use paid informants?
2. How do you feel about the idea that prosecutors can reduce charges or sentences in exchange for information or testimony against others?
3. How many of you feel it is appropriate to use confidential informants to make arrests?
4. How reliable or truthful do you think the testimony of a paid informant is?
8.20.11 Innocent Accused

1. How many of you have ever heard of a person being accused of a crime or punished for a crime when he/she was innocent?
2. Have you ever been accused of something you did not do?

8.20.12 Insanity/Mental Issues

1. Have you ever known anyone who suffered from mental illness?
2. Have you, any of your family members or close friends ever used the services of a psychiatrist or psychologist?
3. Have you, any family member, or close friend ever worked in the field of psychology or Psychiatry?
4. How do you feel about psychiatrists?
5. Have you known anyone who went to a psychiatrist or psychologist?
6. Do you believe psychologists place too much blame on society and a patient’s parents for a person’s problems?

8.20.13 Language

1. How many of you speak another language?
2. How many of you have ever taken a foreign language class?
3. Have you ever tried to communicate with someone who spoke a different language than you?

8.20.14 Law Enforcement

1. Have you ever applied for a job with or worked for a law enforcement agency, or in the security field? *U.S. v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).
2. Do you have any relatives or friends who have applied with or work in law enforcement? *U.S. v. Dellinger*, 472 F.2d at 340.
3. Would any of you tend to give any greater weight or credibility, no matter how slight, to the testimony of a federal agent or prosecution witness merely because they are employees of, or are testifying on behalf of the government?
4. Would you give their testimony greater weight or credibility over that of the defendants or witnesses on their behalf? *U.S. v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979).
5. Are any of you, your family members, or friends employed by the federal government, including the United States Attorneys office? *U.S. v. Segal*, 534 F.2d 578 (3d Cir. 1976).

8.20.15 Legal Principals
1. As the court shows the jurors the indictment, do you understand that an indictment is only a piece of paper which notifies the defendant that he is being charged with a crime? *U.S. v. Glaziou*, 402 F.2d 8 (2d Cir. 1968).

2. Do you understand that an indictment is not evidence that the crime charged was committed and may not be considered as evidence by you in deliberations? *U.S. v. Glaziou*, 402 F.2d 8 (2d Cir. 1968).


5. Do you understand that the government is required by law to prove the defendant guilty beyond a reasonable doubt? *U.S. v. Hill*, 738 F.2d 152 (6th Cir. 1984).

6. If the government fails to meet that burden, do you understand that you must find the defendant not guilty?

7. Do you realize that the burden of proof is greater for a criminal case than for a civil case?

8. Do you understand that the defendant does not have to testify at trial and nothing can be inferred from him not testifying? *Griffin v. California*, 380 U.S. 609 (1965); *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979).

9. In a criminal case, a defendant is not required to explain his or her side of the case since the burden of proof does, in fact, rest with the prosecution. Do you understand this?

### 8.20.16 Pages and Cellular Phones

1. Do any of you, your family members or friends have a pager (cellular phone)?

2. For what purpose do you have a pager (cellular phone)?

### 8.20.17 Pretrial Publicity

1. Have you read or heard anything about this case before coming here today? [Have juror relate substance/and source of information, preferably sidebar].

2. With all the publicity in this case, how do you think my client is going to get a fair trial?

3. What did the publicity in this case make you think about my client?

4. How many of you watch TV news programs such as 60 Minutes, 20/20, 48 hours, Dateline, etc.?

### 8.20.18 Prior Experience with the Justice System

1. Have you previously served on a jury, civil or criminal? *U.S. v. Mutchler*, 559 F.2d 955 (5th Cir. 1977). If so:
   (a) when?
   (b) what type of case?
(c) did you reach a verdict?

2. Have any of you ever served on a federal or state grand jury? If so:
   (a) when and where?

3. Have any of you, any members of your immediate family, or close personal friends ever been a party to or testified in a civil or criminal trial or before a grand jury? If so, please explain.

8.20.19 Statements

1. If you were charged with a crime and gave a statement, how would you want your statement recorded for accuracy?

2. If a law enforcement officer gave one version of a statement and the defendant gave another version, how would you decide credibility?

3. How would you want the most important document in your life recorded for accuracy?

4. Have any of you ever been questioned by a law enforcement officer?

5. Have any of you ever said something that was misunderstood or was misconstrued?

8.20.20 Telemarketing

1. Have any of you been employed in a telemarketing position?

2. Have any of you ever received a sweepstakes entry in the mail?

3. How many of you responded?

4. Have any of you ever played the lottery?

5. Have any of you ever won in a sweepstakes contest (or lottery)?

6. Have any of you had a telemarketer call you?

8.20.21 Victim of Crime

1. Have you had an experience as a victim or has a relative or close friend been a victim of a crime? If so, please explain.

2. Have you or any of your close friends or relatives ever been convicted of any crime?

3. Have you ever been a victim of a violent crime or one involving a weapon?

4. Have any of you, any family members or close friends ever worked for a bank, convenience store, or liquor store?

5. Have you ever been in a fight?

6. Do you believe people act differently when they are scared? (give example)

8.21 POST-TRIAL INTERVIEWS

Post-Trial Interviews are extremely important for a number of reasons:
(1) To give the trial attorney a juror's-eye view of the witnesses, attorneys, evidence, theory of defense, and case presentation.
(2) To provide valuable information for planning of future trials.
(3) To assist attorneys in subsequent jury selections.

If at all possible, follow all trials with post-trial interviews, no matter what the verdict is. Contact with even a few jurors will provide important feedback. Many jurors are willing to share their opinions and impressions about their trial experience given the opportunity. Before conducting post-trial interviews, familiarize yourself with the local rules regarding post-verdict contact. Some federal jurisdictions limit post-trial communication with jurors.

The two most practical methods for conducting interviews are: (1) person to person, following the verdict; and (2) by telephone. Interviews are often conducted by a paralegal, investigator, or trial consultant if one is available. Jurors are more likely to be candid with someone other than the trial attorney.

The interviewer should be familiar with the case or trial presentation. Interview questions should be based on the evidence, witnesses, theory of the defense and prosecution, as well as specific questions proposed by the attorney. Questions should be open-ended, and clear.

8.21.01 Sample interview

“Hi! My name is __________. I’m an attorney that served on the trial of ______________. I would like to ask you a few brief and informal questions about the trial, so I can find ways to improve my practice for future clients. If you’d rather not answer questions, I always appreciate any comments you might have concerning your service as a juror.”

Chit-chat a bit if you need to, explaining to them that this is not for any legal reason and that their comments are just for your own use. If the person asks, inform them that the court released their names, and the phone numbers are simply gathered from the phone book. Go on to ask questions, such as the following, which may apply from your case:

Ç What was the strongest evidence against the defendant?
Ç What are your thoughts about the defense case?
Ç What did you think of the testimony of the different witnesses? (Law enforcement, experts, character witnesses, the defendant)
Ç What did you like the best and least about individual lawyer’s presentation?
Ç How can the attorney improve his or her presentation?
Ç How did you feel about the judge (did you feel he/she was fair)?
Ç What did you think about the appearance of the defendant?
Ç At what point did you feel your mind swaying toward the verdict?
Ç What are your feelings toward (the specific offense)? What should be done?
How did you organize the deliberation or how did you arrive at a verdict?

Also include any case-specific questions.
8.22 SAMPLE OF CONFIDENTIAL JUROR QUESTIONNAIRE

8.22.01 Instructions to Juror

Please answer each question as completely and as accurately as you reasonably can. Your complete written answers will save a great deal of time for the judge, for the lawyers, and for you. What is needed is your very best, honest effort to answer the questions contained in this questionnaire. (Sample for telemarketing case.)

The sole purpose of the questionnaire is to encourage your full expression and candor so that both the government and the defendants will have a meaningful opportunity to select a fair and impartial jury to try the issues of the case.

_______________________________
U.S. DISTRICT COURT JUDGE

Juror Name: _____________________________________________

1. Do you have children or other dependents living in your home?

   Yes ____  No ____

   If yes, please complete:

<table>
<thead>
<tr>
<th>NAME</th>
<th>AGE</th>
<th>EDUCATION</th>
<th>OCCUPATION</th>
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2. Have you, a family member, or friend been contacted by a telemarketing company?________

   If yes, please explain: ___________________

   _______________________________________

3. Have you, a family member, or friend ever worked for, or applied for a position at a telemarketing company?________

   If yes, please explain:
4. Have you ever received materials from Publisher’s Clearing House, or a similar Sweepstakes offer? 
____________ If yes, did you purchase anything? ____________________________

5. Have you ever won anything in a Sweepstakes contest? ________ If yes, please explain:
________________________________________________________________________
________________________________________________________________________

6. Have you heard, or read anything about this case, or a similar telemarketing case before today? 
________ If yes, please explain: ____________________________________________
________________________________________________________________________

7. As a result of filling out this questionnaire, have you formed any opinion about this case? _____ If so, 
please explain: ___________________________________________________________
________________________________________________________________________

8. Have you ever owned your own business? _____ If yes, please explain: 
________________________________________________________________________
________________________________________________________________________

9. Have you, or anyone close to you ever been involved in a business partnership? _____ If yes, please 
explain: __________________________________________________________________
________________________________________________________________________

10. Have you or any member of your family ever been involved in a lawsuit or a situation that almost led 
to a lawsuit?____ If yes, please describe: _____________________________________
________________________________________________________________________

11. Have forgotten to ask you anything which you feel would be important for us to know about your 
ability to be fair in this kind of case? ________________________________________
8.23 SUGGESTED READING


Blue, Saginaw, Jury Selection Strategy and Science: Clark, Boardman, Callaghan (1986)


Bennett, Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics and Civil and Criminal Litigation, Appendices Volume (1993)

Bermant, Jury Selection Procedures in United States District Court (Federal Judicial Center June 1982)


L. Hardwick & B. Ware, Juror Misconduct Law and Litigation (1988)


8.24 SAMPLE MOTION AND MEMORANDUM IN SUPPORT THEREOF

8.24.01 Alternating Peremptory Challenges

ATTORNEY’S NAME
California State Bar Number
ATTORNEYS ADDRESS
Telephone: (  )

Attorney for Defendant *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE [NAME])

UNITED STATES OF AMERICA, ) Case No.
Plaintiff, ) Date:
v. ) Time:
YOUR CLIENT, ) NOTICE OF MOTION AND MOTION
Defendant. ) FOR ALTERNATING PEREMPTORY

TO: *., UNITED STATES ATTORNEY, AND
*, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on *, *, 200* at *:00 *, *, or as soon thereafter as counsel may be heard, the defendant *, by and through his attorney *, will ask this Court to issue an order granting the motion listed below.

MOTION

The defendant, *, by and through his attorney *, asks this Court pursuant to the Fifth and Sixth Amendments to the United States Constitution, Federal Rules of Criminal Procedure * and *, all other applicable statutes, case law and local rules, hereby moves this Court for an order for alternating peremptory challenges.

This motion is based upon the instant motion and notice of motion, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of this motion.

Respectfully submitted,

Dated: *

__________________________
*
Attorneys for Defendant *
I. THE PARTIES SHOULD BE PERMITTED TO ALTERNATELY EXERCISE THEIR PEREMPTORY CHALLENGES


Defendant * requests that an alternating challenge procedure be followed with regard to the exercise of peremptory challenges. That is, rather than both sides submitting all peremptory challenges simultaneously, the government and defense counsel exercise their challenges by utilizing a back-and-forth system, with the government exercising challenges and the defense exercising a proportionate number in each round, until all challenges are exhausted or a jury has been chosen. Failure to exercise a strike on a given round (a pass) would result in the loss of that challenge; and a pass by the government followed by a pass by the defense would result in a jury.
The following chart demonstrates the suggested procedure.

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<tr>
<th>Round</th>
<th>Government</th>
<th>Defense</th>
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<td>1-</td>
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<td>4-</td>
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<td>2</td>
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</tbody>
</table>

The Fifth Circuit has endorsed the alternating challenge system as "the better practice." *Gafford v. Star Fish & Oyster Co.*, 475 F.2d 767, 768 (5th Cir. 1973) (per curiam). Such a system avoids the possibility of duplicative challenges inherent in the simultaneous procedure, yet precludes giving an overwhelming tactical advantage to either side, as did the criticized procedure in *Star Fish & Oyster Co.*. The alternating procedure is also commonplace in other jurisdictions where it has received judicial approval. *See, e.g., U.S. v. Bryant*, 671 F.2d 450, 455 (11th Cir. 1982); *U.S. v. Blouin*, 666 F.2d 796 (2d Cir. 1981). Such system is "fundamentally fair" and consistent with the purpose of Rule 24. *U.S. v. Pimentel*, 654 F.2d 538 (9th Cir. 1981).

For trial to proceed smoothly and in a timely fashion, it is recognized that jury selection issues and procedures are best established in advance of trial. *U.S. v. Sams*, 470 F.2d at 753-55. For that reason and all those detailed above, Mr. * requests that this Court order that government and defense be permitted to alternately exercise their peremptory challenges in this case.

Respectfully submitted,

Dated:

*

Attorney for Defendant *
8.24.02 Attorney Conducted Voir Dire

ATTORNEY’S NAME
California State Bar Number
ATTORNEYS ADDRESS
Telephone: ( )
Attorneys for Defendant *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE [NAME])
UNITED STATES OF AMERICA, ) Criminal No.
) Plaintiff,
) MEMORANDUM OF POINTS
) AND AUTHORITIES IN SUPPORT
v. ) OF DEFENDANT'S MOTION FOR
) ATTORNEY-CONDUCTED VOIR DIRE
YOUR CLIENT,
) Defendant.
)

I. INTRODUCTION

Pursuant to Rule 24(a), Federal Rules of Criminal Procedure, to provide effective assistance of counsel and to exercise the defendant's right to trial by an impartial jury, defense counsel expressly requests the opportunity to personally voir dire the prospective members of the jury. Defense counsel expressly agrees to limit his questioning to make a reasonable inquiry of the background of the prospective members of the jury in order to intelligently exercise his challenges for cause and peremptory challenges.

II. ARGUMENT

Trial by jury lies at the very core of our democratic institutions. The Sixth Amendment to the United States Constitution guarantees the right of an accused to trial before an "impartial" jury. One of the avenues chosen to ensure the selection of a fair and impartial jury is our system of juror challenges. The right to challenges for cause and peremptory challenges is firmly embedded in our Federal System and that

A right to challenge prospective jurors, however, is worthless unless the challenges have meaning. As stated in U.S. v. Ledee, 549 F.2d 990 (1977), "Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." Challenges can only have meaning if the attorneys have information which enables them to discern differences among the prospective jurors. As stated in U.S. v. Harris, 542 F.2d 1283, 1294 (7th Cir. 1976): "The defendants must be permitted sufficient inquiry into the backgrounds and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges."

Allowing counsel to conduct their own limited voir dire enables these challenges to be exercised more intelligently and guarantees the right of fairer jury selection. Reducing the social distance between the questioner and the prospective juror through active participation in the voir dire by attorneys can increase the candor of the jurors' responses and be of more assistance in determining latent biases. Furthermore, the court is less familiar with the evidence, case theories, and strength and weaknesses of the case than are the parties. See generally U.S. v. Ible, 630 F.2d 389, 395 (5th Cir. 1980). Counsel's intimate familiarity with the case will often result in more narrowly focused questions, which can expedite the jury selection process.

In U.S. v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977), the court quoted with approval the work of Frates and Green, "Jury Voir Dire: The Lawyer's Perspective," American Bar Association Litigation (1976) on this subject:

A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weakness of each litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.

Attorney conducted voir dire can be a valuable tool for eliciting juror bias. Counsel is better able to develop the voir dire questions which are relevant to the particular case and more sensitive as to which answers may need follow-up inquiry. In addition, non-verbal communication between the attorneys and prospective jurors, including the use of body language to particular questions, can also be a telling sign of bias during attorney-conducted voir dire which is itself important information in order to exercise challenges intelligently.

III. CONCLUSION

As stated by the court in U.S. v. Ible, 630 F.2d 389 (5th Cir. 1980):
While Federal Rule of Criminal Procedure 24(a) gives wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The `Federal' practice of almost exclusive voir dire examination by the court does not take into account that it is the parties rather than the court who have a full grasp of the nuances and the strength and weaknesses of the case. `Peremptory challenges are worthless if trial counsel is not afforded to gain the necessary information upon which to base such strikes.' (citations) Therefore, questioning by the court must overall, coupled with its charge to the jury, afford a party the protection it seeks. (citations). Experience indicates that in the majority of situations questioning by counsel would be more likely to fulfil this need than an exclusive examination in general terms by the trial court.

_Ible_, 630 F.2d at 395.

While some additional time may be spent in voir dire, it should not seriously affect the flow of court business. In weighing arguments for attorney voir dire against administrative concerns. The function of the jury must be kept clearly in mind--it will determine the fate of a fellow citizen.

Based on the factors previously cited, the defendant respectfully moves that pursuant to Rule 24(a), Federal Rules of Criminal Procedure, the Court allow counsel to participate in the voir dire examination of prospective jurors.

Respectfully submitted,

Dated: *

* ____________________________
* * * * *
* Attorneys for Defendant *
8.24.03 Proposed Voir Dire Questions

ATTORNEY’S NAME
State Bar No.
ATTORNEY’S ADDRESS
Telephone:
Attorneys for Defendant *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE [NAME])

UNITED STATES OF AMERICA, )  Criminal No.
   )
   )  Plaintiff,
   )  Date:
   )  Time:
   )
v. )  DEFENDANT’S QUESTIONS FOR
   )  COURT’S GENERAL VOIR DIRE
   )
   )  Defendant.
   )  OF THE JURY
   )
__________________________________

The Defendant, *, by and through his counsel, * and Federal Defenders of San Diego, Inc., requests, pursuant to Rule 24(a) of the Federal Rules of Criminal Procedure, that the Court include the attached questions in its general voir dire of the jurors prior to the requested attorney conducted voir dire in order that the defense may effectively exercise its challenges for cause and peremptory challenges. The court has an affirmative duty to pose questions which will elicit information above and beyond the level required to disqualify a juror for cause. See U.S. v. Washington, 819 F.2d 221, 224 (9th Cir. 1987).

Respectfully submitted,

DATED:

___________________

Attorney for *

I.

CASE ON TRIAL
(List case specific questions here)

II.

PERSONAL BACKGROUND

1. Each of you should state:
   (a) your name;
   (b) where you live;
(c) your marital status (whether married, single, widowed or divorced);
(d)(1) your occupation, if retired, previous occupation;
(d)(2) your spouse's (or former spouse's) occupation, its length, if retired, previous occupation;
(e) do you have children? What are their ages and occupations?

2. Have you ever served in the United States military: If so:
   (a) what branch?
   (b) when?
   (c) rank?
   (d) have you served on any military hearings?

3. Do you, or do any members of your family or friends know Honorable *, the presiding judge in this case?

4. Do you, or do any members of your family or friends know the Assistant United States Attorney, *, who will be prosecuting this case?

5. Do you, or do any members of your family or friends know the defense attorneys, ?

6. Do you know or recognize any other prospective jury panelist in the courtroom? If so, what is the basis of the relationship? Would such relationship or acquaintance influence your judgment in this case?

7. Have you ever applied for a job with or worked for a law enforcement agency, or in the security field?

8. Do you have any relatives or friends who have applied with or work for:
   (a) law enforcement;
   (b) a district attorney's office;
   (c) the United States Attorney's office;
   (d) any law enforcement or other quasi-law enforcement agency?
   (e) Would any of you tend to give any greater weight or credibility, no matter how slight, to the testimony of a federal agent or prosecution witness merely because they are employees of, or are testifying on behalf of the government? Would you give their testimony greater weight or credibility over that of the defendants or witnesses on their behalf? U.S. v. Baldwin, 607 F.2d 1295 (9th Cir. 1979).

9. Have any of you ever sat as a juror in a criminal case? If so:
   (a) when?
   (b) what type of case?
   (d) did you reach a verdict?

10. Have any of you ever served on a federal or state grand jury? If so:
    (a) when?
    (b) where?

11. Have you or any family members been a victim of a crime, witness to a crime or a defendant? If so, please explain.

12. Have any of you, any members of your immediate family, or close personal friends ever been a party to or testified in a civil or criminal trial or before a grand jury? If so, please explain.
13. Is there anything about the nature of these charges that would make it difficult for you to be fair and impartial as a judge of the facts?
III.

LEGAL PRINCIPLES

1. Do you agree with the fact that an indictment is merely a device for setting in motion the presentation of a case to the jury for your individual determination of a person's innocence or guilt; that it is not evidence and certainly not proof and that no unfavorable inference may be drawn against a person merely because he or she is charged with a crime?

2. Do you understand that you must give the defendant the presumption of innocence without any mental reservations whatsoever and that you are to consider this presumption of innocence as actual proof of innocence until it is overcome by proof of guilt beyond a reasonable doubt.

3. The proof in a criminal case to establish the guilt of any person must be beyond a reasonable doubt. The burden of proof beyond a reasonable doubt rests with the prosecution. Do you understand that the prosecution has to prove each and every element of an offense beyond a reasonable doubt?

4. Do you realize that the burden of proof is greater for a criminal case than for a civil case? The proof to establish the guilt of any person must be beyond a reasonable doubt.

5. Do you understand that in a criminal case a defendant is not required to explain his or her side of the case since the burden of proof does rest with the prosecution?

6. If, after you have heard the evidence, you weren't convinced but you thought the evidence showed the defendant may possibly be guilty -- would you nevertheless be able to return a verdict of not guilty in this case?

7. Do you realize that you are the sole and exclusive judges of the facts and are to judge this case solely on the evidence before you and not allow the fear of later criticism to affect your verdict?

8. Would any of you change your verdict if a majority of the other jurors believed that the defendant was guilty and you were in the minority believing there was a reasonable doubt?

9. Would the fact that you were in the minority influence your vote at all?

10. Do you know of any reason, or has anything occurred during this questioning period, that might make you doubtful as to whether you could be a completely fair and impartial juror in this case? If there is, it is now your duty to disclose this.

Respectfully submitted,

Date:

____________________

Attorneys for *
8.24.04 Motion for a Jury Questionnaire

ATTORNEY’S NAME
State Bar Number
ATTORNEYS ADDRESS
Telephone: ( )
Attorney for Defendant *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE [NAME])

UNITED STATES OF AMERICA,
Plaintiff,
v.
*, Defendant.

Case No. ) Date:
)
)
)
)
)
)

NOTICE OF MOTION AND MOTION FOR JURY QUESTIONNAIRE

TO: *, UNITED STATES ATTORNEY, AND *
* ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on *, *, 200* at *:00 *, or as soon thereafter as counsel may be heard, the defendant *, by and through his attorney *, will ask this Court to issue an order granting the motion listed below.

MOTION

The defendant, *, by and through his attorney *, asks this Court pursuant to the Fifth and Sixth Amendments to the United States Constitution, Federal Rules of Criminal Procedure 24, and all other applicable statutes, case law and local rules, hereby moves this Court for an order for jury questionnaire.

This motion is based upon the instant motion and notice of motion, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of this motion.

Respectfully submitted,

Dated: *

__________________________________________
*

Attorneys for Defendant *
ATTORNEY’S NAME*
State Bar Number
ATTORNEY’S ADDRESS
Telephone: ( )
Attorney for Defendant *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE [NAME])

UNITED STATES OF AMERICA,
Plaintiff,
v.
*,
Defendant.

Case No. *
Date: *
Time: *
DEFENDANT’S MOTION FOR
JURY QUESTIONNAIRE

I.
MOTION FOR JURY QUESTIONNAIRE

A defendant “must be permitted sufficient inquiry into the backgrounds and attitudes of prospective jurors” so that he may exercise his peremptory challenges in an intelligent manner. U.S. v. Harris, 542 F.2d 1283, 1294 (7th Cir. 1976). A right to challenge prospective jurors is worthless unless the challenges have meaning. "Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." U.S. v. Ledee, 549 F.2d 990 (1977). Challenges can only have meaning if the attorneys have information which enables them to discern differences among the prospective jurors. Due to the nature of the issues in this case and the danger of juror bias the defendant ____________, by and through his counsel, ____________, requests that this Court allow a written questionnaire to be completed by the prospective jurors in order to allow counsel to make more informed challenges for cause and peremptory challenges.

See supra section 8.22.01.
CHAPTER 9

JURY INSTRUCTIONS

updated by

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9.01  INTRODUCTION

Within the last two decades, the American federal criminal justice system has undergone a significant and troubling transformation. The progressivism of the 1960’s that spawned serious advances in the protection of criminal defendants’ rights and liberties has largely been replaced by a prosecutorially biased, unyielding federal criminal justice system. Not surprisingly, this exchange of important individual liberties for more effective prosecution has closed numerous avenues of relief for the criminally accused. One such institution that remains a viable and effective tool against prosecutorial excess, however, is the jury.

However, the power of the jury is limited by the instructions given by the trial court. An unfavorable instruction may deprive a jury not only of the legal authority that an acquittal may require, but it also may remove nuances of reasonable doubt that could lead a jury away from a conviction. For this reason, counsel must place no less emphasis on jury instructions than he or she does on opening remarks, closing argument, or any other aspect of the trial process. This chapter will assist counsel in preparing jury instructions in a complete and effective manner.

9.01.01  When to Begin Preparations

Although jury instructions usually represent one of the last courtroom presentations made to a jury during trial, counsel should begin preparing jury instructions from the outset of the case. In addition to giving counsel more time to prepare his or her proposed instructions, early preparation forces counsel to focus on the elements of the charged offense, promoting development of a cogent theory of defense based upon the evidence, and providing counsel with a clearly focused objective toward which to tailor presentation of the evidence. To this end, pattern instruction references, such as E.J. Devitt & C.B. Blackmar, Federal Jury Practice and Instructions §§7.01-7.05 (4th ed. 1992 & Supp. 1997) cite legal authority in support of the proposed instruction which can provide useful secondary research tools to aid in developing an effective defense theory.
9.01.02 Submission of Instructions

The basic procedural requirements for submitting jury instructions to the court are set forth in Fed. R. Crim. P. 30, which states: “at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.”

Thus, the trial judge has discretion to require submission of instructions before the close of evidence, particularly in a lengthy trial. Fed. R. Crim. P. 30; U.S. v. LaMont, 565 F.2d 212 (2d Cir. 1977). Rule 30 requires a defendant to propose jury instructions before closing argument, and case law suggests that a court may reject instructions tendered after closing argument solely on the basis of their untimely submission. U.S. v. Fusaro, 708 F.2d 17, 21-22 (1st Cir. 1983). It is not an abuse of discretion for the court to deny a defendant’s belated request for jury instructions even if it appears the court has “waived” or will not enforce its direction by asking whether the parties have additional requests. See U.S. v. Watson 894 F.2d 1345, 1349 (D.C. Cir. 1990) (court not bound to grant requests for additional instructions made by a party after the court asked the parties if they had any additional requests).

Generally, an instruction that correctly states the law, is supported by the evidence, and is submitted in a timely fashion should be submitted to the jury. U. S. v. Akers, 987 F.2d 507, 513 (8th Cir. 1993). Despite the conceptual liberality of the submission process, however, defense counsel must be careful to comply with the Rule 30 requirements or risk technical default on appeal and “plain error” review. See U.S. v. Hecht, 705 F.2d 976, 978-79 (8th Cir. 1983) (submission of instructions at informal conference did not meet requirements of Rule 30; there must be a distinct statement of the grounds of objection).

In order to preserve the record for appeal, defense counsel must file written instruction requests with the court, serve copies of said requests on the government, and articulate objections to the judge’s choice of instructions on the record. The object of these Rule 30 requirements is to alert the trial judge “to any possible error in the instructions so that he may have an opportunity to correct them.” Hecht, 705 F.2d at 978; see also U.S. v. Hoelscher, 914 F.2d 1527, 1534 (8th Cir. 1990) (issue not preserved for appeal due to failure to articulate objection); U.S. v. Sanchez-Mata, 429 F.2d 1391, 1392 (9th Cir. 1970) (oral request for instructions properly refused); U.S. v. Gonzalez-Carta, 419 F.2d 548, 552 (2d Cir. 1969) (request for charge made orally and not in writing may be denied).

If a defendant does not comply with the Rule 30 requirements, he does not automatically lose an instruction issue for appeal. For instance, failure to object at the time the instruction is given may not be fatal if the issue otherwise has been adequately presented to the court for resolution. See U.S. v. Boney, 977 F.2d 624, 632 (D.C. Cir. 1992) (objection after charge, but before jury retired, was sufficient); U.S. v. Egan, 860 F.2d 904, 907 n.1 (9th Cir. 1988) (submission of demand instruction to court held to be sufficient compliance with Rule 30). Also, if, prior to the Rule 30 conference, the court indicates it intends to give a particular instruction, an oral request for the instruction will likely suffice. Moreover, if the court is already fully aware of a party’s position on a certain instruction and “further objection would be unavailing,” Brown v. AVEMCO Investment Corp., 603 F.2d 1367, 1370 (9th Cir. 1979), or a “pointless formality,” U.S. v. Kessi, 868 F.2d 1097, 1102 (9th Cir. 1989), the objection requirement may
be waived. However, defense counsel should be aware that an objection becomes a “pointless formality” only when the disputed matter is argued extensively at trial, the record shows the court knew the basis for the objection, and an alternative instruction was offered. *U.S. v. Payne*, 944 F.2d 1458, 1464 (9th Cir. 1991).

Mere submission of instructions alone does not by itself preserve error. For instance, appellate courts have declined to review on the merits “a long, verbose instruction . . . containing . . . a detailed description of the purported evidence and inferences drawn therefrom by defense counsel.” *U.S. v. Nance II*, 502 F.2d 615, 619 (8th Cir. 1974). *But see* Carbo v. U.S., 314 F.2d 718, 745 (9th Cir. 1963) (merits addressed despite verbosity of requests). Also, written requests for instructions must be both factually and legally accurate in order to preserve error. *U.S. v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965).

**9.01.03 Jury Instruction Conference**

Pursuant to Rule 30, the court shall have a conference, prior to arguments to the jury, in which it must inform counsel of its proposed action with respect to the jury instructions. While this meeting should involve “a full and explicit discussion of jury instructions is preferred,” the court may state in general terms which instructions it will give. *Fusaro*, 708 F.2d at 22; *Clay*, 495 F.2d at 707-08. Although an informal bench conference also may satisfy the Rule 30 requirement, counsel generally is entitled to a conference outside the presence of the jury in which a full hearing may be had on the court’s proposed instructions. *Hamling v. U.S.*, 418 U.S. 87, 134-35 (1974); *U.S. v. Pelullo*, 964 F.2d 193, 220-21 (3d Cir. 1992).

One of the primary objectives of the Rule 30 conference is to fairly inform the parties of the final instructions so that they may intelligently argue their case to the jury during closing argument. *Fusaro*, 708 F.2d at 22; *Pelullo*, 964 F.2d at 220; *U.S. v. Clay*, 495 F.2d 700, 707 (7th Cir. 1974). At this conference, defense counsel must state in distinct and well-grounded terms the reasons why an instruction is objectionable and why the court is in error for rejecting requested instructions. To preserve an issue surrounding an instruction for appeal, an objection must direct the trial court’s attention to the contention that will be raised on appeal. *U.S. v. Civelli*, 883 F.2d 191, 194 (2d Cir. 1989). Failure to articulate the court’s error in rejecting requested instructions has been construed as non-compliance with Rule 30 sufficient to justify a rejection of the requested instruction. *U.S. v. Hecht*, 705 F.2d 976, 978-79 (8th Cir. 1983) (no error where requested instructions were submitted in writing before the Rule 30 conference but defendant failed to articulate why the court erred in rejecting the requested instructions); *U.S. v. Payne*, 944 F.2d 1458, 1463-64 (9th Cir. 1991) (failure to object results in plain error review, unless objection would have been a “pointless formality,” (citing *U.S. v. Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989)); U.S. v. Canino, 949 F.2d 928, 940-41 (7th Cir. 1992) (reviewing court held that defendants had waived any appellate issues based upon the trial court’s failure to give defendants’ asserted theory of the case instruction because defendants had failed to state the basis for their objection).

The weight of authority indicates that the court must provide counsel with an advance ruling only as to the instructions requested in writing. *U.S. v. Burgess*, 691 F.2d 1146, 1155-56 (4th Cir. 1982); *U.S. v. Newson*, 531 F.2d 979, 982-83 (10th Cir. 1976). *But see* U.S. v. Bass, 425 F.2d 161, 162-63.
(7th Cir. 1970) (finding counsel should be informed of all instructions). The court may change its instructions following its disclosure in the Rule 30 conference so long as the defense is not prejudiced as a result. *U.S. v. Gill*, 909 F.2d 274, 279 (7th Cir. 1990) (agreed upon instruction amended following untimely government objection during defense closing argument; no error because no prejudice). The judge may even supplement instructions *sua sponte* after argument of counsel. *U.S. v. Clarke*, 468 F.2d 890, 891-92 (5th Cir. 1972) (affirming supplemental instruction to prevent jury from placing undue emphasis on government’s failure to call witness); *U.S. v. Shirley*, 435 F.2d 1076, 1078 (7th Cir. 1970) (affirming modification of instruction after closing arguments “to prevent the jury from becoming confused and deciding the case on a false basis”). Despite this allowance for post-conference modifications, counsel nonetheless always should request a clear ruling on instructions proposed to the court as well as any possible *sua sponte* instructions after the Rule 30 conference.

Once the court has indicated which instructions it intends to give, the court must read those instructions aloud to the jury. It is insufficient merely to provide a copy of the instructions for the jurors to read in the jury room, as instructions not read aloud in court will not be preserved for appeal. *People of the Territory of Guam v. Marquez*, 963 F.2d 1311, 1316 (9th Cir. 1992) (the refusal of a trial court to read the elements aloud to the jury compels an automatic reversal).

Generally, a district court’s failure to comply with Rule 30 prejudices a party only if the failure unfairly prevented a party from arguing his or her defense to the jury or substantially misled a party in formulating and presenting arguments. *U.S. v. Gaskins*, 849 F.2d 454, 458-60 (9th Cir. 1988) (prejudice found); *U.S. v. Smith*, 629 F.2d 650, 653 (10th Cir. 1980); see also *U.S. v. Valencia*, 773 F.2d 1037, 1043 (9th Cir. 1985) (failure to instruct jury prior to closing arguments was Rule 30 error, but lack of prejudice did not warrant reversal where instructions were otherwise proper). Non-compliance with Rule 30 constitutes reversible error “only if counsel’s closing argument was prejudicially affected thereby.” *U.S. v. McCown*, 711 F.2d 1441, 1452 (9th Cir. 1983); see also *U.S. v. Wycoff*, 545 F.2d 679, 683 (9th Cir. 1977).

### 9.02 PRETRIAL INSTRUCTIONS

Although the concept of “jury instructions” traditionally encompasses the instructions that are given to the jury after the close of evidence, instructions given prior to trial also can serve a meaningful purpose. Pretrial instructions may be either specifically or generally framed. For example, a court may specifically educate the jury on particular legal and factual issues involved in a case, or it may give a more generalized instruction meant to orient as to federal court criminal procedure. Although neither the Federal Rules of Criminal Procedure nor case law explicitly entitles a defendant to any preliminary instruction of the jury, a significant amount of secondary authority identifies the benefits of using preliminary instructions. See *ABA Standards for Criminal Justice*, Standard 7-3.15, (2d ed. 1986); Prettyman, “Jury Instructions--First or Last?,” 46 A.B.A.J. 1066 (1960); Comment, “Memory, Magic, and Myth: The Timing of Jury Instructions,” 59 Or. L. Rev. 451, 472-73; Forston, “Sense and Non-Sense Jury Trial Communication,” 1975 B.Y.U. L. Rev. 601, 620-23; Rosenberg, “Federal Jury Practice and Instructions,” 79 Harv. L. Rev. 456 (1965); Winslow, “The Instruction Rituals,” 13 Hastings L.J. 456, 470-71 (1962); see also Committee on Model Jury Instructions, Ninth Circuit, *Manual of Model Criminal Jury Instructions for*
A request for preliminary instructions should be made pursuant to Fed. R. Crim. P. 17.1. Rule 17.1 provides that “[a]t any time after the filing of the indictment or information, the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial.”

Generally speaking, preliminary jury instructions should address only issues that are either noteworthy for some particular reason or that may require clarification for the jury. Examples of areas in which such instructions would be helpful include: (1) the weight a judge’s questioning of a witness should carry; (2) the legal standards by which the jury will be required to view the evidence; or (3) the duties of the jury with respect to fact finding and evaluating evidence. See Quercia v. U.S., 289 U.S. 466 (1933); U.S. v. Larson, 507 F.2d 385 (9th Cir. 1974) (cautionary instruction desirable when court questions witnesses); U.S. v. Ruppel, 666 F.2d 261, 274 (5th Cir. 1982) (Ideally, once the jury is sworn and the trial has begun, the trial judge should explain to the jurors the presumption of innocence, the burden of reasonable doubt, and any other preliminary matters that are necessary to guide them through the trial); U.S. v. Hephner, 410 F.2d 930 (7th Cir. 1969) (if the trial court submits a copy of the indictment to the jury, it should instruct jury that the indictment is not evidence, but merely an accusation).

9.03 JURY INSTRUCTION DURING TRIAL

During trial an issue may arise requiring the judge to instruct the jury. The need for such an instruction can arise in a variety of instances, from an improper question asked on cross-examination to a need to admit evidence only for a limited purpose. Counsel must be keenly aware of the situations in which such an instruction is proper, as the need to request the instruction many times will lie with the attorney and the failure to so request may constitute waiver of the issue on appeal.

9.03.01 Instructions Pertaining to Evidence

At various points during the presentation of evidence, it may be appropriate to request that the judge inform the jury whether or not something that has come before the attention of the jury constitutes evidence. Such an instruction should be requested in three instances: (1) when the court takes judicial notice of a fact; (2) when the parties submit a stipulation to the jury; and (3) when the jury is required to disregard certain evidence.

9.03.01.01 Stipulations

Although most courts will instruct the jury at the time a stipulation is read that the stipulated fact is conclusively proven, it is within the discretion of the court whether or not to give the instruction at that time. A jury properly may reject stipulated witness testimony, but not a stipulated fact, and the court must instruct the jury on this distinction. U.S. v. Renfro, 600 F.2d 55, 59 (6th Cir. 1979) (court properly instructed jury as to weight of stipulated business records); U.S. v. Hellman, 560 F.2d 1235 (5th Cir. 1977) (court’s erroneous instructions regarding stipulation as to testimony of government witnesses warranted reversal).
It is improper for the prosecutor to propose a stipulation to an element of the offense or a disputed fact in the presence of the jury. In *U.S. v. Monroe*, 552 F.2d 860, 865 (9th Cir. 1977) the prosecutor stated the following in the presence of the jury: “I am trying to establish, Your Honor, that the drug heroin, particularly in the amount involved in this case, is a commercial quantity; that it is intended for further distribution rather than personal use. If all defense counsel are willing to stipulate that it is a commercial quantity.” The trial court properly interrupted the prosecutor at this point, excused the jury, and informed the prosecutor that such a proposed stipulation was improper. *Id.* The Ninth Circuit acknowledged the erroneous proposed stipulation, but held that any error was harmless. *Id.* Generally, defense counsel should avoid proposing stipulations in the jury’s presence; however, there may be instances in which strategy requires such an offer before the jury.

9.03.01.02 Judicial Notice

Pursuant to Fed. R. Evid. 201, the court may take judicial notice of a certain fact provided that the noticed fact is one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by reference to resources whose accuracy cannot be questioned. *U.S. v. Anderson*, 528 F.2d 590, 591-92 (5th Cir. 1976). If judicial notice is requested by counsel in a criminal case, the court “shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.” Fed. R. Evid. 201(g); see *Anderson*, 528 F.2d at 592.

Because Rule 201(g) clearly permits the jury to reject a fact to which judicial notice has been taken in a criminal case, the trial judge should explicitly instruct on this point. Nonetheless, even if the court errs with respect to this instruction and counsel properly objects, ample evidence in the record as to the noticed issue may mitigate the error. See *Anderson*, 528 F.2d 590, 592 (trial court’s failure to instruct the jury in the proper language of Fed. R. Evid. 201(g) did not constitute reversible error); *U.S. v. Piggie*, 622 F.2d 486, 487-88 (10th Cir. 1980) (ample evidence in support of conclusion that the USP Leavenworth is a special territorial jurisdiction within the United States rendered trial court’s failure to instruct the jury pursuant to Fed. R. Evid. 201(g) harmless). If counsel fails to request such an instruction, the issue is waived on appeal. *U.S. v. Berrojo*, 628 F.2d 368, 369-70 (5th Cir. 1980) (plain error analysis governed judicially noticed fact that cocaine is a controlled substance within meaning of 21 U.S.C. §841(a)(1)).

9.03.01.03 Disregard Evidence

An instruction directing the jury to disregard certain evidence is appropriate in three general situations: (1) when the prosecution proffers an improper question to a witness; (2) when a witness volunteers inadmissible testimony; or (3) when the judge improperly questions witnesses or comments on evidence. To properly preserve the issue for appeal, defense counsel must object to the improper evidence and ask that the statement be stricken from the record and disregarded by the jury. If the level of prejudice from the evidence so warrants, counsel also may move for a mistrial based on the improper evidentiary presentation.
If a prosecutor asks a question that assumes the truth of an unfavorable fact, counsel should request a side bar and demand that the prosecutor demonstrate a good-faith basis for asking the question. In *U.S. v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985), the prosecutor asked an alibi witness on cross-examination a question which sought to elicit a response that would show the criminal propensity of the defendant. The Ninth Circuit stated that the danger in a question that by itself creates prejudice is that the “prosecution will use the question to waft an unwarranted innuendo into the jury box, knowing that the witness’ denial will only serve to defend her credibility, while leaving uncontradicted the reference to the defendant’s prior bad conduct. [Citations.] A limiting instruction would be ineffective in preventing an unjustified innuendo from coming to the attention of the jury.” *Id.* at 1463. Therefore, the court set forth the requirement that the good faith of the prosecutor must be established to the satisfaction of the court, out of the presence of the jury, before such a question may be asked. *Id.* at 1463-64.

If the district court fails to hold a hearing before the prosecution asks a suggestive question, as is required under *Davenport*, this error nonetheless will be considered harmless if the court finds that the prosecution had a good faith basis for asking the question. *U.S. v. Rushton*, 963 F.2d 272, 274-75 (9th Cir. 1992) (district court’s finding that prosecution had a good faith basis for asking suggestive question rendered harmless the failure to request the inquiry before asking the question).

If the evidence does not facially imply the improper use feared by counsel, the court need not give a limiting instruction. In *U.S. v. Diaz*, 922 F.2d 998, 1007-08 (2d Cir. 1990), the trial court refused to give an instruction that threatening gestures made by a co-defendant to a prosecution witness were not connected to the appellant. Appellant argued that the failure of the court to instruct as to this issue “subjected him to prejudicial spillover and ‘injected violence into the trial.’” *Id.* at 1007. On appeal, the Second Circuit upheld the trial court’s refusal to give the requested instruction, holding (1) that the testimony did not link the appellant to the threats, and (2) that appellant failed to object when the subject of the threats was brought up both on cross-examination and on re-direct. *Id.*

### 9.03.02 Conditional Admissibility of Evidence

Under Fed. R. Evid. 104(a), the court must determine all preliminary questions pertaining to the admissibility of evidence. In making a Rule 104(b) determination, however, the court should not inform the jury what facts the judge believes have or have not been established. *U.S. v. Tracy*, 12 F.3d 1186, 1199-200 (2d Cir. 1993). For example, in cases in which the government attempts to introduce the confession of a defendant, the trial court must make an initial determination regarding the voluntariness of the confession outside of the presence of the jury. 18 U.S.C. §3501(a). Even after the trial court makes its preliminary determination of voluntariness, however, the court still must leave “the ultimate determination of its voluntary character and also its truthfulness” to the jury. *Jackson v. Denno*, 378 U.S. 368, 377 (1964) (quoting *Stein v. New York*, 346 U.S. 156, 172 (1953)). Defense counsel should offer an instruction on the conditional admissibility of the confession at the time it is admitted into evidence, as failure to request the instruction may constitute a waiver. *U.S. v. Houle*, 620 F.2d 164, 166 (8th Cir. 1980) (failure either to offer a §3501(a) instruction or to object to its omission constituted waiver of the issue); *U.S. v. Bondurant*, 689 F.2d 1246, 1249-50 (5th Cir. 1982) (defendant’s failure to object to omission of a voluntariness instruction noted by court).
However, a voluntariness instruction is not warranted in all instances in which a defendant makes a statement which is sought to be introduced at trial. Some circuits require that the voluntariness of a statement arise as a genuine issue of fact at trial before a §3501(a) instruction is required. *See U.S. v. Groce*, 682 F.2d 1359, 1366 (11th Cir. 1982) (because voluntariness issue not pursued by defense, court’s failure to instruct as to voluntariness not plain error); *see also U.S. v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981); *U.S. v. Cowden*, 545 F.2d 257, 267 (1st Cir. 1976).

Counsel also must remember (and be prepared to remind the trial court, when necessary) that appellate courts have recognized some practical limits on the jury’s ability to receive evidence conditionally. The case of *U.S. v. Bolick*, 917 F.2d 135 (1st Cir. 1990), is illustrative. There, the district court instructed the jury as to a rather technical distinction between substantive and rehabilitative evidence. *Id.* at 139-40. On appeal, the First Circuit stated:

> We have great difficulty believing that a jury can appreciate the distinction, in this context, between substantive and rehabilitative evidence. If [the] jury consisted of anything less than the fathers of modern philosophy, even a technically correct instruction probably would not have prevented the jury from overlooking the fine distinction between the two uses of the evidence and the jury probably would have used [the] testimony as direct evidence of . . . guilt.

*Bolick*, 917 F.2d at 140.

**9.03.03 Limited Admissibility of Evidence**

Evidence may be admitted in a limited fashion in two basic ways: (1) the evidence may be offered for a limited purpose; or (2) the persons to whom the evidence shall apply may be limited. Pursuant to Fed. R. Evid. 105, a court shall instruct the jury as to the limited admissibility of the evidence if so requested by counsel. *See U.S. v. Sauza-Martinez*, 217 F.3d 754 (9th Cir. 2000) (limiting instruction required when co-defendant’s prejudicial hearsay statement is admitted for impeachment); *U.S. v. Marsh*, 144 F.3d 1229, 1240-41 (9th Cir. 1998) (limiting jury instruction required when government witness reads from the victim’s accusatory letter to the defendant); *U.S. v. Washington*, 592 F.2d 680, 681 (2d Cir. 1979) (error for court to refuse to give limiting instruction concerning evidence of prior criminal conduct).

Any limiting instruction must be sufficiently clear that an ordinary juror will understand and appreciate the limited nature of the evidence. Moreover, in some cases, a limiting instruction will not be sufficient to cure the prejudice suffered by defendant. In a case involving a co-defendant’s confession, for example, a limiting instruction may not suffice. *See Bruton v. U.S.*, 391 U.S. 123 (1968) (despite court’s clear instructions to the jury to disregard the evidence from the confession inculpating defendant, right of cross-examination required greater protection for defendant). However, redaction of the co-defendant’s confession to eliminate reference to the defendant on trial, along with a limiting instruction, generally cures the *Bruton* problem. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (Confrontation Clause not violated by admission of non-testifying co-defendant’s confession where confession is redacted to eliminate defendant’s name and any reference to his or her existence). *But see Gray v. Maryland*, 523 U.S. 185
(1998) (Bruton rule prohibiting introduction during joint trial of confession of non-testifying co-defendant which names defendant as perpetrator extends also to redacted confessions in which name of defendant is replaced with obvious indication of deletion, such as a blank space, using the word “deleted,” or similar symbol).

The timing of a limiting instruction is generally left to the discretion of the trial court. *U.S. v. Dabish*, 708 F.2d 240 (6th Cir. 1983) (limiting instruction given at close of case affirmed); *see also U.S. v. Weil*, 561 F.2d 1109, 1111 (4th Cir. 1977) (instruction at close of evidence and argument adequately protected defendant’s rights and was not required to be given contemporaneously with admission of evidence); *U.S. v. Simmons*, 281 F.2d 354, 358-59 (2d Cir. 1960) (limiting instruction given day after testimony adduced and again at close of trial sufficient). Failure to request an instruction informing the jury of the limited purposes for which evidence is admitted constitutes a waiver of the issue unless the oversight is plain error. *U.S. v. Regner*, 677 F.2d 754, 757 (9th Cir. 1982). *But see U.S. v. Sauza-Martinez*, 217 F.3d 754 (9th Cir. 2000) (Finding plain error and reversing conviction where district court failed to give any limiting instruction after it admitted hearsay evidence regarding incriminating post-arrest statements made by co-defendant which directly implicated both co-defendant and defendant, but were admissible only against co-defendant).

**9.04 THE FINAL CHARGE**

**9.04.01 Timing and Form of Instruction**

Although courts traditionally charge the jury only after the conclusion of closing arguments, parties may stipulate to having the court instruct the jury before closing argument. *See* Fed. R. Crim. P. 30. Counsel should consider any tactical reasons for requesting the reading of instructions before closing argument, as it will afford an opportunity to incorporate in argument the exact language already charged to the jury. Although the judge is required to instruct the jury orally, the trial judge may, in his discretion, give to the jury the instructions in written form. *U.S. v. Engleman*, 648 F.2d 473 (8th Cir. 1981).

**9.04.02 Presumption of Innocence**

A defendant is entitled to an instruction concerning the presumption of innocence if he or she timely requests such an instruction. A court’s refusal to instruct the jury that the defendant is innocent until proven guilty may violate the defendant’s right to a fair trial as guaranteed by the Due Process Clause. *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *U.S. v. Rhodes*, 713 F.2d 463, 471 (9th Cir. 1983). However, a reviewing court will evaluate the trial court’s failure to charge the jury on the presumption of innocence in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial. *Kentucky v. Whorton*, 441 U.S. 786 (1979). *Accord U.S. v. Payne*, 944 F.2d 1458, 1462-66 (9th Cir. 1991) (observing that adequate instructions on reasonable doubt and burden of proof may render harmless failure to instruct on presumption of innocence).
A court also may, over defense objection, give a cautionary instruction that the jury is not to draw an adverse inference from a defendant's decision not to testify. Lakeside v. Oregon, 435 U.S. 333, 336-41 (1978). Such an instruction, however, must not include any adverse commentary regarding a defendant's failure to testify. See Griffin v. California, 380 U.S. 609, 615 (1964) (determining that an adverse comment amounted to an impermissible “penalty imposed by courts for exercising a constitutional privilege”).

**9.04.03 Reasonable Doubt**

“Use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” In re Winship, 397 U.S. 358, 364 (1970); See also Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348 (2000) (holding that any sentencing factor that increases the sentence beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt). A criminal defendant therefore is entitled to a jury instruction that guilt must be established beyond a reasonable doubt. U.S. v. Rhodes, 713 F.2d 463, 471 (9th Cir.1983). If a court gives a constitutionally deficient reasonable doubt instruction, this error never can be regarded as harmless error. Sullivan v. Louisiana, 508 U.S. 275 (1993) (holding that the interrelation of the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict mandate that a constitutionally deficient reasonable doubt jury instruction be deemed a structural defect in the trial mechanism).

Although the beyond a reasonable doubt standard is a requirement of due process, the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Victor v. Nebraska, 511 U.S. 1, 4 (1994). The decision to define reasonable doubt is left to the discretion of the trial court. See, e.g., U.S. v. Olmstead, 832 F.2d 642, 644-46 (1st Cir. 1987); U.S. v. Ivic, 700 F.2d 51, 68-69 (2d Cir. 1983); Thompson v. Lynaugh, 821 F.2d 1054, 1060-61 (5th Cir. 1987); Whiteside v. Parke, 705 F.2d 869, 871-73 (6th Cir.1983); U.S. v. Nolasco, 926 F.2d 869 (9th Cir. 1991) (en banc); Harvell v. Nagle, 58 F.3d 1541, 1542 (11th Cir. 1995). A judge who declines to define reasonable doubt also may be able to preclude defense counsel from defining reasonable doubt in argument. U.S. v. Kramer, 711 F.2d 789 (7th Cir.1983) (court properly prohibited defense counsel from defining reasonable doubt where judge refused to so instruct).

If a reasonable doubt definition is given, it cannot diminish the prosecution’s burden of proof. Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam). When defendant challenges the reasonable doubt definition, the constitutional question is whether there is a “reasonable likelihood” that jury understood instruction to allow conviction based on proof insufficient to meet standard required under Winship. Victor, 511 U.S. at 4. If the reasonable doubt definition suggests a higher degree of doubt than that required for acquittal, the instruction will be rendered constitutionally deficient. See, e.g., Cage v. Louisiana, 498 U.S. 39 (1990) (ruling unconstitutional an instruction that defined reasonable doubt as a "substantial doubt," a "grave" doubt, and required proof to a "moral certainty"); Morris v. Cain, 186 F.3d 581 (5th Cir. 1999) (ruling unconstitutional, in habeas corpus proceedings, an instruction that mirrored the Cage instruction); Humphrey v. Cain, 120 F.3d 526 (5th Cir. 1997), adopted 138 F.3d 552 (5th Cir. 1998) (en banc) (ruling unconstitutional a reasonable doubt instruction which contained the criticized Cage
language and which required the jurors to articulate a “good reason” for any doubt); *Dunn v. Perrin*, 570 F.2d 21, 24 (1st Cir. 1978) (ruling unconstitutional a reasonable doubt instruction containing an articulation requirement and the phrase “strong and abiding conviction”) (“[Such an instruction] suggest[s] that a doubt based on reason was not enough to acquit, implicitly putting [the defendants] to the task of proving that the reason was 'good and sufficient.'”); See also *Victor*, 511 U.S. at 19-22 (disapproving of the use of "moral certainty" and "substantial doubt"). A reasonable doubt definition may be constitutionally sufficient if it contains language which qualifies any ambiguous terms and which provides a constitutionally-sufficient alternative definition of reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1 (1994).

Finally, the Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. *In re Winship*, 397 U.S. 358 (1970). Consequently, the trial court is required to instruct the jury as to every element of each charged offense. See, e.g., *U.S. v. Gaudin*, 515 U.S. 506 (1995) (issue of materiality requires submission to the jury). *But see Neder v. U.S.*, 527 U.S. 1 (1999) (failure to instruct jury as to a single element of the offense is subject to harmless error analysis).

### 9.04.04 Shifting the Burden of Proof

An instruction that impermissibly shifts the burden of proof from the prosecution to the defense on an essential element of a criminal offense is known as a *Sandstrom* instruction. *Sandstrom v. Montana*, 442 U.S. 523-24 (1979). While *Sandstrom* explicitly requires the prosecution to prove all elements of a charged crime beyond a reasonable doubt, *Carella v. California*, 491 U.S. 263 (1989); *Patterson v. New York*, 432 U.S. 197, 204-05 (1977), the Constitution is not violated where a defendant is required to prove an affirmative defense such as insanity. See 18 U.S.C. §17(b); *Leland v. Oregon*, 343 U.S. 790 (1952). Likewise, a defendant may bear the burden of proving he comes within an exception to an offense. See *U.S. v. Gravenmeir*, 121 F.3d 526 (9th Cir. 1997) (defendant forced to prove his conduct fell within exception to felon-in-possession statute); *U.S. v. Freter*, 31 F.3d 783, 788 (9th Cir. 1994) (defendant required to prove release of hazardous substance fell within exception to 42 U.S.C. §9603(b)(3)).

In determining whether a jury instruction impermissibly shifts the burden of proof to the defendant, the threshold inquiry is whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. *U.S. v. Myers*, 972 F.2d 1566 (11th Cir. 1992). A mandatory presumption arises “when a specific instruction, both alone or in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the state proves certain predicate facts.” *Carella*, 491 U.S. at 265. Mandatory conclusive presumptions violate the Due Process Clause by relieving the government of its burden of proof on an element of an offense. *Carella*, 491 U.S. at 268. A *Sandstrom* error is, however, subject to harmless error analysis. *Rose v. Clark*, 478 U.S. 570 (1986).

A permissive inference, on the other hand, requires the government to prove predicate facts and merely allows the jury to infer the fact necessary for conviction. A permissive inference violates the Constitution only if the inferred fact cannot be justified by common sense in light of the facts proven to the jury. See, e.g., *County Court of Ulster v. Allen*, 442 U.S. 140, 157-63 (1979) (permissive presumption
satisfied “rational connection” test where record as a whole was sufficient to establish guilt beyond a reasonable doubt; \textit{U.S. v. Washington}, 819 F.2d 221, 225 (9th Cir. 1987) (instruction that “use of a weapon . . . in a way that causes death is evidence of malice . . .” upheld as sufficiently permissive); \textit{Francis v. Franklin}, 471 U.S. at 314-15 (instruction stating that a person “is presumed to intend the natural and probable consequences of his acts . . . " not a permissive presumption); \textit{Hanna v. Riveland}, 87 F.3d 1034 (9th Cir. 1996) (constitutional error to allow jury to infer reckless driving from excessive speed); \textit{U.S. v. Rubio-Villareal}, 927 F.2d 1495, 1500-01 (9th Cir. 1992) (en banc) (improper to instruct that there is an inference that driver of vehicle was in knowing possession of contraband contained therein based solely on fact he was driving, without regard to ownership or sole recent possession).

Counsel also should beware of instructions that erroneously appear to shift the burden of proof. \textit{See, e.g.}, \textit{U.S. v. Bridges}, 499 F.2d 179, 186 (7th Cir.) (reversing conviction where trial court charged jury that the reasonable doubt standard “is not for the purpose of permitting guilty men to escape” and where the instruction equated reasonable doubt with substantial doubt), \textit{cert. denied}, 419 U.S. 1010 (1974); \textit{U.S. v. Bifield}, 702 F.2d 342, 350-51 (2d Cir.) (instruction that "the law is made to protect innocent persons and not to protect guilty ones” criticized by court), \textit{cert. denied}, 461 U.S. 931 (1983); \textit{Reynolds v. U.S.}, 238 F.2d 460, 462-63 (9th Cir. 1956) (instruction that presumption of innocence “is not intended to prevent the conviction of a person who is in fact guilty, or to aid the guilty to escape punishment” justified reversal). \textit{But see Moffitt v. U.S.}, 154 F.2d 402, 404-05 (10th Cir.) (instruction that the presumption of innocence was not intended to shield those who are actually guilty from just punishment held not to be misleading), \textit{cert. denied}, 328 U.S. 853 (1946).

A court may also comment on the defendant's failure to produce evidence if the defendant has the burden of going forward with evidence. \textit{U.S. v. Fowler}, 605 F.2d 181 (5th Cir. 1980) (comment on defendant's burden to produce evidence of accounting in tax evasion case included in jury instruction); \textit{U.S. v. Higginbotham}, 539 F.2d 17 (9th Cir. 1976) (court commented on absence of alibi witnesses).

9.04.05 Mental State

The mental state of a defendant often represents a pivotal issue in criminal trials. Accordingly, it is imperative that the jury be properly instructed as to the exact level of criminal intent the government must prove with respect to each individual charge. Depending on the nature of the evidence, the government will try to prove either actual or constructive intent, and will utilize bad facts, and inferences from those facts, in an attempt to show both intent and consciousness of guilt.

9.04.05.01 Criminal Intent

In order to prove criminal intent, the government must prove intent to commit the criminal acts by drawing common-sense inferences directly from the evidence. In the traditional analysis, the most important issue concerning intent is whether the defendant acted with specific or general intent. A “willfulness” element in the criminal statute or the indictment generally requires proof of specific intent. On the other hand, a “knowing” element usually requires only a showing of general intent. \textit{See, e.g.}, \textit{Rogers v. U.S.}, 522 U.S. 252, 258 (1998) (defendant needed to know a silencer was in fact a silencer); \textit{Jacobson v. U.S.},
503 U.S. 540, 547-48 (1992) (entrapment instruction requires informing the jury that it must examine the defendant’s criminal disposition before contact with the government).

9.04.05.02 General/Specific Intent

Traditionally, courts have drawn a distinction between general and specific intent. General intent requires that a defendant voluntarily commit an act forbidden by law (or omit a duty required by law). The defendant’s knowledge with respect to the legality of the act is irrelevant. Specific intent, however, requires proof that the defendant knowingly acted in a manner that the law forbids, purposely intending to violate the law.

General intent (i.e., acting “knowingly”) requires only that the defendant voluntarily and intentionally commit the act in question; defendant need not be aware that the act he is performing is illegal. “Knowing” conduct does not include any that is performed through mistake, accident, or for any other innocent reason. See, e.g., U.S. v. Feola, 420 U.S. 671, 686 (1975) (to commit federal crime defendant need not know the officer he assaulted was a federal officer); U.S. v. Crutchley, 502 F.2d 1195 (3d Cir. 1974) (defendant need not know stolen property belonged to federal government). The precise nature of the necessary showing of intent is a matter of statutory construction. See U.S. v. Bailey, 444 U.S. 394, 403-08 (1980). See also Carter v. U.S., ___ U.S. ___, 120 S. Ct. 2159, 2168-69 (2000) (presumption in favor of scienter in 18 U.S.C. §2113(a) requires only proof of general, not specific, intent).

The “willfulness” requirement of specific intent, however, is met only if the defendant acts purposely intending to violate the law. This language, “purposely intending to violate the law,” often has been criticized as being misleading, as the object of a specific intent crime is not to “violate the law,” but, rather, is simply to specifically perform an act that “violates the law.” Therefore, under the old instruction, juries may be misled to believe that specific intent requires a defendant to know his criminal act is in violation of the law. Partly in response to this critique, several modern courts have criticized the traditional distinction between specific and general intent and have urged courts to focus on the particular intent described in a particular statute. See U.S. v. Arambasich, 597 F.2d 609, 611-13 (7th Cir. 1979) (focusing on the particular mental state required for the crime and rejecting the distinction between general and specific intent on the grounds that it was not helpful to juries).

If counsel submits instructions which precisely define the requisite mental state of the particular crime charged, appellate courts likely will charge the jury with such instructions. Counsel should be persistent, however, in seeking the more generous traditional specific intent instruction. Counsel should request a traditional specific intent instruction in every case in which either the criminal statute or the indictment alleges “willful” misconduct. The Supreme Court has defined “willful” to mean a “voluntary, intentional violation of a known legal duty.” U.S. v. Pomponio, 429 U.S. 10, 12 (1976). Alternatively, counsel can attempt to remove the confusion caused in the traditional language by substituting “do what the law forbids” for “violate the law,” so that the instruction reads “defendant knowingly committed an unlawful act purposely intending to do what the law forbids.” The opportunity to argue ignorance of the law will be lost with such an instruction, but the benefit of emphasizing the heightened level of intent accompanying specific intent crimes will be retained.
The advantage of a specific intent instruction is that the defense may be able to argue that ignorance of the law is a defense since the defendant violated no known legal duty. There are two types of cases where a court will be more likely to give a mistake of law instruction. *U.S. v. Fierros*, 692 F.2d 1291 (9th Cir. 1982). The first type includes offenses where the defendant must know of an independently determined legal status. See *U.S. v. Petersen*, 513 F.2d 1133, 1134 (9th Cir. 1975) (reasonable belief that seller of federal property has authorization to sell defeats specific intent required for offense of theft of federal property); see also *U.S. v. Barker*, 546 F.2d 940, 946-54 (D.C. Cir. 1976); *U.S. v. Currier*, 621 F.2d 7, 9 n.1 (1st Cir. 1980). The second type includes criminal statutes which arise from complex regulatory schemes that have the potential of “snaring unwitting violators.” *Fierros*, 692 F.2d at 1295.

The most significant case involving specific intent is *Cheek v. U.S.*, 498 U.S. 192 (1991). In a prosecution involving tax evasion under 26 U.S.C. §7201, the Supreme court noted that the “proliferation of statutes and regulations has sometimes made it difficult for the average citizen to comprehend the extent of the duties and obligations imposed by the tax laws.” *Cheek*, 498 U.S. at 199-200. The Court stated that a defendant’s claim of ignorance shifts the burden to the prosecution to negate the defendant’s claim that, because of a legal misunderstanding, he or she had a good faith belief that he or she was in compliance with the law. *Id.* at 202. “This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist.” *Id.*

Since the Court’s ruling in *Cheek*, many Circuits have supported an instruction in which ignorance of a known legal duty is a defense to a criminal charge. See *U.S. v. Powell*, 955 F.2d 1206, 1211-12 (9th Cir. 1992) (good faith mistake of law charge appropriate in prosecution for failure to file income tax returns); *Liparota v. U.S.*, 471 U.S. 419 (1985) (unauthorized possession of food stamps requires intent to possess with knowledge that such possession is unauthorized); *U.S. v. Lizarraga-Lizaraga*, 541 F.2d 826, 828-29 (9th Cir. 1976) (ignorance of exportation prohibition constituted defense to specific intent); *U.S. v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978) (proper instruction as to 31 U.S.C. §1058 would include some discussion of the defendant’s ignorance of the law); *U.S. v. Pomponio*, 429 U.S. 10, 12 (1976) (conviction for “willful” violations of tax laws requires proof of violation of known legal duty); *Ratzlaf v. U.S.*, 510 U.S. 135, 137 (1995) (conviction under currency structuring laws requires proof that defendant knew conduct was illegal); *U.S. v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995) (specific intent element of currency structuring laws applies equally to conspiracy prosecution under such laws). But see *U.S. v. Fierros*, 692 F.2d at 1295 (court refused to read into 8 U.S.C. §1324(a) the defense of ignorance of the law).

Although a separate specific intent instruction or its equivalent generally is required when willfulness is an element, *U.S. v. Brooksby*, 668 F.2d 1102 (9th Cir. 1982), not all statutes that include some form of a “willfulness” element require that the jury be charged with an instruction requiring proof of knowledge of illegality. In *U.S. v. English*, 92 F.3d 909 (9th Cir. 1996), defendant was charged with securities fraud under 15 U.S.C. §§77q(a) and 77x. Section 77q(a) was the substantive offense under which defendant was charged and did not include a willfulness element. However, the penalty provision to the general statute did include a willfulness element. The court held that a conviction under 15 U.S.C. §§77q(a) and 77x does not require proof of knowledge of illegality. The court distinguished the statute at bar from the statute in *Ratzlaf*, noting that sections 77q(a) and 77x do not represent a trap for the unwary such that there
would be a danger of prosecuting the “innocent, reckless, or reckless” under these laws. Id. at 915. In addition, the court noted that prior circuit case law supported the conclusion that sections 77q(a) and 77x do not require proof of knowledge of illegality. Id.; but see Keating v. Hood, 191 F.3d 1053 (9th Cir. 2000) (prejudicial error to admit mens rea element from instruction defining offense of securities fraud).

In dealing with this issue, counsel must be sure to look beyond the underlying crime charged to determine whether a crime is a general or specific intent crime. For example, aiding and abetting, even if charged in conjunction with a general intent crime, is a specific intent crime. See U.S. v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997) (aiding and abetting second-degree murder has a specific intent element that warrants an instruction as to voluntary intoxication); U.S. v. Bancalari, 110 F.3d 1425, 1430 (9th Cir. 1997) (firearm conviction reversed where instructions did not require jury to find that defendant “knowingly and intentionally” aided and abetted the principal’s use of a firearm). But see Tapia v. Roe, 189 F.3d 1052, 1057 (9th Cir. 1999) (omission of intent in aiding and abetting instruction was harmless error where the jury found special circumstance murder); Spivey v. Rocha, 194 F.3d 971, 977 (9th Cir. 1999) (aiding and abetting instruction was sufficient to convict defendant of second degree murder). Likewise, attempt crimes include an element of specific intent even if the crime attempted does not. U.S. v. Snezer, 900 F.2d 177, 179 (9th Cir. 1990) (attempted sexual abuse charge warranted instruction on voluntary intoxication defense even though sexual abuse is not a specific intent crime); U.S. v. Darby, 857 F.2d 623, 627 (9th Cir. 1988) (trial court reversibly erred by omitting specific intent element from attempted bank robbery charge).

9.04.05.03 Constructive Intent/Deliberate Ignorance

A troublesome issue for the prosecution in cases involving possession of contraband is disproving a defendant’s claim that he or she did not know of the existence of the contraband. However, the courts have made it much easier for the government to meet its burden of proof in these types of cases through the use of the “deliberate ignorance” instruction. In the Ninth Circuit, this instruction is referred to as the “Jewell” instruction. In U.S. v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc), defendant agreed to drive another person’s car across the border for $100 after earlier declining to purchase marijuana from the same person. Before taking the car, defendant searched the glove box, trunk, and under the front seat to see if the car contained marijuana. The Ninth Circuit held that the jury could find the requisite knowledge if it were satisfied that defendant was aware of the “high probability” that the car contained marijuana. Jewell, 532 F.2d at 704 n.21. Other circuits have also upheld a “deliberate ignorance” instruction, see, e.g., U.S. v. Cincotta, 689 F.2d 238, 243 (1st Cir. 1982); U.S. v. Herrero, 893 F.2d 1512, 1538 (7th Cir. 1990), overruled on other grounds by U.S. v. Durrive, 902 F.2d 1221 (7th Cir. 1990), including in cases not involving narcotics. See, e.g., U.S. v. Shannon, 137 F.3d 1112, 1117-18 (9th Cir. 1997) (interfering with commerce by threatened physical violence and mailing threatening communication); U.S. v. Talkington, 875 F.2d 591, 595 (7th Cir. 1989) (counterfeiting); U.S. v. Lanza, 790 F.2d 1015 (2d Cir. 1986) (conspiracy to commit wire fraud); U.S. v. McAllister, 747 F.2d 1273 (9th Cir. 1984) (alien smuggling).

The Jewell instruction consists of two elements. When giving the instruction, the trial court should instruct the jury that (1) the required guilty knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he or she actually believes it does not exist.
See U.S. v. Jewell, 532 F.2d at 704 n.21. It generally constitutes error for the court to omit either part of this bipartite instruction. U.S. v. Valle-Valdez, 554 F.2d 911, 914 (9th Cir. 1977) (reversible error unless conscious avoidance of truth is coupled with subjective awareness of high probability of the unknown fact); U.S. v. Esquer-Gamez, 550 F.2d 1231, 1235-36 (9th Cir. 1977) (reversible error unless jury instructed that inference not appropriate if defendant believed contraband not present).

A Jewell instruction permits the jury to find knowledge where the defendant actually knows of facts indicating his committing of a crime and deliberately avoids learning the truth. Such an instruction to the jury is appropriate where the surrounding circumstances would have put any reasonable person on notice that there was a high probability that the undisclosed venture was illegal. U.S. v. Bobadila-Lopez, 954 F.2d 519, 523 (9th Cir. 1992). A Jewell instruction should not be given, however, when the evidence indicates either (1) that the defendant had actual knowledge that he was committing a crime, or (2) that he had no knowledge at all of the facts in question. U.S. v. de Cruz, 82 F.3d 856, 865 (9th Cir. 1996); U.S. v. Perez-Padilla, 846 F.2d 1182, 1183 (9th Cir. 1988). However, even when the facts of a case indicate that a reasonable person might have been put on notice, counsel nonetheless should argue that the application of the Jewell instruction should be restricted to “those comparatively rare cases where ... there are facts that point in the direction of ‘deliberate ignorance’ or ‘conscious purpose to avoid learning the truth.’” U.S. v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977). See also U.S. v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (restricting the application of the Jewell instruction by requiring a showing “that the defendant purposely contrived to avoid learning all the facts in order to have a defense in the event of being arrested and charged”); U.S. v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984) (no Jewell instruction should be given unless the defendant “purposely contrived to avoid learning all of the facts in order to have a defense ...”). See also U.S. v. Alvarado, 817 F.2d 580 (9th Cir.), amended, 838 F.2d 311 (9th Cir. 1987); U.S. v. Henderson, 721 F.2d 276 (9th Cir. 1983); U.S. v. Suttiswad, 696 F.2d 645 (9th Cir. 1982); U.S. v. Williams, 685 F.2d 319 (9th Cir. 1982).

Fortunately, recent years have not witnessed any significant expansion of Jewell-theory prosecutions. In U.S. v. Baron, 94 F.3d 1312 (9th Cir. 1996), defendant was convicted of possessing 27 pounds of methamphetamine with intent to distribute. Defendant had been asked by a friend to drive a car from California to Arizona, and claimed he had no knowledge of the secret compartments inside the auto which contained drugs. The trial court gave a deliberate indifference instruction to the jury. On appeal, the Ninth Circuit then held that giving the Jewell instruction constituted reversible error because there was no evidence to suggest either (1) that defendant was aware of either the secret compartment in the car or of his friend’s involvement in drug trafficking, or (2) that defendant’s suspicions were aroused. Id. at 1318. Although the court did note that defendant was negligent in disregarding the risk that the car contained drugs, “evidence of negligence or recklessness concerning such a risk is simply insufficient to justify a Jewell instruction.” Id.; see also U.S. v. Aguilar, 80 F.3d 329, 332-33 (9th Cir. 1996) (Jewell instruction not warranted because no evidence existed defendant purposely contrived to avoid learning all of the facts in order to have a defense in the case of subsequent prosecution); U.S. v. Fulbright, 105 F.3d 443, 447 (9th Cir. 1997) (“a few forays into a law library by a layman” insufficient showing to justify Jewell instruction).
The court addressed the relevance of direct evidence that affects an individual’s knowledge in *U.S. v. Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991). In *Sanchez*, defendant was arrested in a van laden with marijuana and cocaine which she claimed to have borrowed without any knowledge of the drugs hidden inside. The only evidence suggesting that Sanchez might have suspected drugs were concealed in the van was direct evidence which served to indicate her actual, rather than constructive knowledge. *Id.* at 1073-75. The Ninth Circuit reversed Sanchez’s conviction because the court gave a Jewell instruction, holding that “a Jewell instruction is not appropriate where the only evidence alerting a defendant to the high probability of criminal activity is direct evidence of the illegality itself. ‘[It] should not be given when the evidence is that the defendant had either actual knowledge or no knowledge at all of the facts in question.’ [Citations.]” *Id.* at 1074.

Defense counsel must object vigorously to any constructive intent instruction, as failure to object normally will not preserve the issue for appeal. See *U.S. v. Eaglin*, 571 F.2d 1069, 1075 (9th Cir. 1977); see *U.S. v. Jewell*, 532 F.2d at 704 n.21. If the court indicates that a Jewell instruction will be given, counsel should carefully weigh the decision of whether to request a more favorably worded instruction because a reviewing court may view the submission of alternate language as invited error.

### 9.04.05.04 Voluntary Intoxication/Diminished Capacity

A defendant is entitled to a voluntary intoxication instruction if drug or alcohol intoxication interfered with his capacity to form the specific intent required for a crime. *U.S. v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990). While a voluntary intoxication instruction is appropriate with a specific intent crime, voluntary intoxication does not provide a defense to a general intent crime. *U.S. v. Jim*, 865 F.2d 211, 212 (9th Cir. 1989); *U.S. v. Echeverry*, 759 F.2d 1451, 1454 (9th Cir. 1985) (intoxication instruction necessary only in specific intent crime); *U.S. v. Lemon*, 550 F.2d 467, 470 n.1 (9th Cir. 1977); *U.S. v. Johnston*, 543 F.2d 55 (8th Cir. 1976) (in order to determine whether the intent element may be vitiated by intoxication, the court must analyze the elements of the offense charged).

Although voluntary intoxication does not provide a defense to general intent crimes, such an instruction is warranted if aiding and abetting also is charged in conjunction with the underlying general intent crime. In the Ninth Circuit case of *U.S. v. Sayetsitty*, 107 F.3d 1405 (9th Cir. 1997), defendant appealed his second-degree murder conviction, arguing that the trial court erred in failing to instruct on voluntary intoxication as a defense to a charge of aiding and abetting second-degree murder. In its instructions to the jury, the court stated that defendant could be convicted if the jury found either (1) that he killed with malice aforethought, or (2) that he aided and abetted his brother, a co-defendant, in the killing. *Id.* at 1412. The court held that the district court’s failure to instruct on voluntary intoxication as a defense to aiding and abetting second-degree murder was plain error. The court noted that although second-degree murder is not a specific intent crime for which a voluntary intoxication instruction would be appropriate, the Circuit’s law is clear that aiding and abetting contains a specific intent element which justifies a voluntary intoxication instruction. *Id.*

In order to justify an instruction as to voluntary intoxication, evidence of intoxication must be sufficient to allow a reasonable man to doubt the defendant’s ability to form the requisite criminal intent.
Defendant need not testify in order to claim intoxication as a defense. *Fay*, 668 F.2d at 378 (although defendant did not testify as to his intoxication, instruction as to voluntary intoxication defense nonetheless warranted because the evidence was sufficient to support a finding that defendant was intoxicated). Moreover, some courts hold that it is error to give an intoxication instruction if the defendant objects. *See U.S. v. Lavallie*, 666 F.2d 1217 (8th Cir. 1981) (intoxication instruction in a general intent crime prosecution served no purpose other than potentially to portray defendant as a “drunken Indian”).

In a disheartening display of portending demise to the voluntary intoxication defense, the Supreme Court, in *Montana v. Egelhoff*, 518 U.S. 37 (1996), opened the door for state and federal legislatures to close off this recently favored defense. In *Egelhoff*, the Court held that the Due Process Clause was not violated by Montana Code Annot. §45-203, which provides that voluntary intoxication “may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.” *Id.* at 39-40. The Court found that there was no violation of the Due Process Clause because the defendant’s right to have a jury consider evidence of his voluntary intoxication in determining whether he possessed the requisite mental state was not a “fundamental principle of justice.” *Id.* at 50-51. The high court stated:

> In sum, not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice. Although the rule allowing a jury to consider evidence of a defendant’s voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance to qualify as fundamental, especially since it displaces a lengthy common law tradition which remains supported by valid justifications today. *Egelhoff*, 518 U.S. at 51.

A related diminished capacity defense arises from an unsuccessful insanity defense. Traditionally, defendants have been entitled to an instruction stating that even if the jury finds the defendant legally sane, the jury must examine the defendant’s mental capacity to form the required specific intent. E.J. Devitt & C.B. Blackmar, *Federal Jury Practice and Instructions* §19.03 (4th ed. 1992 & 1997 Supp.); *U.S. v. Winn*, 577 F.2d 86, 90 (9th Cir. 1978) (defendant entitled to diminished mental capacity instruction if court refused insanity instruction for failure to give notice of defense). However, under the new definition of insanity found in the Comprehensive Crime Control Act of 1984, 18 U.S.C. §17(a), “[m]ental disease or defect does not otherwise constitute a defense.” This statute conceivably could be construed to eliminate
the diminished capacity defense based on the defendant’s mental condition or on voluntary intoxication. This construction seems untenable, however, because diminished capacity for mental condition or voluntary intoxication is not a “defense,” but, rather, an attack on the government’s proof of intent. See U.S. v. Twine, 853 F.2d 676 (9th Cir. 1988) (diminished capacity not abolished by 18 U.S.C. §17).

9.04.05.05  Not Guilty by Reason of Insanity

This defense is governed by the “Insanity Defense Reform Act” (IDRA), 18 U.S.C. §§17, 4241-4247.

In a recent habeas corpus case, the Ninth Circuit held that a California state court’s instruction requiring the jury to presume the defendant sane at the guilt phase of a murder trial, without providing the jury with the legal definition of sanity, violated the Due Process Clause of the United States Constitution. Patterson v. Gomez, 223 F.3d 959 (9th Cir. 2000).

9.04.05.06  Similar Acts

A defendant’s intent also may be established by evidence of similar acts. See Fed. R. Evid. 404(b). Once evidence of similar acts is admitted, it is important that the trial judge caution the jury regarding the reasons why it was admitted. U.S. v. Bradshaw, 690 F.2d 704, 709 (9th Cir. 1982). If the defendant fails to request a limiting instruction, however, the court’s failure to give such an instruction to the jury will not necessarily result in reversible error. Id.

9.04.05.07  Consciousness of Guilt

An instruction regarding an inference of consciousness of guilt is appropriate only when (1) the facts presented and the facts to be inferred are rationally connected by common sense and experience, and (2) the record contains factual support for a consciousness of guilt instruction. See U.S. v. Perkins, 937 F.2d 1397 (9th Cir. 1991) (record did not contain facts supporting instruction on change of appearance; instruction contemplates some independent evidence indicating defendant himself actually changed his appearance); U.S. v. Hawkes, 753 F.2d 355 (4th Cir. 1985) (conviction reversed where the person who ran from the arresting officers was not unequivocally identified as the defendant). For these reasons, modern courts tend to omit instructions on this type of evidence, instead allowing counsel to raise the appropriate inferences during closing argument. U.S. v. McDonald, 576 F.2d 1350, 1357 (9th Cir. 1978); see also U.S. v. Morfin, 151 F.3d 1149, 1151 (9th Cir. 1998) (erroneous jury instruction does not affect defendant’s substantial right when evidence of guilt is overwhelming).

Where a defendant’s action is not directly probative of his consciousness of guilt, a consciousness of guilt instruction is inappropriate. U.S. v. Barnhart, 889 F.2d 1374 (5th Cir. 1989) (mere desire to flee did not warrant instruction that flight could be evidence of guilt); U.S. v. Wagner, 834 F.2d 1474 (9th Cir. 1987) (consciousness of guilt instruction improper where government sought to use defendant’s refusal to submit to a psychiatric exam as evidence of consciousness of guilt).
Consciousness of guilt instructions can be based on a variety of actions undertaken by the defendant. If the defendant fled from the scene of a crime, for example, a proper consciousness of guilt instruction in the Fifth Circuit includes four separate inferences: (1) whether the defendant’s acts show flight; (2) whether the flight shows consciousness of guilt; (3) whether the defendant’s guilty feeling shows consciousness of guilt about the crime charged; and (4) whether consciousness of guilt about the crime charged shows actual guilt. *U.S. v. Myers*, 550 F.2d 1036, 1049-50 (5th Cir. 1977); see also *U.S. v. Clark*, 45 F.3d 1247 (8th Cir. 1995) (instruction proper when flight occurred immediately after the commission of the crime in question). If, for example, the defendant substantially altered his appearance (*i.e.*, cut his hair, shaved his face, or changed his hair color) shortly after the commission of a crime, a consciousness of guilt instruction may be appropriate. *Perkins*, 937 F.2d at 1403.

Perhaps the most devastating type of consciousness of guilt evidence, however, is evidence of witness tampering or destruction of evidence. If the evidence can be construed to show that the government induced witnesses to testify falsely or purposely destroyed evidence, defense counsel must request an instruction allowing the jury to infer that such activity is “affirmative evidence of the weakness of the government’s case.” *U.S. v. Vole*, 435 F.2d 774, 778 (7th Cir. 1970) (quoting charge to jury). A related issue arises when the government fails to call a witness who is peculiarly accessible to the government. Although the trial judge has discretion to decide whether to give the instruction, it is proper to give the instruction if the witness is in the exclusive control of one party. *U.S. v. Bramble*, 680 F.2d 590, 592 (9th Cir. 1982); *U.S. v. Blakemore*, 489 F.2d 193, 195 (6th Cir. 1973). If the judge allows argument on the missing witness problem, “an instruction should be given to the jury defining the conditions under which the inference might properly be drawn.” *U.S. v. Blakemore*, 489 F.2d at 196. The same arguments appear to hold true for documentary or physical evidence exclusively within the control of the government. In such a case, counsel should attempt to subpoena the witness or evidence in order to show that the material is unavailable to the defense.
9.04.06  Theory of the Defense

A strong theory of the defense instruction is essential in any trial, and courts have offered ample support to defendants seeking such instructions. “As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” Mathews v. U.S., 485 U.S. 58, 63 (1988). “A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence.” U.S. v. Escobar de Bright, 742 F.2d 1196, 1198 (9th Cir. 1984) (quoting U.S. v. Winn, 577 F.2d 86, 90 (9th Cir. 1978)) (emphasis in original); U.S. v. Mason, 902 F.2d 1434 (9th Cir. 1990) (entrapment instruction did not express defendant’s theory of case); U.S. v. Freeman, 761 F.2d 549 (9th Cir. 1985) (defendant entitled to First Amendment defense instruction on charges of counseling tax evasion); U.S. v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (court properly denied requested instruction that assumed unconstitutionality of statute at bar). All circuits entitle a defendant to a theory of defense instruction if it is timely requested, supported by the evidence, and is accurate as to the law. See, e.g., U.S. v. Main, 113 F.3d 1046 (9th Cir. 1997) (jury must be instructed it must find victim’s death was within risk created by defendant’s conduct in involuntary manslaughter charge); U.S. v. Swallow, 109 F.3d 656, 658 (10th Cir. 1997); U.S. v. McQuarry, 726 F.2d 401, 402 (8th Cir. 1984); U.S. v. Parker, 566 F.2d 1304 (5th Cir. 1978).

Where a defendant’s theory is legally sound and supported by the evidence, it is reversible error for a court to refuse a theory of defense instruction. U.S. v. Smith, 217 F.3d 746 (9th Cir. 2000) (reversible error for court to refuse to instruct jury on defendant’s theory of the case when the record contains evidentiary support for that theory); U.S. v. Sotelo-Murillo, 887 F.2d 176, 178 (9th Cir. 1989); U.S. v. Mann, 811 F.2d 495 (9th Cir. 1987) (reversible per se). Again, defense counsel must request such an instruction in a timely fashion and in the appropriate form.

Actually receiving a theory of the defense instruction is more difficult than the language of entitlement suggested by case law. The trial court, for instance, may properly reject a requested theory of defense instruction which is submitted “in the form of a narrative recitation of [the defendant’s] version of the facts . . .” rather than “in the form of a statement of appropriate principles of law for the jury to apply to the facts . . .” U.S. v. Nevitt, 563 F.2d 406, 409 (9th Cir. 1977), overruled on other grounds by U.S. v. Rowe, 92 F.3d 928 (9th Cir. 1996). Some courts have held that the submitted request must be fashioned in a form suitable for use by the court and is properly rejected if verbose and overly descriptive of evidence. See U.S. v. Felix-Gutierrez, 940 F.2d 1200, 1211 (9th Cir. 1992) (“[t]he court is not required to accept a proposed instruction which is manifestly intended to influence the jury [on the evidence:] proper theory of the defense instructions set forth the defendant’s theory of the case on a fairly abstract level”); see also U.S. v. Nance, 502 F.2d 615, 619 (8th Cir. 1974). If defense counsel anticipates that the judge may reject the instruction, counsel should draft the instruction in very general terms in order to preserve the issue for appeal.

The amount of evidence necessary to entitle the defendant to a theory of defense instruction is difficult to articulate; however, the instruction must be given if “some” evidence regarding the issue has been presented, “even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.” U.S. v. Wofford, 122 F.3d 787, 789 (9th Cir. 1997) (quoting U.S. v. Lemon, 824 F.2d 763, 764 (9th Cir. 1987)); U.S. v. Sotelo-Murillo, 887 F.2d 176, 178-79 (9th Cir. 1989) (reversal required for failure
to give entrapment instruction). A “mere scintilla” of evidence supporting a defendant’s theory, however, is insufficient to warrant a defense instruction. *U.S. v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993). In making a determination regarding the appropriateness of a theory-of-the-case instruction, the evidence should be analyzed “in the light most favorable to defendant.” *U.S. v. Parker*, 566 F.2d 1304, 1305 (5th Cir. 1978). The defense also can establish facts to justify a theory of defense instruction through cross-examination of government witnesses. *See U.S. v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975) (en banc). The defendant may, however, need to testify or call witnesses in order to establish facts sufficient to elevate a defense theory to a level greater than a simple denial of the charge. *See Charron v. U.S.*, 412 F.2d 657, 660-61 (9th Cir. 1969).

In cases in which the defendant merely denies the charges, instructions regarding the presumption of innocence and the government’s burden of proof beyond a reasonable doubt generally obviate a need for a specific theory of defense instruction. The defense theory must involve issues of law and/or fact that require an acquittal if the jury believes the evidence. *See Laughlin v. U.S.*, 474 F.2d 444, 455 (D.C. Cir. 1972) (instruction that acquittal is warranted if jury believes defense testimony does not rise to the level of a “theory”); *but see U.S. v. Vole*, 435 F.2d 774 (7th Cir. 1970) (refusal of instruction that defendant was framed required reversal).

Likewise, the defense’s legal theory must be valid in order to justify a theory of defense instruction. In *U.S. v. McQuarry*, 726 F.2d 401 (8th Cir. 1984), the trial court properly rejected a defense instruction that defendant’s failure to flee from the crime implied innocence. Although such facts may be argued to the jury, the trial court has discretion to refuse to emphasize particular facts through jury instructions. *See U.S. v. Keane*, 522 F.2d 534, 559-60 (7th Cir. 1975) (court properly refused to give instruction that would only have served to emphasize an evidentiary fact proved at trial by one side); *U.S. v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972) (per curiam).

In *U.S. v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995), the Eleventh Circuit reversed defendant’s conviction due to the district court’s refusal to instruct the jury on the defense’s “mistake of fact” theory of the case. The court stated the jury should have been instructed either:

> [t]hat a defendant who thought he was performing legitimate law enforcement activities may lack the necessary criminal intent where he reasonably believes he acted in cooperation with the government. [Citations.] [O]r that a defendant’s “mistake of fact” may negate criminal intent . . . where the defendant did in fact engage in conduct giving rise to the charged offense.

*Ruiz*, 59 F.3d at 1154.

It is not error to reject a theory of the case instruction if the other jury instructions in their entirety cover the defense theory. *U.S. v. Lopez*, 885 F.2d 1428, 1434 (9th Cir. 1989), *overruled on other grounds by Schmuck v. U.S.*, 489 U.S. 705 (1989). While the issue of whether other instructions adequately cover a defense theory is a question of law reviewed de novo, *U.S. v. Ripinski*, 109 F.3d 1436, 1440 (9th Cir.), *overruled on other grounds by U.S. v. Sablan*, 114 F.3d 913 (9th Cir. 1997).
(en banc), a trial court’s determination of whether a defense theory is supported factually is reviewed for abuse of discretion. *U.S. v. Gomez-Osorio*, 957 F.2d 636, 642 (9th Cir. 1992). The defense also is not entitled to any particular language in the instruction. *U.S. v. Soulard*, 730 F.2d 1292, 1303 (9th Cir. 1984). Consequently, many trial courts will refuse a narrowly tailored theory of the defense instruction if the proposed general instructions adequately represent the issue. *U.S. v. Davis*, 953 F.2d 1482 (10th Cir. 1992) (defendant only entitled to adequate instruction on legal defense raised by the evidence), *overruled on other grounds by U.S. v. Young*, 162 F.3d 1175 (10th Cir. 1998); *U.S. v. St. Gelais*, 952 F.2d 90 (5th Cir. 1992) (district court did not err by refusing to give proposed good faith instruction where the court generally had instructed on specific intent element of wire fraud).

The government also faces restrictions with respect to its theory of the case. Its arguments “must be within the legal theories to be covered by the court’s instructions.” *U.S. v. Companion*, 508 F.2d 1021, 1022 (9th Cir. 1974) (per curiam) (conviction reversed where indictment charged participation and prosecutor argued aiding and abetting); *U.S. v. Shipsey*, 190 F.3d 1081, 1086-87 (9th Cir. 1999) (finding plain error to instruct the jury on an assault theory that was not charged in the indictment); *but see U.S. v. Vines*, 580 F.2d 850, 853 (5th Cir. 1978) (defendant who was indicted as a principal could be convicted on evidence showing that he merely aided and abetted even though indictment did not allege aiding and abetting). On appeal, a conviction cannot be supported by resort to a prosecution theory which was neither articulated to the jury nor presented to them in the form of jury instructions, no matter how otherwise proper the theory or compelling the evidence. *McCormick v. U.S.*, 500 U.S. 257 (1991). Counsel must be certain to object to any such inconsistent arguments by the government in order to preserve the record on appeal. *See U.S. v. Hannah*, 97 F.3d 1267, 1269 (9th Cir. 1996) (defendant not prejudiced by supplemental instruction on theory not presented by prosecution when parties had opportunity for additional argument).

**9.04.07 Instructions for Multiple-Defendant Cases/Conspiracy Instructions**

Jury instructions play a particularly important role in conspiracy cases and cases involving multiple defendants. Obviously, the primary concern in such cases is limiting the admissibility or applicability of evidence only to the defendant or defendants against whom the evidence is offered. In order to accomplish this task, counsel must be persistent in demanding limiting and cautionary instructions during the course of trial and ask that the jury again be instructed on these points at the close of the case.

**9.04.07.01 Mere Presence/Association**

“Mere presence, guilty knowledge, even sympathetic observation’ and close association with a co-conspirator are insufficient, without more, to support a conviction for conspiracy.” *U.S. v. Lyons*, 53 F.3d 1198, 1200 (11th Cir. 1995). If a defendant defends a case on this theory (i.e., that despite his presence at the crime scene, he was not involved in the crime) the court should instruct the jury that it may not infer the defendant’s guilt merely from his presence at the scene of a crime or his proximity to contraband. *See U.S. v. Manning*, 618 F.2d 45, 48 (8th Cir. 1980) (reversal warranted due to fact that instructions improperly failed to acknowledge defendant’s “mere presence” defense); *U.S. v. MacDougal-Pena*, 545 F.2d 833 (2d Cir. 1976) (charge regarding presence and guilty knowledge should be given by
Likewise, having a familial relationship with alleged co-conspirators may not, by itself, provide the basis for a conspiracy conviction. *U.S. v. Freyre-Lazaro*, 3 F.3d 1496, 1505 (11th Cir. 1993) (court’s failure to instruct specifically as to this issue was not error because the issue was covered in general conspiracy instructions and was argued at closing).

In *U.S. v. Locascio*, 6 F.3d 924 (2d Cir. 1993), the defendant appealed his RICO conviction, arguing in part that the court’s improper charge with respect to conspiratorial liability allowed the jury to convict him for mere presence. The trial court instructed the jury:

> Now, although mere presence with conspirators is not enough, it’s a factor that you may consider among others to determine whether a defendant was a member of a conspiracy. The defendant’s presence may establish his membership in a conspiracy, if all of the circumstances considered together show that his presence was meant to advance the goals of that conspiracy. He must not only have been present, he must have known about the conspiracy, he must have intended by his presence to participate in the conspiracy or to help it succeed. In other words, presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.

*Id.* at 945.

The Second Circuit approved of the instruction and affirmed the conviction. Focusing on the portion of the instruction referring to presence, the court wrote that “presence under circumstances that advance the purposes of the conspiracy would be sufficient to support a finding of guilt.” *Id.*

Even if a defendant is charged as a principal, the government also may properly seek an instruction that the defendant was an aider and abetter of someone else’s crime. See *U.S. v. Wellington*, 754 F.2d 1457, 1464 (9th Cir. 1985); *Pigford v. U.S.*, 518 F.2d 831, 834 (4th Cir. 1975) (substantive charges embody the offense of aiding and abetting); see also *U.S. v. Vines*, 580 F.2d 850, 853 (5th Cir. 1978). The aiding and abetting instruction should contain the “mere presence” concept by requiring willful association and participation in the offense. See *U.S. v. Weil*, 561 F.2d 1109 (4th Cir. 1977); *U.S. v. Jones*, 425 F.2d 1048, 1056-57 (9th Cir. 1970). In the Ninth Circuit, the crime of aiding and abetting contains a specific intent element beyond the mental state required by the principal crime. *U.S. v. Sayetsitty*, 107 F.3d 1405, 1412 (9th Cir. 1997). While this is not the case in all circuits, see *U.S. v. Roan Eagle*, 867 F.2d 436, 445 (8th Cir. 1989) (aiding and abetting is *not* a specific intent crime), it is nonetheless appropriate to give both the mere presence instruction and the aiding and abetting instruction. *U.S. v. Avila-Macias*, 577 F.2d 1384, 1390 (9th Cir. 1978).

Finally, the Ninth Circuit recently found that the trial court’s failure to instruct the jury on the target crime in a prosecution for aiding and abetting constituted harmless error. *Solis v. Garcia*, 219 F.3d 922 (9th Cir. 2000) (jury’s guilty verdict indicated unambiguously that it had concluded that the defendant acted to encourage or facilitate the commission of the target offense).

9.04.07.02 Disposition or Dismissal of Co-Defendant's Case
When a co-defendant disappears from the courtroom due to a disposition of his case, jurors undoubtedly speculate as the reason for his absence. For obvious reasons, information on this point usually is damaging to the remaining defendant. If, for example, the judge granted a Rule 29 judgment of acquittal motion for the co-defendant, the jury may infer that the judge decided the remaining defendant was guilty. If the co-defendant pled guilty, the jury may infer the guilt of the remaining defendant, particularly in a conspiracy case. If the co-defendant fled, the jury certainly will consider flight as evidence of consciousness of guilt. Due to the significant prejudice presented by any of these scenarios, counsel for any remaining defendant must carefully draft instructions to guard against any such negative inferences.

Although the trial judge should not inform the jury that the co-defendant has pled guilty or that the co-defendant’s case has been “disposed of,” U.S. v. Gibbons, 602 F.2d 1044, 1048 (2d Cir. 1979), the court’s informing the jury of the co-defendant’s plea generally does not warrant reversal as long as the court also cautions the jury not to infer the defendant’s guilt from the plea. Id.; see also, U.S. v. Thornton, 498 F.2d 749, 751 (D.C. Cir. 1974); U.S. v. Earley, 482 F.2d 53, 56 (10th Cir. 1973). If defense counsel requests a cautionary instruction, a court’s failure to give such an instruction may be reversible error. Babb v. U.S., 218 F.2d 538, 541-42 (5th Cir. 1955). To avoid any negative inferences, counsel should ask the judge to instruct the jury that the missing co-defendant’s case will be considered in a different proceeding and is no longer before the jury.

9.04.07.03 Elements of a Conspiracy Instruction

The government must prove the following four elements beyond a reasonable doubt to establish guilt in a conspiracy prosecution: (1) two or more persons unlawfully agreed to violate a federal law or to defraud the United States; (2) the defendant was a willful and voluntary participant in the conspiracy; (3) at least one of the co-conspirators committed at least one of the overt acts charged in the indictment; and (4) the overt act was committed in the course of, and in furtherance of, the unlawful agreement. See Grunewald v. U.S., 353 U.S. 391 (1957); Blumenthal v. U.S., 332 U.S. 539 (1947); Braverman v. U.S., 317 U.S. 49 (1942); U.S. v. Rabinowich, 238 U.S. 78 (1915). These elements either may be contained in separate jury instructions or, following the modern trend, combined in one simplified instruction. See Committee on Model Jury Instructions, Ninth Circuit, Manual of Model Criminal Jury Instructions for the Ninth Circuit, §8.16, at pp. 147-48 (2000 ed.).

9.04.07.04 Agreement Requirement

The essence of a conspiracy charge is the existence of “an agreement to commit an unlawful act.” Iannelli v. U.S., 420 U.S. 770, 777 (1975); U.S. v. Pintar, 630 F.2d 1270, 1275 (8th Cir. 1980); U.S. v. Camacho, 528 F.2d 464, 469 (9th Cir. 1976). The crime of conspiracy is, by its nature, “an inchoate offense,” Iannelli, 420 U.S. at 777, and the agreement need not be formal or express and may be reached at any time during the course of the activity comprising the conspiracy. Pereira v. U.S., 347 U.S. 1, 12 (1954). However, no conspiracy conviction may lie for mere guilt by association with members of the conspiracy. U.S. v. Melchor-Lopez, 627 F.2d 886, 891 (9th Cir. 1980).
In *Melchor-Lopez*, 627 F.2d at 892, the Ninth Circuit reversed the defendant’s conviction because of insufficient proof of “contacts establishing a ‘meeting of the minds’ between” defendant and the alleged co-conspirator. The court held that the fact that defendant “firmly insisted on certain conditions unacceptable to his would-be co-conspirators” demonstrated that the defendant did not agree to commit the crime absent fulfillment of these conditions precedent. *Id.* at 891. Defense counsel should urge instructions tailored to the proof of an individual case under the *Melchor-Lopez* rationale. See also *U.S. v. Hernandez-Carreras*, 451 F.2d 1315 (9th Cir. 1971) (evidence showing defendant’s participation in conspiracy was too “thin” to support conviction).

A defendant also can attack the alleged conspiratorial agreement by asserting that any alleged relationship was limited to a buyer-seller relationship. “The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy.” *U.S. v. Mancillas*, 580 F.2d 1301, 1307 (7th Cir. 1978) (citing *U.S. v. Ford*, 324 F.2d 950 (7th Cir. 1963)). The validity of this argument is derived from the fact that while, by definition, the buyer-seller relationship requires two actors, it is not, in and of itself, a conspiracy, because there is no joint objective. The buyer wishes to buy, and the seller, to sell; thus, there is no “meeting of the minds” regarding a single, commonly shared objective. See *U.S. v. Prieskorn*, 658 F.2d 631, 634 (8th Cir. 1981) (citations omitted). In deciding whether to give a buyer-seller instruction, the court should consider factors such as the amount of drugs involved, their resale value, whether the defendant is an addict, and whether the purchase appears to be for personal use. *U.S. v. Quintanilla*, 25 F.3d 694 (8th Cir. 1994) (if evidence establishes that drugs have been purchased for further distribution rather than for personal use, no instruction is warranted); *U.S. v. Fort*, 998 F.2d 542, 547 (7th Cir. 1993). If counsel does not request a buyer-seller instruction, the issue is not preserved for appeal. *Quintanilla*, 25 F.3d at 700.

**9.04.07.05 Sears Rule**

In *U.S. v. Escobar de Bright*, 742 F.2d 1196, 1198-200 (9th Cir. 1984), the Ninth Circuit explicitly adopted the longstanding rule that no agreement exists when an individual “conspires” to violate the law with one other person and that person is a government agent. In adopting the so-called “Sears rule,” *Sears v. U.S.*, 343 F.2d 139, 142 (5th Cir. 1965), the Ninth Circuit joined the Fourth, Fifth, Seventh, and Eighth Circuits in holding that such activity does not constitute conspiracy. See *U.S. v. Glickman*, 604 F.2d 625, 631-32 (9th Cir. 1979).

The rationale behind the Sears rule is similar to that which underlies the entrapment defense: “The legitimate law enforcement function of crime prevention ‘does not include the manufacturing of crime.’ Allowing a government agent to form a conspiracy with only one other party would create the potential for law enforcement officers to ‘manufacture’ conspiracies when none would exist absent the government’s presence.” *Escobar de Bright*, 742 F.2d at 1200 (citations omitted). In every conspiracy case, defense counsel should request an instruction that the jury cannot find the defendant guilty of conspiracy if it finds that the defendant conspired only with a government agent, nor may it convict a defendant of conspiracy if all other co-conspirators are acquitted on such a charge. See *Escobar de Bright*, 742 F.2d at 1198. A judge’s refusal to instruct in this manner constitutes reversible error. *Id.*
9.04.07.06 Multiple Conspiracies/Conspiracy Variance

A conspiracy variance claim amounts to a challenge to the sufficiency of the evidence supporting the jury’s finding that each defendant was a member of the same conspiracy. *U.S. v. Nava-Salazar*, 30 F.3d 788, 796 (7th Cir. 1994). A multiple conspiracy instruction is warranted if, based on the evidence, a reasonable jury could find either more than one such illicit agreement or an agreement different from the one charged. *U.S. v. Brandon*, 17 F.3d 409, 449 (1st Cir. 1994). The jury must acquit all defendants charged in the single conspiracy if the jury finds that a series of separate conspiracies existed rather than the lone conspiracy charged in the indictment. *Kotteakos v. U.S.*, 328 U.S. 750, 773-74 (1946). If, however, the evidence shows no variance between the allegation of a single conspiracy and the evidence presented, the court need not give such an instruction. *U.S. v. Mazzanti*, 888 F.2d 1165, 1174 (7th Cir. 1989); *U.S. v. Loya*, 807 F.2d 1483, 1492-93 (9th Cir. 1987).

The matter of whether the evidence has established one conspiracy or more than one is a question of fact for a well-instructed jury. *U.S. v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1192 (2d Cir. 1989). It is imperative that defense counsel request a multiple conspiracy instruction, as it is not reversible error to omit the multiple conspiracy instruction if it is not timely requested. *U.S. v. Rugiero*, 20 F.3d 1387, 1391 (6th Cir. 1994).

Counsel also should request a special unanimity instruction in conspiracy cases in which multiple or complex conspiracies may exist. Normally, a general instruction on the requirement of unanimity suffices to instruct the jury that they must unanimously agree on whatever factual determinations form the basis of the guilty verdict. *U.S. v. Payseno*, 782 F.2d 832, 835 (9th Cir. 1986). Such an instruction usually will be sufficient in routine cases involving multiple counts or schemes. *U.S. v. Echeverry*, 698 F.2d 375 (9th Cir.), modified, 719 F.2d 974 (9th Cir. 1983). A general instruction may be insufficient, however, if such instruction allows the jury to convict without unanimous agreement on the existence and duration of a single conspiracy or multiple conspiracies. *Id.* “A specific unanimity instruction is appropriate ‘where the complex nature of the evidence, a discrepancy between the evidence and the indictment, or some other particular factor creates a genuine possibility of juror confusion.’” *Payseno*, 782 F.2d at 836 (quoting *U.S. v. Frazin*, 780 F.2d 1461, 1468 (9th Cir. 1986)).

9.04.07.07 Withdrawal/Pinkerton Liability

Once a defendant’s membership in a conspiracy is established, the defendant’s participation in the conspiracy is presumed to continue unless the defendant can affirmatively show evidence of withdrawal. See Hyde v. U.S., 225 U.S. 347, 369 (1912); *U.S. v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980). Because withdrawal from the conspiracy is an affirmative defense to the element of membership, it is therefore proper to instruct the jury that membership is presumed to continue absent evidence of withdrawal. *U.S. v. Battista*, 646 F.2d 237, 246 (6th Cir.1981); *U.S. v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980).

The date at which a defendant’s membership in a conspiracy ceases can be extremely significant. Under the so-called ‘Pinkerton’ doctrine, a co-conspirator is vicariously liable for any crime his
co-conspirators commit in furtherance of the conspiracy, provided such crimes are reasonably foreseeable. *Pinkerton v. U.S.*, 328 U.S. 640, 646-47 (1946). Generally, *Pinkerton* liability will lie in two situations: (1) where the substantive crime is also a goal of the conspiracy; and (2) where the substantive offense differs from the precise nature of the ongoing conspiracy, but facilitates the implementation of its goals. *U.S. v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996). Liability will not lie, however, if the substantive crime “did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.” *Id.* (quoting *Pinkerton*, 328 U.S. at 647-48).

In *Mothersill*, 87 F.3d at 1214, the Eleventh Circuit addressed the foreseeability requirement of *Pinkerton* liability. There, defendants were convicted of creating an explosive device that caused the death of a state trooper. Defendants argued that because the objective of the conspiracy was to distribute narcotics, not to build a bomb, the bombing was an “attenuated, unintended act” that should not have been governed by *Pinkerton* vicarious liability. *Mothersill*, 87 F.3d at 1219. The court rejected defendants’ argument, stating:

> When viewed in light of the . . . theory of co-conspirator liability, it is clear that the trial court did not err by submitting the *Pinkerton* issue to the jury. There was sufficient evidence for a reasonable jury to have concluded beyond a reasonable doubt that the murder was a reasonably foreseeable consequence of the drug conspiracy.

*Id.*

A defendant is entitled to a withdrawal instruction only if the evidence could sustain that claim. *U.S. v. Nava-Salazar*, 30 F.3d 788, 799 (7th Cir. 1994). There are no single means by which withdrawal can be established, as the issue in large part depends on context. *U.S. v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995). Although it is reversible error to instruct the jury that the defendant may withdraw only by communicating his or her withdrawal to other conspirators or by informing law enforcement officials of the existence of the conspiracy, *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 463-69 (1978), “mere cessation of activity is not enough [to constitute withdrawal]; there must also be affirmative action, either the making of a clean breast to the authorities, or communication of the abandonment in a manner calculated to reach co-conspirators.” *U.S. v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (quoting *U.S. v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964)). Once a defendant has presented evidence of withdrawal, the jury should be instructed that the government must disprove withdrawal beyond a reasonable doubt. *U.S. v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981); *but see U.S. v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991) (defendant has burden of proving affirmative defense of withdrawal). Finally, it is plain error for the trial court not to instruct the jury on the statute of limitations defense when the record indicates that the conspiratorial acts fell outside that period. *U.S. v. Fuchs*, 218 F.3d 957 (9th Cir. 2000).

### 9.04.07.08 Overt Act

An overt act is defined as “some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.” *Devitt &
Blackmar, §28.07. While most conspiracy statutes (including the general conspiracy statute, 18 U.S.C. §371) require that the government prove that one of the co-conspirators committed at least one of the alleged overt acts in furtherance of the conspiracy, some conspiracy statutes do not require proof of an overt act. See, e.g., U.S. v. Shabani, 513 U.S. 10 (1994) (no overt act required for drug conspiracy prosecution); 21 U.S.C. §846 (conspiracy to manufacture, possess, distribute, or dispense controlled substances); 21 U.S.C. §963 (conspiracy to import or export controlled substances); 18 U.S.C. §2384 (seditious conspiracy).

It is appropriate for the court to instruct the jury that the overt act may be an entirely innocent act, as long as it is knowingly committed by a conspirator in an effort to accomplish the object of the conspiracy. See Chavez v. U.S., 275 F.2d 813 (9th Cir. 1960) (babysitting for children of couple engaged in heroin importation would be sufficient to be an overt act if prosecution had proven it was an act in furtherance of the conspiracy). If appropriate, counsel should request an instruction that concealment of the scheme is not an overt act in furtherance of the conspiracy after the objective of the conspiracy has been attained or the conspiracy has otherwise terminated. See U.S. v. Davis, 533 F.2d 921, 928-29 (5th Cir. 1976).

9.04.08 Lesser Included Offenses

The strength of the government’s case should govern the strategic decision of whether or not to request a lesser included offense instruction. Clearly, a defendant increases the likelihood of a conviction of some crime by submitting a lesser included offense instruction, as such instructions allow the jury to return a “compromise” guilty verdict on a lesser charge. If the government has a strong case with respect to the charged crime, it may be a defense victory to obtain a conviction on a lesser included offense; if, however, the government’s case is not particularly strong, a lesser included offense may be an unnecessary invitation to the jury to convict for a lesser crime.

A defendant is entitled to a lesser-included offense instruction only where the evidence supports a conviction for the lesser-included offense. U.S. v. Walker, 75 F.3d 178, 180 (4th Cir. 1996), overruled on other grounds by Carter v. U.S., ___ U.S. ___, 120 S. Ct. 2159 (2000). The rationale behind lesser included offense instructions is that they ensure “that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Beck v. Alabama, 447 U.S. 625, 634 (1980). It is reversible error to refuse a lesser included offense instruction that is properly requested and is appropriate to the case. See Keeble v. U.S., 412 U.S. 205, 208 (1973); Vickers v. Ricketts, 798 F.2d 369 (9th Cir. 1986) (failure to instruct on lesser included offense denied defendant due process and provided basis for habeas relief); but see Hopkins v. Reeves, 524 U.S. 88, 96-97 (1998) (state trial courts not required to instruct jury on offenses that were not lesser included offenses of charged crime under state law).

A lesser included offense instruction is only appropriate, however, where the elements of the lesser offense are a subset of the elements of the greater offense. U.S. v. Mosley, 126 F.3d 200, 203 (3d Cir. 1997). “Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).” Id. (quoting Schmuck v. U.S., 489 U.S. 705, 716 (1989)); U.S. v. Baker, 985 F.2d 1248, 1259 (4th Cir. 1993). Nor is an instruction warranted where a jury could not have
found a defendant guilty of the lesser included offense and acquitted on the greater. *See*, *e.g.*, *U.S. v. Brown*, 26 F.3d 119, 120 (11th Cir. 1994) (no basis for simple possession instruction when defendant possessed two kilograms of 93% pure cocaine and admitted he was going to sell it); *U.S. v. Fitzgerald*, 89 F.3d 218, 221 (5th Cir. 1996) (no basis for possession instruction when jury could not have rationally concluded drugs seized were not crack cocaine).

Although Fed. R. Crim. P. 31 generally requires that one of the parties request a lesser included offense instruction, the court may *sua sponte* give a lesser included offense instruction if the lesser offense is clearly included in the greater and omission of the instruction would greatly prejudice the defendant. *See* *Walker v. U.S.*, 418 F.2d 1116, 1119-20 (D.C. Cir. 1969) (judge properly gave instruction, over defense objection, to larceny as lesser included offense of robbery). In most cases though, the court need not give the instruction on its own motion; defense counsel must request the instruction or object to its absence. *U.S. v. Lone Bear*, 579 F.2d 522, 523 (9th Cir. 1978); *U.S. v. Carey*, 475 F.2d 1019, 1022 (9th Cir. 1973). The government may also request a lesser offense instruction if the allegations in the indictment sufficiently notified the defendant of the lesser charge. *See* *U.S. v. Martin*, 783 F.2d 1449, 1452 (9th Cir. 1986), *overruled on other grounds* by *Schmuck v. U.S.*, 489 U.S. 705 (1989). If the jury convict the defendant of both the greater and lesser offenses, the conviction on the lesser offense must be vacated. *U.S. v. Crawford*, 576 F.2d 794, 801 (9th Cir. 1978). If the court acquits the defendant on the greater offense on a Rule 29 motion, however, the lesser offense still may be submitted to the jury. *See* *U.S. v. LoRusso*, 695 F.2d 45, 52 (2d Cir. 1982) (submission of reduced count of simple possession to jury after dismissal of possession with intent to distribute count was proper).

If a lesser included offense instruction is given, defense counsel should request a separate instruction as to how the jury should consider the lesser included charge. Courts generally instruct the jury to consider the lesser included offense only if it first unanimously finds the defendant not guilty of the greater offense. Although this instruction is not error if the defendant does not dispute it, it is reversible error to refuse a request for an instruction that the jury must first consider the greater offense and then consider the defendant’s guilt or innocence of the lesser offense if the jury acquits on the greater offense or is unable to reach a unanimous verdict on the greater offense. *U.S. v. Warren*, 984 F.2d 325, 330-31 (9th Cir. 1993); *U.S. v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978); *see also Catches v. U.S.*, 582 F.2d 453, 459 (8th Cir. 1978).

Examples of lesser included offense instructions to which a defendant may be entitled include:

2. Simple possession of a controlled substance to a charge of possession with intent to distribute, *Guam v. Rosario*, 625 F.2d 811, 812 (9th Cir. 1979); *U.S. v. LoRusso*, 695 F.2d 45, 52 (2d Cir. 1982);
3. Conspiracy to import a controlled substance to a charge of conducting a continuing criminal enterprise, *U.S. v. Michel*, 588 F.2d 986, 1000 (5th Cir. 1979);
4. Assault to a charge of rape and assault to commit rape, *Joe v. U.S.*, 510 F.2d 1038, 1040 (10th Cir. 1975);
5. Assault with a deadly weapon to a charge of assault with intent to murder, *U.S. v. Stolarz*, 550 F.2d 488, 491 (9th Cir. 1977);
(6) simple assault to a charge of aggravated assault, *Keeble v. U.S.*, 412 U.S. 205, 213 (1973);
(7) assault with a dangerous weapon to a charge of armed robbery, *U.S. v. Scriber*, 499 F.2d 1041, 1048 (D.C. Cir. 1974);
(8) misdemeanor obstruction of an officer without use of force to a charge of forcible assault on a federal officer, *U.S. v. Giampino*, 680 F.2d 898, 901-902 (2d Cir. 1982);
(9) simple assault to a charge of assault resulting in serious bodily injury, *U.S. v. Johnson*, 637 F.2d 1224, 1243 (9th Cir. 1980) (*subsequent history omitted*);
(10) voluntary manslaughter to a charge of second-degree murder, *U.S. v. Celestine*, 510 F.2d 457, 460 (9th Cir. 1975); *see also U.S. v. Anderson*, 201 F.3d 1145, 1147 (9th Cir. 2000) (involuntary manslaughter to a charge of voluntary manslaughter);
(11) offering and receiving a gratuity to a charge of bribery, *U.S. v. Crutchfield*, 547 F.2d 496 (9th Cir. 1977); *U.S. v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974); *U.S. v. Harary*, 457 F.2d 471 (2d Cir. 1972);
(12) failure to file tax return to a charge of attempted tax evasion if failure to file is one of the means alleged in support of the tax evasion charge, *U.S. v. Buckley*, 586 F.2d 498 (5th Cir. 1978);
(13) willful failure to pay taxes to willfully attempting to evade and defeat payment of federal income taxes, *U.S. v. DeTar*, 832 F.2d 1110 (9th Cir. 1987) (held reversible error);
(14) grand larceny to a charge of armed robbery, *U.S. v. Dixon*, 469 F.2d 940, 942 (D.C. Cir. 1972);
(15) unlawful entry to a charge of burglary, *U.S. v. Whitaker*, 447 F.2d 314, 319 (D.C. Cir. 1971);
(16) careless driving to a charge of vehicular manslaughter, *U.S. v. Pino*, 606 F.2d 908, 915 (10th Cir. 1979);
(17) obstruction of the mails to a charge of taking a package from an authorized depository with design to open, secrete, or embezzle (18 U.S.C. §1702), *U.S. v. Brown*, 551 F.2d 236 (8th Cir. 1977); and
(18) unlawful imprisonment as lesser included offense to kidnaping, *Villafuerte v. Lewis*, 75 F.3d 1330, 1337-338 (9th Cir. 1996) *but see Villafuerte v. Stewart*, 111 F.3d 616, 623-24 (9th Cir. 1997) (finding no reversible error in failing to give instruction of unlawful imprisonment as a lesser included offense to kidnaping when there is no intolerable all-or-nothing situation).

Counsel must be creative in drafting lesser included offense instructions. An accessory after the fact instruction automatically halves the maximum penalty and should be requested when there is some dispute as to the defendant’s participation before the completion of the crime. *See Orlando v. U.S.*, 387 F.2d 348 (9th Cir. 1967). Some unsuccessful attempts to create lesser included offenses include:
(1) aiding and abetting illegal entry not a lesser included offense to a charge of transporting illegal aliens, *U.S. v. Pruitt*, 719 F.2d 975 (9th Cir. 1983);
(2) use of a telephone facility to obtain personal use quantity of cocaine not a lesser included offense for charge of using telephone to facilitate drug transaction (*see 21 U.S.C. §843*), *U.S. v. Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985);
(3) interfering with a flight crew not a lesser offense for charge of air piracy (49 U.S.C. §1472), *U.S. v. Busic*, 592 F.2d 13, 24 (2d Cir. 1978);
(4) neither brandishing a deadly weapon in the presence of two or more persons nor breach of the peace are lesser offenses for charge of assault, *Government of Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3d Cir. 1977);

(5) misdemeanor of conspiring to obtain unlawful entry of alien by means of false and misleading representations not a lesser offense for charge of conspiring to bring alien into the United States, *U.S. v. Wishart*, 582 F.2d 236 (2d Cir. 1978);

(6) bank larceny is not necessarily a lesser included offense of bank robbery, *U.S. v. Gregory*, 891 F.2d 732 (9th Cir. 1989);

(7) sexual abuse and sexual abuse of a minor are not lesser included offenses of aggravated sexual abuse, *U.S. v. Rivera*, 43 F.3d 1291 (9th Cir. 1995).

9.04.09 Witness Credibility

The credibility of certain witnesses can prove to be dispositive in a criminal case. Evidence that can have an effect on this issue includes the defendant’s own out-of-court statements as well as testimony from accomplices, informants, and biased or immunized witnesses.

9.04.09.01 Defendant's Out-of-Court Statements

Defense counsel always should request a cautionary instruction to mitigate damage from a defendant’s out-of-court statements. Such an instruction should include language that the jury should weigh out-of-court statements cautiously and carefully, and that a statement must be disregarded entirely unless the government has proved beyond a reasonable doubt that the statements were voluntarily made. *See Jackson v. Denno*, 378 U.S. 368 (1964); 18 U.S.C. §3501(a). Failure to give a requested instruction that the jury consider the statement in light of the circumstances surrounding the statements may be grounds for reversal. *U.S. v. Miller*, 603 F.2d 109, 110 (9th Cir. 1979) (failure to instruct jury as to voluntariness element of defendant’s statement warranted reversal); *U.S. v. Barry*, 518 F.2d 342, 347-48 (2d Cir. 1975) (plain error to omit this instruction); but see *U.S. v. Fera*, 616 F.2d 590, 592-93 (1st Cir. 1980) (trial court’s failure to instruct jury to give defendant’s statements “whatever weight they considered appropriate” held not to be error).

9.04.09.02 Accomplice Testimony

There is sound reason for a jury to examine closely the testimony of a former accomplice because his credibility is suspect, irrespective of which side has called him to testify or whether his testimony is exculpatory or inculpatory. *U.S. v. Bolin*, 35 F.3d 306, 308 (7th Cir. 1994). An accomplice is “one who could have been indicted for the same offense either as an accessory or a principal.” *People of the Territory of Guam v. Dela Rosa*, 644 F.2d 1257, 1260-61 (9th Cir. 1980). When an accomplice testifies, “it is proper to alert the jury to the possibility of perjured testimony.” *Bolin*, 35 F.3d at 308 (citing *U.S. v. Nolte*, 440 F.2d 1124, 1126-27 (5th Cir. 1971)); *see also U.S. v. McGuire*, 27 F.3d 457, 462 (10th Cir. 1994).
The court’s refusal to give an accomplice instruction is prejudicial error when the testimony is important to the case, especially when other factors, such as drug addiction or payment for information, indicate that the testimony might be unreliable. *U.S. v. Bernard*, 625 F.2d 854 (9th Cir. 1980). Mere admonishment by defense counsel cautioning the jury about how it should consider accomplice testimony is not sufficient. *Id.* at 857-58. In certain situations, such as if an accomplice provides important testimony that is substantially uncorroborated, and other indicators of unreliability are present, then the trial court’s failure to give the accomplice instruction is plain error. *See U.S. v. Martin*, 489 F.2d 674, 677 n.3 (9th Cir. 1973).

**9.04.09.03 Informant/Addict Witnesses**

If an informant testifies for money, immunity from prosecution, or for any other form of remuneration, the jury should be instructed to examine the informant’s testimony with greater care than that of an ordinary witness. It is reversible error to refuse the instruction if a witness gathered information “in an undercover capacity for the government.” *See Guam v. Dela Rosa*, 644 F.2d at 1259-60. A government agent is not, however, an informant. *U.S. v. Hoyos*, 573 F.2d 1111 (9th Cir. 1978). This instruction is similar to the accomplice instruction in both content and application. *Dela Rosa*, 644 F.2d at 1260.

If the informant is also a drug addict, the court should further instruct the jury that his testimony should be considered with great care because, since an addict has a need for drugs and money to support his habit, he fears incarceration more than most people because he loses access to drugs if he is imprisoned. *Government of Virgin Islands v. Hendricks*, 476 F.2d 776 (3d Cir. 1973); *see also U.S. v. Ochoa-Sanchez*, 676 F.2d 1283 (9th Cir. 1982) (addict instruction is appropriate if witness is a heroin addict). Some circuits have adopted a four-part test for determining the applicability of this instruction: (1) was the informant an addict at the time of trial, not at the time of the transactions; (2) was her addiction subject to cross-examination; (3) was the jury instructed that the addict’s testimony should be particularly scrutinized; and (4) was the addict’s testimony corroborated? *U.S. v. Manganellis*, 864 F.2d 528, 543 (7th Cir. 1988); *U.S. v. Shigemura*, 682 F.2d 699, 702-03 (8th Cir. 1983); *but see U.S. v. Burrows*, 36 F.3d 875, 879 (9th Cir. 1994) (mere fact that person said “I am a recovering cocaine addict” is not sufficient to warrant an addict instruction).

The Eleventh Circuit has held that no plain error occurred when the defendant did not receive a special jury instruction on the credibility of a government informant in a case in which the testimony implicating the defendant came solely from the informant. *U.S. v. Williams*, 59 F.3d 1180, 1183 (11th Cir. 1995). At trial, the district judge cautioned the jury on the special credibility issue posed by the testimony of contingently motivated witnesses, and, in closing argument, the prosecutor expressly told the jury that the testimony of a person in the informant’s position should be viewed with skepticism. In light of these unusual circumstances, the Court concluded that “[t]he informant’s economic involvement with the success of the government in this prosecution was spelled out in detail in the facts. There is no doubt whatsoever that the jury was well aware that the testimony of [the informant] was to be viewed with caution. That is the only function of a special instruction.” *Williams*, 59 F.3d at 1184. Of course, the
possible corollary from the Eleventh Circuit’s reasoning in Williams is that for those cases in which the facts do not “spell out” the informant’s role and motivation, a special instruction may be appropriate.

9.04.09.04 Immunized Witnesses

If the government calls a witness who has been granted immunity, the defendant is entitled to an instruction similar to the accomplice or informant instruction. In such a case, the jury must be instructed that the immunized witness’ testimony should be examined with greater caution than the testimony of an ordinary witness. In U.S. v. Winter, 663 F.2d 1120, 1134 (1st Cir. 1981), the court gave the following instruction regarding an immunized witness:

This testimony should be examined by you with greater care than the testimony of an ordinary witness. You should consider that testimony and whether it is being affected by his personal interest, his personal advantage, any prejudice he might have against a defendant or any personal antagonism he might have. Also, you may consider the record of prior conviction in your evaluation of that witness’s testimony; and, after such consideration, you may give the testimony . . . such weight as you believe it deserves.

Id. at 1134 n.24.

The First Circuit held this instruction to be acceptable. In its reasoning, the court noted that such an instruction often provides a fertile area of cross-examination for the defense, and that the instruction did not rise to the level of “judicial vouching” due to the inclusion of explicitly cautionary language in the instruction. Id. at 1134. The court opined that overall, “[the] instruction on this point benefitted rather than injured the appellants.” Id.

Defense counsel cannot compel an immunity instruction, however, if the immunized testimony is exculpatory. U.S. v. Wuliger, 981 F.2d 1497, 1509 (6th Cir. 1992). Moreover, if the defense was able to fully develop the immunity issue on cross-examination and forcefully argue it in summation, a court’s refusal to instruct as to a witness’ immunity may be held not to prejudice the defendant. U.S. v. Morgan, 555 F.2d 238, 243 (9th Cir. 1977).

9.04.10 Informing Jury of Penalty

It is well settled that when a jury has no sentencing function, it should be admonished to “reach its verdict without regard to what sentence might be imposed.” Shannon v. U.S., 512 U.S. 573, 579 (1994) (quoting Rogers v. U.S., 422 U.S. 35, 40 (1975)). Unless a statute specifically requires jury participation in determining punishment, the jury shall not be informed of the possible penalties. U.S. v. Parrish, 925 F.2d 1293, 1299 (10th Cir. 1991) (refusal to instruct jury regarding mandatory minimum sentences), overruled on other grounds by U.S. v. Wacker, 72 F.3d 1453 (10th Cir. 1996).

In Shannon, the high court addressed this issue within the realm of the insanity defense. The specific issue before the Court was whether an instruction informing the jury of the consequences of a “Not
Guilty by Reason of Insanity” (NGRI) verdict is required under 18 U.S.C. §§17, 4241-4247, the “Insanity Defense Reform Act” (IDRA). Previously, in *Lyles v. U.S.*, 254 F.2d 725, 728 (D.C. Cir. 1957) (en banc), the D.C. Circuit had held that jurors had a “right to know” the meaning of an NGRI verdict “as accurately as [they] kno[w] the meaning by common knowledge of the other two possible verdicts.” However, in *Shannon*, the Supreme Court relied on legislative history, statutory interpretation, and general principles of law in holding that the IDRA does not require an instruction concerning the consequences of an NGRI verdict. *Shannon*, 512 U.S. 573. The Court did note, however, that “an instruction of some form may be necessary under certain limited circumstances.” *Id.* at 587. As the *Shannon* dissenter noted, the decision effectively overruled *Lyles*. *Shannon*, 512 U.S. at 588 (Stevens, J., dissenting).

However, this is not to say that counsel should never attempt to inform the jury of the potential penalty faced by the defendant. One case in which a federal district court explicitly sanctioned commentary to the jury regarding the potential penalties in a case was *U.S. v. Datcher*, 830 F. Supp. 411 (M.D. Tenn. 1993). There, defendant, who faced 10-25 years in prison on three drug-related counts, contended that his probable sentence was “draconian” and sought to argue the issue of punishment to the jury. Citing the political history of jury nullification, the court held that the defendant was entitled to argue this issue to the jury. The court based its ruling on the importance of allowing the jury “to decide whether a sentencing law should be nullified.” *Id.* at 412-13. However, it should be noted that the Sixth Circuit explicitly repudiated *Datcher* in *U.S. v. Chesney*, 86 F.3d 564, 574 (6th Cir. 1996), stating that *Datcher* was “contrary to Supreme Court pronouncements on this issue.”

### 9.04.10.01 Informing the Jury of the Possibility of Parole

Two recent cases in this area appear to reach opposite conclusions. In *Coleman v. Calderon*, 210 F.3d 1047 (9th Cir. 2000), the Ninth Circuit upheld the district court’s grant of a *habeas* petition on the grounds that it was prejudicial error for the trial court to instruct the jury that the defendant’s sentence of life without parole could be commuted to a lesser sentence after the prosecutor had argued that the defendant presented a continuing threat to society. The Court stated, “[n]ot only was the instruction misleading, it was constitutionally infirm because it discouraged the jury from giving due weight to [the defendant’s] mitigating evidence.” *Id.* at 1050. However, in *Ramdass v. Angelone*, ___ U.S. ___, 120 S. Ct. 2113 (2000), the Supreme Court held that a defendant who had been sentenced to death was not entitled to have the trial court instruct the jury that, under the state’s “three-strikes” law, he would not have been eligible for parole had the jury voted against a death sentence. While these cases certainly are not directly opposed to one another, they indicate that the two courts involved appear to be headed in opposite directions in this area of law.

### 9.05 APPRENDI ISSUES

#### 9.05.01 Special Circumstances Murder Instruction Ruled a Sentencing Factor

In *Arreguin v. Prunty*, 208 F.3d 835 (9th Cir. 2000), petitioner sought *habeas* relief on the grounds that because the trial court’s instructions to the jury regarding the evidence required to find him guilty of murder with special circumstances were erroneous, he had been denied his Sixth Amendment right
to have each element of the offense proven beyond a reasonable doubt. The district court agreed with petitioner and granted the writ. The Ninth Circuit reversed, holding that because the special circumstances enhancement did not alter the maximum penalty and did not dispense with the presumption of innocence or relieve the prosecutor’s burden of proving guilt, it was a sentencing factor rather than an element of the offense. *Id.* at 838.

Because *Arreguin* was decided in March 2000, three months before *Apprendi*, it is unclear whether or not the Supreme Court’s decision in *Apprendi* would have affected the Ninth Circuit’s reasoning in the case. The key element of *Apprendi* is the notion that anything that increases the maximum penalty to which a defendant is exposed must be submitted to the trier of fact and proven beyond a reasonable doubt. *Apprendi v. New Jersey, ___ U.S. ___,* 120 S. Ct. 2348 (2000). Since “special circumstances” is an enhancement that would appear to increase the maximum penalty to which a defendant is exposed, the Ninth Circuit’s holding in *Arreguin* may be open to a challenge based on *Apprendi*.

### 9.06 SUPPLEMENTAL INSTRUCTIONS

#### 9.06.01 Jury Deadlock

Named after *Allen v. U.S.*, 164 U.S. 492 (1896), jury deadlock charges “expressly direct jurors to reconsider their positions, and address the minority or dissenting jurors alternatively, when a majority is for conviction or when a majority is for acquittal.” *U.S. v. Cortez*, 935 F.2d 135, 140 n.4 (8th Cir. 1991) (quoting *Potter v. U.S.*, 691 F.2d 1275, 1277 (8th Cir. 1982)). This instruction is known as “the dynamite charge. [Therefore,] [l]ike dynamite, it should be used with great caution, and only when absolutely necessary.” *U.S. v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) (*Allen* charge should not be used where jury had only deliberated three hours and had not reported problems in agreeing); see *U.S. v. Guglielmini*, 598 F.2d 1149, 1153 (9th Cir. 1979). Defense counsel should almost always object to the proposed *Allen* instruction and should move for a mistrial if the jury is deadlocked. As noted in *Bollenbach v. U.S.*, 326 U.S. 607, 612 (1946), “[p]articularly in a criminal trial, the judge’s last word is apt to be the decisive word.”

The trial court’s discretion to give the *Allen* instruction varies greatly from circuit to circuit. In some circuits, the instruction may be given before the jury indicates it is unable to reach a verdict. See *U.S. v. Rodriguez-Mejia*, 20 F.3d 1090 (10th Cir. 1994) (although not preferred, it is not error to give *Allen* instruction before jury declares deadlock); *Gov’t of Canal Zone v. Fears*, 528 F.2d 641 (5th Cir. 1976). In *U.S. v. Mason*, 658 F.2d 1263 (9th Cir. 1981), the Ninth Circuit reversed a conviction because the judge gave an *Allen* instruction that, along with other defects, emphasized the time and expense of conducting a retrial. *But see U.S. v. Bonam*, 772 F.2d 1449, 1450-451 (9th Cir. 1985) (reference to expense of retrial “stands at the brink of impermissible coercion”). In *U.S. v. Brown*, 634 F.2d 1069 (7th Cir. 1980), the Seventh Circuit held an *Allen* charge may not be given during deliberations unless the same instruction had been given prior to the beginning of deliberations. Including the *Allen* charge in the general instructions given at the conclusion of the case is the preferable way to avoid the coercive effect of the *Allen* charge. See *U.S. v. Williams*, 624 F.2d 75 (9th Cir. 1980); *U.S. v. McKinney*, 822 F.2d 946, 951 (10th Cir. 1987). Note that in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the Court found no impermissible
coercion where the deadlocked jury was instructed merely to consult and consider each other’s views, thus not singling out the minority jurors.

In *U.S. v. Strothers*, 77 F.3d 1389, 1391 (D.C. Cir. 1996), the D.C. Circuit affirmed its adherence to the American Bar Association’s “Alternative A” deadlock charge in the model jury instructions for the District of Columbia. *Criminal Jury Instructions for the District of Columbia*, Instruction 2.91, Alternative A (4th ed.). The court rejected the district court’s use of “Alternative B” in the instruction manual, noting that “Alternative B” omitted an “important element of the ABA standard,” namely “that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.” *Strothers*, 77 F.3d at 1391 (citing *U.S. v. Berroa*, 46 F.3d 1195, 1197 (D.C. Cir. 1995)).

When the jury reports a deadlock, it is a *per se* error for the court to inquire about the numerical division of the jury. *U.S. v. Warfield*, 97 F.3d 1014, 1022 (9th Cir. 1996); *Brasfield v. U.S.*, 272 U.S. 448 (1926). Under some circumstances, disclosure by the jury of the numerical division, even without the court’s inquiry, results in an *Allen* charge being deemed coercive and impermissible. *Williams v. U.S.*, 338 F.2d 530, 532-33 (D.C. Cir. 1964). See also *U.S. v. Sae-Chua*, 725 F.2d 530, 531-32 (9th Cir. 1984) (after jury foreman sent a note to the judge stating that the majority of the jury favored conviction but that one juror persisted in voting not guilty, court gave *Allen* charge; Ninth circuit reversed, holding that the *Allen* charge was “bound to be coercive” as to the hold-out juror). Factors to be considered when examining the propriety of an *Allen* charge are: (1) the content of the instruction; (2) the length of deliberation after the *Allen* charge; (3) the total length of deliberation; and (4) any indicia that the jury was coerced or pressured. *Warfield*, 97 F.3d at 1022. In the event an *Allen* charge is given, defense counsel should attempt to build an appellate record by stating for the record any facial expressions of the jurors, the judge’s tone of voice when reading the instruction, the prosecutor’s reaction, or any other indicia of coerciveness that may arise.

**9.06.02 Response to Jury’s Question**

In *Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727 (2000), the trial judge responded to a question from the jury regarding mitigating evidence by pointing to a specific paragraph of a jury instruction. The Supreme Court held that reference to a specific paragraph of a constitutionally sufficient instruction was not unconstitutional; to prove a constitutional violation, petitioner would have to show that the jury felt it was restrained from considering some mitigating evidence. *Id.* at 732.

**9.07 CONCLUSION**

From the outset of a case, defense counsel has the obligation to creatively and intensely involve him or herself in the jury instruction process. From researching relevant jury instruction law, to arguing for instructions, to utilizing the court’s instructions during closing argument, the manner and success with which defense counsel employs jury instructions is central to his or her chances for success. In order to accomplish this task, defense counsel must carefully analyze various factors, including the facts and issues of the case at bar, the applicable substantive and procedural law, and the general concepts that encompass
the charging process. Most importantly, however, counsel simply must devote sufficient time and resources to master all the issues that may be encountered during the jury instruction process. Just as the modern importance of the jury cannot be overstated, neither can the importance of the instructions with which the jury will judge the culpability of your client.

CHAPTER 10

MAJOR PROVISIONS OF THE FEDERAL RULES OF EVIDENCE

by

Mario G. Conte

10.01  INTRODUCTION

Due to the availability of major treatises construing the Federal Rules of Evidence, this section will not provide an in-depth analysis of the rules and the case law concerning them. Rather, significant decisions of the Ninth Circuit Court of Appeals and other courts will be presented according to rule number with a brief parenthetical about the holding.

The text of amended Rules 103 (a)(2), 404 (a)(1), 701, 702, 703, 803 (6) and 902 effective December 1, 2000 are included in this chapter.

10.02  RULE 104 -- PRELIMINARY QUESTIONS

10.02.01  Supreme Court


10.03  RULE 106 -- REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

10.03.01  Second Circuit

U.S. v. Rivera, 61 F.3d 131 (2d Cir. 1995) (stipulation of offense conduct that was incorporated by reference into codefendant’s plea agreement was not admissible under doctrine of completeness).

10.03.02  Ninth Circuit
U.S. v. Dorrell, 758 F.2d 427 (9th Cir. 1985) (because necessity defense excluded, it was proper to redact defendant's confession to exclude his motivations for committing the crime; omitted portions were not exculpatory).

10.04 RULE 201 -- JUDICIAL NOTICE OF ADJUDICATIVE FACTS

10.04.01 Ninth Circuit

U.S. v. Chapel, 41 F.3d 1338 (9th Cir. 1994) (court can take judicial notice of federally insured status of bank).

10.05 RULE 401 -- DEFINITION OF “RELEVANT EVIDENCE”

10.05.01 Ninth Circuit

U.S. v. Blaylock, 20 F.3d 1458 (9th Cir. 1994) (district court abused its discretion in excluding defendant’s medical records indicating that defendant had back injury which would have made it difficult for him to have run after girlfriend as officers testified).

U.S. v. Thompson, 37 F.3d 450 (9th Cir. 1994) (when the defense is lack of knowledge, the lack of fingerprint evidence is a relevant fact which may be elicited by defense counsel during direct, cross and incorporated into closing statement).

10.06 RULE 402 -- RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

10.06.01 Ninth Circuit

U.S. v. Thomas, 32 F.3d 418 (9th Cir. 1994) (defendant was entitled to present testimony of customers not named in indictment regarding impact that pricing scheme had on them).

10.07 RULE 403 -- EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

10.07.01 Supreme Court

Old Chief v. U.S., 519 U.S. 172 (1997) (district court abused its discretion under FRE 403 when it spurned defendant’s offer to concede a prior judgment and admits the full judgment record over the defendant’s objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the elements of prior conviction).

10.07.02 Sixth Circuit
U.S. v. Merriweather, 78 F.3d 1070 (6th Cir. 1996) (taped conversations relating to uncharged conspiracy were more substantially prejudicial than probative and should not have been admitted, even if admitted for ostensible purpose of proving only that voice on tape relating to charged conspiracy was defendant’s).
10.07.03 Eighth Circuit

*U.S. v. LeCompte*, 131 F.3d 767 (8th Cir. 1997) (evidence offered under rule permitting evidence of similar crimes in child molestation cases is subject to requirements of rule permitting court to exclude relevant evidence if its probative value is outweighed by other concerns).

10.07.04 Ninth Circuit

*U.S. v. Cabrera*, 222 F.3d 590, 596 (9th Cir. 2000) (improper to admit testimony of a law enforcement officer that included repeated references to the co-defendant’s Cuban origin and generalizations about the Cuban community, where such comments created the perception that Cuban drug dealing was pervasive in Las Vegas and effectively placed the Las Vegas’s Cuban community on trial).

*U.S. v. Benavidez-Benavidez*, 217 F.3d 720, 725 (9th Cir. 2000) (results of a polygraph examination excluded under Fed. R. Evid. 403, where court properly determined that admission of polygraph evidence presented special risk that jury might unduly weigh the testimony of the polygrapher more heavily than other testimony).

*U.S. v. Takahashi*, 205 F.3d 1161, 1164 (9th Cir. 2000) (court properly admitted evidence of the defendant’s gang affiliation because it was relevant to the bias of an exculpatory witness, a fellow gang member, and because court minimized prejudicial effect by offering to give a limiting instruction).

*U.S. v. Hankey*, 203 F.3d 1160, 1173 (9th Cir. 2000) (court did not err in admitting expert testimony of gang membership of a co-defendant who provided exculpatory testimony where it issued “an adamant limiting instruction” restricting the use of the expert testimony for evaluation of the co-defendant’s credibility).

*U.S. v. Lawrence*, 189 F.3d 838 (9th Cir. 1999) (in prosecution for mail and bankruptcy fraud, admission of defendant’s unconventional marriage and lifestyle is prejudicial).

*U.S. v. Mitchell*, 172 F.3d 1104 (9th Cir. 1999) (evidence of poverty inadmissible to show motive when government fails to show abrupt and unexplained improvement in financial condition).

*U.S. v. Scholl*, 166 F.3d 964 (9th Cir. 1999) (expert testimony that defendant was compulsive gambler who experienced thought distortion and “denial” was excludable).

*U.S. v. Neill*, 166 F.3d 943 (9th Cir. 1999) (prejudicial effect of evidence of defendant’s work release status at time of bank robbery was substantially outweighed by its probative value as showing that defendant and his accomplice knew each other, that defendant had checked out of work release center during time in which crime occurred, and that when defendant returned to center that night he had money to pay off fine he owed).
**U.S. v. Alviso**, 152 F.3d 1195 (9th Cir. 1998) (defendant did not waive challenging evidence of prior convictions by not objecting when court read indictment alleging them).

**U.S. v. Merino-Balderrama**, 146 F.3d 758 (9th Cir. 1998) (court should not allow jury to view pornographic material when government can prove scienter from its packaging).

**People of the Territory of Guam v. Shymanovitz**, 157 F.3d 1154 (9th Cir. 1998) (testimony regarding sexually explicit gay adult magazines found in house of defendant charged with child sexual abuse was not harmless error).

**U.S. v. Ellis**, 147 F.3d 1131 (9th Cir. 1998) (admission of *Anarchist Cookbook* violated Rule 403 in that Ellis was charged with receipt and possession of stolen explosives, intent was not an element of the charge and possession of the book was not relevant).

**U.S. v. Pierson**, 121 F.3d 560 (9th Cir. 1997) (threats to co-conspirator’s family after his arrest were relevant to explain why witness was cooperating with the government in exchange for protection).

**U.S. v. Hernandez**, 109 F.3d 1450 (9th Cir. 1997) (district court abused its discretion in permitting the government to introduce an unredacted certified copy of the felony judgment which recited that defendant had been convicted of burglary, despite the offer to stipulate to a felony conviction).

**U.S. v. Bradley**, 5 F.3d 1317 (9th Cir. 1994) (extrinsic evidence of separate homicide unfairly prejudicial; the evidence was vague, and the motive for the other offense was dissimilar from the charged offense).

**U.S. v. Payne**, 944 F.2d 1458 (9th Cir. 1991) (evidence of sex abuse victim's prior sexual conduct inadmissible; evidence not admissible to show victim's motivation to testify against foster father based on discipline arising out of the sexual incident), cert. denied, 503 U.S. 975 (1992).

**U.S. v. Bland**, 908 F.2d 471 (9th Cir. 1990) (factual details in arrest warrant of torture/murder of young girl inadmissible; it would have been sufficient for jury to be informed warrant justified shooting of defendant, but nature of facts inadmissible).

**U.S. v. Layton**, 767 F.2d 549 (9th Cir. 1989) (tape recorded statements of Jim Jones during Jonestown Massacre while mass suicides were taking place, although incriminatory, were unduly prejudicial in light of sounds of dying children after being poisoned).

**U.S. v. Johnson**, 820 F.2d 1065 (9th Cir. 1987) (evidence of uncharged bank robbery admissible in bank robbery trial; probative value not substantially outweighed by prejudicial effect of crime involving intimidation).
U.S. v. Stewart, 770 F.2d 825 (9th Cir.) (exclusion of drug paraphernalia found in third parties’ house to prove person committed crime not error because it did not show the defendant was not a distributor; however, preferable to admit evidence), cert. denied, 474 U.S. 1103 (1986).
10.08 RULE 404 -- CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

10.08.01 (a) Character Evidence Generally

10.08.01.01 (1) Character of Accused

10.08.01.01.01 Ninth Circuit

U.S. v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) (personal use of marijuana not relevant to knowing possession of gun; prejudicial effect of methamphetamine recipes found in defendant’s truck at time of arrest outweighed their probative value).

Arizona v. Elmer, 21 F.3d 331 (9th Cir. 1994) (by asserting federal immunity defense, defendant did not place character in issue because he did not offer evidence of a pertinent trait of character).

U.S. v. Diaz, 961 F.2d 1417 (9th Cir. 1992) (defendant's lack of proneness to criminal activity is admissible character trait under generic definition of law-abidingness).

U.S. v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (testimony limited to defendant's background and childhood did not put his character at issue and therefore testimony regarding characteristics of a child molester was inadmissible).

10.08.02 (2) Character of Victim

10.08.02.01 Ninth Circuit

U.S. v. Keiser, 57 F.3d 847 (9th Cir. 1995) (victim’s violent character was not an essential element of defendant’s claim of self-defense or defense of another, so that specific act evidence was properly excluded).

People of the Territory of Guam v. Tedtaotao, 896 F.2d 371 (9th Cir. 1990) (victim's violent character inadmissible when government stipulates to it; given the stipulation, there was no doubt victim was initial aggressor and additional evidence would have been cumulative).

10.08.03 (b) -- Other Crimes, Wrongs, or Acts

10.08.03.01 Supreme Court


Huddleston v. U.S., 485 U.S. 681 (1988) (other act evidence may be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act; there is no need to prove other act by a preponderance of the evidence).

10.08.03.02 First Circuit

U.S. v. Williams, 985 F.2d 634 (1st Cir. 1993) (defendant's statement to girlfriend that he had "killed a couple of people," improperly admitted in narcotics case -- ruled harmless error).

U.S. v. Burke, 948 F.2d 23 (1st Cir. 1991) (police officer testimony that defendant had grabbed child to use as shield on previous day inadmissibly revealed bad character -- however error was harmless).

10.08.03.03 Third Circuit

U.S. v. Sampson, 980 F.2d 883 (3d Cir. 1992) (defendant's prior drug convictions could not be introduced in marijuana prosecution because government failed to explain basis for admission of the evidence and district court apparently did not balance probative value of the priors against prejudicial effect).

10.08.03.04 Fourth Circuit

U.S. v. Madden, 38 F.3d 747 (4th Cir. 1994) (evidence that defendant was drug user should have been excluded absent showing that drug usage gave rise to such financial need as would render evidence of drug usage relevant to motive for bank robbery).

U.S. v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) (testimony that defendant told witnesses about special recipe for cooking crack cocaine and used to sell it was inadmissible to show intent in prosecution for conspiracy to distribute cocaine and possession with intent to distribute; testimony was not relevant to anything about defendant's conduct or mental state during course of alleged conspiracy).

10.08.03.05 Fifth Circuit

U.S. v. Brown, 71 F.3d 1158 (5th Cir. 1995) (evidence of defendant’s prior conviction of possession with intent to distribute crack cocaine was not admissible under other crimes rule as evidence of identity).

Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) (performance evaluation report showing bad temper of sheriff admissible on issue of intent in civil rights action for excessive use of force).
U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc) (prior act evidence relevant to intent must show that person indulged himself in same state of mind in perpetration of both extrinsic and charged offenses), cert. denied, 440 U.S. 920 (1979).
10.08.03.06 Sixth Circuit

_ U.S. v. Blankenship_, 775 F.2d 735 (6th Cir. 1985) (evidence of prior crimes inadmissible to show predisposition to commit criminal acts generally; evidence did not tend to prove illegal conduct in the same way similar to the crimes charged).

10.08.03.07 Seventh Circuit

_ U.S. v. Wright_, 901 F.2d 68 (7th Cir. 1990) (tape-recorded telephone conversation in which defendant claimed to be a drug dealer was inadmissible to establish identity and was improperly admitted to establish criminal propensity -- conversation indicated defendant sold cocaine at wholesale level and the case concerned the selling of cocaine to an undercover police officer on the street).

10.08.03.08 Eighth Circuit

_ U.S. v. Heidebur_, 122 F.3d 577 (8th Cir. 1997) (conviction for knowingly possessing sexually explicit photographs of a minor vacated; evidence that defendant had previously molested his stepdaughter was inadmissible of other bad acts).

10.08.03.09 Ninth Circuit

_ U.S. v. Derington_, 229 F.3d 1243, 1247 (9th Cir. 2000) (error to admit evidence of the defendant’s illegal cutting of trees on another person’s property, a misdemeanor under California state law, where intent to violate a state regulation is not probative of intent to steal from or destroy government property).

_ U.S. v. James_, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (en banc) (ruling that police or court documents corroborating the decedent’s prior stabbing of several individuals and prior murder of another person were admissible to corroborate the testimony of the defendant regarding her reasons for fearing the decedent’s violent behavior and her motive for acting in self-defense against him under Fed. R. Evid. 404(b)).

_ U.S. v. Vega_, 188 F.3d 1190 (9th Cir. 1999) (evidence of prior border crossings are “other acts” evidence requiring notice).

_ U.S. v. Saenz_, 172 F.3d 60 (9th Cir. 1999) (evidence of defendant’s knowledge of victim’s prior acts of violence was admissible to show defendant’s state of mind for purposes of self-defense claim).

_ U.S. v. Blackstone_, 56 F.3d 1143 (9th Cir. 1995) (evidence that defendant had marijuana for his personal use in his possession at the time of his arrest was not relevant issue of whether he knowingly possessed firearm).
U.S. v. Moorehead, 57 F.3d 875 (9th Cir. 1995) (testimony elicited by district court, suggesting that defendant was drug dealer, was inadmissible evidence of uncharged bad act).

U.S. v. Santa-Cruz, 48 F.3d 1118 (9th Cir. 1995) (evidence of defendant’s prior arrest for possession of small amount of cocaine was relevant to show his knowledge that he was involved in drug transaction in connection with charged offense).

U.S. v. Santiago, 46 F.3d 885 (9th Cir. 1995) (gang-related evidence was not improper other crimes evidence and was admissible as proof of motive).

U.S. v. Vizcarra-Martinez, 66 F.3d 1006 (9th Cir. 1995) (admitting evidence that defendant possessed small, personal-use amount of methamphetamine when arrested as “other act” evidence was harmful error).

U.S. v. DeSalvo, 41 F.3d 505 (9th Cir. 1994) (videotape of presentation to hospital in which defendant was shown promoting her lost charge Medicare audit was admissible to show defendant’s knowledge and intent).

U.S. v. Hinton, 31 F.3d 817 (9th Cir. 1994) (evidence of defendant’s prior assaults on victim was admissible on element of intent).

U.S. v. Luna, 21 F.3d 874 (9th Cir. 1994) (uncharged acts not sufficiently similar to charged acts to prove identity).

U.S. v. Mayans, 17 F.3d 1174 (9th Cir. 1994) (insufficient showing of requisite link between knowledge gained from prior bad acts and knowledge at issue in instant case).

U.S. v. Quinn, 18 F.3d 1461 (9th Cir. 1994) (bank robberies had sufficiently distinct signature to make evidence of each relevant to show identity).

U.S. v. Arambula-Ruiz, 987 F.2d 599 (9th Cir. 1993) (prior heroin conviction admissible as bad act in current heroin trial to show knowledge even when similarity is lacking; similarity only required when admitted to show intent).

U.S. v. Garcia-Orozco, 997 F.2d 1302 (9th Cir. 1993) (prior heroin arrest inadmissible in marijuana case to prove knowledge; no logical basis to infer defendant knew car contained drugs simply because drugs previously found in car in which he was a passenger).

U.S. v. Palmer, 3 F.3d 300 (9th Cir. 1993) (admissions of defendant's statement regarding prior marijuana arrest as evidence of motive did not establish material element of manufacturing marijuana plants; theory of defense was defendant simply moved onto property without knowledge of the marijuana; error harmless).
U.S. v. Pitts, 6 F.3d 1366 (9th Cir. 1993) (other act evidence of gun purchase admissible to corroborate crucial prosecution testimony that witness was trusted intermediary who purchased guns for defendant and helped distribute cocaine).

U.S. v. Bibo-Rodriguez, 922 F.2d 1398 (9th Cir.) (government allowed to use defendant's subsequent arrest and incriminating statements to prove he knew he was transporting cocaine three months earlier; rule does not distinguish between prior and subsequent acts), cert. denied, 501 U.S. 1234 (1991).

U.S. v. Hill, 953 F.2d 452 (9th Cir. 1991) (testimony about prior drug use in conspiracy trial was inadmissible character evidence; prior acts not connected with development of conspiracy and was not inextricably intertwined with it).

U.S. v. McCourt, 925 F.2d 1229 (9th Cir. 1991) (rule does not permit evidence of prior bad acts of third party for the sole purpose of showing propensity towards criminal conduct), cert. denied, 502 U.S. 837 (1991).

U.S. v. Perkins, 937 F.2d 1397 (9th Cir. 1991) (other bank robberies not sufficiently similar to changed offense to be admissible by defense to show third party committed the crimes).


U.S. v. Hadley, 918 F.2d 848 (9th Cir. 1990) (prior acts of sexual misconduct relevant to intent in aggravated sex abuse case where evidence sufficient for jury to conclude they occurred and defendant was the actor; similarity of acts outweighed concerns regarding remoteness).

U.S. v. Ono, 918 F.2d 1462 (9th Cir. 1990) (prior heroin possession with intent to distribute similar enough to be admissible in manufacturing case; both crimes essentially commercial in nature).

U.S. v. Spillone, 879 F.2d 514 (9th Cir. 1989) (because of similarity of prior act and instant offense, 1971 prior conviction not so remote to require exclusion particularly when it was admissible to prove material element of case), cert. denied, 498 U.S. 878 (1990).

U.S. v. Brown, 873 F.2d 1265 (9th Cir.) (when motive is not an element of first degree murder, error to admit prior acts of violence when they did not establish a motive to commit the crime, but simply a propensity to engage in criminal activity), amended, 880 F.2d 1012 (9th Cir. 1989).

U.S. v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (error to allow evidence of defendant's homosexuality because it did not prove he molested the victim).
U.S. v. Bergman, 813 F.2d 1027 (9th Cir.) (filing of false W-4 form was "other crime" and could provide basis for failure to file federal income tax returns; they showed defendant claiming "exempt status" even though he incurred tax liability), cert denied, 484 U.S. 852 (1987).

U.S. v. Soliman, 813 F.2d 277 (9th Cir. 1987) (summary charts of other person's fraudulent insurance claims not "other crimes"; admissible to prove existence of mail fraud scheme and defendant's connection to it).

U.S. v. Alfonso, 759 F.2d 728 (9th Cir. 1985) (error to admit testimony of agent that, five years before, defendant had helped off load drugs from boat where conduct did not result in arrest or conviction; intent on one occasion proved little about intent to execute dissimilar act at a later time).

U.S. v. Campbell, 774 F.2d 354 (9th Cir. 1985) (eyewitness testimony regarding postal theft admissible, despite willingness to stipulate mail was stolen, as direct proof items were stolen, a necessary element of the crime).

U.S. v. Hodges, 770 F.2d 1475 (9th Cir. 1985) (subsequent act of extortion inadmissible in case of defrauding lending institutions; act was at most willingness to help conceal a witness' participation in the fraud, not effort to conceal defendant's participation).

U.S. v. McKoy, 771 F.2d 1207 (9th Cir. 1985) (prior act evidence admissible in stolen merchandise case to show nature of relationship between witness and defendant).

U.S. v. O'Connor, 737 F.2d 814 (9th Cir.) (prior aborted narcotics transactions admissible as background evidence to show existence of debt by informant to defendants which was to be repaid with 30 kilos of cocaine), cert. denied, 469 U.S. 1218 (1985).

U.S. v. Scott, 767 F.2d 1308 (9th Cir. 1985) (prior drug act evidence admissible to show that defendant intended to purchase two ounces of drugs to distribute rather than for personal use).

U.S. v. McCollum, 732 F.2d 1419 (9th Cir.) (prior bank robbery admissible as probative of defendant's intent when defense was that he acted under hypnosis), cert. denied, 469 U.S. 920 (1984).

U.S. v. Winters, 729 F.2d 602 (9th Cir. 1984) (testimony of other female victim in Mann Act trial relevant to establish modus operandi, motive, and intent where defendant raised the issue of voluntariness of women's conduct).

U.S. v. Bernal, 719 F.2d 1475 (9th Cir. 1983) (admission of drug paraphernalia evidence did not constitute character evidence; offer to prove that defendant was a participant in a drug distribution conspiracy).

U.S. v. Bowman, 720 F.2d 1103 (9th Cir. 1983) (admission of prior assault in current assault trial admissible and relevant to motive).
U.S. v. Andrini, 685 F.2d 1094 (9th Cir. 1982) (testimony concerning defendant's familiarity with starting fires admissible to show identity).

U.S. v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982) (prior similar act evidence admissible to prove modus operandi).

U.S. v. Bradshaw, 690 F.2d 704 (9th Cir. 1982) (evidence relating to sexual activity with kidnapped boy relevant to show defendant's dominion over the boy), cert. denied, 463 U.S. 1210 (1983).

U.S. v. Mehrmanesh, 689 F.2d 822 (9th Cir. 1982) (prior drug incident did not logically relate to issue in this drug importation case other than general criminal propensity; error amounted only to violation of an evidentiary rule).

U.S. v. Bramble, 641 F.2d 681 (9th Cir. 1981) (evidence in cocaine distribution trial that defendant had previously been convicted of possession of marijuana improperly admitted to rebut entrapment defense), cert. denied, 459 U.S. 1072 (1982).

U.S. v. Ezzell, 644 F.2d 1304 (9th Cir. 1981) (similarities between prior act and instant offense not sufficiently peculiar, unique or bizarre to be admitted on issue of identity).

U.S. v. Bettencourt, 614 F.2d 214 (9th Cir. 1980) (error to admit prior state arrest which had been expunged; harmless however).

U.S. v. Longoria, 624 F.2d 66 (9th Cir.) (when issue at trial was knowledge, proper to admit prior similar act of transporting aliens), cert. denied, 449 U.S. 858 (1980).

U.S. v. Calhoun, 604 F.2d 1216 (9th Cir. 1979) (admission of evidence connecting "bait bills" to a different bank robbery improper).

10.08.03.10 Eleventh Circuit

U.S. v. Philibert, 947 F.2d 1467 (11th Cir. 1991) (evidence that defendant had purchased cache of weapons and ammunition two months before he allegedly made threatening telephone call was not relevant and was inadmissible evidence of other wrongs).

10.08.03.11 D.C. Circuit

U.S. v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996) (en banc) (defendant’s unequivocal offer to concede elements of knowledge and intent precluded admission of bad acts evidence to prove those elements).

10.09 RULE 405 -- METHODS OF PROVING CHARACTER
10.09.01  (a) Reputation or Opinion

10.09.01.01  Fifth Circuit

*U.S. v. Hewitt*, 634 F.2d 277 (5th Cir. 1981) (character trait of lawfulness always relevant and may be introduced whether or not defendant takes the stand).

10.09.01.02  Eleventh Circuit

*U.S. v. Guzman*, 167 F.3d 1350 (11th Cir. 1999) (government can cross character witness regarding their knowledge of specific instances of defendant’s misconduct, but may not pose hypothetical questions that assume the guilt of the accused in the very case at bar, subject to the harmless error analysis).

10.09.02  (b) Specific Instances of Conduct

10.09.02.01  Third Circuit


10.09.02.02  Eighth Circuit

*U.S. v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996) (government’s good faith belief that defendant lied before federal grand jury did not in itself suffice to satisfy the first prerequisite for allowing prosecutor to cross-examine defendant’s character witness regarding whether witness knew that defendant had perjured himself before grand jury).

10.09.02.03  Ninth Circuit

*U.S. v. Thomas*, 134 F.3d 975 (9th Cir. 1998) (defendant asserting entrapment defense was entitled to present evidence of prior good acts or conduct, including evidence of his lack of criminal or arrest record to demonstrate lack of predisposition).

*U.S. v. Elmer*, 21 F.3d 331 (9th Cir. 1994) (subsequent act of shooting illegal alien by Border Patrol agent in his civil rights trial inadmissible; honest character is not an essential element of the federal immunity defense).

10.09.02.04  Tenth Circuit

*U.S. v. Polsinelli*, 649 F.2d 793 (10th Cir. 1981) (prosecutor cannot cross-examine reputation witnesses about their opinions on awareness that defendant had distributed narcotics twice in the instant
case; prosecutor assumed guilt in case on trial, and defendant only elicited witnesses' understanding of community reputation).

10.09.02.05 Eleventh Circuit

_U.S. v. Hewitt_, 663 F.2d 1381 (11th Cir. 1981) (improper to ask reputation witness if reputation testimony would be the same if she heard of another pending trial against defendant after she had already denied knowledge of it).

10.10 RULE 410 -- INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

10.10.01 Supreme Court

_U.S. v. Mezzanatto_, 513 U.S. 196 (1995) (agreement to waive provisions of plea-statement was enforceable absent any showing that defendant entered agreement unknowingly or involuntarily).

10.11 RULE 413 -- EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT CASES

10.11.01 Eighth Circuit

_U.S. v. Withorn_, 204 F.3d 790, 794-95 (8th Cir. 2000) (court did not abuse discretion admitting testimony of victim of a prior sexual assault by the defendant because both the alleged prior assault and the charged conduct involved individuals of approximately the same age, the use of force and isolation prior to the assaultive conduct, threats to the victims if they informed others about the incidents, and involved defenses of consent to sexual activity).

_U.S. v. Withorn_, 204 F.3d 790, 796 (8th Cir. 2000) (rejecting claim that the overall effect of applying Fed. R. Evid. 412-414 at trial is not so unfair as to contravene fundamental conceptions of justice and violate the Due Process Clause).

_U.S. v. Running Horse_, 175 F.3d 635, 637 (8th Cir. 1999) (court did not abuse discretion in refusing to sever ten counts of sexual abuse of a minor from the eleventh count alleging sexual abuse against a different individual, where evidence of the other acts of sexual abuse would have been admissible against the defendant under Fed. R. Evid. 413).

_U.S. v. Mound_, 149 F.3d 799, 800 (8th Cir. 1998) (rejecting constitutional challenge to Rule 413 under the Equal Protection Clause, because rule neither burdens a fundamental right nor affects the rights of a suspect class of sex-offense defendants, and because Congress’ desire to facilitate difficult credibility determinations by juries in sexual assault cases furnishes a rational basis for the adoption of Rule 413).

_U.S. v. Mound_, 149 F.3d 799, 802 (8th Cir. 1998) (upholding admission of the defendant’s prior conviction for sexual abuse of a minor, where the proffered evidence was strikingly similar to the charged
offenses, and where the district court instructed the jury that defendant’s prior conviction could not serve as substantive evidence of guilt).

Jones v. Clinton, 993 F. Supp. 1217, 1221 (E.D. Ark. 1998) (legislative history surrounding the adoption of Rules 413-415 indicates that Congress intended that courts balance the prejudicial and probative aspects of evidence of prior sexually assaultive behavior before admitting the proffered evidence under Rule 413).

10.11.02 Ninth Circuit

Doe v. Rudy-Glanzer, No. 98-36213, 2000 WL 1715945, at *7 (9th Cir. Nov. 17, 2000) (Rule 413 was passed by Congress as an exception to Rule 404(b), the general prohibition upon the admissibility of propensity evidence against a criminal defendant).

10.11.03 Tenth Circuit

U.S. v. Roberts, 185 F.3d 1125, 1142-43 (10th Cir. 1999) (court did not abuse discretion in admitting evidence of prior acts of sexual misconduct under Rules 404(b) and 413, where court held testimony of six female members of the Choctaw Nation relevant to establish the defendant’s scheme to sexually assault women under his authority as Chief of the Choctaw Nation).

U.S. v. Enjady, 134 F.3d 1427, 1429 (10th Cir. 1998) (applying Rule 413 to trials commenced after the effective date of its enactment, despite the defendant’s indictment before the provision’s effective date).

U.S. v. Guardia, 135 F.3d 1326, 1329-30 (10th Cir. 1998) (balancing test of Rule 403 applies to evidence introduced under Rule 413) (citing U.S. v. Meacham, 115 F.3d 1488 (10th Cir. 1997)).

U.S. v. Guardia, 135 F.3d 1326, 1328-29 (10th Cir. 1998) (Rule .413 “supercedes” the Rule 404(b)’s prohibition of admissibility of prior misconduct to establish propensity to commit crime by permitting government to offer evidence of prior acts of sexual assault to demonstrate propensity to engage in sexually assaultive behavior).

U.S. v. Guardia, 135 F.3d 1326, 1332 (10th Cir. 1998) (upholding court’s exclusion of evidence of prior engagement in sexually assaultive behavior under Rule 403; concluded admission of prior acts of inappropriate clitoral contact between gynecologist and his female patients would allow “conflicting and overlapping testimony” regarding the extent to which defendant exceeded the scope of his patients’ consent in prior incidents and would obscure the factual distinctions between the prior conduct and the charged offenses).

10.12 RULE 414 -- EVIDENCE OF SIMILAR CRIMES IN CHILD MOLESTATION CASES

10.12.01 Second Circuit
U.S. v. Larson, 112 F.3d 600 (2d Cir. 1997) (evidence of prior acts of child molestation are admissible but subject to Rule 403 balancing test).

10.12.02 Eighth Circuit

U.S. v. Sumner, 204 F.3d 1182, 1187 (8th Cir. 2000) (courts must balance the probative and prejudicial aspects of evidence of a defendant’s prior engagement in acts of child molestation when determining the admissibility of evidence under Rule 414).

U.S. v. Sumner, 204 F.3d 1182, 1187 (8th Cir. 2000) (court did not abuse discretion in admitting evidence under Rule 414 by concluding that the prior acts occurred relatively close in time and bore substantial similarities to the charged crimes; the risk of prejudice was indistinguishable from that present in all cases of child sexual abuse).

U.S. v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (rejecting claim that evidence offered under Rule 414 must also comport with general prohibitions upon the admission of propensity evidence under Rule 404 to be properly admitted against the defendant at trial) (citing U.S. v. LeCompte, 99 F.3d 274 (8th Cir. 1996)).

U.S. v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (evidence of defendant’s prior federal conviction for carnal knowledge under Rule 414, involving the sexual abuse of minor admissible; court mitigated prejudicial effect of conviction by admitting testimony of the defendant’s common-law wife and by balancing the probative and prejudicial aspects of the defendant’s prior conviction under Rule 403).

10.12.03 Tenth Circuit

U.S. v. Velarde, 214 F.3d 1204, 1212 (10th Cir. 2000) (court must balance probative and prejudicial aspects of evidence of defendant’s prior sexual abuse of a minor on the record before admitting evidence of prior uncharged sex offenses under Rule 414).

U.S. v. Mann, 193 F.3d 1172, 1174-75 (10th Cir. 1999) (court did not abuse discretion in admitting evidence of prior sexual abuse of a minor under Rule 414, where the government sufficiently proved the prior sexual contact, the uncharged sexual conduct demonstrated defendant’s propensity to commit acts of sexual abuse, admission of evidence would resolve dispute of material fact, and where government had no access to less prejudicial evidence on the disputed issues in the present case).

U.S. v. Charley, 189 F.3d 1251, 1259-60 (10th Cir. 1999) (rejecting challenge to admission of evidence of prior sexual offense conviction under Rule 414(a), where court properly found that admission of evidence established defendant’s “unusual disposition” for harboring a sexual interest in children, the conduct underlying the prior conviction bore significant similarities to the charged offenses, and where the conviction supplied valuable corroborating evidence), cert. denied, 120 S. Ct. 842 (2000).
U.S. v. McHorse, 179 F.3d 889, 896-97 (10th Cir.) (admission of uncharged acts of sexual abuse under Rule 414(a) not so prejudicial as to violate due process rights because court protected constitutional rights by instructing the jury that the uncharged misconduct was insufficient evidence of guilt for the charged crimes, the defendant was not on trial for any acts not charged in the indictment, and the government retained the burden of proving that the defendant committed each element of the charged offenses), cert. denied, 120 S. Ct. 358 (1999).

U.S. v. McHorse, 179 F.3d 889, 897 (10th Cir.) (rejecting constitutional challenge to Rule 414(a) under the Equal Protection Clause for allegedly authorizing disproportionate numbers of federal sex crime prosecutions against Native American defendants, because defendant presented no evidence that Congress enacted Rule 414(a) for discriminatory purpose, and Congress’ goal of enhancing effective prosecution of child sexual abuse cases furnished a rational basis for the provision’s enactment under the Equal Protection Clause), cert. denied, 120 S. Ct. 358 (1999).

U.S. v. Castillo, 140 F.3d 874, 882 (10th Cir. 1998) (rejecting a facial challenge to Rule 414 under the Due Process Clause because the history of evidentiary prohibitions upon admissibility of a criminal defendant’s sexual proclivities does not unambiguously indicate that admission of such evidence violates fundamental concepts of fairness and justice; federal courts have routinely admitted evidence of a defendant’s criminal propensity under similar evidentiary rules, and where the application of Rules 402 and 403 mitigates the prejudicial effect of admitting the challenged evidence).
10.13 RULE 501 -- GENERAL RULE (PRIVILEGES)

10.13.01 Supreme Court


*Trammel v. U.S.*, 445 U.S. 40 (1980) (common-law privilege precluding one spouse from testifying against the other in federal proceedings unless both consent was modified so the choice of giving the testimony belongs to the witness spouse alone).

10.13.02 Ninth Circuit

*U.S. v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997) (no “joint criminal participant” exception to the spousal testimonial privilege that can compel an unwilling witness to testify against spouse).

*U.S. v. Marashi*, 913 F.2d 724 (9th Cir. 1990) (partnership in crime exception permits introduction of confidential marital communications).

*U.S. v. Roberson*, 859 F.2d 1376 (9th Cir. 1988) (couple's separation and failed marriage made marital communication privilege inapplicable).

10.14 RULE 602 -- LACK OF PERSONAL KNOWLEDGE

10.14.01 Supreme Court

*U.S. v. Owens*, 484 U.S. 554 (1988) (Confrontation Clause not violated when witness' past belief introduced and is unable to recollect reason for past belief; witness still subject to cross-examination even though he asserts memory loss--see Rule 801(d)(1)(C)), *on remand*, 889 F.2d 913 (9th Cir. 1989) (reasonable juror could find witness had personal knowledge of attacker).

10.15 RULE 606 -- COMPETENCY OF JUROR AS WITNESS

10.15.01 (b) Inquiry Into Validity of Verdict or Indictment

10.15.01.01 Ninth Circuit

*McDowell v. Calderon*, 107 F.3d 1351 (9th Cir. 1997) (testimony regarding extraneous influences on jury is admissible, but testimony regarding deliberative process, motives of individual jurors, and conduct during deliberations is inadmissible).

*U.S. v. Maree*, 934 F.2d 196 (9th Cir. 1991) (juror's *ex parte* contact with friends about their opinions of verdict outcome constituted actual prejudice; because no extraneous information about the
defendant or the case was added, actual prejudice was required; it existed due to strong opinion about proper outcome of case).

10.16 RULE 607 -- WHO MAY IMPEACH

10.16.01 Ninth Circuit

*U.S. v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) (extrinsic evidence admissible for impeachment by contradiction of defendant’s testimony volunteered on direct).

*U.S. v. Gilbert*, 57 F.3d 709 (9th Cir. 1995) (impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible).

*U.S. v. Gomez-Gallardo*, 915 F.2d 553 (9th Cir. 1990) (government cannot call witness for primary purpose of impeachment).

*U.S. v. Crouch*, 731 F.2d 621 (9th Cir. 1984) (improper for government to elicit witness' testimony denying that defendant inculpated himself and then impeach the witness with hearsay testimony of FBI agent; testimony in reality used against defendant rather than to impeach witness), *cert. denied*, 469 U.S. 1105 (1985).

10.17 RULE 608 -- EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

10.17.01 (a) Opinion and Reputation Evidence of Character

10.17.01.01 Ninth Circuit

*U.S. v. Dring*, 930 F.2d 687 (9th Cir. 1991) (Rule 608(a)(2) only permits rehabilitation by character evidence of truthfulness after indirect attacks on a witness' general character for truthfulness; indirect attacks include opinion or reputation evidence, or evidence of corruption), *cert. denied*, 506 U.S. 836 (1992).

10.17.02 (b) Specific Instances of Conduct

10.17.02.01 Supreme Court


10.17.02.02 Fifth Circuit

*Carson v. Polley*, 689 F.2d 562 (5th Cir. 1982) (extrinsic evidence admissible whenever it contradicts a witness' testimony on a material issue).
10.17.02.03 Ninth Circuit

U.S. v. Jackson, 882 F.2d 1444 (9th Cir. 1989) (impeachment of defendant by extrinsic evidence, not admitted, did not violate the rule).

U.S. v. Dickens, 775 F.2d 1056 (9th Cir. 1985) (cross-examination of defendant concerning his association with organized crime improper; no direct evidence of connection with "the mob").

U.S. v. Noti, 731 F.2d 610 (9th Cir. 1984) (defendant could not introduce extrinsic evidence that informant was user and supplier of cocaine because there was no proof that informant cooperated in investigation to gain lenient treatment in future regarding his own drug violations).

U.S. v. Ray, 731 F.2d 1361 (9th Cir. 1984) (defendant should have been allowed to introduce extrinsic evidence of informant's continued drug dealing because that allegation might have biased him against the defendant); but see U.S. v. Elmer, 21 F.3d 331 (9th Cir. 1994) (district court properly excluded evidence of confidential informant's unauthorized drug sales while working for task force; there was no evidence government aware of it while he was working for them).

U.S. v. Bosley, 615 F.2d 1274 (9th Cir. 1980) (government could not properly impeach defendant through extrinsic evidence of his delivery of cocaine to another individual).

10.17.02.04 Eleventh Circuit

U.S. v. Reed, 700 F.2d 638 (11th Cir. 1983) (person's possession of small amount of marijuana does not shed any light on character for truthfulness).

10.18 RULE 609 -- IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

10.18.01 (a) General Rule

10.18.01.01 Supreme Court


Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) (civil witness may be impeached with evidence of prior felony convictions regardless of unfair prejudice; only the accused in a criminal case is protected by the Rule's unfair prejudice prong).

10.18.01.02 D.C. Circuit

10.18.01.03 Ninth Circuit

U.S. v. Foster, 227 F.3d 1096, 1099-1100 (9th Cir. 2000) (court erred in admitting evidence of defendant’s prior conviction for receipt of stolen property without inquiring into facts underlying prior conviction to determine that the underlying prior offense qualified as a crime of dishonesty under Rule 609(a)(2)).

U.S. v. Jimenez, 214 F.3d 1095, 1098 (9th Cir. 2000) (court demonstrated its awareness of the requirements of Rule 609(a)(1), despite failure to explicitly weigh the prejudicial and probative aspects of prior conviction under Rule 403, by admitting evidence of defendant’s prior felony conviction involving use of a weapon, but ameliorating prejudicial effect of conviction by prohibiting admission into evidence of the nature of the defendant’s conviction for assault with a deadly weapon).

U.S. v. Cabrera, 201 F.3d 1243, 1246-47 (9th Cir. 2000) (court correctly admitted evidence of defendant’s prior convictions, but prohibited admission of any evidence of the nature of the prior offenses).

U.S. v. Colbert, 116 F.3d 395 (9th Cir. 1997) (witness’ prior conviction for lewd conduct was inadmissible for impeachment purposes; witness was subject to maximum imprisonment of six months and conviction did not involve dishonesty or false statement).

U.S. v. Brackeen, 969 F.2d 827 (9th Cir. 1992) (en banc) (bank robbery is not per se a crime of "dishonesty").

U.S. v. Cuozzo, 962 F.2d 945 (9th Cir.) (prior conviction for dealing in counterfeit obligations is crime of dishonesty or false statement), cert. denied, 506 U.S. 978 (1992).

U.S. v. Williams, 939 F.2d 721 (9th Cir. 1991) (defendant waives appellate right to challenge admission of prior conviction by introducing it on direct examination).

U.S. v. Browne, 829 F.2d 760 (9th Cir. 1987) (not error to refuse to rule pretrial on admissibility of prior bank robbery conviction in bank robbery trial; given defendant's testimony, his credibility's centrality to the case, the admission of the prior was correct), cert. denied, 485 U.S. 991 (1988).

U.S. v. Bagley, 772 F.2d 482 (9th Cir. 1985) (prior robbery convictions did not implicate veracity of witness; prejudicial impact overwhelming because of similarity of crimes; however, error was harmless), cert. denied, 475 U.S. 1023 (1986).

U.S. v. Givens, 767 F.2d 574 (9th Cir.) (evidence of prior robbery convictions admissible; defendant's proposed testimony would have placed his credibility at issue), cert. denied, 474 U.S. 953 (1985).


**U.S. v. Glenn**, 667 F.2d 1269 (9th Cir. 1982) (prior convictions for burglary and grand theft did not involve dishonesty or false statement).

**U.S. v. Dunn**, 640 F.2d 987 (9th Cir. 1981) (error to permit government to cross-examine admitted co-conspirator by inquiring as to criminal convictions of other members of her family).

**U.S. v. Lipps**, 659 F.2d 960 (9th Cir. 1981) (improper to permit introduction of evidence of prior felony conviction against defendant being prosecuted for receipt by a felon of a firearm; error harmless).

**U.S. v. Field**, 625 F.2d 862 (9th Cir. 1980) (forgery is a crime of dishonesty or false statement).

**U.S. v. Hendershot**, 614 F.2d 648 (9th Cir. 1980) (error to admit prior armed robbery conviction where it was not clear that trial court required prosecution to establish probative value).

**10.18.02 (b) Time Limit**

**10.18.02.01 Ninth Circuit**

**U.S. v. Bensimon**, 172 F.3d 1121 (9th Cir. 1999) (prejudicial effect of 17-year-old mail fraud conviction admitted to impeach credibility of defendant on drug charges not substantially outweighed by probative value).


**U.S. v. Portillo**, 699 F.2d 461 (9th Cir. 1982) (even if court ruling erroneous in admitting 1963 prior conviction, defendant did not show that he would have testified).

**10.18.02.02 Tenth Circuit**

**U.S. v. Begay**, 144 F.3d 1336 (10th Cir. 1998) (evidence that prosecution witness had been convicted of possession of marijuana not admissible for purposes of attacking his credibility in robbery trial as conviction was not necessarily relevant to credibility and was potentially prejudicial in arousing sentiment against witness; evidence that prosecution witness had been convicted of rape and burglary was not admissible for purposes of attacking his credibility in robbery trial as convictions were nearly ten years old).
10.19 RULE 613 -- PRIOR STATEMENT OF WITNESSES

10.19.01 (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness

10.19.01.01 Second Circuit

_U.S. v. Strother_, 49 F.3d 869 (2d Cir. 1995) (statements made previously by witness need not be diametrically opposed to later statements to be considered “inconsistent” for purposes of admission to impeach credibility).

10.19.01.02 Seventh Circuit

_U.S. v. Lashmett_, 965 F.2d 179 (7th Cir. 1992) (question directed to witness regarding accusation of forgery made against him by family member was not evidence of specific act of dishonesty so as to be admissible for impeachment purposes).

10.19.01.03 Eighth Circuit

_U.S. v. Roulette_, 75 F.3d 418 (8th Cir. 1996) (codefendant’s statement to his probation officer that he was with defendant on two or three occasions when defendant had sold cocaine did not involve collateral matter and could be used to impeach codefendant’s testimony that he had told officer he had never seen defendant sell drugs in exchange for money).

10.19.01.04 Ninth Circuit

_U.S. v. Higa_, 55 F.3d 448 (9th Cir. 1995) (testimony of government agent and a lawyer about what they had said to witness had told them and what they had said to witness, relating to whether defendant had willfully participated in conspiracy or refused to participate, was admissible as impeachment by prior inconsistent statements, after witness changed his story during cross, and was not impeachment by specific instances of conduct).


_U.S. v. McLaughlin_, 663 F.2d 949 (9th Cir. 1981) (error to exclude testimony of prior inconsistent statement of immunized government witness).

_U.S. v. Williams_, 668 F.2d 1064 (9th Cir. 1981) (error to disallow extrinsic evidence of prior inconsistent statement where evidence of defendant's guilt subject to more than one interpretation).

10.20 RULE 614 -- CALLING AND INTERROGATION OF WITNESS BY COURT

10.20.01 Second Circuit
U.S. v. Filani, 74 F.3d 378 (2d Cir. 1996) (in determining whether defendant received fair trial, presiding judge cannot interrogate so zealously as to give jury impression of partisanship or foster idea that judge believes one version of an event and not another).

10.21 RULE 615 -- EXCLUSION OF WITNESSES

10.21.01 Fifth Circuit

U.S. v. Hickman, 151 F.3d 446 (8th Cir. 1998) (overruling defendant’s objection to presence at prosecutor’s table of police detective and federal case agent who were to testify was abuse of discretion as case did not fall within complexity exception; defendants not prejudiced by refusal to sequester as detective and agent generally testified about different subject matter and in two instances during cross agent directly contradicted testimony given earlier by detective).

10.21.02 Ninth Circuit

U.S. v. Hobbs, 31 F.3d 918 (9th Cir. 1994) (order precluding defense witnesses from testifying held erroneous when court precluded witness as sanction for violation of witness sequestration order).

U.S. v. Brewer, 947 F.2d 404, 411 (9th Cir. 1991) (rule for exclusion of witnesses applicable to pre-trial motions hearings; district court’s order allowing two officers to remain in courtroom who were percipient witnesses to the same facts reversed because “the officers’ testimony overlapped completely concerning critical testimony regarding the presence or absence of a pretextual stop.”).

U.S. v. Ell, 718 F.2d 291 (9th Cir. 1983) (error for court not to exclude rebuttal witnesses from courtroom upon defendant’s request; prejudice presumed).

10.21.03 District Court

U.S. v. Ortiz, 10 F.Supp.2d 1058 (N.D. Iowa) (defendant’s court-appointed investigator, who had intimate knowledge of facts, without which defense counsel could not effectively function, and who would be unable to present essential testimony without hearing trial testimony of other witnesses, or at least learning about that testimony, was essential to defendant’s presentation of her case).

10.22 RULE 701 -- OPINION TESTIMONY BY LAY WITNESSES

10.22.01 Fifth Circuit

U.S. v. Riddle, 103 F.3d 423 (5th Cir. 1997) (testimony of bank examiner, who had not been qualified as an expert, exceeded the scope of proper lay testimony where, instead of merely drawing straightforward conclusions from observations formed by his own experiences, bank examiner purported to describe sound banking practice in the abstract).
10.22.02 Ninth Circuit

U.S. v. Henke, 222 F.3d 633, 642 (9th Cir. 2000) (court erred in admitting testimony of a lay witness under Rule 701 about defendant’s knowledge of false revenue reporting scheme, where the jury was “in a superior vantage point to decide” the issue).

10.22.03 Eleventh Circuit

U.S. v. Marshall, 173 F.3d 1312 (11th Cir. 1999) (district court abused its discretion in allowing prosecutor to ask a DEA agent whether crack cocaine obtained by police from an informant came from a source other than defendants’, since agent was lay a witness who had no personal knowledge regarding the origin of the cocaine given to him by the informant, and was not present at any of the meetings between the informant and defendants).

10.23 RULE 702 -- TESTIMONY BY EXPERTS

10.23.01 Supreme Court

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (Daubert’s “gatekeeping” obligation requiring an inquiry into both relevance and reliability applies not only to “scientific” testimony, but to all expert testimony).


10.23.02 Second Circuit

U.S. v. Diallo, 40 F.3d 32 (2d Cir. 1994) (in prosecution for heroin smuggling in which defendant claimed he believed he was smuggling gold dust, not drugs, district court abused its discretion in refusing to allow commodities analyst, specializing in precious metals, to testify as expert regarding market price of gold in the U.S. and profit to be made by smuggling gold out of Africa).

10.23.03 Third Circuit

U.S. v. Downing, 753 F.2d 1224 (3d Cir. 1985) (error to exclude expert testimony of eyewitness identification because court thought it could never meet helpfulness standard of rule).

10.23.04 Seventh Circuit

*U.S. v. Hall*, 93 F.3d 1337 (7th Cir. 1996) (district court applied incorrect standard in excluding proffered expert testimony regarding defendant’s susceptibility to giving false confession).
10.23.05 Eighth Circuit

U.S. v. Rouse, 111 F.3d 561 (8th Cir. 1996) (district court committed reversible error when it refused to let a court-appointed expert in a child sex abuse prosecution testify as to his opinion that the five child complainants had been subjected, over a six month period, to questioning and an overall atmosphere that was “suggestive” of what their trial testimony should be).

10.23.06 Ninth Circuit

U.S. v. Alatorre, 222 F.3d 1098, 1104 (9th Cir. 2000) (court considering admissibility of expert testimony need not hold separate hearing before trial on the admissibility of expert evidence; may admit expert testimony consistently with Rule 702 and with its gate-keeping function under Daubert and its progeny by making evidentiary determinations during trial).

U.S. v. Campos, 217 F.3d 707, 712 (9th Cir. 2000) (court did not err in failing to conduct a Daubert hearing to determine admissibility of otherwise excludable expert testimony regarding defendant’s responses to a polygraph examination under Rule 704(b)).

U.S. v. Chang, 207 F.3d 1169, 1172-73 (9th Cir.) (court properly concluded that the proffered expert testimony regarding the history of and purpose for the issuance of Certificates of Payback Balance was not relevant to the authenticity of the document), cert. denied, 121 S. Ct. 148 (2000).

U.S. v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000) (court considering admissibility of proffered expert testimony need not make findings regarding each of the specific factors used to evaluate the admissibility of expert testimony in Daubert).

U.S. v. Hankey, 203 F.3d 1160, 1169-70 (9th Cir. 2000) (proper to admit testimony of law enforcement expert regarding the gang affiliations of the defendant and the consequences to the co-defendant if he testified against the defendant to rebut the co-defendant’s exculpatory testimony).

U.S. v. Cordoba, 194 F.3d 1053 (9th Cir. 1999) (exclusion of polygraph test results was not abuse of discretion, in view of lack of known error rate, controversy in relevant scientific community, and paucity of controlling standards).


U.S. v. Morales, 108 F.3d 1031 (9th Cir. 1997) (rule limiting expert testimony on ultimate issues did not preclude proffered expert testimony on defendant’s weak grasp of booking principles; expert was not going to state opinion or draw inference on defendant’s mens rea, but was going to state her opinion on predicate matter).
\textit{U.S. v. Webb}, 115 F.3d 711 (9th Cir. 1997) (experts may testify to reasons criminals conceal weapons in engine compartments).

\textit{U.S. v. Alonso}, 48 F.3d 1536 (9th Cir. 1995) (agents qualified to testify as experts regarding counter-surveillance).


\textit{U.S. v. Rincon}, 28 F.3d 921 (9th Cir. 1994) (no abuse of discretion in excluding expert testimony on eyewitness identification where defendant’s proffer failed to satisfy \textit{Daubert} standard).

\textit{U.S. v. Rahm}, 993 F.2d 1405 (9th Cir. 1993) (admission of psychological testimony does not require mental disorder; defendant may introduce expert testimony relating to any mental condition bearing on issue of guilt; expert need not testify in form of opinion, and the opinion need not be conclusive).

\textit{U.S. v. Taren-Palina}, 997 F.2d 525 (9th Cir. 1993) (expert testimony regarding use of guns in narcotics transactions admissible).


\textit{U.S. v. Lui}, 941 F.2d 844 (9th Cir. 1991) (improper to use drug courier profile evidence as substantive evidence of defendant’s guilt or innocence).

\textit{U.S. v. Beltran-Rios}, 878 F.2d 1208 (9th Cir. 1989) (government may introduce expert testimony of drug courier profile in rebuttal).

\textit{U.S. v. Miller}, 874 F.2d 1255 (9th Cir.) (introduction of polygraph evidence error; testimony re: polygraph may be admitted for limited purpose unrelated to substantive correctness of results), \textit{reh’g denied}, 884 F.2d 1149 (9th Cir. 1989).

\textit{U.S. v. Sanchez}, 829 F.2d 757 (9th Cir. 1987) (FLIR can be used for generic identification of objects).

\textit{U.S. v. Brewer}, 783 F.2d 841 (9th Cir.) (expert eyewitness testimony not essential since expert did not conclusively offer to state that defendant was not the robber in the surveillance photographs; failure of court to appoint eyewitness identification expert not error because the defendant did not show actual prejudice caused by the failure), \textit{cert. denied}, 479 U.S. 831 (1986).

U.S. v. Winters, 729 F.2d 602 (9th Cir. 1984) (expert testimony re: post-traumatic stress disorder and forced prostitution admissible against defendant in trial for kidnaping and transportation of women).

U.S. v. Barrett, 703 F.2d 1076 (9th Cir. 1983) (government expert could testify regarding similarities between defendant's seized clothing and that worn by robber in surveillance photograph).

10.23.07 Eleventh Circuit

U.S. v. Roark, 753 F.2d 991 (11th Cir.) (expert testimony admissible to explain susceptibility to confess to crime), reh’g denied en banc, 761 F.2d 698 (1985).

10.24 RULE 704 -- OPINION ON ULTIMATE ISSUE

10.24.01 Ninth Circuit

U.S. v. Campos, 217 F.3d 707 (9th Cir. 2000) (court did not improperly exclude expert testimony regarding defendant’s responses to a polygraph examination under Rule 704(b)).

U.S. v. Plunk, 161 F.3d 1195 (9th Cir. 1998) (agent may testify on the meaning of code words and jargon used by the defendant).

U.S. v. Morales, 108 F.3d 1031 (9th Cir. 1997) (rule limiting expert testimony on ultimate issues did not preclude defendant’s proffered expert testimony on defendant’s weak grasp of bookkeeping principles).

U.S. v. Wang, 49 F.3d 502 (9th Cir. 1995) (admission of expert’s testimony that he believed defendant was involved in smuggling conspiracy was harmless error).

10.24.02 D.C. Circuit

U.S. v. Boyd, 55 F.3d 667 (D.C. Cir. 1995) (officer’s expert testimony opining that “hypothetical” facts exactly mirroring alleged facts surrounding defendant’s arrest showed “possession with intent to distribute,” rather than possession for personal use, violated rule of evidence prohibiting expert witnesses from stating opinion as to whether defendant had mental state constituting element of crime charged).

10.25 RULE 801(c) -- HEARSAY

10.25.01 Second Circuit

U.S. v. Reyes, 18 F.3d 65 (2d Cir. 1994) (testimony of custom’s agent regarding statements by two persons implicating defendant in drug trafficking conspiracy resulted in prejudice that exceeded probative value of nonhearsay uses of evidence).
10.25.02 Third Circuit

U.S. v. Sallins, 993 F.2d 344 (3d Cir. 1993) (police officers’ testimony concerning contents of police radio call stating that there was black male dressed in black with gun at particular location was hearsay; contents of 911 call contained in police computer record were inadmissible hearsay).

U.S. v. Reynolds, 715 F.2d 99 (3d Cir. 1983) (co-defendant's out-of-court statement implicating defendant offered for truth of the matter and was hearsay).

10.25.03 Fifth Circuit

U.S. v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) (error to admit DEA agent's statement that defendant brought to his attention by another agency as a drug smuggler).

10.25.04 Ninth Circuit

U.S. v. Arteaga, 117 F.3d 388 (9th Cir. 1997) (customer-provided information on money wires admissible in some circumstances as non-hearsay).

U.S. v. Lim, 984 F.2d 331 (9th Cir. 1993) (witness' conversations with unindicted co-conspirator not hearsay; they were verbal acts admissible to show that an agreement existed between the defendant and the witness).

U.S. v. Jaramillo-Suarez, 942 F.2d 1412 (9th Cir. 1991) (although rule against hearsay prohibits admission of documents to prove their truth, rule does not bar admission of drug pay/owe sheets to show character and use of place where documents were found).


10.26 RULE 801(d) -- STATEMENTS WHICH ARE NOT HEARSAY

10.26.01 Rule 801(d)(1) Prior Statement by Witness –

(A) Inconsistent with Declarant's Testimony, and was Given under Oath, Subject to the Penalty of Perjury at Trial, Hearing or Other Proceeding, or in a Deposition

10.26.01.01 Ninth Circuit
U.S. v. Armijo, 5 F.3d 1229 (9th Cir. 1993) (prior inconsistent statement not given under oath inadmissible; court failed to give limiting instruction that it could be used only to impeach and not be used as evidence of guilt; error harmless).

U.S. v. Tafollo-Cardenas, 897 F.2d 976 (9th Cir. 1990) (prior statement inadmissible as substantive evidence when not given under oath, at a trial, hearing or other proceeding, or in a deposition).
10.26.02 Rule 801(d)(1)(B)

(B) Consistent with Declarant's Testimony and is Offered to Rebut an Express or Implied Charge Against the Declarant of Recent Fabrication or Improper Influence or Motive

10.26.02.01 Supreme Court


10.26.02.02 First Circuit

U.S. v. Lozada-Rivera, 177 F.3d 98 (1st Cir. 1999) (prior report of law enforcement agent was not admissible as prior consistent statement).

10.26.02.03 Second Circuit

U.S. v. Forrester, 60 F.3d 52 (2d Cir. 1995) (handwritten document prepared by witness in prosecution for conspiracy to distribute and export cocaine who pled guilty and testified in exchange for reduced sentence, during three weeks following her interview by DEA agent, was inadmissible hearsay even though it was prior statement by witness, as her motive to fabricate arose as soon as she was arrested in connection with prosecution).

10.26.02.04 Ninth Circuit

U.S. v. Bao, 189 F.3d 860 (9th Cir. 1999) (statement printed in newspaper inadmissible hearsay and not prior consistent statement).

U.S. v. Beltran, 165 F.3d 1266 (9th Cir. 1999) (prior consistent statement admissible when witness asked if testimony prepared with government).

U.S. v. Ellis, 147 F.3d 1131 (9th Cir. 1998) (witnesses’ statement was a recollection of related event and inadmissible as a prior consistent statement).

U.S. v. Collicott, 92 F.3d 973 (9th Cir. 1996) (officer’s testimony about conversation with witness who testified that she did not remember making the statements was not admissible to rebut claim of recent fabrication or as past recollection recorded).

U.S. v. Payne, 944 F.2d 1458 (9th Cir. 1991) (although prior consistent statements not made before motive to fabricate arose, they were from the very same reports from which impeaching statements were drawn, they had significant probative force bearing on credibility, and they demonstrated the
inconsistent statements were a minor part of an otherwise consistent account), *cert. denied*, 503 U.S. 975 (1992).

*U.S. v. Miller*, 874 F.2d 1255 (9th Cir.) (motive to fabricate is one of several factors to be considered in determining relevancy -- judge must determine whether statement has significant probative force bearing on credibility apart from mere repetition), *reh’g denied*, 884 F.2d 1149 (1989).

*U.S. v. DeCoito*, 764 F.2d 690 (9th Cir. 1985) (statement made before motive to fabricate arose admissible).

*U.S. v. Stuart*, 718 F.2d 931 (9th Cir. 1983) (witness' prior consistent statements admissible to rebut charge of improper motive in testifying for the government).

10.26.03 Rule 801(d)(1)(C)

(C) One of Identification of a Person Made After Perceiving the Person

10.26.03.01 Ninth Circuit


10.26.04 Rule 801(d)(2) -- Admission by Party-opponent--The statement is offered against a party and is:

(A) The Party's own Statement in Either an Individual or a Representative Capacity

10.26.04.01 Ninth Circuit

*U.S. v. Chang*, 207 F.3d 1169, 1176 (9th Cir.) (court excluded defendant’s proffered testimony that the Security Information Center, a federal agency, assigned an identifying number to a Certificate of Payback Balance fraudulently uttered by the defendant, under Rule 801(d)(2), where defendant failed to establish that statement was uttered within the scope of the SIC’s agency), *cert. denied*, 121 S. Ct. 148 (2000).

People of the Territory of Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985) (statements under this rule need not be incriminating to be admissions; they need only relate to the offense).

U.S. v. Felix-Jerez, 667 F.2d 1297 (9th Cir. 1982) (defendant's statement contained in interrogator's notes not an admission; he never read or signed the document so they were not his statements, and therefore the document was inadmissible).

10.26.05 Rule 801(d)(2)(B)

(B) A Statement of Which the Party Has Manifested an Adoption or Belief in Its Truth

10.26.05.01 Ninth Circuit

U.S. v. Hove, 52 F.3d 233 (9th Cir. 1995) (defendant’s declination of offer to explain situation to investigators and decision not to testify before grand jury did not constitute admission by silence to truth of statement as no statements had been made of which failure to deny could constitute admission).

U.S. v. Carrillo, 16 F.3d 1046 (9th Cir. 1994) (drug tally sheet admissible as adoptive admission).

U.S. v. Monks, 774 F.2d 945 (9th Cir. 1985) (statements by co-defendant that defendant only had to be worried about being identified by bank camera admissible as adoptive admissions heard, understood, and acceded to by defendant).

U.S. v. Ospina, 739 F.2d 448 (9th Cir. 1984) (business cards with handwritten notations concerning locations of cocaine transactions admissible as adoptive admissions because they were in possession of defendants and defendants acted on the information), cert. denied, 471 U.S. 1126 (1985).

U.S. v. Ordonez, 737 F.2d 793 (9th Cir. 1983) (ledger entries, absent identification of entrant, inadmissible adoptive admissions).

U.S. v. Sears, 663 F.2d 896 (9th Cir.) (co-defendant's statement after robbery in presence and hearing of defendant who understood them and had opportunity to deny it was adoptive admission), cert. denied, 455 U.S. 1027 (1982).

10.26.06 Rule 801(d)(2)(E)

(E) A Statement Made by a Co-conspirator of a Party During the Course and in Furtherance of the Conspiracy

10.26.06.01 Supreme Court
Bourjaily v. U.S., 483 U.S. 171 (1987) (court considering admissibility of statements need not determine by independent evidence that a conspiracy existed and the defendant and declarant were members of the conspiracy; further, there is no longer a necessity that the statements have to satisfy an independent test of reliability under the Confrontation Clause).

10.26.06.02 Ninth Circuit

U.S. v. Castaneda, 16 F.3d 1504 (9th Cir. 1994) (government must produce some independent evidence which, viewed in light of coconspirator statements, establishes connection between accused and conspiracy before coconspirator exception to hearsay rule may apply).


U.S. v. Smith, 893 F.2d 1573 (9th Cir. 1990) (calendar/drug ledger admissible as made in furtherance of conspiracy as a record of financial transactions).

U.S. v. Layton, 855 F.2d 1388 (9th Cir.) (speeches admissible when made during the course of and in furtherance of conspiracy that was not changed and that had legal objective), cert. denied, 489 U.S. 1046 (1989).

U.S. v. Schmit, 881 F.2d 608 (9th Cir. 1989) (defendant's taped statement seized in his home referring to drug activities before tape dictated was made during course of conspiracy).

U.S. v. Vowiell, 869 F.2d 1264 (9th Cir. 1989) (statement to witness about aiding escapees concealment did not further assisting the escape, but rather harboring a concealment, crimes not charged).

U.S. v. Andersson, 813 F.2d 1450 (9th Cir. 1989) (statement admissible as "keep a conspirator abreast of a co-conspirator's" activities).

U.S. v. Paris, 827 F.2d 395 (9th Cir. 1987) (statements admissible as in furtherance of conspiracy in that they ensured agent's continued interest in purchasing cocaine).


U.S. v. Bibbero, 749 F.2d 581 (9th Cir.) (statement of another person that defendant owned marijuana did not further the conspiracy), cert. denied, 471 U.S. 1103 (1985).

U.S. v. Echeverry, 759 F.2d 1451 (9th Cir. 1985) (statements admissible since they assured DEA agent of person's access to necessary quantity of cocaine).

U.S. v. Jennell, 749 F. 2d 1302 (9th Cir.) (handwritten notes concerning matters of conspiracy that only members of conspiracy could have written admissible despite fact that there was no identification of the specific co-conspirator), cert. denied, 474 U.S. 837 (1985).

U.S. v. Vincent, 758 F.2d 379 (9th Cir.) (statements established interstate element of wire fraud), cert. denied, 474 U.S. 838 (1985).
U.S. v. Arbelaez, 719 F.2d 1453 (9th Cir.) (co-conspirators' statements properly admitted as in furtherance of the conspiracy and were reliable), cert. denied, 467 U.S. 1255 (1984).

U.S. v. Foster, 711 F.2d 871 (9th Cir. 1983) (statement that other defendant had quit selling drugs because someone had taken money from him were merely narrative declarations insufficient to satisfy the in furtherance requirements of the co-conspirator rule; improper admission not of constitutional dimension), cert. denied, 465 U.S. 1103 (1984).

U.S. v. Tille, 729 F.2d 615 (9th Cir.) (narrations of past events may be in furtherance of continuing conspiracy if they are intended to further its objectives), cert. denied, 469 U.S. 845 (1984).

U.S. v. Ordonez, 737 F.2d 793 (9th Cir. 1983) (foundational requirements not satisfied for admissibility of ledgers reflecting drug transactions which were the only evidence offered in support of the indictment).

10.27 RULE 803 -- HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMATERIAL

10.27.01 Rule 803(1) Present Sense Impression

10.27.01.01 Ninth Circuit

Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995) (911 tape inadmissible as caller did not meet requirement of personal knowledge of events described).

Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993) (child molestation victim's statement to sister while experiencing pain admissible as present sense impression).

10.27.02 Rule 803(2) Excited Utterance

10.27.02.01 Ninth Circuit

U.S. v. Rivera, 43 F.3d 1291 (9th Cir. 1995) (district court did not abuse discretion in determining that statements made by victim to mother after assault came within excited utterance exception).

Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993) (child molestation victim's statement to defendant's wife about trauma admissible as excited utterance).

10.27.03 Rule 803(3) Then Existing Mental, Emotional, Or Physical Condition

10.27.03.01 Eleventh Circuit
U.S. v. Veltmann, 6 F.3d 1483 (11th Cir. 1993) (witness’ videotaped deposition testimony on prior alleged suicide threats by murder victim was admissible under state of mind exception to hearsay rule).
10.27.04 Rule 803(4) Statements For Purposes Of Medical Diagnosis Or Treatment

10.27.04.01 Ninth Circuit

*U.S. v. Yazzie*, 59 F.3d 807 (9th Cir. 1995) (mother’s out-of-court statements to doctor which identified defendant as perpetrator were admissible under medical treatment exception, thus Rule 803(4) not limited to patient-declarant).

*Guam v. Ignacio*, 10 F.3d 608 (9th Cir. 1993) (child molestation victim's statement to pediatrician about identity of perpetrator admissible as medical exception when made for purpose of medical diagnosis and treatment).

*U.S. v. George*, 960 F.2d 97 (9th Cir. 1992) (victim's hearsay statements identifying defendant as sex abuse assailant fell within hearsay exception).

10.27.05 Rule 803(6) Records of Regularly Conducted Activity

10.27.05.01 Ninth Circuit


*U.S. v. Ray*, 920 F.2d 562 (9th Cir. 1990), *op. amended and superseded on denial reh'g*, 930 F.2d 1368 (9th Cir. 1992) (non-custodian of records was qualified witness; the phrase "other qualified witness" is broadly interpreted to require only that the witness understand the record-keeping system).

*U.S. v. Catabran*, 836 F.2d 453 (9th Cir. 1988) (computer printout admissible as business record).

*U.S. v. Huber*, 772 F.2d 585 (9th Cir. 1985) (testimony by son that it was his father's regular practice to maintain an inventory established that it was in the course of a regularly conducted business, and it was the regular practice of the business to make the inventory).

*Paddack v. Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984) (audit reports prepared for purposes of litigation not business records in that they were not conducted with regularity, and were not kept in regularly conducted business activity of plaintiffs).

*Keogh v. C.I.R.*, 713 F.2d 496 (9th Cir. 1983) (diary kept by fellow worker admissible under business records exception).

**U.S. v. Ordonez**, 737 F.2d 793 (9th Cir. 1983) (government failed to comply with foundational requirements of business records exception).

**U.S. v. Pazsint**, 703 F.2d 420 (9th Cir. 1983) (tape recorded emergency calls made to police inadmissible under business records exception).

**10.27.06 Rule 803(8) Public Records and Reports**

**10.27.06.01 Supreme Court**

*Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (factual findings in a report include conclusions or opinions flowing from a factual investigation; as long as the conclusion is based on a factual investigation to satisfy a trustworthiness requirement, it is admissible).

**10.27.06.02 Ninth Circuit**

**U.S. v. Pena-Gutierrez**, 222 F.3d 1080, 1086-87 (9th Cir. 2000) (report of INS inspector containing an interview with a subsequently deported material witness could only be admissible against defendant under the public-records exception to the hearsay rule).

**Wigglesworth v. Oregon**, 49 F.3d 578 (9th Cir. 1995) (statute allowing for admissibility of laboratory report in drug case and allowing defendant to call the criminalist who prepared it relieved state of burden a reasonable doubt).

**10.27.07 Rule (10) Absence of Public Record or Entry**

**10.27.07.01 Ninth Circuit**

**U.S. v. Mateo-Mendez**, 215 F.3d 1039, 1043 (9th Cir. 2000) (court need not find that INS Certificate of Non-Existence of Record offered by government contains indicia of trustworthiness before admitting document as a certification that a diligent search by a public agency failed to disclose existence of a record, report, statement, data compilation, or entry ordinarily made and preserved by the public agency).

**10.27.08 Rule 803(19) Reputation Concerning Personal or Family History**

**10.27.08.01 Second Circuit**

**U.S. v. Jean-Baptiste**, 166 F.3d 102 (2d Cir. 1999) (testimony of defendant’s father as to place of defendant’s birth fell within exception to hearsay rule).

**10.27.09 Rule 803(24) Other Exceptions**
10.27.09.01 Ninth Circuit

*U.S. v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994) (prior inconsistent out-of-court statements of witness admissible under catch-all exception rather than provisions of rule specifically dealing with prior unsworn inconsistent statements).

*U.S. v. Bachsian*, 4 F.3d 796 (9th Cir. 1993) (shipping documents admissible; they had particularized guarantees of trustworthiness in that customer's brokers regularly relied upon their accuracy).

10.28 RULE 804 -- DECLARANT UNAVAILABLE

10.28.01 Rule 804(a) In General

10.28.01.01 Ninth Circuit

*U.S. v. Pena-Gutierrez*, 222 F.3d 1080, 1086-87 (9th Cir. 2000) (court erred in concluding that a foreign witness, subsequently deported to Mexico, was unavailable within the meaning of Rule 804(a)(5), and that the witness’ hearsay statements within an INS report were admissible, where government agents did not engage in good faith, reasonable effort to contact the witness in Mexico and to procure his appearance at trial, despite their possession of the witness’ name and address).

*U.S. v. Olafson*, 213 F.3d 435, 441 (9th Cir.) (material witnesses were unavailable within the meaning of Rule 804, where such witnesses were inadvertently returned to Mexico and were thus placed beyond the subpoena power of the district court, and where the witnesses failed to respond to telephonic efforts by the United States Border Patrol to procure their appearance at trial in the United States), *cert. denied*, 121 S. Ct. 269 (2000).

10.28.02 Rule 804(b) Hearsay Exceptions. Not excludable by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony

10.28.02.01 Supreme Court

*U.S. v. Salerno*, 505 U.S. 317 (1992) (unavailable witnesses' former grand jury testimony inadmissible for defendants against government because government had no similar motive to develop the testimony).

10.28.03 Rule 804(2) Statement Against Interest

10.28.03.01 Supreme Court
Williamson v. U.S., 512 U.S. 594 (1994) (rule does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory; district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else).

10.28.03.02 Eighth Circuit

U.S. v. Mendoza, 85 F.3d 1347 (8th Cir. 1996) (statements of co-defendant charged with conspiring to distribute and to possess methamphetamine that defendant had delivered methamphetamine was not sufficiently against co-defendant’s penal interest to warrant admission under exception to hearsay rule).

10.28.03.03 Ninth Circuit

U.S. v. Boone, 229 F.3d 1231, 1234 (9th Cir. 2000) (incriminating hearsay statements of a co-defendant were properly received into evidence as statements against defendant’s penal interest where co-defendant uttered “unabashedly inculpating” statements implicating both individuals in a private setting without involvement of law enforcement, and where circumstances surrounding utterance of hearsay statements indicated that statements contained “particularized guarantees of trustworthiness”).

U.S. v. Olafson, 213 F.3d 435, 441-42 (9th Cir.) (statements of material witnesses regarding citizenship or alienage admissible as statements against declarant’s interest under Rule 803(b)(3) or as statements of the declarant’s personal or family history under Rule 803(b)(4)), cert. denied, 121 S. Ct. 269 (2000).

LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998) (no constitutional error in state court’s decision to exclude defendant’s statement that co-defendant was not involved in murder).

U.S. v. Beydler, 120 F.3d 985 (9th Cir. 1997) (hearsay exception for statements against penal interest does not apply to information given to police by an informant in exchange for a promise of leniency).

U.S. v. Paguio, 114 F.3d 928 (9th Cir. 1997) (a parent’s statement that he committed a crime and that a child had nothing to do with it is admissible under the hearsay exception for inculpatory statements by an unavailable witness).

U.S. v. Fowlie, 24 F.3d 1070 (9th Cir. 1994) (unavailable declarant's videotaped statement did not meet against interest requirement).

U.S. v. Rubio-Topete, 999 F.2d 1334 (9th Cir. 1993) (holding inadmissible hearsay testimony regarding informant's statements to defense investigator; statements not against informant's interest because statement did not subject informant to criminal prosecution).
U.S. v. Magana-Olvera, 917 F.2d 401 (9th Cir. 1990) (although declarant unavailable, his statements did not meet the requirement that a reasonable person in his shoes would not have made the statements unless they were true; a reasonable person in this situation might very well have made no statements even if they were not true; the declarant had a great deal of incentive to minimize his penalty).

U.S. v. Holland, 880 F.2d 1091 (9th Cir. 1989) (one co-defendant's tape recorded statement admissible against the other).

U.S. v. Slaughter, 891 F.2d 691 (9th Cir. 1989) (witness' out-of-court statement regarding informant's and witness' use of cocaine should have been admitted; they would have subjected the witness to possible criminal liability, were corroborated by the defendant's testimony, and the witness was unavailable), cert. denied, 505 U.S. 1228 (1992).

U.S. v. Ospina, 739 F.2d 448 (9th Cir.) (court did not err in refusing to admit exculpatory statements as to one defendant that were declarations against penal interest made by co-defendants; statements lacked spontaneity because they were made after the defendants were left alone in a detention room), cert. denied, 471 U.S. 1126 (1985).

U.S. v. Monaco, 735 F.2d 1173 (9th Cir. 1984) (witness' prior testimony not statement against interest since he did not expose himself to criminal liability).

10.28.04 Rule 804(3) Statement of Personal or Family History

(A) A Statement Concerning the Declarant's Own Birth . . . Ancestry

10.28.04.01 Ninth Circuit

U.S. v. Winn, 767 F.2d 527 (9th Cir. 1985) (material witnesses' statements admissible if they were unavailable and the statements concerned their personal or family history).

U.S. v. Medina-Gasca, 739 F.2d 1451 (9th Cir. 1984) (error for court to allow introduction of material witnesses' statements re: ancestry through testimony of agent since it went to critical element of crime, i.e., illegal alienage of witness; error harmless).

10.29 RULE 807 -- RESIDUAL EXCEPTION

10.29.01 Ninth Circuit

U.S. v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998) (court erred in refusing to admit sworn videotaped testimony of deported eyewitness after denying defendant opportunity to depose).

10.30 RULE 902 -- SELF-AUTHENTICATION
U.S. v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000) (INS Certificate of Non-Existence of Record met the requirements of self-authentication under Rule 902(1) because document was made under seal and was signed by an INS official attesting to the truthfulness of the statements contained in the document).

10.31 RULE 1006 -- SUMMARIES

10.31.01 Ninth Circuit

U.S. v. Leon Reyes, 177 F.3d 816 (9th Cir. 1999) (summaries of oral testimony admissible to prove materiality in perjury trial).
10.32 RULE 1101(d)(3)--APPLICABILITY OF RULES

10.32.01 Ninth Circuit

_U.S. v. Walker_, 117 F.3d 417 (9th Cir. 1997) (FRE do not apply in supervised release revocation proceedings).

10.33 AMENDED FEDERAL RULES OF EVIDENCE -- EFFECTIVE 12/1/00

10.33.01 RULE 103: Rulings on Evidence [amended by new paragraph approved by Supreme Court, effective December 1, 2000]

(a) Effect of Erroneous Ruling
   (1) Objection
   (2) Offer of Proof

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

[Editorial Note: This amendment should resolve one of the thornier questions of evidentiary procedure. After noting the varying approaches of the Circuit Courts, the Committee concluded that demanding a renewal is "more a formalism than a necessity." The term "definitive" is key. Thus, a reserved or provisional ruling requires a renewed objection. Moreover, the aggrieved party has to timely bring to the court's attention any material changes in the relevant facts and circumstances that took place after the advance ruling if that party intends to rely upon them on appeal. "Nothing in the amendment is intended to affect the rule set forth in _Luce v. U.S._, 469 U.S. 38 (1984), and its progeny." Nor does the amendment deal with the question the Supreme Court addressed in _Ohler_ below under Rule 609.]

10.33.02 Rule 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

   (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.
[Editorial Note: The amendment to Rule 404(a)(1) represents a change in the law. In a homicide trial involving a claim of self-defense, for example, the accused has long been able to rely on Rule 404(a)(2) to offer evidence of the alleged victim's violent propensities (which the prosecutor can rebut) without exposing himself or herself to evidence that he or she has a violent character. Under the amendment, the government will be able to respond by adducing proof aimed at the accused's own character for violence.

Several cautions, however, are in order. The amendment does not change the standards for proving character by evidence of other specific sexual behavior or sexual offenses under RULES 412-415. As its context shows, the amendment pertains only to proof of character through reputation or opinion under RULE 405(a). Nor does it apply to the proof of the alleged victim's violent character known to defendant when offered for the limited purpose of showing the reasonableness of defendant's assessment of whether the alleged victim's aggression created a danger of serious bodily harm. Finally, an accused's attack on the alleged victim's veracity character under Rules 608 or 609 does not trigger the amendment. Note also that the Committee has inserted the term "alleged" before each reference to the "victim" in Rule 404(a)(2) (not set forth above).]

10.33.03  Rule 701 -- Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, [and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[Editorial Note: This change precludes a party from surprising the opponent by calling a technical or scientific expert as a lay person to make an end run on the privileges and strictures of Rule 702. It speaks to expert testimony only and does not prevent an expert from testifying about matters dealing with everyday human perceptions such as the size or shape or speed of automobiles, heights, weights or sounds etc. Moreover, the amendment does not seek to change the traditional admissibility of an owner's lay opinions as to the value or profits of his business based on his intimate knowledge thereof. Nor would it preclude a lay opinion from a person familiar with a certain controlled substance, such as a user, that a given substance was an illegal drug.]

10.33.04  Rule 702 -- Testimony by Experts

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.
[Editorial Note: In very broad terms, this amendment appears to distill the essential elements developed by the Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US. 579 (1993) and *Kum Ho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999) to guide lower courts in performing their "gatekeeper" function when ruling on the admissibility of expert opinion evidence. Under Rule 104(a), the party who offers expert testimony has the burden of persuading the trial judge that its offer meets the pertinent admissibility requirements.

The Committee Note also points out that the factors listed in *Daubert* are not exhaustive. For example, Courts have long applied other factors as bearing on the reliability of expert opinions such as whether they developed their opinions expressly for the litigation, whether there is a substantial analytical gap between the data and the opinion, whether the witness has sufficiently accounted for "obvious alternative explanations," whether the expert's forensic analysis is as rigorous as in the expert's regular professional practice or whether the witness' claimed field of expertise is capable of producing reliable results on the matter. No single factor, however, is necessarily dispositive.

The Note also cautions that the Rule 702 issue is *reliability*, not *correctness* since the application of accepted but competing principles or methods may rationally reach differing conclusions from the same data. The amendment applies just as rigorously to non-scientists as to scientists and recognizes that, in certain fields, experience alone or in combination with other factors may provide a reliable foundation for expertise.

According to the Committee, subpart (1) suggests a quantitative analysis and the term "data" is broad enough to include "the reliable opinions of other experts" as well as hypothetical facts supported by the evidence. Nothing in the amendment allows a trial judge to keep out an expert's testimony because the judge believes one version of the facts and not the other.

As to the interaction between Rules 702 and 703, the Note explains that Rule 702 expresses the requirements of the expert opinions as to sufficiency and reliability. More narrowly, however, the original Rule 703 set out a reasonable reliability test for otherwise inadmissible material the expert may rely upon in forming an opinion.

In addition, the Committee expresses concern that constantly referring to qualified witnesses as "experts" in open court implies a judicial stamp of authority that may over persuade a jury. "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." Finally, the amendment does not change the traditional practice of calling experts broadly to educate the fact finder on the general principles of a specialized area without applying them to the facts of the case.]
10.33.05 Rule 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

[Editorial Note: The Committee explains that the amendment is to bring uniformity to the federal courts on the question of the circumstances, if any, in which the calling party may disclose to a jury the otherwise -- F.R.E. -- inadmissible, but professionally reliable- bases of the expert's opinion. From now on, the judge, upon objection, may allow disclosure of the material only if it survives a balance analysis similar to, but significantly stricter than, that found in Rule 403.

One saving grace lies in the breadth of the hearsay exceptions, (e.g., the "learned treatise" exception in Rule 803(18) and the residual exception of Rule 807) as well as the liberalization of the authentication and "best evidence" provisions of Articles IX and X respectively. These bring what is technically admissible in court somewhat closer to what is "professionally reliable."

Moreover, nothing in the amended Rule prevents the adversary from bringing out the inadmissible material on cross to suggest how weak the bases for the opinion may be. It is also possible that cross-examination of the expert may justify redirect where the proponent may bring out the excluded evidence in rebuttal. In any event, if the trial court concludes that the underlying material does meet the new test, it should allow its revelation to the jury accompanied with a limiting instruction, if requested.]

10.33.06 Rule 803(6) -- Records of Regularly Conducted Activity

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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 memorandum, report, record or data compilation as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack
of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[Editorial Note: Trial lawyers have traditionally had to lay a foundation for the introduction of business records by calling their "custodian or other qualified witness." The Committee Note, however, explains that: "[t]he amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses." The Committee cites three protective factors that compensate for the lack of a live witness subject to cross-examination, i.e., the authentication requirements (1) of Rule 902 (11) in the case of domestic records; (2) of Rule 902 (12) for foreign records in civil actions, and (3) of 18 U.S.C. §3505 for foreign records in criminal cases.]

10.33.07 Rule 902 -- Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

[Subsections (1) to (10)]

(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record - -

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record - -

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to
criminal penalty under the laws of the country where the declaration is signed. A party intending to offer
a record into evidence under this paragraph must provide written notice of that intention to all adverse
parties, and must make the record and declaration available for inspection sufficiently in advance of their
offer into evidence to provide an adverse party with a fair opportunity to challenge them.

[Editorial Note: This amendment creates two new sections for self-authentication under
Rule 902. As in the amendment to Rule 803(6) above, the new sections provide a
procedure for authenticating records of regularly conducted activity through certifications
as an alternative to using live witnesses in every instance.

In 18 U.S.C. §3505, criminal litigators have long had a method to authenticate foreign
records of regularly conducted activity. The amendment sets up a similar procedure for
domestic records and, in civil actions, for foreign records. According to the Committee
Note, the notice element in both of the new sections aims to furnish the opposing party "a
full opportunity to test the adequacy of the foundation set forth in the declaration."

Many foreign legal systems do not use the oath at all or as routinely as in the United States.
As a safeguard of truthfulness, Rule 902 (12) broadly requires some form of criminal
penalty for making a false certification. Rule 902 (12) embodies a choice-of-law doctrine
that selects the law of the place where the falsehood was made.]
CHAPTER 11

AFFIRMATIVE DEFENSES IN FEDERAL COURT

updated by

Tony Cheng and Suzanne Lachelier

11.01 INTRODUCTION

This chapter covers the affirmative defenses of insanity, entrapment, entrapment by estoppel, duress or coercion, necessity, self-defense, voluntary intoxication, and outrageous governmental conduct. The affirmative defenses of good faith, reliance on advice of counsel, and alibi will also be addressed. Each defense will be addressed individually, discussing its elements, the prerequisites to presenting the defense, relevant case law and applicable statutory provisions and federal rules. Finally, the chapter will discuss battered woman syndrome and its effect and use with other defenses.

11.02 INSANITY

In 1984, Congress dramatically altered the insanity defense under federal law by enacting the Insanity Defense Reform Act (hereinafter “IDRA”). See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Title II, §402(a), 98 Stat. 2057, §20 (1984). Passed in the wake of public outcry over the acquittal of John Hinkley, Jr. for his attempted assassination of former President Ronald Reagan, the IDRA significantly narrowed the definition of insanity which had then evolved under federal case law. U.S. v. Garcia, 94 F.3d 57, 61 (2d Cir. 1996). Through the IDRA, Congress intended to prohibit the presentation of evidence of mental disease or defect, short of insanity, to excuse conduct. U.S. v. Pohlot, 827 F.2d 889, 897 (3d Cir. 1987). Thus, the most significant provisions of the IDRA: (1) limit the definition of insanity to be applied in federal court; (2) shift the burden of proof to the defendant to prove insanity by clear and convincing evidence; (3) amend Rule 704 of the Federal Rules of Evidence to limit the scope of expert testimony on ultimate legal issues; and (4) provide federal civil commitment procedures for persons suffering from a mental disease or defect. U.S. v. Cameron, 907 F.2d 1051, 1061 (11th Cir. 1990).

11.02.01 The Insanity Defense in Federal Court

The IDRA’s definition of insanity is codified at 18 U.S.C. §17, which provides:
**Affirmative defense.** It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.


Before IDRA, the test for insanity in most federal circuits was based on the American Law Institute (hereinafter “ALI”) test. S. Rep. No. 225, 98th Cong., 1st Sess. XXX, XXX-XX (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 31XX. Under the ALI test, a defendant is not responsible for his or her criminal conduct if, at the time of his or her actions, as a result of mental disease or defect, he or she lacked the substantial capacity to either: (1) appreciate the criminality of his or her conduct; or (2) conform his or her conduct to the requirements of the law. Model Penal Code §4.01 (P.O.D. 1962).

The first prong of the ALI test essentially evolved from the English common law. In *M’Naghten’s Case*, 8 Eng. Rep. 718, 722 (H.L. 1843), the House of Lords established a rule which required the defendant to prove that his or her mental disease or defect prevented him or her from knowing the nature and quality of his or her actions or from knowing that his or her actions were wrong. *Garcia*, 94 F.3d at 62 n.3. The *M’Naghten* rule, or the so-called “right-wrong” test, was the prevailing rule in most jurisdictions for more than a century after *M’Naghten’s Case* was decided. *Id.* at 462.

The ALI definition added the so-called “irresistible impulse” test to the “right-wrong” test established in *M’Naghten’s Case*. *Id.* Thus, under the ALI definition, a defendant could establish the insanity defense either by satisfying the *M’Naghten* rule, or by showing that he or she was driven by an “irresistible impulse” to commit an offense. *Id.*

Subsequently, however, the IDRA substantially modified the ALI definition by eliminating the ALI’s “irresistible impulse” prong altogether. *Id.; Cameron*, 907 F.2d at 1061; *Pohlot*, 827 F.2d at 896. The IDRA eliminated the “substantial capacity” requirement from in the ALI definition as well. *See U.S. v. Shlater*, 85 F.3d 1251, 1257 (7th Cir. 1996).

Under the IDRA, then, the defendant must prove two facts: (1) that he or she suffered from a severe mental disease or defect; and (2) that disease or defect rendered him or her unable at the time of the alleged crime to appreciate the nature and quality or the wrongfulness of his or her actions. 18 U.S.C. §17(a); *Shlater*, 85 F.3d at 1257. Both prongs of this test are questions of fact to be determined by the jury. *U.S. v. Reed*, 997 F.2d 332, 334 (7th Cir. 1993).

**11.02.02 Burden of Proof**

Prior to the IDRA, once the defendant raised the issue of insanity, the burden of proof fell upon the government of disproving the defense beyond a reasonable doubt. S. Rep. 98-225, at XXX -XX, reprinted in 1984 U.S.C.C.A.N. 3182, 31XX. Under the IDRA, however, the burden of proof shifts to
the defendant to establish the defense by clear and convincing evidence. 18 U.S.C. §17(b); U.S. v. Cartagena-Carrazquillo, 70 F.3d 706, 710 (1st Cir. 1995); U.S. v. Long Crow, 37 F.3d 1319, 1323 (8th Cir. 1994); Reed, 997 F.2d at 333; Cameron, 907 F.2d at 1061. Congress enacted this change largely in response to criticisms that the task of proving a defendant’s sanity beyond a reasonable doubt was sometimes an “impossible burden” for the government to shoulder. S. Rep. No. 98-225, at XXX-XX, reprinted in 1984 U.S.C.C.A.N. 3182, 31XX.

The Supreme Court has expressly noted that “[a] defendant could be required to prove his insanity by a higher standard than a preponderance of the evidence.” Jones v. U.S., 463 U.S. 354, 368 n.17 (1983). After Jones, the constitutionality of IDRA’s allocation of the burden of proof has not been in much doubt. See, e.g., U.S. v. Amos, 803 F.2d 419, 421 (8th Cir. 1986) (federal defendants may constitutionally be required to prove insanity by clear and convincing evidence).

11.02.03 Use of Psychiatric Evidence For Purposes Other than Insanity: the Distinction Between Diminished Responsibility, Diminished Capacity, and Negating the Mens Rea

The last sentence of the IDRA insanity definition provides that “[m]ental disease or defect does not otherwise constitute a defense.” 18 U.S.C. §17(a). While Congress intended this language to eliminate all other affirmative defenses based upon mental disease or defect, this section has nevertheless been subject to much interpretation regarding its effect on the so-called “diminished capacity” or “diminished responsibility” defenses. Cameron, 907 F.2d at 1061-62. Part of the problem, at least according to one court, is the “persistent confusion regarding the precise definition of [these] terms.” Id. at 1062.

According to the Eleventh Circuit in Cameron, federal courts have adopted three different interpretations of the terms “diminished capacity” and “diminished responsibility.” Id. at 1062-63. One group of courts uses the terms “as a shorthand for the proposition that expert evidence of mental abnormalities is admissible on the question of whether the defendant in fact possessed a particular mental state which is an element of the charged offense.” Id. at 1062 (citations omitted). A second group permits such evidence not specifically to negate specific intent, but instead to excuse, mitigate, or lessen the defendant’s moral culpability due to psychiatric compulsion or the failure or inability to engage in normal reflection. Id. A third group distinguishes between the two terms. Id.

According to this third group of courts, “diminished responsibility” means that the defendant “suffered from an abnormality of mind that ‘substantially impaired his mental responsibility.’” Id. “Diminished capacity,” on the other hand, refers to “defenses aimed at negating specific intent.” Id. at 1062-63.

Under IDRA, however, courts are precluded from considering “diminished capacity” and “diminished responsibility” as an affirmative defense which excuses or justifies a defendant’s conduct. U.S. v. Bennett, 161 F.3d 171, 184 (3d Cir. 1998), cert. denied, 120 S. Ct. 61 (1999); U.S. v. Schneider, 111 F.3d 197, 201 (1st Cir. 1997); Cameron, 907 F.2d at 1065-66; Pohlot, 827 F.2d at 905-06. All circuits which have addressed the issue do agree, though, that the IDRA does not preclude the use of psychiatric evidence to negate the specific intent or mens rea element of the charged offense. Bennett,
11.02.04 Notice Requirements

Rule 12.2(a) of the Federal Rules of Criminal Procedure requires that counsel for the defendant notify the government, in writing, of his or her intent to present an insanity defense within the time provided for the filing of pretrial motions, or at such later time as the court may direct. Cartagena-Carrasquillo, 70 F.3d at 710. A copy of this notice must be filed with the clerk. Fed. R. Crim. P. 12.2(a). Rule 12.2(a) further requires that the filing be done within a reasonable time. See also Gov’t of Virgin Islands v. Knight, 989 F.2d 619, 627-28 (3d Cir. 1993) (notice of insanity defense given three days before trial is unreasonable). Rule 12(f) provides that the court may still permit the defense to be raised if good cause for the untimely notice is shown. Id. at 628; U.S. v. Cervone, 907 F.2d 332, 346 (2d Cir. 1990) (seven days before trial is unreasonably late, especially without any justifiable cause). If the defendant fails to comply with these notice requirements, the insanity defense may be precluded. Fed. R. Crim. P. 12.2(a); Cartagena-Carrasquillo, 70 F.3d at 710.

As noted previously, the IDRA was intended to prohibit the presentation of “diminished capacity” and “diminished responsibility” as affirmative defenses which would excuse or justify a defendant’s conduct. Bennett, 161 F.3d at 184; Schneider, 111 F.3d at 201; Cameron, 907 F.2d at 1065-66; Pohlot, 827 F.2d at 905-06. However, if the defendant intends to introduce expert testimony of mental disease or defect to negate the mens rea, the notice requirement he or she must comply with the notice requirement. Fed. R. Crim. P. 12.2(b). Rule 12.2(b) requires the defendant to notify the attorney for the government, in writing, and file a copy of such notice with the clerk, whenever he or she intends to introduce expert testimony relating to any mental condition which bears upon the issue guilt. U.S. v. Davis, 93 F.3d 1286, 1291-92 (6th Cir. 1996).

The rule does not require the defendant to specify whether the expert testimony relates to insanity or to negating the mens rea. Fed. R. Crim. P. 12.2. Failure to give notice concerning expert testimony under Rule 12.2(b) or to submit to a mental examination under Rule 12.2(c) (see below), however, may result in the court excluding expert testimony offered by the defendant on the issue of mens rea. Fed. R. Crim. P. 12.2(d).

The Seventh Circuit has held that a defendant seeking to introduce testimony under Rule 12.2(b) must inform the government “of both the name of the witness and the general substance of the testimony that the witness is expected to give.” Fazzini, 871 F.2d at 640. That court also ruled that the defense must
give a general description of the mental condition, e.g., “alcohol-induced unconsciousness,” but not necessarily the “particular condition that he or she intends to rely upon.” *Id.*

### 11.02.05 Getting the Trial Court to Allow Psychiatric Evidence for the Defense

After defense counsel decides to use psychiatric evidence and notifies the court and the government, the defense must make an offer of proof to have such evidence admitted. The defense must prove to the court that the psychiatric evidence: (1) is relevant; (2) that its probative value substantially outweighs any confusion or delay; and (3) if it is expert testimony, that the evidence is scientifically reliable, helpful to the jury, and that the expert will not testify as to the “ultimate issue.” *See* Fed. R. Evid. 403, 702, 704(b); *Schneider*, 111 F.3d at 201. *See also infra* section 11.02.05.02. The district court retains the discretion to make these determinations. *Shlater*, 85 F.3d at 1256-57. Psychiatric evidence should be evaluated outside the presence of the jury. *Pohlot*, 827 F.2d at 905-06. Generally, courts hear *voir dire* or hold an evidentiary hearing to determine these preliminary matters. *See* Schneider, 111 F.3d at 200; Shlater, 85 F.3d at 1255; *Cameron*, 907 F.2d at 1060 n.14.

One court, however, ruled that defense counsel made “a formal offer of proof regarding psychiatric evidence of insanity” through her motion for hospitalization pursuant to 18 U.S.C. §4244. *Cameron*, 907 F.2d at 1059. The motion, along with other parts of the record, indicated to the appellate court that the defense attorney would have presented evidence of schizophrenia had her motion to admit expert mental testimony not been denied. *Id.* Another court relied solely on the expert’s report to determine whether the evidence would be admitted. *Cartagena-Carrasquillo*, 70 F.3d at 711. *But see U.S. v. Salava*, 978 F.2d 320, 322 (7th Cir. 1992) (court heard *voir dire* in addition to reviewing the expert’s report).

#### 11.02.05.01 Showing Relevance and Probative Value

In order for the court to deem psychiatric evidence relevant to an insanity defense, such evidence must show that the defendant’s mental defect was “severe.” *Long Crow*, 37 F.3d at 1324; *Reed*, 997 F.2d at 333. Proof of mental disorder is not enough. *Id.* The legislative history indicates that the term “severe” was added to the definition to insure that certain mental disorders, such as non-psychotic behavior disorders or personality defects, would not provide the basis for an insanity defense. *Salava*, 978 F.2d at 323; S. Rep. No. 98-225, at 229. If an expert’s report characterizes the defendant’s suffering as only a “significant” disorder, the disorder is not “severe” under the IDRA, and the expert’s testimony will be excluded. *Cartagena-Carrasquillo*, 70 F.3d at 712. Similarly, if the expert classifies the defect as a mild to moderate personality disorder, this also is not “severe” under the statute, and the court may exclude the testimony. *Shlater*, 85 F.3d at 1257. If the jury were to hear such testimony, the evidence would confuse the jury as to the required mental state. *Id.* at 1257; *see also Cameron*, 907 F.2d at 1067. Only a district court which actually hears or is otherwise aware of the expert testimony can determine whether such mental defects describe a mental illness falling under the statute, thus making the evidence relevant and probative. *Salava*, 978 F.2d at 324.

Courts have been reluctant to admit evidence regarding a defendant’s mental condition absent expert testimony. For example, the Ninth Circuit held that where the defense proffered only the defendant’s family, and no psychiatric expert, to testify as to their observations regarding the defendant’s
behavior during the relevant time, the evidence was properly excluded. *U.S. v. Keen*, 96 F.3d 425, 430 (9th Cir. 1996), *op. amended on denial of reh’g*, 104 F.3d 1111 (9th Cir. 1997). The court found that the proffered evidence did not show the effect the condition had on the defendant’s ability to appreciate the nature of his actions. *Id.* Under this standard, then expert testimony is virtually required for the defense to succeed.

### 11.02.05.02 Rule 704(b): Limitation on Expert Testimony

Rule 704 of the Federal Rules of Evidence limits the use of expert opinion testimony on “ultimate issues.” The rule provides that:

(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 there to. Such ultimate issues are matters for the trier of fact alone.

Fed. R. Evid. 704 (*as amended by* Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Title IV, §406, 98 Stat. 2067 (1984) (adding subsection (b)). Prior to IDRA, expert witnesses were permitted to express their opinions as to whether the defendant was sane, whether he or she was able to appreciate the nature and quality or the wrongfulness of his or her acts, and whether he or she had the capacity to conform his or her behavior to the requirements of the law. S. Rep. No. 98-225, at 2XX. The IDRA’s addition of subsection (b) to Rule 704 was intended to limit expert psychiatric testimony to presenting and explaining the expert’s diagnosis only (*i.e.*, whether the defendant had a severe mental disease or defect and what the manifestations of this disease or defect may have been). *See* S. Rep. No. 98-225, at 230. Moreover, subsection (b) prohibits expert witnesses from testifying as to their opinions on the ultimate issue raised by the IDRA standard for insanity -- whether, as a result of severe mental disease or defect, the defendant was unable to appreciate the nature and quality or wrongfulness of his or her act. *U.S. v. West*, 962 F.2d 1243, 1250 (7th Cir. 1992). Subsection (b) was enacted in response to congressional concern that expert psychiatric testimony “regarding inherently malleable psychological concepts can be misused at trial to mislead or confuse the jury.” *Cameron*, 907 F.2d at 1062.

As previously mentioned, however, evidence focusing on the defendant’s specific state of mind at the time of the alleged offense is properly admitted to negate *mens rea*. *Bennett*, 161 F.3d at 184-85; Gonyea, 140 F.3d at 650-51; *Schnieder*, 111 F.3d at 201; *Westcott*, 83 F.3d at 1358 (11th Cir. 1996); *Childress*, 58 F.3d at 728-30; *Cameron*, 907 F.2d at 1066; *Fazzini*, 871 F.2d at 641 n.5; *Bartlett*, 856 F.2d at 1079; *U.S. v. Darby*, 857 F.2d 623, 627 (9th Cir. 1988) (a psychiatrist’s testimony regarding defendant’s mental condition is admissible if it concerns the defendant’s capacity to form the requisite intent); *Pohlot*, 827 F.2d at 890. *See also supra* section 11.02.03. Additionally, if the psychiatric
testimony is not specific to the defendant’s mental state but concerns a characteristic of the mental disorder, Rule 704(b) will not preclude the evidence. *U.S. v. Brown*, 32 F.3d 236, 240 (7th Cir. 1994).

Rule 704(b) does, however, clearly exclude expert testimony regarding the defendant’s ability to appreciate his or her acts, that being the “ultimate issue” of the insanity test. *Brown*, 32 F.3d at 240. On the other hand, testimony that the defendant had a severe mental defect cannot be excluded simply because the opinion fails to establish whether the defendant could appreciate the wrongfulness of his or her acts. *Salava*, 978 F.2d at 322-23. Because the jury decides whether the evidence is sufficient to show the defendant insane, the trial court should not exclude evidence it deems insufficient to show insanity. *West*, 962 F.2d at 1248 (fact that defense expert’s testimony did not show inability to determine right from wrong did not allow district court to exclude testimony for insanity defense).

Some circuits do not allow experts to answer hypothetical questions based upon facts similar to those involved the case. These circuits claim such hypotheticals violate Rule 704(b) because the answers contain a necessary inference as to whether the defendant had the requisite mental state. See, e.g., *U.S. v. Levine*, 80 F.3d 129, 134 (5th Cir. 1996). A hypothetical involving the conduct of a similar hypothetical person suffering from a similar defect, though, does not involve the ultimate issue and is permitted under the rule. *Id*.

Courts have rejected the argument that Rule 704(b) violates either the Due Process Clause or the Equal Protection Clause. *U.S. v. Abou-Kassem*, 78 F.3d 161, 166 (5th Cir. 1996); *U.S. v. Austin*, 981 F.2d 1163, 1165-66 (10th Cir. 1992). If an expert is not allowed to testify as to the defendant’s sanity at the time of the alleged crime, that exclusion does not violate a defendant’s rights to due process or equal protection. *Abou-Kassem*, 78 F.3d at 166.

### 11.02.06 Jury Instructions

Before the trial court will instruct a jury on the insanity defense, the defendant must adduce evidence sufficient to allow a reasonable jury to find that insanity has been established with “convincing clarity.” *U.S. v. Dixon*, 185 F.3d 393, 403-04 (5th Cir. 1999); *Keen*, 96 F.3d at 430 (quoting *U.S. v. Whitehead*, 896 F.2d 432, 435 (11th Cir. 1988)). Under this test, a defendant asserting an insanity defense is not required to eliminate all ambiguity or to instill certainty in the minds of the jurors. *Id*. Instead, the defendant’s burden is to produce evidence sufficient for the jury to find to a “high probability” that he or she was insane. *Dixon*, 185 F.3d at 404. Every circuit that has considered the issue has adopted this “convincing clarity” standard. *Id*. at 404 (citing *Long Crow*, 37 F.3d at 1323-25; *U.S. v. Denny-Shaffer*, 2 F.3d 999, 1015-16 (10th Cir. 1993); *U.S. v. Whitehead*, 896 F.2d 432, 435 (9th Cir. 1990)).

In *Denny-Shaffer*, the Tenth Circuit addressed the quantum of proof necessary to raise the insanity defense. Denny-Shaffer was convicted after trial of interstate transportation of a kidnaped child, in violation of 18 U.S.C. §1201(a)(1). *Id*. at 1002. On appeal, the central issue was whether the evidence adduced at trial was sufficient to raise an insanity defense. *Id*. at 1022. Finding that the trial court had erred by rejecting the insanity defense, the Tenth Circuit reversed Denny-Shaffer’s conviction. *Id*. 
At trial, two expert witnesses testified that Denny-Shaffer suffered from multiple personality disorder (hereinafter “MPD”). Id. at 1004. Both experts agreed that one of Denny-Shaffer’s alter personalities was in control of her conduct at the time of the kidnaping. Id. Nevertheless, the district court rejected the insanity defense because Denny-Shaffer presented no evidence as to whether her alter personalities could appreciate the wrongfulness of the kidnaping. Id. at 1009. Instead, the experts testified that Denny-Shaffer’s host or dominant personality was altogether unaware of the kidnaping. Id.

The Tenth Circuit concluded the insanity defense should have been presented to the jury. Id. at 1018. Holding that kidnaping is a continuing offense, the court noted that the evidence showed that Denny-Shaffer’s dominant personality became aware of the kidnaping after the baby had been abducted. Id. at 1019. The evidence also showed that individuals suffering from MPD tend to cover up acts which their alter personalities commit, and that Denny-Shaffer’s host personality had attempted to conceal the baby after the kidnaping. Id. at 1019-20. However, because there was a genuine issue as to whether Denny-Shaffer’s host personality was able to appreciate the nature and qualities of these actions, the court concluded that a question of fact had been raised that the jury should have resolved. Id. at 1020. On remand, the Tenth Circuit instructed the trial court to charge the jury to consider evidence concerning the ability of Denny-Shaffer’s host personality to appreciate the nature and quality of her acts both during and after the kidnaping. Id. at 1021-22.

If the defendant does not establish both prongs of the insanity test -- that he or she suffered from a severe mental defect which affected his or her ability to appreciate the nature of his or her actions -- the judge will not give the jury an insanity instruction. Keen, 96 F.3d at 431. In Long Crow, 37 F.3d at 1324, no insanity instruction was given when the only evidence of insanity was the defendant’s testimony that he blacked out after he fired the first shot in the incident; the doctor who testified for the defense never personally examined the defendant; and there was no diagnosis of the alleged posttraumatic stress disorder. Moreover, no evidence showed the defect was “severe.” Id. In another case, no insanity instruction was required where the evidence only showed the defendant felt “goofy in the head” before the incident, blacked out, did not remember robbing the bank, and had frequent memory loss. U.S. v. Holsey, 995 F.2d 960, 963 (10th Cir. 1993). Also, because the expert there testified that the defendant’s stress may have caused the disassociative state, there was no showing that the defendant suffered from a mental disease or defect. Id. at 962-63.

A federal district court is not required to instruct the jury regarding the consequences to the defendant of a verdict of “not guilty only by reason of insanity” (hereinafter “NGRI”) either under IDRA or as a matter of general practice. Shannon v. U.S., 512 U.S. 573 (1994); U.S. v. Martinez, 49 F.3d 1398, 1404 (9th Cir. 1995), superseded on other grounds, U.S. v. Randolph, 93 F.3d 656 (9th Cir. 1996). In Shannon, the Supreme Court rejected the defense’s contention that Congress had, by modeling IDRA on D.C. Code Ann. §24-301 (1981), impliedly adopted the D.C. Circuit’s practice of instructing the jury on the consequences of an NGRI verdict. Shannon, 512 U.S. 580. Instead, the Shannon Court found that Congress had “departed” from the D.C. Code in significant ways in adopting the IDRA and that the Senate Report’s endorsement of the District of Columbia procedure of instructing on the effect of an NGRI was not “anchored” in the text of the act and therefore carried little weight. Id. at 580-81. The Court did leave open the possibility, however, that there may be some circumstances in which such an
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instruction would be warranted. *Id.* For example, if the government argued during closing that a particular defendant would “go free” if the jury returned a NGRI verdict, it “may be necessary for the district court to intervene with an instruction to counter such a misstatement.” *Id.* at 588.

11.02.07 Psychiatric Examinations

Once the government receives notice of an insanity defense pursuant to Rule 12.2(a), or of the defendant’s intent to introduce expert testimony of his or her mental condition pursuant to Rule 12.2(b), the government may move for a psychiatric examination of the defendant pursuant to Rule 12.2(c). Fed. R. Crim. P. 12.2(c). The government should give defense counsel notice of its intention to seek a psychiatric examination and of its intention to interview the defendant. *U.S. v. Garcia*, 739 F.2d 440, 442 (9th Cir. 1984). No statement made by the defendant in the course of any examination shall be admitted in evidence against the defendant in any criminal proceeding. Fed. R. Crim. P. 12.2(c). Failure to submit to such an examination will result in the same sanctions as those imposed for violations of Rule 12.2(b); thus, the defense may be precluded from presenting any expert testimony on the issue of the defendant’s guilt. Fed. R. Crim. P. 12.2(d).

However, Rule 12.2(c), does not authorize the district court to order a custodial pretrial examination of the defendant regarding the mental state at the time of the alleged offense. *Davis*, 93 F.3d at 1295. (Nor do 18 U.S.C. §§4241 or 4242, discussed *infra*, for that matter.) Also, the requirement for advance notice of expert evidence does not imply that a court-ordered examination of the defendant is necessarily needed or appropriate. *Id.* at 1294. It is within the court’s discretion to order a reasonable, noncustodial examination under appropriate circumstances to be determined on a case by case basis. *Id.* at 1295.

11.02.08 18 U.S.C. §4241: Determination of Mental Competency to Stand Trial

The court, the defendant, or the attorney for the government may request an examination of the defendant to determine his or her present competency to stand trial. 18 U.S.C. §4241(a). A person is considered competent to stand trial if he or she has a “sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding,” and “a rational as well as factual understanding of the proceedings against him [or her].” *Dusky v. U.S.*, 362 U.S. 402 (1960) (per curiam). The court must grant such a motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect that renders him or her mentally incompetent to the extent that he or she is unable to understand the nature and consequences of the proceedings to assist in the defense. 18 U.S.C. §4241(a); *U.S. v. Boigegrain*, 122 F.3d 1345, 1347 (10th Cir. 1997), *cert. denied*, 525 U.S. 1083 (1999); *U.S. v. Downs*, 123 F.3d 637, 639–40 (7th Cir. 1997); *U.S. v. Lebron*, 76 F.3d 29, 32 (1st Cir. 1996); *Davis*, 93 F.3d at 1290.

Prior to the date of the competency hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court pursuant to the provisions of 18 U.S.C. §4247(b)-(c). 18 U.S.C. §4241(b). A competency hearing, however, is not required whenever an examination is ordered. *Downs*, 123 F.3d at 640. A competency hearing is only required if the court finds reasonable cause to believe that the defendant is not competent. *U.S. v. Graves*, 98 F.3d 258, 261 (7th Cir. 1996).
A judge may ask the defense attorney and defendant questions to determine whether reasonable cause exists to believe the defendant is incompetent. Id. A defendant’s outbursts and hysteria should trigger to the court a bona fide doubt as to competency, and a court should order a hearing on its own motion under 18 U.S.C. §4241. U.S. v. Williams, 113 F.3d 1155, 1160 (10th Cir. 1997). Where the defendant attempts suicide the night before trial and answers the court that he does not know what is going on, due process requires that the court hold a competency hearing. U.S. v. Loyola-Dominguez, 125 F.3d 1315, 1318-19 (9th Cir. 1997). There was no error, however, in failing to order an examination to determine competency where the defendant took notes, conversed with counsel, and reacted reasonably to evidence when admitted. U.S. v. Sovie, 122 F.3d 122, 128 (2d Cir. 1997).

In Medina v. California, 505 U.S. 437 (1992), the Supreme Court held that the Due Process Clause allows a state requirement that the defendant claiming incompetence bear the burden of proving so by a preponderance of the evidence. Relying upon, inter alia, Speiser v. Randall, 357 U.S. 513 (1958), Leland v. State of Oregon, 343 U.S. 790 (1952), and Patterson v. New York, 432 U.S. 197 (1977), and the Court’s “review of the historical treatment of the burden of proof in competency proceedings,” it found that the allocation of the burden to a criminal defendant did not “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Medina, 505 U.S. at 446 (quoting Patterson, 432 U.S. at 202).

In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Supreme Court decided a slightly different issue: whether a state may continue with a criminal trial after the defendant had shown he is more likely than not incompetent. Oklahoma wanted to use its statute requiring a clear and convincing standard. Id. at 355-56. The Supreme Court rejected the state’s argument, holding that the “heightened standard offends a principle of justice that is deeply ‘rooted in the tradition and conscience of our people.’” Id. at 362 (quoting Medina, 505 U.S. at 445). A defendant’s fundamental right to be tried while competent outweighs the state’s interest in efficient operation of a criminal justice system. Id. at 367. Additionally, the right not to stand trial while incompetent merits protection even if the defendant failed to make a timely request for a competency determination. Id. at 354 n.4 (citing Pate v. Robinson, 383 U.S. 375, 384 (1966)).

The defendant must prove by a preponderance of the evidence that he or she suffers from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature and consequences of the proceedings or to assist properly in his or her defense. Cooper, 517 U.S. at 368. If, after a competency hearing, the court does find by a preponderance of the evidence that the defendant suffers from such a mental disease or defect, the court is required to commit the defendant to the custody of the Attorney General. 18 U.S.C. §4241(d); Boigegrain, 122 F.3d at 1347. The Attorney General must hospitalize the defendant for treatment in a “suitable facility” for a reasonable period of time, though not to exceed four months, to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed. 18 U.S.C. §4241(d)(1); Boigegrain, 122 F.3d at 1347; U.S. v. Ecker, 78 F.3d 726, 731 (1st Cir. 1996). The defendant may be hospitalized for an additional reasonable period of time until the defendant’s mental condition is so improved that trial may proceed. 18 U.S.C. §4241(d)(2). This is true if the court finds that there is a substantial probability that within the additional time the defendant will attain the capacity to allow
the trial to proceed, or until the pending charges against the defendant are disposed, whichever is earlier. *Id.*; *Boigegrain*, 122 F.3d at 1347. If the defendant’s condition does not improve within the prescribed time, his or her continued commitment must be based on the provisions for dangerous persons under 18 U.S.C. §4246. *Id.*

If the director of the facility in which the defendant is hospitalized pursuant to 18 U.S.C. §4241(d) determines that the defendant has recovered to such an extent that he or she is able to understand the nature and the consequences of the proceedings and to assist in his or her defense, the director must file a certificate to that effect with the clerk of the court which ordered the commitment. 18 U.S.C. §4241(e). The clerk must also direct a copy to defense counsel and the attorney for the government. *Id.* Once received, the court must hold a hearing pursuant to 18 U.S.C. §4247(d) to determine the competency of the defendant. *Id.*; *U.S. v. Nevaerez-Castro*, 120 F.3d 190, 191 (9th Cir. 1997). If the court finds by a preponderance of the evidence that the defendant is competent to stand trial, the court must order the defendant’s immediate discharge from the facility in which he or she is hospitalized and set the date for trial. 18 U.S.C. §4241(e). Upon discharge, the defendant is subject to the usual release and detention provisions. 18 U.S.C. §3141, et seq. Only the director of the facility or the patient’s attorney or guardian may file a discharge motion; the patient himself may not do so *pro se*. *U.S. v. Hunter*, 985 F.2d 1003, 1006 (9th Cir.), vacated as moot, 1 F.3d 843 (9th Cir. 1993). A finding by the court that the defendant is mentally competent to stand trial does not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged and is not admissible as evidence at trial. 18 U.S.C. §4241(f). The delay attributable to or resulting from a competency evaluation tolls the Speedy Trial Act. *U.S. v. Miranda*, 986 F.2d 1283, 1285 (9th Cir. 1993)

### 11.02.09 18 U.S.C. §4242: Determination of the Existence of Insanity at the Time of the Offense and Special Verdict

If defense counsel files notice of an insanity defense pursuant to Rule 12.2(a), the court is required to order a psychiatric or psychological examination of the defendant upon the government’s request. 18 U.S.C. §4242(a); *Davis*, 93 F.3d at 1291. In such an instance, the court must order that a psychiatric or psychological examination of the defendant be conducted and that a report be filed with the court, pursuant to 18 U.S.C. §§4247(b) and (c). *Id.* This is true because “an insanity defense will necessarily put in issue a very specific question regarding the defendant’s mental condition at the time of the offense, and will therefore require that the government be permitted to examine the defendant on request.” *Davis*, 93 F.3d at 1292. The court, however, is not required nor permitted to order an examination when the defendant files notice to negate the *mens rea*. *Id.* at 1291. In that instance, the expert testimony “does not particularly suggest the need for an examination of the defendant, let alone require it.” *Id.* at 1292-93. The court should conduct a case-by-case analysis to determine whether an examination will be necessary for the government to fairly rebut defense expert evidence on *mens rea*. *Id.* at 1293.


If the issue of insanity is raised pursuant to Rule 12.2(a), the three possible verdicts are: (1) guilty; (2) not guilty; or (3) NGRI. 18 U.S.C. §4242(b); *Shannon*, 512 U.S. at 576. A defendant found NGRI
is subject to federal commitment under the procedures contained in 18 U.S.C. §4243. See Shannon, 512 U.S. at 576. Section 4243 establishes a federal commitment procedure for individuals who have been found “not guilty only by reason of insanity” and who are presently dangerous. 18 U.S.C. §4243. If this occurs, the individual is to be committed to a suitable facility until he or she is eligible for release pursuant to 18 U.S.C. §4243(e), i.e., when a court finds that the individual would not create substantial risk of bodily injury to another person or serious damage to the property of another. 18 U.S.C. §§4243(a), (e). A medical prison facility with prison-like features is “suitable” under 18 U.S.C. §4243 if the individual has an extensive criminal history, mental diagnosis, and there are limited facility choices. Phelps v. U.S. Bureau of Prisons, 62 F.3d 1020, 1023 (8th Cir. 1995). However, an individual found NGRI may be constitutionally held only as long as he or she is both mentally ill and dangerous. Foucha v. Louisiana, 504 U.S. 71, 77 (1992) (citing Jones v. U.S., 463 U.S. at 368); see also U.S. v. Murdoch, 98 F.3d 472, 476 (9th Cir. 1996).

In order to determine whether the individual would create a risk of danger, a hearing must be held not later than forty days following the NGRI verdict. 18 U.S.C. §4243(c); Shannon, 512 U.S. at 581. If the individual is found to have dangerous propensities which do not result from mental disease or defect, continued confinement is not justified under 18 U.S.C. §4243. Murdoch, 98 F.3d at 476. On the other hand, the mere fact that the individual is not in a situation where he or she will react dangerously, does not mean he or she no longer suffers from a mental disease which causes his or her dangerous propensities. Id.

Prior to the date of the hearing, the court must order that a psychiatric or psychological examination of the individual be conducted and that a report be filed with the court. 18 U.S.C. §4243(b). The only mandatory period of confinement is the period between the NGRI verdict and the hearing. Shannon, 512 U.S. at 586.

At the hearing, an individual found NGRI of an offense involving bodily injury or serious damage to the property of another person, or a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another or create serious property damage. 18 U.S.C. §4243(d); Shannon, 512 U.S. at 581. With respect to any other type of offense, the defendant has the burden of proof only by a preponderance of the evidence. 18 U.S.C. §4243(d). If the defendant fails to meet the applicable standard, the court must commit him to the custody of the Attorney General. 18 U.S.C. §4243(e); Phelps, 62 F.3d at 1021; Murdoch, 98 F.3d at 476. Because the possibility exists that an individual who is found NGRI may be incarcerated for a significant period of time, defense counsel would be wise to obtain a psychiatrist’s or psychologist’s opinion as to the defendant’s dangerousness before deciding whether to raise an insanity defense.

Once the individual has been committed to the custody of the Attorney General, the Attorney General must release the individual to the appropriate state official of the person’s domicile or place of trial, if the state will assume responsibility for custody, care, and treatment. 18 U.S.C. §4243(e). If the state is to assume this responsibility, the Attorney General must hospitalize the individual for treatment in a suitable facility until either a state will assume this responsibility, or the individual’s mental condition is
improved, whichever is first. Id. The improvement must be such that release or conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to another’s property. Id.; Shannon, 512 U.S. at 582; U.S. v. Jackson, 19 F.3d 1003, 1006 (5th Cir. 1994).

When the director of the facility of hospitalization determines that the individual has recovered from his or her mental disease or defect to such an extent that release or conditional release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the director must file a certificate to that effect with the clerk of the court that ordered the commitment. 18 U.S.C. §4243(f). The clerk must send a copy of the certificate to defense counsel and to the government attorney. Id. The court shall then either order the discharge of the individual or, on the motion of the attorney for the government or on its own motion, hold a hearing, conducted pursuant to the provisions of 18 U.S.C. §4247(d), to determine whether the individual should be released. Id.; see also U.S. v. Bilyk, 29 F.3d 459, 460 (8th Cir. 1994). If, after the hearing, the court finds by the applicable standard (either clear and convincing evidence or by a preponderance of the evidence), that the individual has recovered from his or her mental disease or defect to such an extent that release would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another, the court must order the individual discharged immediately. 18 U.S.C. §4243(f)(1); Jackson, 19 F.3d at 1006. This procedure is similar to that dealing with competency. See supra section 11.02.08.

In the alternative, a court may also order the conditional release of the individual. 18 U.S.C. §4243(f)(2). Thus, if the court finds that the person is recovered to the extent that his or her conditional release under a prescribed treatment program would no longer create the above risks, the court must order that he or she be discharged conditionally under a prescribed regimen of medical, psychiatric, or psychological care or treatment. Id. Additionally, the court must order, as an explicit condition of release, that he or she comply with the treatment program. 18 U.S.C. §4243(f)(2)(B). The court may at any time, after a hearing employing the above criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment. 18 U.S.C. §4243(f).

The director of the medical facility responsible for administering the treatment program for an individual conditionally discharged under §4243(f) must notify the Attorney General and the court of any failure of the individual to comply with the treatment program. 18 U.S.C. §4243(g). Upon such notice, or upon other probable cause to believe that the individual has failed to comply with the prescribed treatment program, the individual may be arrested. Id. Upon arrest, the individual is to be taken “without unnecessary delay” before the court having jurisdiction over him or her. Id. The court must hold a hearing and determine whether the person should be remanded to a suitable facility on the ground that, in view of his or her failure to comply with the prescribed treatment program, continued release would create a substantial risk of bodily injury to another person or serious damage to the property of another. Id.

In Jones v. U.S., 463 U.S. 354 (1983), the Supreme Court upheld the constitutionality of a District of Columbia statute similar to 18 U.S.C. §4243, which required mandatory commitment of defendants found NGRI and which placed the burden of proof on the defendant at the release hearing. Jones, 463 U.S. at 363-66. Similarly, the Ninth Circuit found the provisions of section 4243(e) constitutional despite a vagueness challenge. Phelps v. U.S., 831 F.2d 897, 898 (9th Cir. 1987).
In *Foucha v. Louisiana*, 504 U.S. 71 (1992), however, the Supreme Court held that a Louisiana statute violated due process by allowing continued confinement of an insanity acquittee on the basis of his antisocial personality, after a hospital review committee reported no evidence of medical illness and had recommended conditional discharge. *Foucha*, 504 U.S. at 78-80. The Court compared the indefinite detention permitted by Louisiana law with the limited and procedurally constrained detention permitted under the Bail Reform Act of 1984 and upheld as constitutional by the Court in *U.S. v. Salerno*, 481 U.S. 739 (1987):

> Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.

*Id.* at 81-82. The Court found that the statute violated Foucha’s rights under the Equal Protection Clause as well. *Id.* at 84-85.

**11.02.11 Related Commitment Provisions**

**11.02.11.01 18 U.S.C. §4244: Hospitalization of a Convicted Person**

Under 18 U.S.C. §4244, either the defendant or the government attorney may, within ten days after a defendant is convicted, but prior to sentencing, file a motion for a hearing on the present mental condition of the defendant. 18 U.S.C. §4244(a). The motion must be supported by “substantial information” indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he or she is in need of custody for care or treatment in a suitable facility. *Id.* The court must either grant the motion, or at any time prior to the sentencing of the defendant, must order such hearing *sua sponte*, if the court is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for which he or she needs appropriate care in a suitable facility. *See Id.; U.S. v. Moses*, 106 F.3d 1273, 1275 (6th Cir. 1997). A psychiatric exam requested pursuant to 18 U.S.C. §4244 is basically mandatory. *U.S. v. George*, 85 F.3d 1433, 1437 (9th Cir. 1996). Prior to the hearing, the court may order a psychiatric or psychological examination of the defendant and that a report be filed with the court. 18 U.S.C. §4247(b)-(c). If the report includes an opinion by examiners that the defendant is presently suffering from a mental disease or defect but that he or she does not require custody for care or treatment in a suitable facility, the report must also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment needed. 18 U.S.C. §4244(b).

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he or she should be committed for care or treatment, instead of being sentenced to imprisonment, the court must commit the defendant to the custody of the Attorney General for treatment. 18 U.S.C. §4244(d); *Moses*, 106 F.3d at 1275. A sentence of
imprisonment, however, may nevertheless be proper despite the fact that a defendant is suffering from a mental disease or defect. 18 U.S.C. §4244(d). Relying on the language of section 4244(d), the court in U.S. v. Buker, 902 F.2d 769 (9th Cir. 1990), found that a sentencing court must find both that a defendant is suffering from a mental disease or defect and should be hospitalized instead of imprisoned. Buker, 902 F.2d at 770. The Attorney General must hospitalize the defendant for care or treatment in a “suitable facility.” 18 U.S.C. §4244(d). Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense of conviction. Id.; Moses, 106 F.3d at 1275.

When the director of the facility in which the defendant is hospitalized pursuant to section 4244(d) determines that the defendant has recovered from his or her mental disease or defect to such an extent that he or she is no longer in need of treatment in such a facility, the director must file a certificate to that effect with the clerk of the court that ordered the commitment. See, e.g., Moses, 106 F.3d at 1275. Copies of the certificate must be sent to defense counsel and to the government attorney. 18 U.S.C. §4244(d). If at the time such a certificate is filed the provisional sentence imposed pursuant to section 4244(d) has not expired, the court must proceed to final sentencing and may modify the provisional sentence. 18 U.S.C. §4244(e); Moses, 106 F.3d at 1276.

11.02.11.02 18 U.S.C. §4245: Hospitalization of an Imprisoned Person

Title 18 U.S.C. §4245 provides for the involuntary commitment of inmates to prison psychiatric facilities. U.S. v. Baker, 45 F.3d 837, 840 (4th Cir. 1995). The government must prove by a preponderance of the evidence that the inmate currently suffers from a mental disease or defect requiring “custody for care or treatment in a suitable facility.” 18 U.S.C. §4245(a); Baker, 45 F.3d at 840. An imprisoned person can object, either in writing or through his attorney, to being transferred to a facility for care or treatment. 18 U.S.C. §4245(a). In such a case, and at the request of the director of the facility, the government may file a motion with the court for the district in which the facility is located to hold a hearing on the present mental condition of the person. Id. The court must grant the motion if there is reasonable cause to believe that the person may presently be suffering from a mental disease or defect requiring treatment in a suitable facility. Id. If such a motion is filed, the transfer of the person must be stayed pending completion of the procedures contained in the section. Id. A hearing under this section may be conducted by means of a video conference. U.S. v. Hamilton, 107 F.3d 499, 505 (7th Cir. 1997).

As is the case with hospitalization of a convicted person, prior to the date of the hearing, the court may order a psychiatric or psychological examination of the person and that a report be filed with the court, pursuant to 18 U.S.C. §4247(b)-(c). 18 U.S.C. §4245(b)-(c). If, after the hearing, the court finds by a preponderance of the evidence that the person is suffering from a mental disease or defect requiring treatment, the court must commit the person to the custody of the Attorney General. 18 U.S.C. §4245(d). The Attorney General must hospitalize the person for treatment in a suitable facility until he or she is no longer in need of such custody for care or treatment, or until the expiration of his or her sentence, whichever is earlier. Id.; Baker, 45 F.3d at 840.

When the director of the facility in which the person is hospitalized pursuant to §4245(d) determines that the person has recovered from his or her mental disease or defect to the extent that he is no longer in need of custody for care or treatment in the facility, the director is to file a certificate to that effect with the
clerk of the court that ordered the commitment. 18 U.S.C. §4245(e). The clerk then sends a copy of the certificate to defense counsel and to the government attorney. *Id.* If at the time of the filing of this certificate the term of imprisonment imposed upon the person has not expired, the court must order that the person be reimprisoned until the expiration of his sentence of imprisonment. *Id.*

11.02.11.03 18 U.S.C. §4246: Hospitalization of A Person Due for Release

Title 18 U.S.C. §4246 establishes federal commitment procedures for mentally ill persons who are due to be released from custody but whose release would create a substantial risk of serious bodily injury or serious property damage to others. The mental facility director may certify that a hospitalized person is currently suffering from such a mental disease or defect that release might create a substantial risk of bodily injury or property damage. 18 U.S.C. §4246(a). The director’s certification may include defendants whose time for release is near, or who has been committed to the Attorney General’s custody under 18 U.S.C. §4241(d) to determine competency to stand trial, or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person. *Id.* The director must also certify that suitable arrangements for state custody and care of the person are unavailable. *Id.* Then, the director must transmit this certification to the clerk of the court for the district in which the person is incarcerated. *Id.* The clerk must send a copy of the certificate to the defendant and to the government attorney, and if the person was committed pursuant to 18 U.S.C. §4241(d), to the clerk of the court that ordered the commitment. *Id.* The court must order a hearing to determine whether the person is presently suffering from a mental disease or defect such that release would create a substantial risk of bodily injury to another person or serious damage to the property of another. *Id.* The filing of such a certificate stays the release of the person pending completion of the procedures contained in §4246. *Id.*

In *Weber v. U.S. District Court for the Central District of California*, 9 F.3d 76 (9th Cir. 1993), the Ninth Circuit held that the district court lacked the authority pursuant to §4246 to initiate a hearing to determine whether the petitioner should continue treatment in a psychiatric facility. *Weber*, 9 F.3d at 79. In *Weber*, because the court’s assumption that the petitioner’s sentence was about to expire was erroneous, §4246(a), which directs the court to order such hearing, did not apply. *Id.* Also, the medical facility that had treated the petitioner for the past year had determined that he no longer suffered from a mental disease or defect requiring custody for care or treatment. *Id.* Once the director certified pursuant to §4244(d) that the petitioner had recovered, “any remaining concern regarding [his] dangerousness became a matter to be considered at sentencing.” *Id.* at 79 n.1.

Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted and that a report be filed with the court pursuant to 18 U.S.C. §4247(b)-(c). 18 U.S.C. §4246(b); *Bilyk*, 29 F.3d at 460. Also, if after the hearing the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect such that release would create a substantial risk of bodily injury to another person or serious damage to the property of another, the court must commit the person to the custody of the Attorney General. 18 U.S.C. §4246(d). The Attorney General is to release the person to the appropriate official of the state in which the person is domiciled or was tried, if the state will assume responsibility for custody, care and treatment. *Id.* The Attorney General is to make “all reasonable efforts” to cause the state to assume this responsibility. *Id.*
If the state(s) will not assume this responsibility, the Attorney General must hospitalize the person in a suitable facility until either a state will assume the responsibility, or until the person’s mental condition is such that release or conditional release under a prescribed treatment program would not create the risks described above, whichever is earlier. *Id.* The Attorney General is to continue periodically to exert “all reasonable efforts” to cause a state to assume the responsibility for the person’s custody, care and treatment. *Id.*

When the director of the facility in which a person is hospitalized pursuant to §4246(d) determines that the person has recovered from his or her mental disease or defect to the extent that release would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another, the director is to file a certificate to that effect with the clerk of the court that ordered the commitment. 18 U.S.C. §4246(e). The clerk is to send a copy of this certificate to defense counsel and to the attorney for the government. *Id.* The court must either order the discharge of the person, or on the motion of the attorney for the government, or on its own motion, hold a hearing conducted pursuant to §4247(d) to determine whether the person should be released. *Id.* After the hearing, if the court finds by a preponderance of the evidence that the person is recovered from his or her mental disease or defect to such an extent that release would no longer create the risks mentioned above, the court must order that he or she be immediately discharged. 18 U.S.C. §4246(e)(1). If the court finds that the person has recovered to the extent that conditional release under a prescribed treatment program would no longer create the risks described above, the court must order that he or she be conditionally discharged under a prescribed regimen of medical, psychiatric or psychological care or treatment, and order as an explicit condition of release that he or she comply with this treatment program. 18 U.S.C. §4246(e). At any time after the hearing, the court, employing this same criteria, may modify or eliminate the program of care or treatment. *Id.*

The director of the medical facility responsible for administering the treatment program imposed on a person conditionally discharged under § 4246(e) must notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the treatment program. 18 U.S.C. §4246(f). Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed treatment program, the person may be arrested. *Id.* If arrested, the person is to be taken “without unnecessary delay” before the court. *Id.* The court is to hold a hearing, and determine whether the person should be remanded to a suitable facility on the ground that, in view of failure to comply with the prescribed treatment, continued release would create a substantial risk of bodily injury to another person or serious damage to the property of another. *Id.* The Ninth Circuit held that a district court violates due process when it revokes the conditional release of a person diagnosed with a mental impairment, where the probation department, rather than medical experts, prescribes and approves his regimen. *U.S. v. Woods,* 995 F.2d 894, 896-97 (9th Cir. 1993).

If charges are dismissed for reasons not related to the mental condition, the director of the facility of hospitalization may certify to the Attorney General that, because of mental disease or defect the release would create a substantial risk of bodily injury to another person or cause serious property damage. 18 U.S.C. §4246(g). Under such circumstances, the Attorney General must release the person for institution of state proceedings for civil commitment. *Id.* Moreover, the Attorney General must release that person to an appropriate official of the state in which the person is domiciled or was tried. *Id.* If the state(s) will
not assume this responsibility, the Attorney General must release the person upon receipt of such notice from the state that will not assume the responsibility. *Id.* This release must be no later than ten days after certification by the director of the facility. *Id.*

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court held that, in order to protect the public, an inmate who was found to suffer from “mental abnormalities” as defined by the Kansas Sexually Violent Predator Act could be committed into civil custody after being released from state prison. Hendricks, an inmate who had a long history of sexually molesting children, was scheduled to be released from prison shortly after the Kansas Act had been passed. *Id.* Under the Act, because pedophilia qualified as a “mental abnormality,” Hendricks was ordered into the Secretary’s custody upon his release from prison. *Id.* at 355-56. Hendricks, however, argued that the application of the Act violated Due Process, Double Jeopardy, and Ex Post Facto Clauses. *Id.* at 356.

The Court held that the Kansas Act did not violate the due process clause because it required a court to determine whether an individual could control his or her dangerousness before it imposed commitment. *Id.* at 360. Hendricks’ diagnosis as a pedophile “plainly sufficed” for due process purposes. *Id.* In response to Hendricks’ allegations of double jeopardy violations, the Court asserted that nothing on the face of the statute suggested that the state legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm. *Id.* at 361. The Court also found significant that commitment under the Kansas Act is only potentially indefinite because the maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. *Id.* at 364. Moreover, because the Court declined to find civil commitment akin to “punishment,” the Kansas Act did not violate the double jeopardy clause. *Id.* at 361-63.

### 11.02.12 Practical Considerations Surrounding the Insanity Defense

Generally, a series of interviews with his or her client will reveal whether defense counsel may want to assert an insanity defense. If it appears that an insanity defense may be appropriate, the first step is to obtain a signed release of information form from the defendant and obtain any prior medical and psychiatric records. A review of these records will be helpful to the psychiatrist who is selected by the defense as an expert witness.

Under 18 U.S.C. §3006A(e), an *ex parte* application may be submitted by appointed counsel to the court in order to obtain the necessary expert services. The defense should request that the application be filed under seal to assure that the government does not become aware of which experts the defense contacted, unless and until the defense is required to reveal those experts.

In preparing for the cross-examination of the government’s expert, extensive research is vital. Frequently, the government’s experts will have spent very little time speaking to the defendant and looking into the defendant’s background. In addition, researching the area(s) of psychiatry involved in the case can be of enormous assistance in discovering weaknesses in the testimony of government experts.
On the other hand, the defense expert must be careful not to exhibit the same weakness. The expert should be fully acquainted with the defendant’s background and also fully acquainted with the defense theory of the case. For example, the expert must know whether the defense is trying to demonstrate that as a result of severe mental disease or defect the defendant either failed to appreciate the nature and quality or the wrongfulness of his acts, or lacked the specific intent necessary to commit the crime charged. The defense should also attempt to utilize lay witnesses in addition to its expert(s); this is frequently a good way to put the defendant’s family before the jury without resorting to character evidence and all of its potential pitfalls.

The controversial nature of an insanity defense mandates that the defense attorney request personal voir dire of the jury at the time of trial. The cursory examination conducted by most courts will almost never reveal the strong feelings most individuals have about the insanity defense. If personal voir dire is not permitted, the attorney should at least provide a list of questions dealing solely with the issue of the insanity defense to the court and a written request that the judge ask each of the jurors those questions. Several circuit courts have held that a criminal defendant has the right to have prospective jurors questioned about their ability to evaluate objectively and fairly the evidence of insanity or lack of mental capacity. *U.S. v. Allsup*, 566 F.2d 68, 70 (9th Cir. 1977).

A series of instructions relating to the insanity defense should also be presented to the judge. The instructions should be tailored to fit the facts of the particular case. The attorney should not rely on the judge to give an insanity instruction if one has not been presented to the court by the defense.

At trial, the defense should never stipulate to the qualifications of its expert. A step-by-step review of his or her credentials covering the following areas should be conducted: undergraduate work (especially honors received); medical school and graduate studies; internship, residency, and licensing as a doctor; board certification; hospital work and staff assignments; professional work over the years (number of psychiatric examinations conducted); teaching positions; consulting work; prior court experience; publications, books, and articles; areas of specialization; professional associations, etc. The credentials of the defense expert are frequently much more impressive than those of the government expert, and the jury will never hear about them if counsel stipulates.

Practically speaking, a defense based on insanity is often a difficult proposition. The common misconception among juries is that a defendant simply creates this defense in order to “get off.” One approach to overcoming this misconception is to demonstrate that the defendant’s mental condition is organic. If the defense can show physical evidence of organic brain damage, graphs of abnormal brain waves, or evidence of retardation or epileptic seizures, the defense can be made more palatable. In view of the strict commitment provisions created by IDRA, however, the insanity defense should be asserted with caution.

### 11.03 ENTRAPMENT

In *Sorrells v. U.S.*, 287 U.S. 435 (1932), the Supreme Court first recognized that an entrapment defense may be asserted when the government causes or induces an otherwise innocent person to commit a crime. The defense of entrapment, which is clearly recognized in all federal circuits, consists of two
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elements: (1) government inducement to commit the crime; and (2) absence of predisposition by the
Cir. 2000); *U.S. v. Brace*, 145 F.3d 247, 254 (5th Cir. 1998); *U.S. v. Duran*, 133 F.3d 1324, 1330
(10th Cir. 1998); *U.S. v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997); *U.S. v. King*, 73 F.3d
1564, 1568 (11th Cir. 1996); *U.S. v. Jensen*, 69 F.3d 906, 910 (8th Cir. 1995); *U.S. v. Hollingsworth*,
27 F.3d 1196, 1198 (7th Cir. 1994); *U.S. v. Johnson*, 14 F.3d 766, 771 (2d Cir. 1994); *U.S. v.
Kussmaul*, 987 F.2d 345, 348 (6th Cir. 1993); *U.S. v. Jones*, 976 F.2d 176, 179-80 (4th Cir. 1992);

Entrapment is not a constitutionally-based defense; instead the doctrine is a judicially- created
limitation on governmental activity. *See, e.g., U.S. v. Tucker*, 28 F.3d 1420, 1422-23 (6th Cir. 1994)
1987) (entrapment is “a court-created limitation on governmental activity”) (citing *Ainsworth v. Reed*, 542
F.2d 243, 244 (5th Cir. 1976)). The defense recognizes that law enforcement agents may not “implant in
an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime
287 U.S. at 442). Similarly, in *Russell*, the Supreme Court recognized that the doctrine:

is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it
feels to have been “overzealous law enforcement,” but instead in the notion that Congress
could not have intended criminal punishment for a defendant who has committed all the
elements of a proscribed offense but was induced to commit them by the Government.

*Russell*, 411 U.S. at 435.

To raise an entrapment defense, the defendant must present evidence that he or she was (1)
induced to commit the crime by a government agent; and (2) not otherwise predisposed to commit the
crime. *U.S. v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998); *U.S. v. Manarite*, 44 F.3d 1407, 1417 (9th Cir.
1995). Although the defendant must present evidence of both elements, the threshold of proof is generally
low. *See, e.g., Poehlman*, 217 F.3d at 698 (“[t]o raise entrapment, defendant need only point to evidence
from which a rational jury could find that he was induced to commit the crime but was not otherwise
predisposed to do so); *Manarite*, 44 F.3d at 1417 (“slight evidence” sufficient to create a factual issue to
get the defense to the jury). Once the defense meets its initial burden of production, the burden of proof
shifts to the government to disprove the existence of the defense beyond a reasonable doubt. *Jacobson*,
503 U.S. at 548-49; see also *In re Winship*, 397 U.S. 358, 364 (1970) (“Due process commands that
no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder
of his guilt.”) (citations omitted).

11.03.01 Governmental Inducement Element

“‘Inducement’ exists when the governmental deception or instigation actually implants the criminal
design in the defendant’s mind.” *Gamache*, 156 F.3d at 9 (citing *Russell*, 411 U.S. at 436). The
inducement, however, must consist of more than “mere suggestions or the offering of an opportunity to
commit a crime.” *Manarite*, 44 F.3d at 1418. Thus, where the government simply gives the defendant “an opportunity to commit a crime,” and the defendant accommodates by committing the crime, the entrapment defense is not available. *Kussmaul*, 987 F.2d at 349 (citing *Jacobson*, 503 U.S. at 549-50).

Inducement, however, goes beyond providing an ordinary “opportunity to commit a crime.” *U.S. v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994). Instead, “the government induces a crime when it creates special incentive for the defendant to commit the crime.” *Poehlman*, 217 F.3d at 698. “This incentive can consist of anything that materially alters the balance of risks and rewards bearing on defendant’s decision whether to commit the offense.” *Id.* Thus, while, an ordinary opportunity to commit a crime is not sufficient to establish inducement, “proof of opportunity plus ‘something else’ may be adequate to meet a defendant’s burden.” *Gamache*, 156 F.3d at 9. For purposes of an entrapment defense, this “something else” may include: persuasion; fraudulent representations; threats; coercive tactics; harassment; promises of reward; pleas based on need, sympathy, or friendship; or any other governmental conduct that creates a risk of causing an otherwise unwilling person to commit the crime charged. See *Gendron*, 18 F.3d at 961-62 (listing types of “improper” government conduct sufficient to satisfy inducement prong); Cf. *Poehlman*, 217 F.3d at 701 (“even very subtle governmental pressure, if skillfully applied, can amount to inducement”).

In *Gendron*, the First Circuit upheld the conviction of a man convicted for receipt of child pornography in violation of 18 U.S.C. §2252(a)(2). *Id.* at 957. Then Chief Judge (now Justice) Breyer’s illustration of inducement in that case is instructive:

> [W]e should ask how the defendant likely would have reacted to an ordinary opportunity to commit the crime. By using the word “ordinary,” we mean an opportunity that lacked those special features of the government’s conduct that made it an “inducement,” or an “overreaching.”

*Id.* at 962 (emphasis in original, citations omitted).

An example of government overreaching can be found in *Jacobson*. There, government agents targeted the defendant with twenty-six months’ worth of repeated mailings and communications. *Jacobson*, 503 U.S. at 550. Over this period of time, government agents sent Jacobson materials from fictitious political organizations they had created to communicate with him. *Id.* at 543-47. The Court found that

by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited [Jacobson’s] interest in sexually explicit materials banned by law but also exerted substantial pressure on [him] to obtain and read such material as part of a fight against censorship and the infringement of individual rights.

*Id.* at 552.

Generally, the entrapment defense is only available to defendants who were directly induced by the government, as there is no defense of entrapment by private citizens. *U.S. v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997); *U.S. v. Layeni*, 90 F.3d 514, 517 (D.C. Cir. 1996); *U.S. v. Neville*, 82 F.3d 750,
760 (7th Cir. 1996). However, governmental inducement may be provided either directly by government officials, or, indirectly, through the acts of private citizens considered agents of the government. *Id.*

In some cases, the question of whether an individual acts as a government agent will be a critical issue. For example, in *U.S. v. Fontenot*, 14 F.3d 1364 (9th Cir. 1994), the district court left for the jury to decide whether the confidential informant involved in that case could be considered a government agent. *Fontenot*, 14 F.3d at 1369. In response to a question from the jury, the district court instructed that, to determine whether the confidential informant was a government agent,

[y]ou must look to all of the circumstances existing at the time, and including, but not limited to, the nature of the informant's relationship with the government, the purposes for which it was understood that he may act on behalf of the government, the instructions given to the informant about the nature and extent of permissible activities and what the government knew about those activities and permitted or used.

*Id.* at 1367-68.

On appeal, Fontenot argued that the confidential informant should have been considered a government agent as a matter of law. *Id.* at 1369. The Ninth Circuit, however, held to the contrary, stating that the issue was a factual one for the jury to decide, and affirming the use of the supplemental jury instruction under the facts presented. *Id.*

While it is well settled that no defense of private entrapment exists, some circuits have recognized the related doctrine of “derivative entrapment.” *Washington*, 106 F.3d at 993 n.6 (collecting cases). Thus, while “[p]ersuasion, seduction, or cajoling by a private party does not qualify as entrapment,” a number of circuits allow a derivative entrapment defense when “government agents act through private citizens.” *Id.* (citations omitted). Of those jurisdictions permitting the defense, some have allowed it only in cases in which the government acts through a knowing agent, whereas others have also allowed its application in cases of unwitting agents. *Id.*

Circuits are split as to the circumstances, if any, under which a derivative entrapment defense may be asserted. Some circuits have rejected the derivative entrapment defense altogether. See, e.g., *U.S. v. Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992) (claiming to be “among the majority of Circuits that have not recognized the defense of vicarious or derivative entrapment”) (quoting *U.S. v. Marren*, 890 F.2d 924, 931 (7th Cir.1989)); *U.S. v. Mers*, 701 F.2d 1321, 1340 (11th Cir. 1983); *U.S. v. Beverly*, 723 F.2d 11, 12 (3d Cir. 1983); *U.S. v. Dove*, 629 F.2d 325, 329 (4th Cir. 1980); *U.S. v. Burkley*, 591 F.2d 903, 911 n.15 (D.C. Cir. 1978); *U.S. v. Garcia*, 546 F.2d 613, 615 (5th Cir. 1977); *Whiting v. U.S.*, 321 F.2d 72, 76 (1st Cir. 1963); *Beard v. U.S.*, 59 F.2d 940, 941 (8th Cir. 1932). Other circuits have sanctioned the defense, albeit under limited circumstances. See, e.g, *Layeni*, 90 F.3d at 517-18 (entrapment defense can be raised by a defendant who was induced by an unknowing intermediary at the instruction or direction of a government official or third party acting on behalf of the government); *U.S. v. Hollingsworth*, 27 F.3d 1196, 1204 (7th Cir. 1994) (en banc); *U.S. v. Hodges*, 936 F.2d 371, 372 (8th Cir. 1991) (under certain circumstances, an “unknowing middleman . . . can satisfy the elements of
governmental inducement in another’s entrapment defense”); *U.S. v. Jones*, 839 F.2d 1041, 1054 (5th Cir. 1988) (government may entrap a defendant through the actions of an “ignorant pawn”). A third group of circuits limits the defense to private citizens who knowingly work for the government. See, e.g., *Thickstun*, 110 F.3d at 1398 (“a principal wrongdoer, not knowingly working for the government, cannot entrap his co-conspirator”); *U.S. v. McLernon*, 746 F.2d 1098, 1109 (6th Cir. 1984).

11.03.02 Predisposition Element

Once the defendant establishes the inducement prong, he or she will be considered entrapped unless the government can prove, beyond a reasonable doubt, that “the defendant [already] had the inclination to commit the crime with which he is charged, and that his criminal inclination did not possibly result from the seductions of Government agents.” *Kussmaul*, 987 F.2d at 349. Thus, in order to defeat a claim of entrapment, the government must establish that the defendant was predisposed to commit a crime, *i.e.* the defendant had an inclination to engage in the charged criminal activity. *Gamache*, 156 F.3d at 9; see also *Duran*, 133 F.3d 1330 (10th Cir. 1998) (while the government generally meets its burden by proving predisposition, the government may, of course, also try to prove beyond a reasonable doubt that it did not induce the defendant to commit the charged offense).

Five factors may be considered to show predisposition: (1) the character or reputation of the defendant; (2) whether the initial suggestion of criminal activity was made by the government; (3) whether the defendant was engaged in the criminal activity for profit; (4) whether the defendant showed any reluctance to commit the offense; and (5) the nature of the government’s inducement. *Thickstun*, 110 F.3d at 1396. Although none of the factors is conclusive, “the defendant’s reluctance is the most important.” *Thickstun*, 110 F.3d at 1396-97. Moreover, the fact that three of the five factors focus on the government’s conduct demonstrates the point made by the First Circuit in *Gendron* that “our effort to define ‘predisposition’ through reference to the nature of the government conduct reflects the fact that, despite partial descriptions that focus primarily upon the defendant’s state of mind, government misconduct lies at the heart of the entrapment defense.” *Gendron*, 18 F.3d at 962.

Once the defense establishes a *prima facie* case of entrapment, the government must then prove beyond a reasonable doubt that the defendant was not entrapped. *Jacobson*, 503 U.S. at 548-49. Thus, once the defendant makes an initial showing of inducement and lack of predisposition, the government must ordinarily prove the defendant’s predisposition to engage in the charged criminal activity beyond a reasonable doubt. *Gamache*, 156 F.3d at 9. If the evidence shows inducement as a matter of law, the jury should be instructed to determine only whether the defendant was predisposed beyond a reasonable doubt. *Burkley*, 591 F.2d at 915. Defective instructions on predisposition result in reversal. *Duran*, 133 F.3d at 1333 (citing *Notaro v. U.S.*, 363 F.2d 169, 175-76 (9th Cir. 1966) as the “seminal case on the issue of entrapment jury instructions”).

In *Jacobson*, the Supreme Court reaffirmed the rule that the government must prove, beyond a reasonable doubt, that a defendant had the predisposition to engage in criminal activity prior to contact with law enforcement officers. *Jacobson*, 503 U.S. at 540 n.2. In *Jacobson*, the defendant was a 56-year-old farmer who was targeted by law enforcement authorities in an operation meant to locate and prosecute violators of the Child Protection Act of 1984. *Id.* at 542-43. Over the next two-and-a-half years, the
government enticed Jacobson to purchase materials depicting young children involved in sexual acts. *Id.* at 543-47. Jacobson eventually did purchase such a publication and was prosecuted. *Id.* at 547. The Supreme Court reversed Jacobson’s conviction, holding that his responses to the government’s solicitations were not enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails . . . . Rational jurors could not say beyond a reasonable doubt that [Jacobson] possessed the requisite predisposition prior to the Government’s investigation and that it existed independent of the Government’s many and varied approaches to [him].

*Id.* at 553.

Although the Court acknowledged that by the time Jacobson placed his orders, he appeared “ready and willing to commit the offense,” it viewed this willingness as arising only after sustained government contact designed to create the requisite openness to commit the crime. *Id.* “[T]he Government [may not] pla[y] on the weaknesses of an innocent party and beguil[e] him into committing crimes he otherwise would not have attempted.” *Id.*

The jury should be instructed that it must not assess predisposition as of that time when the defendant committed the crime, but rather, before agents made any suggestion for him or her to do so. *Jacobson*, 503 U.S. at 549 n.2; *Poehlman*, 217 F.3d at 703 (“the relevant time frame for assessing a defendant’s disposition comes before he has any contact with government agents”); *Gamache*, 156 F.3d at 12 (the inquiry must focus on the defendant’s predisposition before contact with the government). *But see Thickstun*, 110 F.3d at 1397 (evidence of predisposition may arise “both before the government’s initial contact and during the course of dealings”) (citing *U.S. v. Garza-Juarez*, 992 F.2d 896, 908 (9th Cir. 1993); *U.S. v. Mitchell*, 67 F.3d 1248, 1255-56 (6th Cir. 1995) (initial entrapment does not immunize defendant from criminal liability for subsequent transactions over two week period that he or she readily and willingly undertook) (citing *U.S. v. North*, 746 F.2d 627, 630 (9th Cir. 1984), overruled by *Jacobson*, 503 U.S. at 547-48 n.1, as stated in *U.S. v. Mkhsian*, 5 F.3d 1306, 1311 (9th Cir. 1993), overruled on other grounds by *U.S. v. Keys*, 133 F.3d 1282 (9th Cir. 1998)). Several cases have reversed convictions because the jury instructions failed to state clearly that the government carried the burden of proving predisposition prior to the time the government intervened. *See, e.g. Duran*, 133 F.3d at 1334; *U.S. v. Reese*, 60 F.3d 660, 664 (9th Cir. 1995) (plain error not to instruct jury that to convict, the government must prove beyond a reasonable doubt “that defendant was predisposed to commit the criminal act prior to first being approached by government agents.”). *Mkhsian*, 5 F.3d at 1306. *But see Davis*, 36 F.3d at 908 (improper instruction was error, but not warranting reversal because error did not amount to miscarriage of justice).

If the government fails to establish predisposition beyond a reasonable doubt, the defendant may move for a judgment of acquittal on the theory that he or she was entrapped “as a matter of law.” *Duran*, 133 F.3d at 1335; *Thickstun*, 110 F.3d at 1396. However, such a motion will succeed only if “there is
undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act.” *Duran*, 133 F.3d at 1335 (citations omitted). Moreover, at least one circuit has found that a defendant is not entitled to such a claim if the government has presented any evidence to contradict the entrapment defense. *Id.* (citations omitted).

On the other hand, if there is overwhelming evidence of predisposition, an entrapment instruction need not even be given. *U.S. v. Busby*, 780 F.2d 804, 806 (9th Cir. 1986). The government may prove predisposition by showing that the defendant “responded affirmatively to less than compelling inducement.” *U.S. v. Jenrette*, 744 F.2d 817, 822 (D.C. Cir. 1984) (quoting *Burkley*, 591 F.2d at 916). In *Perez-Leon*, 757 F.2d 866 (9th Cir. 1985), the Ninth Circuit took the position that the defendant's initial reluctance to participate in a drug transaction did not establish his lack of predisposition because his “slight hesitation” may have been caused by the nature of drug transactions, that is, that “a new buyer is usually checked and cross-checked to the best of his supplier’s ability.” *Perez-Leon*, 757 F.2d at 872. In *Sotelo-Murillo*, 887 F.2d 176 (9th Cir. 1989), however, the same court acknowledged that the defendant’s testimony that he initially refused to “pose” as a drug broker, but then relented when the informant persuaded him that it was the only way to obtain repayment of the loan, suggested enough reluctance to put the matter before the jury. *Id.* at 182. *See also Brace*, 145 F.3d at 262 (evidence of the defendant’s ready response to the solicitation, as well as evidence of independently motivated behavior that occurs after government solicitation begins, can be used to prove predisposition) (citation omitted).

In *Hollingsworth*, the Seventh Circuit added a controversial new gloss to the definition of predisposition. In that case, Judge Posner interpreted *Jacobson* to mean that “[p]redisposition is not a purely mental state, the state of being willing to swallow the government’s bait. It has positional as well as dispositional force.” *Hollingsworth*, 27 F.3d at 1200. Judge Posner further wrote that the “defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime, some criminal would have done so.” *Id.* However, the circuits which have considered the issue have rejected this stricter definition of predisposition. *Thickstun*, 110 F.3d at 1397.

**11.03.03 Burden of Production**

In general, a defendant who seeks to raise the defense of entrapment carries the initial burden of producing some evidence of both improper inducement and the defendant’s lack of predisposition to commit the alleged offense. *See Gamache*, 156 F.3d at 9; *Duran*, 133 F.3d at 1330. Once the defendant makes this required showing, the burden shifts to the government to prove, beyond a reasonable doubt, that the defendant “committed the crime not as a result of having been induced by the government but as a result of his [or her] predisposition to do so.” *U.S. v. Barry*, 814 F.2d 1400, 1402 (9th Cir. 1987). *See also Brace*, 145 F.3d at 257; *Kussmaul*, 987 F.2d at 349.

Although entrapment ordinarily is a jury question, *Mathews*, 485 U.S. 58, the trial court must first determine whether there is sufficient evidence to instruct the jury on the defense. *Gamache*, 156 F.3d at 9. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. *Id.* Instead, the court’s function is to determine whether
the evidence, taken in the light most favorable to the defense, can plausibly support the theory of defense. *Id.*

A defendant is entitled to an entrapment instruction when there is sufficient evidence from which a reasonable jury could find entrapment. *U.S. v. Bradfield*, 113 F.3d 515, 520-21 (5th Cir. 1997). When a defendant’s properly requested entrapment instruction “is undergirded by evidence sufficient to support a reasonable jury’s finding of entrapment,” the district court reversibly errs if it does not charge the jury as to entrapment. *Id.* at 521. Even if an entrapment instruction is inconsistent with a defendant’s theory of the case, the instruction nonetheless is appropriate if supported by the evidence. *U.S. v. Marbella*, 73 F.3d 1508, 1512 (9th Cir. 1996) (entrapment instruction proper even though inconsistent with lack of knowledge defense); see also infra section 11.03.05.

The specific quantum of evidence needed before the court will give an entrapment instruction, however, varies among the circuits. In some circuits, the quantum of evidence required is quite low. See, e.g., *Marbella*, 73 F.3d at 1512 (“slight evidence” sufficient to create a factual issue to get the defense to the jury); *U.S. v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985) (a defendant meets his or her burden by producing “any evidence” that government conduct created a risk that the offense would be committed by a person other than one ready to commit it); *U.S. v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993) (requiring “more than a scintilla of evidence that the government induced him to commit the charged offense”); *Burkley*, 591 F.2d at 914 (requiring “some evidence of government ‘inducement’”).

Other circuits have articulated a standard based upon reasonable doubt. See, e.g., *Duran*, 133 F.3d at 1331 (requiring evidence “from which a reasonable juror could derive a reasonable doubt as to the origin of criminal intent”); *Bradfield*, 113 F.3d at 521 (evidence must provide, at the least, a basis for reasonable doubt on the ultimate issue of whether criminal intent originated with the government); *U.S. v. Tejeda*, 974 F.2d 210, 217 (1st Cir. 1992) (requiring some evidence to support fairly both elements of inducement and lack of predisposition such that the evidence, if believed by a rational juror, would be sufficient to create a reasonable doubt that the defendant committed the crime of his or her own accord). Finally, the Second Circuit has expressly held that the defendant must show government inducement by a preponderance of the evidence. *U.S. v. Steinberg*, 551 F.2d 510, 513 (2d Cir. 1977).

**11.03.04 Character Evidence: the Interplay Between the Entrapment Defense and Rules 404 and 405 of the Federal Rules of Evidence**

When entrapment is raised as a defense, both the government and the defense will likely attempt to introduce evidence of the defendant’s background and character. The defense will, of course, attempt to establish the defendant’s lack of predisposition by showing that he or she is a law-abiding and impressionable person. The government will attempt to establish predisposition by showing the converse.

Under Federal Rule of Evidence 404(b) (hereinafter “Rule 404(b)”), evidence of other crimes is admissible to establish the defendant’s predisposition to criminal conduct. *U.S. v. Simtob*, 901 F.2d 799, 807 (9th Cir. 1990) (evidence of two prior convictions for drug distribution admissible to show
predisposition for distributing drugs); *U.S. v. Moschiano*, 695 F.2d 236, 243 (7th Cir. 1982) (subsequent similar acts may, under proper circumstances, be admissible to prove the defendant's predisposition to commit the crime charged). Such efforts may be defeated by arguing that the prior convictions would be more prejudicial than probative, in violation of Federal Rule of Evidence 403. *Simtob*, 901 F.2d at 808 (courts should be “extremely cautious” about admitting old convictions because their prejudicial impact may frequently outweigh their probative value); *Moschiano*, 695 F.2d at 244 (subsequent similar acts are “less probative on this issue” than prior similar acts). See also *U.S. v. Harvey*, 991 F.2d 981, 995-97 (2d Cir. 1993) (reversing child pornography conviction because evidence of adult X-rated videos seized from the defendant’s residence that was introduced at trial was irrelevant, had the “likely effect” of creating “disgust and antagonism toward [defendant], and resulted in overwhelming prejudice against him”).

In another case, *U.S. v. Armendariz-Mata*, 949 F.2d 151 (5th Cir. 1991), the Fifth Circuit upheld a broad reading of evidence admitted to show predisposition. At trial, Armendariz-Mata claimed that he was entrapped by a confidential informant into brokering a drug deal. *Id.* at 154. To prove his predisposition to commit the offense, the government introduced evidence of the drug trafficking activities of someone whom Armendariz-Mata knew (and with whom he allegedly associated). *Id.* In addition, the government introduced the “expert” testimony of an agent, who concluded that, based upon Armendariz-Mata’s use of particular “code words,” he was a “knowledgeable drug trafficker.” *Id.* at 155 (internal quotations omitted).

The Fifth Circuit sanctioned the admission of both types of testimony. *Id.* First, the court found that evidence linking Armendariz-Mata to a known drug trafficker was probative on the issue of his predisposition to deal drugs. *Id.* at 155. Second, the court found the “expert” witness’ testimony admissible because he did not testify to the ultimate issue in the case, namely “whether [Armendariz] was in fact induced to commit the crime.” *Id.* Interestingly, though, the court did warn the government that the “expert’s” testimony “was totally unnecessary” to the case because the evidence of the defendant’s predisposition was “more than sufficient to meet the applicable standard of proof,” and reminded the government that “caution should be used in admitting opinion testimony of this nature in future cases.” *Id.*

A defendant’s preemptive effort to demonstrate that he or she lacked predisposition through character evidence may be held inadmissible. In *U.S. v. Barry*, 814 F.2d 1400 (9th Cir. 1987), for example, the defendant, a lieutenant in the Security Patrol at a United States Naval Weapons Station, was accused of six unauthorized sales of government property. *Barry*, 814 F.2d at 1401. The trial court refused to admit evidence offered by Barry to support his entrapment defense, including two letters of commendation, an FBI rap sheet, and testimony of an FBI agent to show that Barry’s only other arrest ended in a dismissal of the charges. *Id.*

Although the Ninth Circuit noted that a defendant may offer evidence of ‘a pertinent trait of his character’ under Federal Rule of Evidence 404(a)(1), the court found that the proffered evidence did not qualify under the rule. *Id.* at 1403. The court noted that testimony as to lack of prior bad acts would be, in essence, testimony as to multiple instances of good conduct, and that admission of such evidence would “violate a strict reading of Rule 405(a).” *Id.* (quoting *Gov’t of Virgin Islands v. Grant*, 775 F.2d 508, 512 (3d Cir. 1985)). The court left unresolved several issues. It did not address whether a defendant’s
character is an “element” of the entrapment defense, so that evidence of specific acts is admissible to show character under Federal Rule of Evidence 405(b), since the evidence was excludable on other grounds. *Id.* at 1404. The court also discussed, but left open, whether Rule 405(b) would allow proof of prior good acts offered by a defendant in support of an entrapment defense, because courts have held that proof of prior illegal conduct could be offered under the rule to show predisposition. *Id.* at 1403 n.6.

In 1998, the Ninth Circuit resolved these issues questions in *U.S. v. Thomas*, 134 F.3d 975 (9th Cir. 1998). Thomas had been convicted of conspiracy to possess methamphetamine with intent to distribute and aiding and abetting possession of methamphetamine with intent to distribute. *Thomas*, 134 F.3d at 977. On appeal, Thomas argued that he should have been allowed to testify, as part of his entrapment defense, that he had never been arrested or convicted of any offense prior to the time the government agent approached him. *Id.* The Ninth Circuit agreed and reversed Thomas’ conviction. *Id.* at 980.

Unlike in *Barry*, the testimony offered by Thomas was neither hearsay nor outdated: instead, Thomas was himself prepared to testify that he had no prior arrests or convictions. *Id.* at 979. The court noted that

[w]here the issue is predisposition--and specifically, predisposition to engage in a drug transaction involving multiple pounds of methamphetamine--the evidence that the defendant has no record of prior bad acts is clearly relevant; it is probative as to his intent to commit the crime.

*Id.*

Not only did the court conclude the evidence was relevant under Rule 404(b), but it also held the evidence independently admissible under Rule 405(b). *Id.* at 980. Finding the defendant’s character an “essential element” of the entrapment defense, the court specifically held that Thomas’ lack of prior criminal history was admissible under Rule 405(b) to prove lack of predisposition. *Id.*

Similarly, in *U.S. v. Dion*, 762 F.2d 674 (8th Cir. 1985) (en banc), rev’d on other grounds, 476 U.S. 734 (1986), a defendant was arrested after the government visited an Indian reservation over a two-year period offering great sums of money to Indians in exchange for protected bird artifacts and feathers. *Id.* at 686. The Eighth Circuit reversed two defendants’ convictions, holding they were entrapped as a matter of law because the government did not prove, beyond a reasonable doubt, that they were predisposed to commit the crime of taking and selling protected birds or bird parts in violation of the federal law. *Id.* at 690. In so holding, the court examined “several factors which relate[d] to [one defendant’s] character, background and state of mind.” *Id.* at 686. Chief among these factors was that the government offered him a substantial sum of money. *Id.* at 689. It reasoned that although one’s “poor financial condition and difficulty in obtaining a job may not, in the vast majority of cases, be relevant to the question” of entrapment, “it may be that the unusual poverty of the defendant or other problems peculiar to the defendant must be considered in determining predisposition.” *Id.* (citing *Sherman*, 356 U.S. at 376). The court continued:
In this case, government agents came upon an extremely impoverished Indian Reservation in a desolate area of South Dakota where, according to some of the witnesses at the trial below, life is for many Indians, a mere question of simple survival. The risk for the government in offering so much money to these individuals for nearly a two-and-one-half-year period was that many who would never have shot a protected bird would be enticed into doing so.

Id. at 689-90.

Dion, therefore, stands for the proposition that in some cases, evidence of the defendant’s particular vulnerabilities -- that is, a subjective portrayal of the defendant -- can be relevant to the question of his or her predisposition. Defense counsel should argue that if the government can introduce bad character evidence to prove predisposition, the defense should be permitted to introduce evidence demonstrating not only why this particular defendant was not predisposed to commit the crime, but also why he or she was especially vulnerable to the agent’s inducement to do so. See also U.S. v. Ford, 918 F.2d 1343, 1348-49 (8th Cir. 1990) (predisposition analysis should focus on defendant’s personal background, character, and state of mind); U.S. v. King, 803 F.2d 387, 390 (8th Cir. 1986) (per curiam) (same).

11.03.05 Pleading Inconsistent Defenses: Asserting the Entrapment Defense While Denying the Elements of the Charged Offense

In Mathews, the Supreme Court resolved an issue on which the various circuit courts of appeal had been previously divided: whether a defendant in a criminal prosecution who denied commission of the crime could nevertheless have the jury instructed on entrapment. Mathews, 485 U.S. at 59.

The defendant in Mathews was an employee of the Small Business Administration (SBA), was charged with accepting a gratuity in exchange for an official act. Id. at 60-61. Prior to trial, Mathews filed a motion in limine seeking to raise an entrapment defense. Id. at 61. The district court denied the motion, ruling that the entrapment defense was not available to Mathews because he would not admit all of the elements of the offense charged. Id. The Seventh Circuit affirmed the district court’s refusal to allow Mathews to argue that he had been entrapped, stating that:

When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was “the Government’s deception [that implanted] the criminal design in the mind of the defendant.” . . . . We find this to be inconsistent per se with the defense that the defendant never had the requisite criminal intent. We see no reason to allow [Mathews] or any other defendant to plead these defenses simultaneously.

Id. at 62 (citations omitted).

The Supreme Court, however, reversed the Seventh Circuit, holding that even if the defendant denied one or more elements of a crime, he or she is nevertheless entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. Id. In reaching its decision, the Court recognized the appropriateness of alternative pleading in both civil cases and at the
appellate level, and dismissed the government’s contention that such a rule would encourage perjury, lead to jury confusion, and subvert the truth-finding function of the trial. *Id.* at 63-65. “We would not go so far as to say that charges on inconsistent defenses may not on occasion increase the risk of perjury, but particularly in the case of entrapment we think that the practical consequences will be less burdensome than the Government fears.” *Id.* at 65. *See also Gamache*, 156 F.3d at 9 n.2 (a defendant who claims innocence can nevertheless seek an entrapment instruction).
11.04 ENTRAPMENT BY ESTOPPEL / PUBLIC AUTHORITY

11.04.01 Entrapment by Estoppel

The doctrine of entrapment by estoppel applies when a government official tells a defendant that certain conduct is legal and the defendant commits what would otherwise be a crime in reasonable reliance on the official’s representation. *U.S. v. Ortegon-Uvalde*, 179 F.3d 956, 959 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 433 (1999) (citation omitted). Circuits vary slightly in their formulation of the defense. *Compare U.S. v. Ellis*, 168 F.3d 558, 560 (1st Cir. 1999) *with U.S. v. Stewart*, 185 F.3d 112, 124 (3d Cir.), *cert. denied*, 120 S. Ct. 618 (1999). For example, in the First Circuit, a defendant must establish that: (1) a government official told him or her the act was legal; (2) he or she relied on the advice; (3) the reliance was reasonable; and (4) that, given the reliance, prosecution would be unfair. *Ellis*, 168 F.3d at 560. To assert the defense in the Third Circuit, on the other hand, the defendant must establish, by a preponderance of the evidence, that: (1) a government official; (2) told the defendant that certain criminal conduct was legal; (3) the defendant actually relied on the government official’s statements; and (4) the defendant’s reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official’s statement. *Stewart*, 185 F.3d at 124; *see also U.S. v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1166 (10th Cir.), *cert. denied*, 120 S. Ct. 513 (1999) (same).

Although the defense focuses on the conduct of government officials, not on the state of mind of the defendant, the defendant’s reliance must nevertheless be “reasonable” to invoke the defense. *U.S. v. Eaton*, 179 F.3d 1328, 1332 (11th Cir. 1999). A defendant’s reliance is reasonable if “a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.” *U.S. v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (citation omitted). The reasonableness of the defendant’s reliance will depend on the identity of the official, the point of law represented, and the substance of the misrepresentation. *Gutierrez-Gonzalez*, 184 F.3d at 1166; *Eaton*, 179 F.3d at 1332. Thus, even if a defendant holds a mistaken belief that he is acting as an agent for law enforcement, such a belief will suffice if “reasonable.” *U.S. v. Mason*, 902 F.2d 1434, 1439-40 (9th Cir. 1990).

To succeed under this theory, the defendant must do more than show that the government made “vague or even contradictory statements.” *Ramirez-Valencia*, 202 F.3d at 1109 (quoting *Raley v. Ohio*, 360 U.S. 423, 438 (1959)). Instead, the defendant must show that the government told him or her that the proscribed conduct was permissible. *Id.; Eaton*, 184 F.3d at 1166 (there must be an “active misleading” by the government agent). Moreover, for a statement to trigger an entrapment by estoppel defense, it must be made directly to the defendant, not to others. *Eaton*, 179 F.3d at 1332. Circuits are split, however, as to whether the government official in question must actually be an agent for the government. *Compare Gutierrez-Gonzalez*, 184 F.3d at 1167 (the government agent must be “a government official or agency responsible for interpreting, administering, or enforcing the law defining the offense”) *with U.S. v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (statement of federally licensed firearms dealer could support entrapment by estoppel defense).

11.04.02 Public Authority
Similarly, the “public authority” defense exonerates an individual from criminal liability if he or she believes that a government agency had authorized the commission of the crime. *U.S. v. Pitt*, 193 F.3d 751, 756 (3d Cir. 1999). Originally, this defense only applied to cases where the agency possessed the authority to permit the defendant to engage in otherwise illegal conduct and the defendant was actually given permission. *Id.* However, in 1976, the D.C. Circuit recognized the related doctrine of “apparent” public authority in *U.S. v. Barker*, 546 F.2d 940 (D.C. Cir. 1976). In *Barker*, a divided panel decided that the defense should be extended to an individual who acted at the behest of government official and in reasonable reliance on that official’s authority to permit the behavior. *Barker*, 546 at 948-49. To assert the defense, the defendant must show that there were: (1) facts justifying the defendant’s reasonable reliance on the official; and (2) a legal theory on which to base a reasonable belief that the official possessed the authority to permit the conduct. *Id.* at 949. Thus, to establish a defense of “apparent” public authority, the defendant is not required to establish that the government official actually had the authority to sanction the illegal activity. *Pitt*, 193 F.3d at 756. Instead, the defendant must merely establish his or her belief that his or her actions were condoned by some government agency. *Id.*

Rule 12.3 of the Federal Rules of Criminal Procedure sets forth the procedural requirements for a public authority defense. Rule 12.3 provides in part:

A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense . . . shall serve upon the attorney for the government a written notice of such intention . . . . Within seven days after receiving the Government’s demand [for the names and addresses of witnesses], the defendant shall serve upon the attorney for the Government a written statement of the names and addresses of such witnesses.


Thus, once Rule 12.3 was enacted, the public authority defense required two components: (1) a procedural component, namely, compliance with Rule 12.3; and (2) a substantive component, namely establishing the elements of the defense. *Pitt*, 193 F.3d at 757. Further, although the language of Rule 12.3 covers both the defenses of “actual” public authority and “apparent” public authority, not all circuits recognize the latter defense. *Id.* at 758 (limiting the public authority defense to situations where the government agent in fact had the authority to authorize the criminal acts); *U.S. v. Cardoen*, 898 F. Supp. 1563 (S.D. Fla. 1995), aff’d *sub nom.*, *U.S. v. Johnson*, 139 F.3d 1359 (11th Cir.) (determining that authority relied upon must be real and not apparent), *cert. denied*, 119 S. Ct. 2365 (1999); *U.S. v. Rosenthal*, 793 F.2d 1214, 1235-37 (11th Cir. 1986) (stating that defendant could only be exonerated if he relied on real and not apparent authority); *U.S. v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984) (declining to adopt apparent authority from *Barker* and instead requiring actual authority).

As with Rules 12.1 and 12.2, the rationale behind Rule 12.3 is to avoid any unfair surprise to the government, as the public authority defense “‘remains an unusual defense’” and “‘the government rarely will have reason to anticipate it.’” *U.S. v. Burrows*, 36 F.3d 875, 881 (9th Cir. 1994) (quoting Advisory Committee Notes to Rule 12). Defense counsel must carefully comply with the explicit provisions regarding
notice and disclosure of witnesses, as failure to comply allows the court to exclude the testimony of any undisclosed witness or to impose any “other order as it deems just under the circumstances.” Fed. R. Crim. P. 12.3(c).

11.05 DURESS

11.05.01 The Distinction Between the Defenses of Duress and Necessity

The defenses of duress and necessity are distinct legal concepts, and are triggered by different factual circumstances. Under the common law, duress excused criminal conduct when a person acted under an unlawful threat of imminent death or serious bodily injury which caused that person to engage in conduct that violated the “literal terms” of the criminal law. See U.S. v. Bailey, 444 U.S. 394, 409-10 (1980). A defendant may generally raise a defense of duress when under coercion resulting from the actions of other human beings. See Id.; See also U.S. v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984) (citing W. LaFave & A. Scott, Handbook on Criminal Law §50, at 383 (1972)). The defense of necessity, however, traditionally would be raised where physical forces beyond the actor’s control rendered his or her illegal conduct the lesser of two evils. Bailey, 444 U.S. at 410. Despite inherent difference between the defenses of duress and necessity, modern courts have significantly obfuscated the distinction between the two. Id.; U.S. v. Gomez, 92 F.3d 770, 774 n.5 (9th Cir. 1996) (citing U.S. v. Padello, 951 F.3d 537, 540 (3d Cir. 1991)).

11.05.02 The Duress Defense

The defense of duress, also known as coercion, compulsion, or impelled perpetration, has traditionally excused otherwise legally punishable conduct. Under a duress defense, the criminal actor will not be held criminally liable if he or she acted under a well-grounded fear of immediate death or serious bodily injury and had no reasonable course of action available other than to violate the law. Defendants have raised this defense in various contexts. See, e.g., Bailey, 444 U.S. at 410 (escape); Kawakita v. U.S., 343 U.S. 717, 735 (1952) (treason); U.S. v. Kinslow, 860 F.2d 963 (9th Cir. 1988) (kidnapping), overruled on other grounds sub nom., U.S. v. Brackeen, 969 F.3d 827, 829 (9th Cir. 1992); U.S. v. Moreno, 102 F.3d 996 (9th Cir. 1996) (possession of cocaine with intent to distribute); U.S. v. Campbell, 675 F.2d 815, 820-21 (6th Cir. 1982) (bank robbery); U.S. v. Gant, 691 F.2d 1159 (5th Cir. 1982) (possession of firearm by a convicted felon); U.S. v. Agard, 605 F.2d 665, 668 (2d Cir. 1979) (possession of firearm); U.S. v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (false declarations under oath); U.S. v. Patrick, 542 F.2d 381 (7th Cir. 1976) (contempt); U.S. v. Furr, 528 F.2d 578, 580 (5th Cir. 1976) (embezzlement); Barton v. U.S., 407 F.2d 1155, 1166 (10th Cir. 1969) (making a false loan application to a federal credit union).

11.05.03 Elements of the Duress Defense

To establish a defense of duress, a defendant must present evidence of: (1) an immediate threat of death or serious bodily injury; (2) a well-founded fear that the threat will be carried out; and (3) the absence of any reasonable opportunity to escape the threatened harm. See U.S. v. Paul, 110 F.3d 869, 871 (2d Cir. 1997); Moreno, 102 F.3d at 997, 981-82; U.S. v. Riffe, 28 F.3d 565, 568 (6th Cir. 1994).
If the defendant escaped from custody due to alleged duress, a fourth element applies: the defendant must have surrendered to proper authorities after attaining a position of safety. *U.S. v. Williams*, 791 F.2d 1383, 1388 (9th Cir. 1986); *Conteto-Pachon*, 723 F.2d at 693.

The defendant must introduce sufficient evidence on all elements of the duress defense before the court will instruct the jury regarding this defense. *See Bailey*, 444 U.S. at 415; *U.S. v. Wofford*, 113 F.3d 977, 979-82 (9th Cir.), amended, 122 F.3d 787 (9th Cir. 1997); *U.S. v. May*, 727 F.2d 764, 765 (8th Cir. 1984). Although a defendant must present evidence as to all elements of the duress defense, a defendant is entitled to rely on this defense even where the evidentiary foundation of the defense is tenuous. *Paul*, 110 F.3d at 871; *see also Riffe*, 28 F.3d at 569 (requiring the defendant to “introduce some evidence to trigger consideration of the [duress] defense,” even though “that burden is not a heavy one.”).

Courts have strictly construed the defense of duress. The case law is replete with examples of trial courts disallowance of the defense as a matter of law. The most common rationale for excluding the defense as a matter of law and for refusing to give a duress instruction is the insufficiency of the defendant’s offer of proof on the elements of immediacy and opportunity to escape the threatened harm. *See Moreno*, 102 F.3d at 997-98 (finding no error in the district court’s approval of the government’s motion to strike a proposed duress defense because defendant failed to offer evidence that he did not have the opportunity to escape the threatened harm, duress instruction not warranted); *U.S. v. Jennell*, 749 F.2d 1302, 1306 (9th Cir. 1984) (fear alone is not sufficient to make a prima facie case of duress).

Defense counsel should consider using expert psychiatric testimony to establish the elements of the duress defense. *See, e.g., U.S. v. Hearst*, 563 F.2d 1331, 1348-49 (9th Cir. 1977) (permitting two psychiatrists to testify at length concerning the issue of duress or compulsion). Expert testimony may be particularly helpful in establishing the defendant’s susceptibility to undue influence, through which he might engage in conduct that he otherwise abhors. *See also U.S. v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992) (noting that although the Model Penal Code uses a person of “ordinary firmness” to measure duress, “its commentary expands the defense to encompass a case where ‘by the continued use of unlawful force, persons effectively break down the personality of the actor, rendering him [or her] submissive to whatever suggestions they make.’”).

### 11.05.03.01 Immediacy

To establish a defense of duress, the defendant must present some evidence of an immediate, or impending threat of injury. The requirement explicitly provides that, “[a] veiled threat of future unspecified harm” will not satisfy this requirement, *Conteto-Pachon*, 723 F.2d at 693; *U.S. v. Villegas*, 899 F.2d 1324, 1343 (2d Cir. 1990) (quoting *Rhode Island Recreation Ctr. v. Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949)); *U.S. v. Polytarides*, 584 F.2d 1350, 1352 (4th Cir. 1978) (holding that defendant was not entitled to a duress instruction because the defendant indicated that he acted under “threats in vague terms of future reprisals” rather than under a “present and immediate” compulsion); *U.S. v. Patrick*, 542 F.2d 381, 388 (7th Cir. 1976). Likewise, prior threats or threats of specific future injury will not suffice to establish duress. *Conteto-Pachon*, 723 F.2d at 693.
11.05.03.02 Opportunity to Escape the Threatened Harm

To present a duress defense, the defendant must also show that he or she had no reasonable opportunity to escape the threatened harm. This does not mean, however, that the defendant must have exhausted every possible means of escaping the harm. See Contento-Pachon, 723 F.2d at 694 (citing U.S. v. Gordon, 526 F.2d 406, 407 (9th Cir. 1975)). The Ninth Circuit has stressed that the opportunity to escape must be reasonable. Id. In Moreno, the Ninth Circuit upheld the trial court’s refusal to allow the defendant to present a defense of duress because the defendant failed to demonstrate the absence of a reasonable opportunity to escape. See Moreno, 102 F.2d at 997. Moreno was distinguished from Contento-Pachon, in which the Ninth Circuit reversed the trial court’s exclusion of evidence that the defendant could not seek the assistance of local law enforcement agencies that were purportedly corrupt and controlled by gang members. See Contento-Pachon, 723 F.2d at 694.

The Moreno opinion and other such decisions (regarding the reasonableness of a person’s conduct under fear of injury) illustrate a major flaw that has evolved relating the duress defense. Courts have considerable power to take the issue of “reasonableness” from the jury’s consideration, and to make independent determinations based on their own criteria and values. A court can deny a defendant’s request to present a duress defense if it believes the defendant should have contacted the police or tried to escape, even though a jury, comprised of a cross-section of the community living under economic and social conditions vastly different from those of judges, might disagree.

In U.S. v. Alicea, 837 F.2d 103 (2d Cir. 1988), the Second Circuit illustrated this significant degree of judicial control exercised over the duress defense. In Alicea, two men approached a pair of female vacationers awaiting their return to the United States at an airport in Ecuador. See id. at 104. One of the men put his hand in his pocket as if he had a gun, ordered the women into a nearby automobile, and drove them to a house where they were ordered to undress so that cocaine could be strapped to their bodies to be smuggled into the United States. After raping one woman, the men taped cocaine-filled packages to their body suits and delivered the women to the airport. See id. at 105. The men told them that someone would be watching them on the airplane and warned them not to try “anything.” Id.

At U.S. Customs, one woman passed through without detection, but the second was apprehended. The first woman returned to her friend, even though she was free to leave, and explaining to the Customs officials that they had been forced to smuggle cocaine. See id. The woman who was raped later learned that, as a result of the rape, she had become pregnant. While she awaited an abortion, she confided the incident to a staff psychologist at the Metropolitan Correctional Center. See id. at 105.

Incredibly, the Second Circuit held that the women presented no “special circumstances” which created a question of fact as to whether they had exercised “reasonable opportunities to escape.” Id. at 106. Although the court conceded that “there was testimony that threats were made against [the defendants’] families in New Jersey, and specifically against [the] daughter,” there was “no evidence that [either] made any attempt to seek protection from the authorities for their families or to telephone a warning directly to their relatives when they had an opportunity to do so.” Id. at 107.

Courts that disallow the duress defense based have emphasized the defendant’s inability to escape the threatened harm or have mentioned the fact that the defendant failed to pursue the simple remedy of
contacting the police. *Gant*, 691 F.2d at 1164; *see also U.S. v. Bakhtiari*, 913 F.2d 1053, 1057-58 (2d Cir. 1990) (defendant’s failure to take steps to notify authorities along with their affirmative steps to commit further crimes showed lack of duress). Courts have also held that the duress defense may not be raised by defendants who have recklessly placed themselves in dangerous situations. *U.S. v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983) (internal citations omitted); *see also U.S. v. Singleton*, 902 F.2d 471, 473 (6th Cir. 1990) (returning to scene where pursuer could again apprehend defendant did not constitute reckless or negligent behavior).

### 11.05.03.03 Submitting to Authorities

Generally, the requirement that a defendant must have surrendered promptly to proper authorities upon arrival at a place of safety only exists in cases involving an escape from law enforcement custody. *See U.S. v. Solano*, 10 F.3d 682, 683 (9th Cir. 1993); *Williams*, 791 F.2d at 1385. Since the Ninth Circuit decided *Contento-Pachon*, however, it has stated that this element is a factor which the court may nevertheless consider in assessing the escapability prong of the duress test. *See U.S. v. Charmley*, 764 F.2d 675, 676 (9th Cir. 1985) (citing *Jennell*, 749 F.2d at 1305); *see also U.S. v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989) (court upheld a jury instruction stating that the jury could consider whether the defendant surrendered to authorities as part of its assessment of whether the defendant had a reasonable opportunity to escape).

In *Solano*, the defendant was convicted of six counts relating to methamphetamine production. *See Solano*, 10 F.3d at 682. The defendant claimed that he possessed an illicit chemical used for methamphetamine production because his and his family’s life had been threatened. *See id.* The defendant, however, continued to possess the chemicals even after the person who delivered the threats had died. *Id.* The Ninth Circuit reversed the conviction on the ground that the district court erroneously included a “surrender to authorities” element in the duress instruction. *Id.* at 683. The court noted both that this was not a prison escape case, and that the fourth element of the duress instruction prevented him from taking advantage of the defense. *See id.*

### 11.05.04 Burdens of Production and Proof

At common law, the defense of duress excused criminal conduct. Modern courts differ, however, in their assessment of whether duress negates a defendant’s specific intent, to commit a criminal offense or instead, excuses conduct that otherwise would be criminal. In *U.S. v. Mitchell*, 725 F.2d 832, 835 (2d Cir. 1983), the Second Circuit described the conflicting characterizations of the duress defense noting:

Some view duress as precluding the *mens rea* required for criminal culpability. However, others contend that duress does not preclude a finding of the voluntariness required for criminal responsibility because the defendant, though motivated by an impulse to save himself or another from serious harm, nonetheless forms an intention to commit a crime and chooses to act upon that intention. *See G. Williams, Criminal Law* §240 at 751 (2d ed. 1961); 2 J. Stephen, *History of Criminal Law* 101-04 (1883).
Id. at 835 (citations omitted).

The Mitchell court relied specifically noted the Supreme Court's observation that “[t]he doctrines of actus reus, mens rea, insanity, mistake, justification, and duress historically have provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, common, moral, philosophical, and medical views of the nature of man.” Id. at 835 (quoting Powell v. Texas, 392 U.S. 514, 536 (1968)) (internal quotations omitted). See also U.S. v. Falcon, 766 F.2d 1469, 1477 (10th Cir. 1985) (once raised, the prosecution must disprove the duress defense beyond a reasonable doubt); U.S. v. Campbell, 675 F.2d 815, 821 (6th Cir. 1982) (same); U.S. v. Calfon, 607 F.2d 29, 30 (2d Cir. 1979) (requiring the government to prove absence of duress by a preponderance of the evidence, once the defendant raises the defense).

The question of whether the coercion prevents the defendant from forming the requisite criminal intent or justifies the formation of that intent is important in evaluating the validity of a shift in the burden of proof from the government to the defense. One view is that if the coercion precludes the defendant from forming the requisite mens rea, then it negates an element of the crime, and the burden must remain on the government to prove beyond a reasonable doubt that the defendant did not act under duress. If, by contrast, the coercion does not preclude the defendant from forming the requisite intent, but rather excuses the formation of that intent, then it may not negate any element of the offense and the burden may constitutionally shift to the defense to prove duress by a preponderance of the evidence. See generally Mitchell, 725 F.2d at 835. The Supreme Court, however, introduced some confusion as to this issue in Martin v. Ohio, 480 U.S. 228 (1987), holding that placing the burden of proving self-defense on the defendant does not offend accepted notions of justice or violate the Due Process Clause so long as evidence offered to support the defense is also “considered in deciding whether there was a reasonable doubt about the sufficiency of the state’s proof of the elements of the crime.” Martin v. Ohio, 480 U.S. 228, 234 (1987). Accordingly, evidence not strong enough to prove self-defense by a preponderance may still cast doubt on the government’s case. See id. at 233.

In U.S. v. Dominguez-Mestas, 929 F.2d 1379 (9th Cir. 1991), the Ninth Circuit crafted an exception to the rule set forth in Mitchell that the government carries the burden of disproving duress beyond a reasonable doubt. In Dominguez-Mestas, the defendant entered a conditional plea to unlawful importation of heroin and expressly reserved the right to appeal the district’s court’s ruling excluding evidence of a duress defense. See id. at 1381. The Ninth Circuit held that placement of the burden of proving a duress defense on the defendant did not violate the Due Process Clause. See id. at 1383. Framing the issue as one of determining whether, “[i]n the instant case . . . proof of duress necessarily entails disproof of the elements of the charged offense,” id. at 1382, the court noted that the offense to which Dominguez pled guilty did not contain a mens rea requirement. See id. at 1382. The court specifically contrasted the applicable statutory language with another statutory prohibition within the same statute that imposed punishment on persons who “knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States, any merchandise which should have been invoiced.” Id. at 1382 (quoting 18 U.S.C. §545). The court then reasoned that:
[t]he only mental state required by the portion of section 545 charged in Dominguez’ information is knowledge. Dominguez admits that he knowingly brought heroin into the United States. Whether he was forced to do so does not negate his criminal knowledge.

Id. at 1382. In this situation, in which “a defense of duress does not involve refutation of any of the elements of the offense we conclude that it is proper to place the burden of proving the defense by a preponderance of the evidence on the defendant.” Id. at 1384.

The Ninth Circuit did not directly resolve the question of whether it was constitutional to place the burden on the defense when duress did refute an element of the offense, but the court strongly implied that it was not, observing that when “the charge involves mens rea, different considerations are present.” Id. at 1384, n.3. Although it only hinted at what those “different considerations” were, it suggested that one such consideration was whether the charged offense required that the government prove specific intent. In an analysis of U.S. v. Hearst, 563 F.2d 1331 (9th Cir. 1977), for example, in which the Ninth Circuit held that the government must prove beyond a reasonable doubt the nonexistence of duress, the Dominguez court noted that unlike the charge of unlawful importation of merchandise, the armed robbery charge in Hearst required proof of criminal intent. See Dominguez, 929 F.2d at 1383.

The Ninth Circuit appeared to recant any promise offered in Dominguez-Mestas, however, in U.S. v. Meraz-Soloman, 3 F.3d 298 (9th Cir. 1993). Meraz pled guilty to importation of a controlled substance in violation of 21 U.S.C. §§952, 960. See id. at 299. The district court held in a pretrial ruling that Meraz carried the burden of proving duress by a preponderance of the evidence. Id. The Ninth Circuit affirmed the conviction, first noting that Dominguez held it was not a violation of due process to require the defendant to bear the burden of proving duress when “a statute identified knowledge as the only mental element necessary for commission of the crime.” Id. at 299. The challenged statute in Meraz criminalized knowing or intentional conduct, which, the court continued, the prosecution could prove by showing that the accused "possessed" either one of these alternate mental states. Id. at 299-300. Since “intentional commission [was] not a necessary element of the offense with which he was charged,” the court concluded that it need not consider the defendant’s argument that duress negates mens rea, and that requiring the defendant to prove duress impermissibly shifts the burden of proof to the defendant. Id. at 300.

In U.S. v. Santos, the Third Circuit recognized explicitly the federal rule that the government bears the burden of disproving duress beyond a reasonable doubt when the charges “require the government to prove that the criminal acts were done with criminal intent.” U.S. v. Santos, 932 F.2d 249 (3d Cir. 1991). The Third Circuit characterized the holding in Dominguez-Mestas as stating that “there is no constitutional bar to placing the burden upon a defendant to prove the affirmative defense of duress by a preponderance of the evidence where the crime charged contains no requirement of mens rea.” Id. (emphasis added). Since the statute before the court in Dominguez-Mestas did not require the government to prove specific criminal intent, but only knowledge, the Santos court ruled that any burden shifting to the defense was permissible. See id. Cf. U.S. v. Amparo, 961 F.2d 288, 291 (1st Cir. 1992) (ruling that “if [the]charged crime requires mens rea, the government must prove beyond a reasonable doubt that the defendant's criminal acts were not in fact the product of duress”.


Meraz appears to have narrowed the instances in which the government must disprove duress beyond a reasonable doubt. To trigger the applicability of that standard, the statute under which the defendant is charged must require that the government only prove intentional conduct. The Ninth Circuit seems to recognize the confused state of the law, as different panels confront the question of which mental states different statutes require. After Meraz was issued, the Ninth Circuit reversed a conviction in Solano, because the district court had wrongfully instructed the jury that the duress defense required proof that the defendant had surrendered to the proper authorities after attaining a position of safety. See Solano, 10 F.3d at 682. The court found that the error was not harmless, in part because the instruction had also included a “confusing statement about the burden of proof.” Id. at 684. The instruction failed to inform the jury of the identity of the party that carried the burden of proof on the issue of duress, as well as the applicable standard with which the jury could evaluate the defense of duress. Id. Declining to address this issue, the Solano court held, instead, that the “standard and burden of proof of duress were complex, and may have varied between counts according to which charge mens rea crimes.” Id.

11.05.05 Duress in Mitigation

In U.S. v. LaFleur, 971 F.2d 200 (9th Cir. 1991), the defendant argued that because he participated in a murder as a result of the duress inflicted by a co-defendant who held him at gunpoint and forced him to shoot the victim, the trial court reversibly erred by refusing to instruct the jury as to voluntary manslaughter. The Ninth Circuit affirmed the district court, stating that the defense of duress involved a “choice of evils” and argument “that even though he has done the act the crime requires, and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is justified because he has thereby avoided a harm of greater magnitude.” Id. at 205 (citing W. LaFave & A. Scott, Substantive Criminal Law supra at §5.3). It held the “choice of evils” rationale to be “strained” “when the defendant is confronted with taking the life of an innocent third person in the face of a threat on his own life” because the “death of an innocent person--is at least as great as the threatened harm--i.e. the death of the defendant.” Id. at 205. In other words, a defendant confronted with the choice of killing another to save him or herself cannot justifiably kill another, as “[d]uress cannot legally mitigate murder to manslaughter.” Id.

11.05.06 The Duress Defense in Escape-from-Custody Cases

The duress defense is popular in cases involving escape from custody. The cases make it clear, however, that although duress may excuse the defendant’s initial escape from custody, it does not excuse his or her continued absence for any longer period of time than necessary. U.S. v. Michelson, 559 F.2d 567, 570-71 (9th Cir. 1977). The Michelson court held that duress may only be raised as a defense to escape from custody if there was no other opportunity to avoid the threat of danger. Id. at 571

In Bailey, 444 U.S. 394 (1980), the Supreme Court limited the defense of duress and necessity as applied to cases of escape from custody (18 U.S.C. §751(a)). See Bailey, 444 U.S. at 394. After escaping from the District of Columbia jail, the defendants in Bailey remained at large for periods of one to three-and-one-half months before they were apprehended. At trial, the court refused to allow defendants to offer evidence concerning the inhumane conditions at the jail. Id. at 397. The Supreme Court held that the trial court had acted properly, because the defense of duress requires that the defense offer
evidence justifying both the initial escape and the defendants’ continued absence. *Id.* at 412. The defendant must show an offer to surrender when the duress or necessity which caused the escape from custody had lost its coercive force. *Id.* at 412-13.

In *Williams*, 791 F.2d 1383 (9th Cir. 1986), the Ninth Circuit ruled that the trial court had erred in its pretrial ruling that the defendant’s offer of proof was insufficient to support a duress defense. Defendant had offered evidence showing that he had initially declined to participate in a planned prison escape, but that when he had done so, his life was threatened. *Id.* at 1388. The proffered evidence also indicated that the defendant attempted to jam the gears on the truck to stop it from running during the escape and that he ran from the guards to protect himself rather than to escape from prison. *Id.*

The *Williams* court reversed defendant’s conviction related to the escape attempt, holding that when a defendant is caught in the act of escaping and is not at large for a significant period of time, the requirement that the defendant submit to proper authorities after attaining a position of safety was inapplicable. *Id.* at 1388. Under these circumstances, the court stated that a defendant would have to show only that he intended to surrender had his escape succeeded. *Id.* (citing *U.S. v. McCue*, 643 F.2d 394, 396 (6th Cir. 1980); *U.S. v. Caldwell*, 625 F.2d 144, 148 (7th Cir. 1980); *U.S. v. Boomer*, 571 F.2d 543, 545 (10th Cir. 1978).

**11.05.07 Interaction of the Duress Defense and Rule 404(b)**

A major problem with raising a duress defense is that once it is raised, the prosecution may either demonstrate the defendant's predisposition to commit the offense or present evidence showing a continuous course of criminal activity on the part of the defendant to rebut the claim of duress. For example, in *Hearst*, the court held that the trial court had not erred in admitting evidence of subsequent criminal acts by the defendant because the government had the burden of showing the absence of duress. *Hearst*, 563 F.2d at 1336. Similarly, in *Jennell*, in which defendant claimed that he had participated in a drug smuggling conspiracy only because he had been coerced, the court considered it relevant that Jennell had been convicted of drug smuggling in the past, and that he had been an active participant in the conspiracy in the case at bar for a “substantial part” of the 14-month period preceding his arrest. *Jennell*, 749 F.2d at 1306. Clearly, defense counsel must anticipate and prepare to defend such a prosecutorial offering under Rule 404(b), as such evidence is potentially lethal to a defense of duress.

**11.06 NECESSITY**

The necessity defense is available “when a person is faced with a choice of two evils and must then decide whether to commit a crime or an alternative act that constitutes a greater evil.” *U.S. v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985) (quoting *U.S. v. Contento-Pachon*, 723 F.2d at 695 (9th Cir. 1984)). The theory underlying the necessity defense is that the defendant's free will was properly exercised to achieve a greater good or avoid a greater harm. This is distinct from duress defense because a duress requires that a defendant’s free will be overcome by an outside force. *See Contento-Pachon*, 723 F.2d at 695. Traditionally, in order for the necessity defense to apply, the actor's choices must be dictated by physical forces beyond his or her control. *See id.* at 694 (holding that “in order for the necessity defense
to apply, the coercion must have had its source in the physical forces of nature”). Modern courts, however, have considered the necessity defense in cases when the defendant acted in the interest of the general welfare. *Dorrell*, 758 F.2d at 430-31 n.2.

### 11.06.01 Elements of the Necessity Defense

To establish a defense of necessity, a defendant must, as a matter of law, establish the existence of four elements: “(1) that he was faced with a choice of two evils and he chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his or her conduct and the harm to be avoided; and (4) that there were no legal alternatives to violating the law. *U.S. v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989). The *Dorrell* test is stated in the conjunctive; thus, if defendant’s offer of proof is deficient with regard to any of the four elements, the judge must grant the motion to preclude evidence of necessity. *Aguilar*, 883 F.2d at 693. *See also U.S. v. Quilty*, 741 F.2d 1031 (7th Cir. 1984) (per curiam) (rejecting a necessity defense where defendants failed to prove that there was no reasonable legal alternative to violating the law by entering military property to protect nuclear war). The defense is most often raised where the defendant acts in the interest of the general welfare -- or what the defense believes to be the interest of the general welfare.

If the defendant had a reasonable, legal alternative to violating the law, the necessity defense will fail. *See Bailey*, 444 U.S. at 410; *Quilty*, 741 F.2d at 1033; *Gant*, 691 F.2d at 1163-64. The defendant also must show that a “direct causal relationship be reasonably anticipated to exist between the defender’s action and the avoidance of harm.” *Dorrell*, 758 F.2d at 433 (quoting *U.S. v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); *see also U.S. v. Newcomb*, 6 F.3d 1129, 1138 n.7(6th Cir. 1993) (rejecting necessity defense for felon’s possession of firearm after taking it from girlfriend’s son who was threatening to use it to commit murder); *U.S. v. Burton*, 894 F.2d 188, 191 (6th Cir. 1990) (rejecting “medical necessity” defense for possession of marijuana by glaucoma sufferer because government program existed to study effects of marijuana on glaucoma sufferers); *Aguilar*, 883 F.2d 663 (rejecting necessity defense in case involving an underground railroad that smuggled Central American aliens into the United States illegally because defendants failed to appeal to the judiciary to correct any alleged improprieties by the Immigration and Naturalization Service and immigration courts in handling of asylum claims); *U.S. v. Montgomery*, 772 F.2d 733, 737 (11th Cir. 1985) (rejecting necessity defense raised by anti-nuclear demonstrators who damaged defense site where viable legal alternatives, such as peaceful protests existed to accomplish the same purpose as damage to government property); *Quilty*, 741 F.2d at 1033 (rejecting necessity defense in anti-nuclear demonstration) (citations omitted); *U.S. v. Richardson*, 588 F.2d 1235, 1239 (9th Cir. 1978) (rejecting necessity defense as justification for bringing laetrile into United States as treatment for cancer patients because the defendants could have sought FDA approval to legally import the drug).

### 11.06.02 Burdens of Production and Proof

When the defense of necessity is presented at trial, the jury must make three determinations. The first is factual: whether circumstances existed requiring the defendant to make a choice between two courses of action. The burden is on the defense to present evidence that would place such a possibility before the jury. The second determination requires an assessment of values: whether the alternative chosen
was, in fact, the lesser evil and was the only course of action available. *Richardson*, 588 F.2d at 1239. Finally, the jury must determine whether the government proved beyond a reasonable doubt that the defendant did not act as a result of necessity.

In *Dorrell*, the Ninth Circuit upheld the trial court’s refusal to allow the defendant to present the defense of necessity because the defendant could not establish that his entry into the base and vandalism of government property could reasonably lead to the termination of the nuclear missile program. *Dorrell*, 758 F.2d at 427. The court held that “[w]here the evidence, even if believed, does not establish all of the elements of a defense, . . . the trial judge need not submit the defense to the jury.” *Id.* at 430 (citing *U.S. v. Bifield*, 702 F.2d 342, 346 (2d Cir. 1983), and *Bailey*, 444 U.S. at 416-17 (1980)). The court stated that the district court is allowed to determine the admissibility of the necessity defense by motions in limine, and that if a defendant’s offer of proof is insufficient as a matter of law to support the proffered defense, the trial court should exclude both the defense and the evidence offered in support of it. *Dorrell*, 758 F.2d at 430 (citing *Contento-Pachon*, 723 F.2d at 695; *U.S. v. Shapiro*, 669 F.2d 593, 596 (9th Cir. 1982); *U.S. v. Lowe*, 654 F.2d 562, 566-67 (9th Cir. 1981)). It concluded:

> Asserting the defense requires a showing that the defendant act[ed] to prevent ‘an imminent harm which no available options could similarly prevent’ . . . . In addition, the defendant must establish that he reasonably anticipated the existence of a direct causal relationship between his conduct and the harm to be averted.

*Id.* at 430-31 (quoting *U.S. v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983)).

With its decision in *U.S. v. Schoon*, 971 F.2d 193 (9th Cir. 1991), the Ninth Circuit endorsed the *Dorrell* reasoning and went one step further to foreclose the possibility of raising the necessity defense altogether in future cases involving political protest. The defendants were among a group of 30 people who disrupted a Tucson, Arizona IRS office to protest United States involvement in El Salvador. *See Schoon*, 971 F.2d at 195. The Ninth Circuit affirmed, the district court’s holding that the necessity defense is always unavailable in cases of indirect civil disobedience, which it defined as conduct “violating a law or interfering with a government policy that is not, itself, the object of protest.” *Id.* at 195-96. The Ninth Circuit analyzed three of the four criteria for establishing a necessity defense to conclude that “necessity can never be proved in a case of indirect civil disobedience.” *Id.* at 197-98. These elements were: (1) balance of harms; (2) causal relationship between criminal conduct and harm to be averted; and (3) legal alternatives. *Id. See also Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992) (no necessity defense for abortion protestors to charges of criminal trespass because they were not seeking to avert a legally recognized harm and had legal alternatives to violating the law).

### 11.06.03 Statutory Law

The Model Penal Code in §3.02 recognizes and defines the defense of necessity as follows:

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the code or other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harm or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.
11.06.04 Justification Defense

The following four elements must be established to make out a justification defense: (1) the defendant was under unlawful and present threat of death or serious bodily injury; (2) the defendant did not recklessly place himself or herself in a situation where he would be forced to engage in criminal conduct; (3) the defendant had no reasonable legal alternative; and (4) “there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.” *U.S. v. Gomez*, 92 F.3d 770 (9th Cir. 1996).

In *Gomez*, defendant, a convicted felon, was asked to kill six witnesses who were going to testify at an upcoming criminal trial. Defendant reported the solicitation to jail guards and agreed to help the government gather evidence against the solicitor. See *id.* at 772. After receiving death threats due to his involvement in the affair, defendant armed himself with a firearm. Government agents subsequently arrested defendant on a felon-in-possession charge. See *id.* at 773. The Ninth Circuit reversed the conviction, holding that the trial court erred by refusing to allow a justification defense. *Id.* at 774-75. Although Gomez claimed to have established a necessity or duress defense, the Ninth Circuit held that the proper inquiry was whether he had established a *justification* defense, as courts have evaluated such cases in terms of justification. *Id.* at 773 (citing *U.S. v. Sahakian*, 965 F.2d 740, 741 (9th Cir. 1992); *U.S. v. Paolello*, 951 F.2d 537, 540-41 (3d Cir. 1991); *U.S. v. Singleton*, 902 F.2d 471, 472-73 (6th Cir. 1990); *U.S. v. Stover*, 822 F.2d 48, 49-50 (8th Cir. 1987).

11.07 SELF-DEFENSE

Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force, and the person uses no more force than appears reasonably necessary in the circumstances. See Ninth Circuit Manual of Model Jury Jury Instructions, §6.5 (2000 ed.). In cases involving a defendant’s use of force likely to cause death or great bodily harm, such force is justified only if the person reasonably believed such force was necessary to prevent death or great bodily harm. *Id.*

Generally, a defendant is entitled to a self-defense instruction if he produces some evidence concerning the justification for a homicide or an assault. *Mathews v. U.S.*, 485 U.S. 58, 63 (1988) (“As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.”) (citations omitted); *U.S. v. Winn*, 577 F.2d 86, 90 (9th Cir. 1978) (“A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence.”) (citations omitted); see also *U.S. v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976) (defendant need only present some evidence on theory of self-defense to warrant instruction). Even where the evidence leaves “little room” for a self-defense claim, it is error to omit a self-defense instruction. *U.S. v. Morton*, 999 F.2d 435, 439-40 (9th Cir. 1993). Self-defense is an affirmative defense on which the defendant bears the initial burden of production; if the defendant meets this initial burden of production, the government then bears the burden of persuasion and must negate self-defense beyond a reasonable doubt. *U.S. v. Branch*, 91 F.3d 699, 714 n.1 (5th Cir. 1996) (citations omitted).
It is a necessary precondition to the claim of self-defense that the defendant be free from fault in prompting the use of force. *Branch*, 91 F.3d at 717. “One cannot provoke a fight and then rely on a claim of self defense when that provocation results in a counterattack, unless he has previously withdrawn from the fray and communicated this withdrawal.” *Id.* (quoting *Harris v. U.S.*, 364 F.2d 701 (D.C. Cir. 1966) (per curiam)). In a case in which the initial non-aggressor significantly escalates the level of violence of an incident started by a defendant, however, counsel should argue that such sudden escalation, like withdrawal, allows the defendant to rely on a claim of self-defense. Also, the point of time in which retreat became a viable option may be scrutinized by the court in deciding the validity of a self-defense claim. *See U.S. v. Deon*, 656 F.2d 354, 356 (8th Cir. 1981) (refusal to instruct that defendant may pursue assailant until secure from danger affirmed). Although a defendant is not necessarily required to retreat before resorting to force, *U.S. v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973), the defendant’s ability to retreat may be a factor for which the jury receives instruction to evaluate the claim of self-defense or defense of others. *U.S. v. Blevins*, 555 F.2d 1236 (5th Cir. 1977).

Although the general definition of self-defense is fairly well-settled, counsel must nonetheless research whether a particular crime carries with it a distinct elementary definition of self-defense. For instance, a claim of self-defense lies for a felon-in-possession charge only if the defendant can establish that: (1) he was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *U.S. v. Elder*, 16 F.3d 733, 738-39 (7th Cir. 1994) (citations omitted). A self-defense claim in an assault upon a federal officer case is only appropriate if the defendant had: (1) a mistake or lack of knowledge as to authority; (2) a reasonable belief that force was necessary to defend against an immediate use of unlawful force; and (3) the use of no more force than appeared reasonably necessary. *Morton*, 999 F.2d at 437-38. Because the elements of a self-defense claim as to a particular charge may differ from the general requirements of the defense, counsel must not neglect this basic task of understanding the elemental requirements as to self-defense in the case at bar.

An issue that often arises with any self-defense claim is whether the “reasonableness” requirement can be satisfied even in cases in which defendant used self-defense as a result of a misapprehension. In *U.S. v. Keiser*, 57 F.3d 847 (9th Cir. 1995), defendant appealed his conviction for assault resulting in serious bodily injury based on his shooting a person whom he believed was preparing to kill his brother. Defendant argued in part that the court erred by refusing to charge the jury with a self-defense instruction that included an allowance for a misapprehension. The Ninth Circuit rejected defendant’s argument and declined to mandate such an instruction; however, the court did note that some commentators have recommended that such an instruction is appropriate in cases in which a misapprehension may exist. *Id.* at 852 n.5.

Related to the aforementioned issue is the question of whether a “reasonableness” determination should be made based on an objective or a subjective standard. While federal courts have afforded surprisingly little attention to this issue, the courts that have addressed this issue seem to lean toward an objective reasonable person standard for self-defense determinations. *See Gov’t of Virgin Islands v. Robinson*, 29 F.3d 878, 882 (3d Cir. 1994) (whether or not defendant acted in self-defense hinges on the defendant’s subjective beliefs and the objective reasonableness of these beliefs). Obviously, in most cases,
counsel should attempt to have an instruction with a subjective standard given to the jury, as such a standard affords greater latitude with respect to satisfying the reasonableness requirement for self-defense.

In many instances in which the issue of self-defense is raised, the defendant also may wish to present evidence of the victim’s violent character or specific past acts of violent or aggressive behavior to buttress the self-defense assertion. Such evidence may serve two distinct purposes: (1) to show the victim’s propensity for violence or aggressiveness which would lead to an inference that the victim was using unlawful force at the time of the incident in question; and (2) to show the state of mind of the defendant at the time of the incident. See U.S. v. Saenz, 179 F.3d 686, 688-89 (9th Cir. 1999) (finding that Rule 404(b) does not apply when a defendant seeks to introduce evidence that he knew of a victim’s other acts, specifically past acts of violence, to show the defendant’s state of mind); U.S. v. James, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (holding that extrinsic evidence, such as court documents and police reports, concerning the victim’s past violent acts is admissible under Rule 404(b) to show defendant’s state of mind).

Generally, courts have allowed reputation or opinion evidence for the purpose of establishing a victim’s violent or aggressive nature, but have disallowed the use of specific instances of conduct to show action in conformity therewith. See Fed. R. Evid. 404(a)(2), 405(a),(b); Perrin v. Anderson, 784 F.2d 1040, 1045 (10th Cir. 1986) (testimony concerning violent reputation of victim is relevant to infer that victim was acting violently on the occasion at issue); U.S. v. Piche, 981 F.2d 706, 713 (4th Cir. 1992) (opinion or reputation evidence concerning victim is allowable). Moreover, whether the defendant knew of the victim’s character at the time of the crime has no bearing on whether evidence of this sort should be admitted. Keiser, 57 F.3d at 854.

Pursuant to Fed. R. Evid. 405, however, many courts have barred the introduction of a victim’s specific acts to show violent character or nature, as these courts have held that the violent or aggressive character of the victim does not constitute an “essential element” of a self-defense or defense of others claim. Keiser, 57 F.3d at 856. See also U.S. v. Talamante, 981 F.2d 1153, 1156-57 (10th Cir. 1992) (in a self-defense case, defendant could not offer specific acts to prove the victim’s trait for aggressiveness); Piche, 981 F.2d at 712-13 (evidence concerning victim’s past participation in racially violent episodes properly excluded). At the same time, however, it is recognized that because different jurisdictions have different formulations of the elements of self-defense, courts may reach differing conclusions as to whether aggressiveness or violence indeed is an “essential element” of self-defense. Keiser, 57 F.3d at 857 n.21. For this reason, counsel must analyze the self-defense law of a particular circuit to discern whether this powerful evidence may be admissible for the purpose of establishing the victim’s violent or aggressive nature.

With respect to victim-related evidence offered to show the state of mind of a defendant at the time of the incident, courts have allowed defendants to proffer such evidence in support of self-defense claims. See Gov’t of the Virgin Islands v. Carino, 631 F.2d 226 (3d Cir. 1980) (evidence of defendant’s knowledge of victim’s prior manslaughter conviction was admissible to show defendant’s fear or state of mind). “Although there is no specific reference in the Federal Rules of Evidence to admissibility for [the purpose of demonstrating the fear and the state of mind of a defendant], we do not read the Rules as
changing the prior precedent under which certain acts of violence by the victim are admissible to corroborate defendant’s position that he ‘reasonably feared he was in danger of imminent great bodily injury.’” *Id.* at 229 (citing *U.S. v. Burks*, 470 F.2d 432, 435 (D.C. Cir. 1972)). In such a case in which a defendant wishes to introduce victim evidence for the purpose of establishing his or her state of mind at the time of the incident in question, counsel should base such evidence on Rule 404(b) to show fear or state of mind. *See Carino*, 631 F.2d at 229 (although defendant improperly based his argument for admissibility on Fed. R. Evid. 609(a), court relied upon 404(b) to admit evidence).

11.08 VOLUNTARY INTOXICATION

Alcohol or drug intoxication which renders a person unable to form the specific intent required to commit a crime represents a valid defense and warrants a jury instruction as to this issue. *U.S. v. Sneezer*, 900 F.2d 177 (9th Cir. 1990). In order to invoke the voluntary intoxication defense, evidence of intoxication must be sufficient to allow a reasonable man to doubt the defendant’s ability to form the requisite criminal intent. *Heideman v. U.S.*, 259 F.2d 943, 945 (D.C. Cir. 1958) (footnote omitted); *see also U.S. v. Navarrette*, 125 F.3d 559, 563 (7th Cir. 1997) (intoxication must be so severe as to suspend all reason for voluntary intoxication defense to apply). While voluntary intoxication provides a defense to specific intent crimes, it cannot be relied upon to defend against a general intent crime. *U.S. v. Jim*, 865 F.2d 211, 212 (9th Cir. 1989); *U.S. v. Oliver*, 60 F.3d 547, 551 (9th Cir. 1995) (court properly excluded intoxication evidence in car jacking prosecution, as car jacking is a general intent crime). Even if the underlying crime is a general intent crime to which a voluntary intoxication defense is inapplicable, however, counsel must note that the defense remains viable for attempt or aiding and abetting charges to general intent crimes. *See U.S. v. Sayetsitty*, 107 F.3d 1405, 1412 (9th Cir. 1997) (voluntary intoxication instruction warranted for aiding and abetting second-degree murder charge); *U.S. v. Darby*, 857 F.2d 623, 627 (9th Cir. 1988) (court erred by failing to instruct jury as to voluntary intoxication defense in attempted bank robbery case).

11.08.01 Due Process Argument

Unfortunately, the Supreme Court’s recent holding in *Montana v. Egelhoff*, 518 U.S. 37 (1996), significantly diluted any due process grounded arguments that may be set forth under this defense. In *Egelhoff*, the Court addressed whether a Montana statute which eliminated the voluntary intoxication defense from consideration in criminal cases violated the Due Process Clause. Pursuant to the statute at issue, the trial court instructed the jury that it could not consider respondent’s “intoxicated condition . . . in determining the existence of a mental state which is an element of the offense.” *Id.* at 41 (citations omitted). The Court held that the elimination of this defense did not transgress due process, as the right to have a jury consider evidence of voluntary intoxication was not a “fundamental principle of justice.” *Id.* at 43. “The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant’s state of mind is at issue . . . [and] no[thing in the Due Process Clause prevents them from doing so . . . .” *Id.* at 56.

11.08.02 Voluntary Intoxication and Insanity
Only two circuits, the Ninth and the Second, have addressed the effect of voluntary intoxication on a claim of insanity. In *U.S. v. Knott*, 894 F.2d 1119, 1120 (9th Cir. 1990), defendant claimed that his drinking and drug abuse, along with a pre-existing schizophrenic condition, rendered him legally insane. The court rejected defendant’s argument, holding that “voluntary drug use or intoxication at the time of the crime may not be considered in combination with [] mental disease or defect in determining whether the defendant was unable to appreciate the nature and quality or wrongfulness of his acts.” *Id.* at 1123. In *U.S. v. Garcia*, 94 F.3d 57, 61-62 (2d Cir. 1996), the Second Circuit addressed defendant’s argument that the court erred in instructing the jury that insanity must have been caused by severe mental disease rather than by alcohol or drug use. The court affirmed defendant’s conviction, holding that voluntary substance abuse must not be taken into account when determining whether severe mental disease or defect exists. *Id.* The court did add, however, that where mental disease or defect is found, voluntary intoxication will not defeat an insanity defense. *Id.* See also supra section 11.02.

11.09 OUTRAGEOUS GOVERNMENTAL CONDUCT

Governmental conduct may warrant a dismissal of an indictment if that conduct is so excessive, flagrant, scandalous, intolerable and offensive that it violates due process. *U.S. v. Russell*, 411 U.S. 423, 431-32 (1973) ("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction") (citation omitted); *U.S. v. Luttrell*, 889 F.2d 806, 811 (9th Cir.), *vacated in part*, 923 F.2d 764 (9th Cir. 1991) (en banc). While the entrapment defense focuses upon whether the government's actions implanted the criminal design in the mind of an otherwise unpredisposed person, the outrageous governmental conduct defense focuses solely on the behavior of the government without any reference to predisposition on the defendant’s part. *U.S. v. Garza-Juarez*, 992 F.2d 896, 903 (9th Cir. 1993); *U.S. v. Stenberg*, 803 F.2d 422, 428-29 (9th Cir. 1986), *superceded by statute as stated in U.S. v. Atkinson*, 966 F.2d 1270 (9th Cir. 1992). This defense is premised upon the notion that the Due Process Clause imposes limits upon how far the government may go in detecting crime, regardless of the character of the target. *U.S. v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985); *U.S. v. Thoma*, 726 F.2d 1191, 1196 (7th Cir. 1981) (citing *U.S. v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983)); *U.S. v. Twigg*, 588 F.2d 373, 377 (3d Cir. 1978).

The question of whether the involvement of government agents rises to the level of outrageous governmental conduct is a question of law reviewed *de novo*. *Garza-Juarez*, 992 F.2d at 903; *U.S. v. Citro*, 842 F.2d 1149 (9th Cir. 1988). Although the issue may be properly raised and decided by a pretrial motion to dismiss the indictment under Fed. R. Crim. P. 12(b), *U.S. v. Duncan*, 896 F.2d 271, 274 (7th Cir. 1990) (outrageous governmental conduct claim must be made by pretrial motion), other courts have deferred ruling on the pretrial motion until after trial. See *U.S. v. Marcello*, 537 F. Supp. 402 (C.D. Cal. 1982) (court addressed defendants’ motion to dismiss for government overreaching after trial). The court will view the evidence in the light most favorable to the government, and will accept the district court's factual findings unless they are clearly erroneous. *U.S. v. Emmert*, 829 F.2d 805, 810-11 (9th Cir. 1987) (citations omitted). If, however, defendant failed to raise an outrageous government conduct claim in the district court, such failure constitutes a waiver of the defense. *U.S. v. Shaw*, 94 F.3d 438, 442 (8th Cir. 1996).
A defendant has standing to raise the outrageous governmental conduct defense only if he or she was a “target” of the government’s activity. *U.S. v. Simpson*, 813 F.2d 1462, 1469 n.7 (9th Cir. 1987) (direct target of FBI probe had standing to contest his conviction on grounds that government violated his due process rights during investigation). A defendant does not have standing, however, to raise a due process violation suffered by a third party. *U.S. v. Valdovinos-Valdovinos*, 743 F.2d 1436, 1437 (9th Cir. 1984).

Although there is no established standard for determining when governmental conduct transgresses the boundary of permissible investigative techniques, courts have noted some general areas that require heightened scrutiny. When the government supplies contraband or becomes intimately involved in its production, for instance, its conduct will be closely examined by the court. *Thoma*, 726 F.2d at 1199. Also, the courts will closely scrutinize cases in which the government's conduct injures third parties in some way. *U.S. v. Archer*, 486 F.2d 670, 677 (2d Cir. 1973). Each case of potential misconduct must be considered under a totality of the circumstances standard, however, as no single factor is controlling. *U.S. v. Yater*, 756 F.2d 1058, 1065 (5th Cir. 1985) (citing *U.S. v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981).

With respect to the “targeting” process, for example, the government need not have any particular level of suspicion in order to target an individual. In *Luttrell*, 923 F.2d at 764, an en banc panel of the Ninth Circuit vacated that part of a three-judge panel ruling which had held that the government must have “reasoned grounds” based on the Due Process Clause to investigate an individual. *Luttrell*, 923 F.2d at 764. In so vacating its original holding in *Luttrell*, the Ninth Circuit joined other circuits which also rejected such a reasonability test for targeting an individual. *Id.* at 764 (citing *U.S. v. Jenrette*, 744 F.2d 817, 824 (D.C. Cir. 1984) (no due process violation where government targeted defendant without reasonable suspicion of wrongdoing)); *U.S. v. Gamble*, 737 F.2d 853, 860 (10th Cir. 1984) (undercover investigation need not be based on reasonable suspicion of illegal activity); *U.S. v. Jannotti*, 673 F.2d 578, 608-09 (3d Cir. 1982) (en banc) (court rejected reasonable basis test for targeting of individuals); *U.S. v. Myers*, 635 F.2d 932, 941 (2d Cir. 1980) (no reasonable suspicion required); *Thoma*, 726 F.2d at 1198-99 (good-faith basis not a constitutional prerequisite to an undercover investigation). Since the Ninth Circuit abandoned its reasonable suspicion standard, other circuits have joined the consensus with respect to this issue. See *U.S. v. Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990), rev’d in part by *Jacobson v. U.S.*, 503 U.S. 540 (1992) (joining other circuits in holding Constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation).

Unfortunately, despite the conceptual attractiveness of this defense, the modern reality is that absolutely egregious conduct is required to successfully invoke this defense. Courts have held, for example, that the due process defense can only be raised in the “rarest and most outrageous circumstances.” *U.S. v. Stanley*, 765 F.2d 1224, 1231 (5th Cir. 1985) (citation omitted). “To be so ‘outrageous’ as to effect a denial of due process, government enforcement techniques must be ‘fundamentally unfair’ or ‘shocking to the universal sense of conscience.’” *U.S. v. Andrews*, 765 F.2d 1491, 1498 n.4 (11th Cir. 1985) (quoting *U.S. v. Russell*, 411 U.S. 423, 432 (1973)); see also *Simpson*, 813 F.2d at 1464 (due process claim may be asserted when the conduct of law enforcement officers is “so grossly shocking and so outrageous as to violate the universal sense of justice”) (internal quotation and citation omitted). “The due process channel which *Russell* left open is a most narrow one.” *Simpson*, 813 F.2d at 1465 (quoting *U.S. v. Ryan*, 548 F.2d 782, 789 (9th Cir. 1976)).
Recent case law illustrates the extreme difficulty faced by defendants who attempt to rely upon this defense. See *U.S. v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998) (single instance of sexual misconduct between undercover agent and defendant does not support claim under outrageous government conduct doctrine); *U.S. v. Berg*, 178 F.3d 976, 979 (8th Cir. 1999) (participation by government agents or informants in the illegal manufacture or distribution of drugs is a recognized means for the government to obtain convictions in drug-related offenses). In *U.S. v. Cuellar*, 96 F.3d 1179 (9th Cir. 1996), the court addressed whether an arrangement in which an informant was paid $580,000 for his services, which included a contingent fee based on the amount of money seized, constituted outrageous governmental conduct. The informant in this case received this money for his actions during an investigation of a money laundering scheme, $400,000 of which was a “bonus” paid to the informant after the close of the investigation. *Id.* at 1180-81. The Ninth Circuit, while noting that the informant “got paid a ton of money,” held that paying an informant based on a percentage of laundered funds and on results obtained in an extensive undercover operation did not constitute outrageous conduct in violation of defendant’s due process rights. *Id.* at 1182-83. In its decision sanctioning the actions of the government, the court noted both that there was extensive cross-examination regarding the remuneration issue and that nothing in the record directly tied the $400,000 payment to the result at trial. *Id.*

In *U.S. v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991), the Ninth Circuit reversed the district court’s dismissal of an indictment against four defendants in which the district court had found that the informant was at least partially responsible for the men becoming addicted to narcotics. The Ninth Circuit reinstated the indictments, holding that at worst the government passively “tolerated” rather than directed the informant’s conduct, and that the informant did not engineer and direct the criminal enterprise from start to finish. See *id.* at 1092. The court also refused to uphold the dismissal as a valid exercise of the court’s supervisory powers, resting its decision on the distinction between condemning misconduct inside the courtroom (valid invocation of supervisory power) and condemning misconduct outside the courtroom (invalid invocation of supervisory power). The Ninth Circuit did hold, however, that the defense for the two as yet untried defendants could make use of the government’s lack of supervision and informant’s drug testing at trial, *id.* at 1093, and that its decision did not preclude a motion after remand for a new trial for the other two defendants based on the defense’s incomplete knowledge of the informant’s activity and lack of testing. *Id.* at 1093 n.2.

Due to the unfavorable state of the law with respect to the outrageous government conduct defense, counsel always should argue that the court should employ its inherent supervisory power to dismiss an indictment on the basis of governmental misconduct. *U.S. v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978). In *U.S. v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991), the Ninth Circuit set forth the three legitimate bases for such a judicial exercise of supervisory power: (1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct. Like the outrageous government conduct defense itself, however, this defense also represents a difficult challenge to a defendant, as “rarely, if ever, will judicial integrity be threatened by conduct outside the courtroom that does not violate a federal statute, the Constitution, or a procedural rule.” *Id.*

11.10 GOOD FAITH
While the general rule that ignorance of the law is no defense to a criminal prosecution remains well-settled in American law, courts have established the good faith defense in response to the proliferation of statutes and regulations that embody modern American law. This defense, essentially a claim by a defendant that he or she had an honest and reasonable misunderstanding as to the legality of a particular action, arises primarily in the context of tax code violations and in cases involving mail, wire, and bank fraud.

A defendant is not entitled to a good faith instruction without establishing a “reasonable factual predicate” for the instruction. See U.S. v. Pappert, 104 F.3d 1559, 1563 (10th Cir.), vacated and superseded, 112 F.3d 1073 (10th Cir. 1997) (because there was not adequate factual support for the good faith defense, the court properly refused to so instruct the jury). The level of evidence necessary to warrant a good faith instruction is evidence such that “a reasonable jury could find in . . . favor [of the defendant].” Matthews v. U.S., 485 U.S. 58, 63 (1988); Pappert, 104 F.3d at 1563 (in mail fraud case, standard was whether defendant in good faith believed that his plan would succeed and his promises would be carried out). The validity of a good faith defense is an issue to be decided by the jury. U.S. v. Turner, 799 F.2d 627, 629-30 (10th Cir. 1986).

The Supreme Court’s decision in Cheek v. U.S., 498 U.S. 192 (1991), specifically addressed the reasonableness element of the good faith defense. Defendant was charged with tax evasion and failure to file a tax return, both of which require proof of willfulness. At trial, the judge’s instruction as to the willfulness element included an objective, rather than subjective, standard for determining the reasonableness of the belief. The Supreme Court reversed defendant’s conviction, holding that the court committed reversible error by giving an instruction that the good faith belief of a tax protester must be objectively reasonable in order to support a good faith defense. “Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it.” Id. at 203. Counsel must note, however, that the Ninth Circuit has refused to extend Cheek beyond the context of criminal tax offenses. U.S. v. Burrows, 36 F.3d 875, 883 (9th Cir. 1994).

Most circuits have held that an adequate specific intent instruction can obviate the need for a separate good faith charge. See U.S. v. Rochester, 898 F.2d 971, 978-79 (5th Cir. 1990) (failure to instruct specifically on good faith not fatal when jury is given detailed instruction on specific intent and the defendant is allowed to argue good faith to the jury); U.S. v. Mancuso, 42 F.3d 836, 847 (4th Cir. 1994) (good faith instruction not necessary if jury charged as to specific intent); U.S. v. Dockray, 943 F.2d 152, 154-55 (1st Cir. 1990) (court need only convey “substance” of good faith theory to the jury); U.S. v. Walker, 26 F.3d 108, 109 (11th Cir. 1994) (court’s instruction on intent to defraud adequately addressed good faith issue); U.S. v. McElroy, 910 F.2d 1016, 1026 (2d Cir. 1990) (instructions need only convey “essence” of good faith defense); U.S. v. Duran, 59 F.3d 938, 941-42 (9th Cir. 1995) (adequate specific intent instruction eliminates need for separate good faith instruction). Generally, courts will make such a determination by examining the facts of a particular case to determine the adequacy of the instructions as a whole and the effect of the omission on the defendant’s case. U.S. v. Sirang, 70 F.3d 588, 594 (11th Cir. 1995). The Tenth Circuit, however, still requires that a good faith instruction be given where one has been requested and finds support in the evidence, U.S. v. Haddock, 956 F.2d 1534, 1547 (10th Cir. 1992), overruled on other grounds by U.S. v. Pappert, 104 F.3d 1559 (10th Cir. 1997), as does the Eighth Circuit, U.S. v. Casperson, 773 F.2d 216, 222-23 (8th Cir. 1985). But see Willis v. U.S., 87
F.3d 1004, 1008 (8th Cir. 1996) (in claim of ineffective assistance of counsel due to failure to request separate good faith instruction, court found that instructions as to specific intent and bank fraud adequately conveyed good faith concept to jury).

11.11 RELIANCE ON THE ADVICE OF COUNSEL

Related to the aforementioned good faith defense is the defense of reliance on advice of counsel. Under this defense, a defendant may be excused from wrongdoing if he or she acted on the basis of advice from his or her attorney. In *Liss v. U.S.*, 915 F.2d 287 (7th Cir. 1990), the Seventh Circuit set forth a test governing the invocation of this defense. The court stated that to rely on the advice of counsel defense, the defendant must show that: “(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered to be competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.” *Id.* at 291.

Any foundation in the evidence as to reliance on the advice of counsel is sufficient to merit a jury instruction on a reliance theory. *U.S. v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994). It is not for the judge, but rather for the jury, to ‘appraise the reasonableness or the unreasonableness of the evidence’ relative to a reliance theory, as to hold otherwise would be tantamount to a grant of partial summary judgment to the Government in a criminal case. *U.S. v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988), *overruled on other grounds* sub nom. *U.S. v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992). Although the defense of reliance traditionally is thought of as applying to the attorney-client relationship, reliance on the advice of an accountant also constitutes a valid defense and consists of the same general elements as the reliance on counsel defense. *Id.* A defendant may not, however, raise the reliance defense as to all crimes. *U.S. v. Remini*, 967 F.2d 754 (2d Cir. 1992) (advice of counsel is no defense to act of contempt).

11.12 ALIBI

The essence of the alibi defense is the impossibility of the defendant’s guilt based on his or her physical absence from the location of the crime. *See, e.g.*, *Roper v. U.S.*, 403 F.2d 796, 798 (5th Cir. 1968). An alibi does not represent a true “defense,” but rather is simply a denial of the prosecution’s accusation against the defendant. *Waters v. Bensinger*, 507 F.2d 103, 105 (7th Cir. 1974) (an alibi is merely a method of disproving the case of the prosecution).

An alibi instruction is critical because a juror, unschooled in the intricacies of the law, may interpret a failure to prove the alibi defense as proof of the defendant’s guilt. *U.S. v. Hoke*, 610 F.2d 678, 679 (9th Cir. 1980). Accordingly, counsel can obtain an alibi instruction when any evidentiary support for this defense exists. *U.S. v. Zuniga*, 6 F.3d 569, 570 (9th Cir. 1993) (quoting *U.S. v. Ragghianti*, 560 F.2d 1376, 1379 (9th Cir. 1977)); *U.S. v. Washington*, 819 F.2d 221, 225 (9th Cir. 1987) (citing *U.S. v. Doubleday*, 804 F.2d 1091, 1095 (9th Cir. 1986) (holding that “[e]ven where the alibi evidence is ‘weak, insufficient, inconsistent, or of doubtful credibility, the instruction should be given’”). Additionally, when alibi is the defense, an alibi instruction must be given when requested. *Zuniga*, 6 F.3d at 571. Along with a
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separate alibi instruction, the court also is required to instruct the jury that the government maintains the burden of establishing beyond a reasonable doubt the defendant’s presence at the location of the crime. *U.S. v. Simon*, 995 F.2d 1236, 1243 (3d Cir. 1993). Failure to instruct as to this burden may result in reversal of the conviction even without an objection to the instruction. *U.S. v. Alston*, 551 F.2d 315 (D.C. Cir. 1976). An alibi instruction also is required when the government, as opposed to the defendant, introduces evidence that supports the alibi theory. *U.S. v. Hairston*, 64 F.3d 491, 494-95 (9th Cir. 1995).

Counsel must be sure to request an alibi instruction, as omission of an unrequested alibi instruction is not plain error so long as the jury is otherwise correctly instructed concerning the government’s burden of proof and the defense is allowed a “full opportunity to present his alibi defense in closing argument.” *U.S. v. McCall*, 85 F.3d 1193, 1196 (6th Cir. 1996). Moreover, if the defendant’s presence at the scene of the crime is not an element of the offense, the defense of alibi cannot be raised. *U.S. v. Lustig*, 555 F.2d 737, 750-51 (9th Cir. 1977) (court properly refused alibi instruction in conspiracy case).

Defense counsel should consider requesting an alibi instruction without use of the word “alibi,” as jurors may tend to attach negative connotations to the term and subconsciously shift the burden of proof to the defense. See Federal Judicial Center Committee to Study Criminal Jury Instructions, *Pattern Criminal Jury Instructions* (Federal Judicial Center 1982) (instruction 53). Instead of using the term “alibi,” counsel should suggest language such as the following: “If, after considering all the evidence, you have a reasonable doubt that [the defendant] was present, then you must find her not guilty.” If the court indeed uses the word alibi in the instruction, counsel should request the court to include supplemental language that an alibi is a proper and legitimate claim in defense of an indictment. See *Alston*, 551 F.2d at 317.

An alibi defense is unique in that a defendant may win a case based on an alibi defense even if he does nothing to dispute the government’s proof, as the alibi itself can create sufficient reasonable doubt to justify acquittal. See *Zuniga*, 6 F.3d at 571-72. This is one reason that the alibi defense is afforded special consideration under Rule 12.1 of the Federal Rules of Criminal Procedure. Rule 12.1 mandates that the defendant notify the government of any “specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.” Fed. R. Crim. P. 12.1(a). This required declaration is intended to avoid unfair surprise and prevent trial delays due to unexpected witness or alibi defenses. *U.S. v. Dupuy*, 760 F.2d 1492, 1498 (9th Cir. 1985).

11.13 BATTERED WOMAN SYNDROME

The battered woman’s syndrome is not a defense, but rather is a form of expert testimony offered to explain a psychological phenomena which in turn can buttress a defendant’s “real” defense of duress, necessity, or entrapment. Increasing numbers of state courts permit the admission of expert testimony on the syndrome. See, e.g., *State v. Hickson*, 630 So. 2d 172, 175 (Fl. 1993) (expert testimony admissible

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1 A recent survey of potential jurors showed that jurors believed “alibi” to mean “lie.”
to help jury understand the “syndrome” and address self-defense claim); People v. Minnis, 118 Ill. App. 3d 345, 455 N.E.2d 209 (Ill. App. Ct. 1983) (reversible error to refuse to permit offer of proof on battered woman syndrome through expert); State v. Stewart, 243 Kan. 639, 763 P.2d 572, 579 (Kan. 1988) (permits expert testimony on battered woman syndrome to determine whether woman suffered from “imminent peril,” an element of the defense); Roger v. State, 616 So. 2d 1098 (Fla. App. 1 Dist. 1993), approved in part, vacated in part by State v. Rogers, 630 So. 2d 177 (Fla. 1993) (lower court’s refusal of expert testimony regarding battered woman syndrome was reversible error).

Federal courts, however, have been slow to accept defense evidence relating to Battered Woman Syndrome. For example, the Eleventh Circuit ruled such evidence admissible, but only to bolster the credibility of a prosecution witness. Arcoren v. U.S., 929 F.2d 1235 (8th Cir. 1991). The defendant in Arcoren was charged with and convicted of aggravated sexual abuse, abusive sexual contact and sexual abuse of a minor on an Indian Reservation. The victim, defendant’s estranged wife, reported the sexual assaults and testified about them before a federal grand jury. After the wife recanted her testimony, the district court allowed the government to admit expert testimony concerning the “battered woman syndrome” under Fed. R. Crim. P. 702. The Eighth Circuit held that the court did not abuse its discretion because the “testimony provided the jury with a basis upon which to understand and evaluate the change in [her] testimony.” Id. at 1241. See also U.S. v. Winters, 729 F.2d 602, 604-05 (9th Cir. 1984) (government may present battered woman syndrome evidence to explain why kidnapped women forced to engage in prostitution did not try to escape).

In U.S. v. Homick, 964 F.2d 899 (9th Cir. 1992), defendant and her ex-husband were charged with conspiracy to commit wire fraud. Defendant claimed she was a battered woman who acquiesced to her ex-husband’s orders only because of his domination over her. The district court excluded the testimony, however, because defense counsel failed to provide written notice of its plan to introduce expert testimony on the battered woman syndrome pursuant to Fed. R. Crim. P. 12.2(b). Id. at 905. The Ninth Circuit affirmed, holding that even if the ruling were an abuse of discretion, the error was harmless because the “defense was unavailable to [defendant].” Id. at 905. The court reasoned that the ex-husband’s directives conveyed no implicit or explicit threats to defendant and that defendant “indicate[d] no concern whatsoever over what her husband’s reaction might be to her lack of cooperation.” Id. at 906. Cf. U.S. v. Sixty-Acres in Etowah County, 930 F.2d 857, 861 (11th Cir. 1991) (holding in forfeiture action that the wife of a convicted drug dealer failed to justify her consent to her husband’s illegal conduct even though she presented evidence that her husband had beaten his previous wife to death, assaulted and threatened her and other women in the family, owned several guns, and drank excessively).

The Fifth Circuit, in U.S. v. Willis, 38 F.3d 170, 175 (5th Cir. 1994), held that because the test is objective rather than subjective, evidence of battered woman syndrome is irrelevant to a duress defense. The Second and Third Circuits similarly have evinced little receptivity to the claim that a woman who commits a criminal act under the direction of a man who has subjected her to sexual and physical violence has acted under duress. See U.S. v. Santos, 932 F.2d 244, 253 (3d Cir. 1991) (instruction that “certainly an abusive husband is no license to become involved in transactions, half pound or half ounce or half kilo transactions of narcotics” upheld by court); U.S. v. Alicea, 837 F.2d 103 (2d Cir. 1988).
Defense counsel should draw upon state court rulings and the limited inroads in federal court, including those involving downward departures under the sentencing guidelines for imperfect duress, to justify introduction of evidence on the battered woman syndrome. The Ninth Circuit, for instance, considered the battered woman syndrome as an extension of the defense of duress when presented as relevant evidence for sentencing. See *U.S. v. Johnson*, 956 F.2d 894, 899-900 (9th Cir. 1992) (court accepted the expert testimony and gave the defendant permission to use the affirmative defense of duress with battered woman syndrome as the catalyst of that defense); see also *U.S. v. Whitetail*, 956 F.2d 857, 861 (8th Cir. 1992) (held that the sentencing court should consider evidence that the defendant was a battered woman who acted under duress, even if the defense failed as a matter of law at trial); cf. *U.S. v. Cheape*, 889 F.2d 477, 479-80 (3d Cir. 1989) (although court rejected wife’s coercion defense, the defense could be considered at sentencing).

11.14 CONCLUSION

This chapter has set forth what may be considered the main defenses to federal prosecutions. This list of defenses, however, is not exhaustive, as other defenses might exist for a particular case. Accordingly, defense counsel should always consider and explore all options. While a defense might not lead to an acquittal or favorable disposition, a defense might be very beneficial in obtaining favorable plea bargains or pretrial dispositions.
11.15 ADDITIONAL REFERENCES

11.15.01 Insanity


11.15.02 Entrapment


11.15.03 Duress


11.15.04 Necessity
11.15.05 Self-Defense


11.15.06 Voluntary Intoxication


11.15.07 Outrageous Governmental Conduct


11.15.08 Good Faith


11.15.09 Alibi


11.15.10 Battered Woman Syndrome


CHAPTER 12

COMMON FEDERAL OFFENSES AND ISSUES

updated by

Ross Viselman, Todd Burns, and Michael Petrik

12.01 INTRODUCTION

This chapter covers basic issues in eight common federal offenses: assault on a federal officer, check offenses, conspiracy, drug offenses, mail fraud, immigration offenses, bank robbery, and false statements to a federal officer.

12.02 ASSAULT ON A FEDERAL OFFICER -- 18 U.S.C. §111

12.02.01 Elements

Section 111 is intended to provide federal officials the greatest possible personal protection. U.S. v. Feola, 420 U.S. 671, 684 (1975). Thus, subsection (a)(2), prohibits forcible assault or intimidation of a former federal official when that conduct is motivated by the former officials official duties or actions as a federal official.

The first element of 18 U.S.C. §111 requires that the "victim" be an “officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services).” 18 U.S.C. §1114. There is no requirement that the defendant know that the victim is a federal officer. Feola, 420 U.S. at 684. Section 1114 protects a broad category of federal officials and courts have likewise interpreted the meaning of federal officer broadly. See U.S. v. Diamond, 53 F.3d 249, 251 (9th Cir.1 995) (state officer cross-deputized as U.S. marshal, and acting under control of FBI agent held within purview of section 111); U.S. v. Martin, 163 F.3d 1212, 1214 (10th Cir. 1998) (discussing cases).

The second element of 18 U.S.C. §111 is the defendant must use force when resisting, opposing, impeding, intimidating or interfering with the victim. Physical contact is not necessarily required. U.S. v. Chambers, 195 F.3d 274, (6th Cir. 1999) (reaching in pocket for gun is assault); U.S. v. Street, 66 F.3d 969, 977 (8th Cir. 1995) (threat of physical aggression is sufficient).
The third element of §111 requires that the victim be engaged in the performance of official duties at the time of the assault. *U.S. v. Clemons*, 32 F.3d 1504, 1507-08 (11th Cir. 1994) (surveying various circumstances in which courts have held that an agent or officer was acting within the scope of his or her official duties). Additionally, whether a federal officer is engaged in the performance of her duties does not turn on the constitutionality of the law being enforced or its applicability to the defendant. *Street*, 66 F.3d at 978; *U.S. v. Streich*, 759 F.2d 579, 584 (7th Cir. 1985).

The fourth element of §111 is that the assault must be committed knowingly. This *mens rea* element is satisfied by a willful attempt or threat to inflict injury upon the person of another that, when coupled with an apparent present ability to apply force, causes the victim to reasonably apprehend immediate bodily harm. *U.S. v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (per curiam). Most circuits have held that §111 is a general intent crime. *U.S. v. Kleinbart*, 27 F.3d 586, 592 (D.C. Cir. 1994); *U.S. v. Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998); *but see U.S. v. Oakie*, 12 F.3d 1436, 1443 (8th Cir. 1993) (noting conflicting prior decisions as to whether specific intent is an element of a §111 violation).

12.02.02 Defenses

A person accused under 18 U.S.C. §111 may raise the issue of self-defense. In *Feola*, the Supreme Court noted that:

We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under §111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.

420 U.S. at 686.

Unlike an ordinary assault case, a defendant's knowledge of the victim’s status as a federal officer is relevant if self-defense is raised. *See U.S. v. Branch*, 91 F.3d 699, 714-15 (5th Cir. 1996) (self-defense instruction available if the defendant was unaware of the agent’s identity, or the agent’s “use of force viewed from the perspective of a reasonable officer at the scene was objectively unreasonable under the circumstances”); *U.S. v. Goldson*, 954 F.2d 51, 54-56 (2d Cir. 1992) (where a federal agent has failed to identify herself prior to the assault, and her identity or authority was not apparent, a self-defense instruction will most likely be necessary); *U.S. v. Ochoa*, 526 F.2d 1278, 1281-82 (5th Cir. 1976) (acquittal is proper if defendant is unaware of agent’s identity and reasonably believed the agent had an intent to damage property or injure family).

To defend against an unlawful attack, a person can use only the amount of force that appears necessary under the circumstances. Any use of excessive force negates a self-defense claim. *U.S. v.*
Once a defendant asserts self-defense, the government bears the burden of establishing beyond a reasonable doubt that the defendant did not act in self-defense. \textit{U.S. v. Johnson}, 542 F.2d 230, 232 n.4 (5th Cir. 1976); \textit{see also U.S. v. Jackson}, 569 F.2d 1003, 1008 n.12 (7th Cir. 1978) (if the record sufficiently supports self-defense instruction and counsel requests it, failure to give a self-defense instruction is ground for reversal).

A person also may be justified in resisting an arrest not based on probable cause. \textit{U.S. v. Bailey}, 691 F.2d 1009, 1018 n.9 (11th Cir. 1982) (the court will not tolerate an “intentionally provoked” fight or a manufactured second resisting arrest as a “pretext to provide an independent . . . basis for the prior illegal arrest”); \textit{U.S. v. Moore}, 483 F.2d 1361, 1364-65 (9th Cir. 1973) (if an officer has no right to arrest, there is a right to resist the illegal attempt to arrest by use of no more force than is absolutely necessary). The court in \textit{Moore} noted that the warrantless arrest of the defendant in that case was unlawful only in the exclusionary rule sense because it was the fruit of a prior unlawful search. \textit{Id.} at 1364-65. Thus, in a situation in which the arrest is unlawful only in a derivative sense, and the officer has not acted in bad faith, with unreasonable force, or has not engaged in provocative conduct, there is no defense. \textit{Id.}

If the defendant asserts that he was defending another person against an illegal arrest, the jury should be instructed that force may be used if the defendant reasonably believed that the third person was being subjected to an unprovoked physical assault by law enforcement officers. \textit{U.S. v. Grimes}, 413 F.2d 1376, 1379 (7th Cir. 1969). A third person does not have the right to intervene and assist a person whom a police officer is endeavoring to arrest, however, if the third person knows or has reason to believe that the police officer is authorized to make the arrest and the officer is not clearly using unnecessary force. \textit{See, e.g.}, \textit{U.S. v. Vigil}, 431 F.2d 1037, 1042 (10th Cir. 1970) (no right to aid resistance if the third person should believe the attacker is an agent who is not clearly using unnecessary force).

Finally, counsel should always consider asking for a lesser-included offense of, for example, simple assault. \textit{See, e.g.}, \textit{U.S. v. Estrada-Fernandez}, 150 F.3d 491 (5th Cir. 1998); \textit{U.S. v. Gonzalez}, 122 F.3d 1383 (11th Cir. 1997).

\textbf{12.02.03 Penalties}

The statutory maximum under 18 U.S.C. §111(a) is three years for felony assault.\footnote{Simple assault is a misdemeanor punishable by up to one year in custody. 18 U.S.C. §111.} Section 111(a) is a Class E Felony. 18 U.S.C. §3559. Section 111(b) contains a maximum of 10 years imprisonment for assault with a deadly or dangerous weapon or infliction of bodily injury. Section 111(b) is a Class C Felony. 18 U.S.C. §3559. Probation is statutorily permissible under either subsection. 18 U.S.C. §3561. Supervised release of up to one year is authorized for simple assault, and for up to three years for assault with a dangerous or deadly weapon. 18 U.S.C. §3583. The maximum fine under §111 is $250,000. 18 U.S.C. §3571. Under the United States Sentencing Commission, \textit{Guidelines Manual} (hereinafter “U.S.S.G.”) §§2A2.2 and 2A2.4 apply to assaults.
Subsection (b) to §111 provides for an "enhanced penalty" when a deadly or dangerous weapon is used. Courts have gone so far as to categorize innocuous objects (such as shoes, a garden rake and a wine bottle) as dangerous weapons. See U.S. v. Murphy, 35 F.3d 43, 147 (4th Cir. 1994) (stationary steel bars); Loman, 551 F.2d at 169 (walking stick). Enhancements of varying degrees apply if a dangerous weapon was possessed or its use was threatened, a firearm was used, a firearm was discharged, bodily injury was caused, the assault was in exchange for payment of money, or the assault involved more than minimal planning.

Significantly, the Supreme Court’s recent decisions in U.S. v. Jones, 526 U.S. 227 (1999) and Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348 (2000) have changed the landscape of sentencing enhancements. At least two circuits have found that the sentence enhancement under §111(b) is in fact a separate element to be submitted to a jury and proven beyond a reasonable doubt. See, e.g., U.S. v. Nunez, 180 F.3d 227, 233 (5th Cir. 1999) and U.S. v. Chestaro, 197 F.3d 600 (2d Cir. 1999) (rejecting defendant's double jeopardy claim because using a deadly and dangerous weapon or inflicting serious bodily injury is an element of 18 U.S.C. §111); but see U.S. v. Young, 936 F.2d 1053-55 (9th Cir. 1991) (sentence enhancement provision does not constitute a separate offense).

12.03 CHECK CASES/FORGERY OF GOVERNMENT WRITING -- 18 U.S.C. §495

This statute encompasses three distinct offenses. The first offense under §495 prohibits the making of a forged or counterfeit deed or other writing for the purpose of obtaining any sum of money from the United States or its officers. The second offense consists of the uttering or passing of any such forged or counterfeit writing with intent to defraud the United States and with knowledge that the writing was a forgery. The third offense involves the “transmitting or presenting” to any office or officer of the United States any such writing with knowledge that it was false or forged and with intent to defraud the United States.

Congress intended the word "forged" in §495 to have its common law meaning. Gilbert v. U.S., 370 U.S. 650, 655-58 (1962). Forgery at common law meant the false making of any written instrument for the purpose of fraud and deceit, and included any alteration of or addition to a true instrument. Id. at 656. This definition of "forged" does not include an agency endorsement; that is, a defendant who fraudulently signs his true name on an endorsement of a treasury check claiming to be an agent of the payee is not covered by the common law definition. Id. at 657. If a defendant forges the endorsement itself, however, he is liable. U.S. v. Faust, 850 F.2d 575, 582 (9th Cir. 1988).

Section 495 is not intended to punish one who, in good faith, cashes another person's government check believing he has authority to do so. See, e.g., U.S. v. Lewis, 592 F.2d 1282, 1285-86 (5th Cir. 1979) (if third party had payee's authority to cash check, the third party is not guilty of forgery for

2 Congress enacted 18 U.S.C. §510 (in part) to close the "loophole" in §495 which makes it inapplicable to stolen Treasury checks which are not falsely endorsed. U.S. v. LeCoe, 936 F.2d 398, (9th Cir. 1991).
exercising such authority).  But see Ross v. U.S., 374 F.2d 97, 102-03 (8th Cir. 1967) (check is forged within the meaning of §495 if defendant endorses checks issued to deceased person).

The statute requires that the defendant forge or utter "a writing." The writing requirement means that if the falsity lies in the representation of facts, as opposed to the genuineness of execution, there is no forgery. Gilbert, 370 U.S. at 658. The Supreme Court has interpreted the word "writing" to be "comprehensive and all-embracing." Prussian v. U.S., 282 U.S. 675, 679 (1931). In Prussian, the Court held that an endorsement was "a writing" within the meaning of this section. Id. The Court reasoned that the writings enumerated in the statute had no common characteristic from which a congressional purpose could be inferred to restrict the statute's coverage to the listed classes of writings. Id. The addition of "other writing" to the statute was not for the purpose of referring to "other writings" of a particular listed class, but rather to extend the penal provisions of the statute to include all writings forged for the purpose of obtaining money from an officer of the United States. Id. at 679-80.

The first portion of the statute is violated when a person forges a writing for the purpose of obtaining or receiving, or enabling any other person to obtain or receive, a sum of money from the United States or its officers. The forgery provision does not explicitly include an intent to defraud as an element of the statute; however, courts have interpreted this portion of §495 to require proof of intent to defraud. Since Prussian, courts have recognized that intent to defraud is an element of a crime of forgery under 18 U.S.C. §495. See, e.g., U.S. v. Hall, 845 F.2d 1281, 1285 (5th Cir. 1988) (specific intent to defraud is an element of the offense of forgery); U.S. v. Hester, 598 F.2d 247, 249 (D.C. Cir. 1979) (same). Notwithstanding the specific intent requirement, in U.S. v. Indelicato, 611 F.2d 376, 385 (1st Cir. 1979), the court held that if the defendant utters a falsely endorsed United States Treasury check, the government need not prove that the defendant intended to defraud the United States because the defendant is charged with knowledge that the ultimate loss would be suffered by the United States.

For purposes of §495, the defendant need not intend for the United States to suffer a monetary loss. Likewise, the government is not required to prove that such a loss actually occurred. Instead, it is only necessary that the defendant intend to impair the administration of government functions. Faust, 850 F.2d at 581-2(rejecting defense claim that McNally v. U.S., 483 U.S. 350 (1987), requires the government to prove actual monetary loss); U.S. v. Dimond, 445 F.2d 866, 867 (9th Cir. 1971) (uttering a forged U.S. Treasury check was sufficient to show that the defendant intended to defraud the U.S.); U.S. v. Sullivan, 406 F.2d 180, 187 (2d Cir. 1969) (same).

The second and third offenses defined by §495 require that one utter or transmit to an officer or office of the United States, as true, a false or forged writing with intent to defraud the United States, knowing the writing to be false or forged. The offense of uttering requires proof of an attempt to circulate a writing by fraudulently representing that the writing is genuine. U.S. v. Rivamonte, 666 F.2d 515, 517 (11th Cir. 1982). Uttering does not require presentation of a check at a bank for cashing, but only requires an attempt to circulate the writing. Id.; see also U.S. v. Jones, 648 F.2d 215, 217-18 (5th Cir. 1981) (offering check to landlord in order to pay rent constituted uttering); U.S. v. DeJohn, 638 F.2d 1048, 1054 (7th Cir. 1981) (utilizing a forged check in ordinary commerce in itself may be sufficient to establish an attempt to circulate the check as genuine).
Unlike the forgery provision of §495, the uttering and transmitting provisions specifically require that the defendant commit the act with the intent to defraud the United States. In *Lewis*, the Fifth Circuit held that because the defendant contended that he relied in good faith on another person's assurances that he was authorized by a former owner to cash the owner's check, he was entitled to the following instruction defining good faith reliance on apparent authority:

A false or forged writing is not established by the bare fact that one person has signed the name of another to a writing having apparent legal significance because the signing: (1) may have been authorized, in which case the writing is not false; or (2) though unauthorized may have been in the bona fide belief in the existence of such authority, in which case, although the writing is actually false, it was prepared without an intent to defraud.

592 F.2d at 1285.

Once a defendant has produced some evidence of authority, the government must prove beyond a reasonable doubt that the defendant lacked such authorization. *U.S. v. West*, 666 F.2d 16, 19 (2d Cir. 1981).

Title 18 U.S.C. §1003, false demands against the United States, is a plea bargaining tool that can be used as an alternative to the forgery offenses contained in §495. Section 1003 provides both misdemeanor and felony sentences, depending upon the amount involved.

12.03.01 Penalties

Title 18 U.S.C. §495 is a Class D Felony providing for imprisonment of not more than 10 years. 18 U.S.C. §3559. Probation is statutorily permissible, as is supervised release of not more than three years, and a fine of not more than $250,000. 18 U.S.C. §§3561, 3583, and 3571.

12.03.02 Sentencing Issues

U.S.S.G. §2F1.1 applies to 18 U.S.C. §495. Under §2F1.1, a defendant with no prior record faces a sentencing range of 0-6 months. Substantial enhancements are possible, however, if the offense involved, *inter alia*, amounts greater than $2,000, more than minimal planning, defrauding more than one victim, misrepresenting that defendant was acting on behalf of an agency, violation of an order, a foreign bank account, or risk of serious bodily injury.


The federal conspiracy statute covers both conspiracies to commit a federal offense and conspiracies to defraud the United States. Defending a federal conspiracy case is much like taking a trip to Lewis Carroll's *Alice in Wonderland*. As Barry Tarlow points out in his article on "The Defense of a Federal Conspiracy Prosecution," *J. Crim. Def.* 183 (1978), the crime of conspiracy is the "darling of the modern prosecutor's nursery." Mr. Tarlow notes that this reputation is well deserved due to the procedural advantages that accrue to the prosecution from alleging the crime. The poorly defined nature
Interestingly, if a defendant does not proceed to trial he may be convicted twice for participation in the same conspiracy as long as he, through counsel, pleads guilty to two counts alleging different facts; double jeopardy is not a bar because it is implicitly waived by such a procedure. *U.S. v. Broce*, 488 U.S. 563, 569-76 (1989).

Title 18 U.S.C. §371 makes it a crime for "two or more persons [to] conspire . . . to defraud the United States" or "to commit any offense against the United States." Despite the fact that these concepts or theories of conspiracy are contained in the same code section, they are completely different from one another and involve different elements of proof. Conspiracy "to commit any offense" is fairly straightforward, as it simply involves a conspiracy to commit a recognized federal crime. Conspiracy "to defraud," on the other hand, is a conspiracy to impair, obstruct, or defeat some lawful function of the government. *Dennis v. U.S.*, 384 U.S. 855, 861 (1966) (citations omitted).

Therefore, depending on the part of the statute relied upon by the prosecution, the required proof may well consist of different evidence. Conspiracy to defraud requires proof of an agreement to interfere with some lawful governmental function or purpose, regardless of whether that interference is, itself, a separate substantive criminal offense. *U.S. v. Shoup*, 608 F.2d 950, 959-60 (3d Cir. 1979). The conspiracy to defraud element reaches not only property or pecuniary loss, but also the integrity of the United States and its agencies and programs. *U.S. v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985) (dishonest administration of Social Security program covered by 18 U.S.C. §371) (citations omitted). Alternatively, conspiracy "to commit any offense" requires proof of an intent to commit the underlying offense charged in the conspiracy. *U.S. v. Martinez*, 806 F.2d 945, 946-947 (9th Cir. 1986) (government met its burden to show defendant intended to aid and abet the procurement of false birth certificates). Due to this inherent distinction, care must be exercised in drafting the appropriate conspiracy jury instruction for each case.

When the government charges, in a single count, a conspiracy with more than one objective, counsel must address important issues concerning the appropriate jury instructions. Although the government may charge, in a single count of the indictment, a conspiracy to commit several crimes, the jury need only find that a conspiracy existed to commit one crime. *U.S. v. Smith*, 891 F.2d 703, 712-13 (9th Cir. 1989), modified, 906 F.2d 385 (9th Cir. 1990). *Braverman v. U.S.*, 317 U.S. 49, 53-54 (1942). 3 The appropriate procedure in such a case, however, is for the court to charge the jury with a unanimity instruction, possibly involving special interrogatories, to determine that a unanimous jury agrees that the evidence demonstrates beyond a reasonable doubt that the defendant conspired to commit at least one of the charged offenses. *U.S. v. Castro*, 887 F.2d 988, 993 (9th Cir. 1989) (a unanimity instruction is appropriate "where it appears that a conviction might rest upon different jurors [finding] different facts . . . where the complex nature of the evidence, a discrepancy between the evidence and the indictment, or some other particular factor creates a genuine possibility of juror confusion.") (citations omitted); *U.S. v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975) (due to ambiguity in conspiracy instructions, judgment would be withheld); see also Fed. R. Crim. P. 23(c) and 31(a). See supra Chapter 6 for a discussion of motions in conspiracy cases.

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3 Interestingly, if a defendant does not proceed to trial he may be convicted twice for participation in the same conspiracy as long as he, through counsel, pleads guilty to two counts alleging different facts; double jeopardy is not a bar because it is implicitly waived by such a procedure. *U.S. v. Broce*, 488 U.S. 563, 569-76 (1989).
12.04.01 Elements

A conviction under 18 U.S.C. §371 requires proof of (1) an agreement to commit an illegal act; (2) at least one overt act in furtherance of the illegal purpose; and (3) the requisite intent to commit the substantive offense. *U.S. v. Carpenter*, 95 F.3d 773, 775 (9th Cir. 1996), *cert. denied*, 519 U.S. 1155 (1997). Defense counsel must be aware that Congress has eliminated the overt act requirement for some specialized conspiracy statutes. *See, e.g.*, 21 U.S.C. §§846 and 963; *U.S. v. Shabani*, 513 U.S. 10, 14-16 (1994) (section 846 requires no overt act because Congress did not include that requirement in the statute); *U.S. v. Iriarte-Ortega*, 113 F.3d 1022, 1024 n.1 (9th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998).

12.04.01.01 Agreement

The crime of conspiracy requires an agreement between two or more persons to do something unlawful. If there is no meeting of the minds on some common purpose or design, no conspiracy can exist regardless of the defendant's criminal intent. *U.S. v. Rubio-Villareal*, 927 F.2d 1495, 1499 (9th Cir. 1991) (drug conviction reversed where no co-conspirator shown), *rev'd on remand*, 967 F.2d 594 (9th Cir. 1992). For instance, in a drug case in which the government is able to prove only that a defendant possessed and gave or sold the drug to friends, there is no evidence of an agreement and thus no evidence of a conspiracy. Mere proof of distribution is not proof of a conspiracy. *U.S. v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994); *U.S. v. Lechuga*, 994 F.2d 346 (7th Cir. 1993) (en banc).

There is no agreement or meeting of the minds if the defendant conspires only with another person who is a government agent. Many of the circuits have adopted this logical concept known as the Sears rule. *See U.S. v. Escobar De Bright*, 742 F.2d 1196, 1198-200 (9th Cir. 1984) (en banc) (an individual cannot conspire to possess and distribute heroin with a government agent); *U.S. v. Barboa*, 777 F.2d 1420 (10th Cir. 1985). It is sufficient for a conspiracy, however, for the government to allege and prove a conspiracy between the defendant and “persons unknown to the grand jury.” *Rogers v. U.S.*, 340 U.S. 367, 375 (1951) (“[T]he identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown.”); *but see U.S. v. Patterson*, 678 F.2d 774, 781 (9th Cir. 1982) (insufficient evidence where co-defendants are acquitted of conspiracy charge and lack of evidence supporting reasonable inference of conspiratorial endeavor with an unknown person). Thus, if a conspiracy indictment names certain defendants as conspirators while alleging that other conspirators are "unknown to the grand jury," a defendant may be convicted at trial even if all other named defendants are acquitted.

An interesting problem arises if all other members of a conspiracy are acquitted but one defendant is found guilty. Traditionally, courts have required consistent verdicts, so that one defendant cannot be found guilty of conspiracy if all the other alleged conspirators are acquitted. *See, e.g.*, *U.S. v. Fleming*,

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4 For a useful chart listing all the federal conspiracy statutes, their overt act requirements, and their maximum punishments, *see 3 Criminal Defense Techniques* §59.06 pp. 59-122 (Sidney Bernstein ed., Matthew Bender 1996).
504 F.2d 1045, 1055 (7th Cir. 1974) (conspiracy requires at least two participants). In the last fifteen years, however, many courts have abandoned the so-called “rule of consistency.” U.S. v. Valles-Valencia, 823 F.2d 381 (9th Cir. 1987) (inconsistent verdict can be the result of jury lenity); U.S. v. Andrews, 850 F.2d 1557, 1560-62 (11th Cir. 1988) (en banc); U.S. v. Bucuvalas, 909 F.2d 593, (1st Cir. 1990); but see Cortis v. Kenney, 995 F.2d 838 (8th Cir. 1993). Thus, the acquittal of all conspirators except one does not necessarily indicate that the jury did not find an agreement to act. U.S. v. Mejia-Mesa, 153 F.3d 925, 930 (9th Cir. 1998) (rule of consistency applies where all conspirators are tried jointly, but does not apply where they are tried separately).

12.04.01.02 Knowing Participation

Often the question is not whether a conspiracy existed or whether an overt act was committed, but rather whether a defendant became a member of that conspiracy. Although supported by only a slight connection to the scheme, a defendant's membership in a conspiracy must be knowledgeable and such knowledge must be shown by unequivocal evidence. Direct Sales Co. v. U.S., 319 U.S. 703, 711 (1943).

In determining whether a particular defendant is involved in a conspiracy, courts often have employed a test focusing on whether the defendant knew or had reason to know of his or her connection with the conspiracy, and whether the defendant had an interest in or obtained benefits from the success of the entire venture. U.S. v. Vizzcarra-Martinez, 66 F.3d 1006 (9th Cir. 1995) (defendant’s conduct at scene coupled with circumstantial evidence sufficient to show defendant knew of and was connected to conspiracy); U.S. v. Bailey, 607 F.2d 237, 245 (9th Cir. 1979) (government must show more than defendant’s single or minor involvement in overall criminal venture); U.S. v. Umagat, 998 F.2d 770, 773 (9th Cir. 1993) (defendants did not enter into conspiracy if their interest, participation and scope were minor). One of the real dangers of a conspiracy case is that courts have permitted proof of an agreement and knowledge by way of circumstantial evidence and inferences drawn from that evidence. This is especially true in cases involving large narcotics operations. See U.S. v. Matta-Ballesteros, 98 F.3d 1100 (9th Cir. 1996) (evidence that defendant was member of drug cartel, participated in some meetings where kidnapping of DEA agent was discussed, and other members of cartel kidnapped and killed agent sufficient to support conviction); U.S. v. Pemberton, 853 F.2d 730, 733 (9th Cir. 1988) (physical inspection of narcotics was sufficient to show agreement). However, where the evidence simply shows that the defendant participated in a conspiracy, but had no knowledge of the charged conspiracy, insufficient evidence exists to convict. U.S. v. Martin, 4 F.3d 757, 759-60 (9th Cir. 1993) (conspirator double-crossed defendant and dealt behind his back after defendant introduced conspirator to DEA agent).

The nature of goods sold in a conspiracy prosecution also may affect the proof required to establish intent. If lawful goods are sold for an illegal purpose, courts may or may not require the person selling the lawful goods to have a “stake” in the profits of the illegal enterprise for which the lawful goods are sold. U.S. v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940) (sugar sold to moonshiners not sufficient). But see Direct Sales Co., 319 U.S. at 709-10 (large sale of morphine to distributing doctors sufficient). Conversely, receiving stolen property from conspiratorial thieves does not necessarily implicate the receiver in the conspiracy to sell, unless the mode and means of distribution to the receiver were part of the plan to
steal at the outset. See *U.S. v. Braico*, 422 F.2d 543, 544 (7th Cir. 1970) (“[n]o evidence was adduced at the trial as to any agreement . . . [or] . . . understanding . . . prior to or contemporaneous with the robbery”).

Outside of the scope of the large drug prosecution, courts have been less likely to infer an agreement or knowing membership where no evidence exists that the defendant engaged in acts in furtherance of the conspiracy. Absent proof of such an act, expressions of sympathy or approval are not sufficient manifestations of an agreement. *Roberts v. U.S.*, 416 F.2d 1216, 1221 (5th Cir. 1969). The Second Circuit has held that, in certain circumstances, voluntary participation in acts with alleged co-conspirators and the general knowledge of their intention to break the law is not a sufficient showing of intent. See *U.S. v. Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973) (cocaine prosecution); *U.S. v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970) (bank robbery prosecution); but see *U.S. v. Zambrano*, 776 F.2d 1091 (2d Cir. 1985) (counterfeit card ring).

Similarly, mere knowledge of the conspiracy, failure to inform authorities of the conspiratorial activity, having a desire to see it succeed, or being present at the scene of the substantive offense will not suffice to support a conspiracy charge. *U.S. v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977) (mere casual association with conspiring people is not enough); *U.S. v. Bostic*, 480 F.2d 965, 968-69 (6th Cir. 1973) (testimony of willingness to purchase counterfeit money is insufficient to establish a conspiracy). In a charge of conspiracy to distribute drugs, for example, knowledge that drugs are present, without more, is not enough to prove involvement in a drug conspiracy. *U.S. v. Sanchez-Mata*, 925 F.2d 1166, 1168 (9th Cir. 1991) (mere knowledge of drug presence is not enough to establish conspiracy); see also *U.S. v. Wiseman*, 25 F.3d 862, 865 (9th Cir. 1994); *U.S. v. Estrada-Macias* (9th Cir. 2000) (mere casual association with members of a conspiracy insufficient to support conviction).

The Ninth Circuit, however, has held that circumstantial evidence that a defendant engaged in "counter-surveillance" prior to a drug transaction is sufficient to sustain a conspiracy conviction. *U.S. v. Mares*, 940 F.2d 455, 458-59 (9th Cir. 1991). But see *U.S. v. Ramos-Rascon*, 8 F.3d 704, 707-09 (9th Cir. 1993) (mere presence at meetings, coupled with following the load vehicle, acting in a manner equivocally consistent with counter-surveillance, and fleeing from police is insufficient to establish guilt).

**12.04.01.03 Overt Act**

To show a conspiracy under 18 U.S.C. §371 and most other conspiracy statutes, the government must prove that one of the conspirators committed at least one of the alleged overt acts named in the conspiracy. While the indictment may charge a series of overt acts, the government need prove only one overt act.

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5 A well organized distribution mechanism may suffice to show that the receipt was part of the plan. See *U.S. v. Greer*, 467 F.2d 1064, 1070-71 (7th Cir. 1972) (“Conspiracy law does not require a direct connection with all coconspirators in the sense of person-to-person communication, or even specific knowledge of their identities. Once the essential nature of the plan is discovered, and the defendant’s adherence to it shown, ignorance of some of the participants in that plan does not relieve the defendant of liability.”) Also, “a conspiracy with multiple objects and multiple parties can also be held to constitute a single conspiracy as long as the objects are integrally related, such that the success of that part with which [the defendant] was immediately concerned, was dependent upon the success of the whole”) (quotations omitted).
such physical act. This overt act may consist of innocent conduct and need not be important to the conspiracy’s objective. *Braverman*, 317 U.S. at 53. One act by one defendant can support a conviction of all defendants. *Id.*

Note, however, that recent cases have not required an overt act in certain conspiracy indictments, because Congress did not explicitly call for an overt act in the statute, as it did in §371. See, e.g., *Shabani*, 513 U.S. at 14-16 (§846); *U.S. v. Pulido*, 69 F.3d 192, 209 (7th Cir. 1995) (same); *U.S. v. Montgomery*, 150 F.3d 983, 997 (9th Cir. 1998) (§846 and §963); *U.S. v. Crochiere*, 129 F.3d 233 (1st Cir. 1997) (§241); *U.S. v. Pistone*, 177 F.3d 957, 960 (11th Cir. 1999) (Hobbs Act).

**12.04.02 Vicarious or *Pinkerton* Liability for Substantive Offenses Committed by Co-Conspirators**

One of the significant issues in a conspiracy case is a defendant's vicarious liability for acts of co-defendants. As a general rule, a conspirator is liable for all acts committed by the co-conspirators during the course of and in furtherance of the conspiracy. Under *Pinkerton v. U.S.*, 328 U.S. 640 (1946), a conspirator who participates at the outset is responsible for acts committed by latecomers to the conspiracy, even if those acts change the object of the conspiracy, so long as the changes were "foreseeable" and furthered by the goals of the original conspiracy. *Id.* at 647-48. If, however, the changes in the object of the conspiracy were unforeseeable, an individual defendant would be liable only for "the fair import of the concerted purpose or agreement as he understands it." *See U.S. v. Alvarez*, 755 F.2d 830, 847-49 (11th Cir. 1985).

In sum, if the substantive crime was committed in furtherance of the conspiracy, the defendant was a member of the conspiracy at the time, and the crime was reasonably foreseeable, that defendant may be convicted of the substantive offense as if it were committed or aided and abetted by himself. *U.S. v. Fonseca-Caro*, 114 F.3d 906, 908 (9th Cir. 1997), *cert. denied*, 522 U.S. 1097 (1998); *U.S. v. Cantone*, 426 F.2d 902, 904 (2d Cir. 1970). The Eleventh Circuit has suggested that a "minor" participant in a conspiracy, while unable to escape full liability for the conspiracy in which he was involved, may avoid *Pinkerton* liability. *Alvarez*, 755 F.2d at 851 n.27. This is not necessarily true in the Ninth Circuit, however, where a mere lookout in a drug transaction can be liable for the substantive offense under *Pinkerton*. *Mares*, 940 F.2d at 460. However, the Ninth Circuit has recognized a due process constraint upon *Pinkerton* liability for substantive offenses. *U.S. v. Castaneda*, 9 F.3d 761, 766-68 (9th Cir. 1993) (where defendant played a small role in overall conspiracy, convicting her of a substantive gun offense violated due process due to absence of evidence concerning foreseeability), *overruled on other grounds*, *U.S. v. Nordby* 225 F.3d 1053 (9th Cir. 2000).

**12.04.03 Venue and Statute of Limitations**

Venue for a conspiracy offense may lie in any district where an overt act was either committed or through which a conspirator passed to accomplish the overt act. *See U.S. v. Williams*, 536 F.2d 810, 812 (9th Cir. 1976) ("venue for conspiracy may be laid in a district through which conspirators have passed on their way to obtain contraband"); 18 U.S.C. §3237. The statute of limitations for a conspiracy charge
begins to run from the time of the last overt act committed by any conspirator, from the termination of the conspiracy, or from the time of defendant's effective withdrawal, whichever occurs latest. See Fiswick v. U.S., 329 U.S. 211, 216 (1946) (continuous cooperation of the conspirators to keep the conspiracy going is necessary). For purposes of the statute of limitations, the duration of the conspiracy is marked by the actual overt acts proven at trial. U.S. v. Frank, 156 F.3d 332, 338-39 (2d Cir. 1998); U.S. v. Fuchs, 218 F.3d 957 (9th Cir. 2000) (plain error where court failed to instruct jury that acts which formed the basis of conspiracy had to fall within the limitation period).

12.04.04 Aiding and Abetting a Conspiracy

Unbelievably, a defendant can be convicted of aiding and abetting a conspiracy; therefore, under 18 U.S.C. §2 and Pinkerton, a defendant can be held fully liable for all substantive offenses committed during the course of the conspiracy. U.S. v. Savinovich, 845 F.2d 834, 838 (9th Cir. 1988) (aiders and abettors are liable as principals so long as the proof against them encompasses the same elements as would be required to convict the principal); U.S. v. Galiffa, 734 F.2d 306, 309 (7th Cir. 1984) (aiding and abetting a conspiracy could occur in more ways than simply operating as a liaison).
12.04.05 Defenses

12.04.05.01 Mere Presence

A defendant who merely was present with the co-conspirators but did not act in a manner suggesting even a slight connection to the conspiracy must be acquitted. See supra section 12.04.01.02. A good discussion of innocent passenger cases may be found in U.S. v. Pinkney, 15 F.3d 825, 827 (9th Cir. 1994). Obviously, this defense requires a clear and concise jury instruction by the court; accordingly, the "mere presence" charge should be used as a demonstrative exhibit in closing argument.

12.04.05.02 Withdrawal

A defendant who enters into a conspiracy but withdraws before the commission of any overt act will be immunized from liability for the conspiracy if, in fact, the conspiracy statute requires an overt act. See U.S. v. Heathington, 545 F.2d 972, 973 (5th Cir. 1977) (defendant's alleged withdrawal from conspiracy would come too late where an agreement and overt act already existed); U.S. v. Monroe, 552 F.2d 860, 864 (9th Cir. 1977) (to avoid complicity in the conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement). While a defendant who withdraws from a conspiracy after the commission of an overt act may be found guilty of the conspiracy, such a defendant is not liable for any substantive offenses committed after the withdrawal. See Levine v. U.S., 383 U.S. 265, 266 (1966). A conspiracy is presumed to continue until there is an affirmative showing it has been abandoned. U.S. v. Hayter Oil Co., Inc., 51 F.3d 1265, 1270-71 (6th Cir. 1995); U.S. v. Walker, 653 F.2d 1343, 1347-48 (9th Cir. 1981). Attempted communication to withdraw in a manner reasonably calculated to reach the conspirators may be enough. U.S. v. U.S. Gypsum Co., 550 F.2d 115, 129 (3d Cir. 1977).

12.04.05.03 Variance between Indictment and Proof

A perceptually difficult defense for juries is a single/multiple conspiracies defense. If the indictment charges one overall conspiracy but the government's proof at trial shows several conspiracies, the defense is entitled to an instruction for acquittal. See Kotteakos v. U.S., 328 U.S. 750, 768-74 (1946). In addition, a motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29, may be granted after the government's case-in-chief if the conspiracy(ies) proved at trial vary(ies) markedly from the conspiracy(ies) in the indictment.

Discussions of single/multiple conspiracies often evolve into curious analogies in which the conspiracy is described as either a "chain" or a "wheel." Kotteakos involved a "wheel" conspiracy in which one defendant brokered fraudulent government loans for 32 individual conspirators who did not know one other. The conviction was reversed due to prejudicial variance because the government proved the "wheel" of the conspiracy (that is, numerous smaller conspiracies) without establishing a rim to enclose the spokes (that is, showing a single comprehensive conspiracy). A "chain" conspiracy, on the other hand, is best described as a series of transactions involving suppliers, middlemen and retailers. A single conspiracy is alleged properly when the jury may reasonably infer that the retailer, who has personally met only a
middleman, knew about the existence of a supplier with whom he has had no contact. *U.S. v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939).

Increasingly, courts have left variance analysis to the jury rather than treating it as an issue for pretrial motions. *See U.S. v. Rivera-Santiago*, 872 F.2d 1073, 1079 (1st Cir. 1989) (factors to be considered by the jury are the nature of the illegal activity, the method of operation, and the scope of conspirator involvement) (citation omitted). Nonetheless, it may be prudent to file a pretrial motion to dismiss the indictment as duplicitous if proceeding with a variance defense. *See supra* Chapter 6. While the element of surprise is sacrificed by this procedure, the trial and appellate courts may be more sympathetic to defense arguments if the government, after having been put on notice of a variance issue, proceeds to present a case that differs from the allegations in the indictment.

When the proof at trial differs from the facts stated in the indictment, a multiple conspiracy or lesser included offense instruction may be appropriate. *U.S. v. Linn*, 880 F.2d 209, 218 (9th Cir. 1989) (instruction on “multiple conspiracies is unnecessary in the absence of evidence rationally supporting a verdict at variance with the conspiracy charge”), *overruled on other grounds*, *Florida v. White* 526 U.S. 559 (1999); *U.S. v. Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979) (when the possibility of a variance between the indictment and the trial proof appears, the court should give the jury a limiting instruction about the procedure for considering evidence of multiple conspiracies). Failure to request such an instruction in these circumstances may waive the issue for appeal.

In general, prejudicial variance results when: (1) the defendant could not reasonably have anticipated from the indictment the evidence to be presented against him; (2) the indictment is so vague that there is a possibility of subsequent prosecution for the same offense; or (3) the defendant was prejudiced by "spillover" of evidence from one conspiracy to another. *U.S. v. Johansen*, 56 F.3d 347, 351 (2d Cir. 1995); *U.S. v. Jones*, 880 F.2d 55, 66 (8th Cir. 1989); *but see U.S. v. George*, 752 F.2d 749, 754 (1st Cir. 1985). The Supreme Court has looked to the following factors to determine whether prejudice has resulted from a variance between indictment and proof: (1) surprise to the defendant resulting from the variance, (2) possibility of subsequent prosecution for the same offense, (3) likelihood of jury confusion as measured by the number of conspirators charged and the number of separate conspiracies proven, and (4) likelihood of jury confusion in light of the instructions. *U.S. v. Curtis*, 37 F.3d 301, 305 (7th Cir. 1994).

There are cases in which a prejudicial variance was found as a matter of law. *See U.S. v. Jackson*, 696 F.2d 578, 586-87 (8th Cir. 1982) (indictment claimed single conspiracy for participation in "arson-for-profit" ring while trial showed that multiple conspiracies were in existence); *U.S. v. Coward*, 630 F.2d 229, 230-31 (4th Cir. 1980) (trial showed unrelated conspiracies between one pharmacist and a local physician and between another pharmacist and the same physician); *U.S. v. Lindsey*, 602 F.2d 785, 786 (7th Cir. 1979) (indictment charged defendant with one conspiracy involving theft and resale of motor vehicles while the evidence showed the involvement of a smaller conspiracy). There are relatively few cases in which courts have found prejudicial variance when the charges involve narcotics. *But see U.S. v. Snider*, 720 F.2d 985, 989-90 (8th Cir. 1985) (indictment alleged marijuana-growing activities on two farms at two separate times as one conspiracy, while trial established two distinct conspiracies); *U.S. v. Bertolotti*, 529 F.2d 149, 156-58 (2d Cir. 1975) (a prejudicial variance existed where indictment charged
one conspiracy to violate federal narcotics laws while proof showed a minimum of four different conspiracies).
12.04.05.04 "Isolated" Buyer/Seller

The “isolated buyer/seller” defense is based on the proposition that a single, ordinary act which, by definition, requires two or more participants, is not conspiratorial. *U.S. v. Rivera-Santiago*, 872 F.2d at 1082. Whenever the jury could logically infer from the evidence that only a buyer and seller relationship existed, the court should instruct that "mere proof of the existence of a buyer-seller relationship is not enough to convict one as a co-conspirator on drug conspiracy charges." *U.S. v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994) (proof of drug sales alone is not proof of conspiracy); *U.S. v. Douglas*, 818 F.2d 1317, 1321 (7th Cir. 1987) (collecting cases); *U.S. v. Tyler*, 758 F.2d 66, 69 (2d Cir. 1985) (evidence that defendant helped a willing buyer locate a willing seller is insufficient to establish existence of agreement and make the defendant a part of the conspiracy).

12.04.06 Co-Conspirators' Statements

12.04.06.01 Foundational Requirements

Fed. R. Evid. 801(d)(2)(E) makes a statement by a co-conspirator during the course of and in furtherance of a conspiracy admissible against the defendant. This rule requires three foundational prerequisites:

1. the offering party must show that a conspiracy existed which involved the declarant and the non-offering party;
2. the declaration must be made during the course of the conspiracy; and
3. the declaration must be in furtherance of the conspiracy.

*Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987). These three foundational prerequisites are preliminary questions of fact which are governed by Fed. R. Evid. 104. *Id.*

When preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence. *Id.* at 176. The court, in making a preliminary factual determination under Rule 801(d)(2)(E), may consider the hearsay statements sought to be admitted. *Id.* at 181.

12.04.06.02 Threshold Showing of Existence of Conspiracy

In *Bourjaily*, the Supreme Court overruled the longstanding requirement that independent evidence must be used to prove the existence of a conspiracy. The Court stated that co-conspirator statements themselves could be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in that conspiracy. *Id.* at 180. The Court also cautioned, however, that the judge making these admissibility determinations should receive the evidence of the statements and afford it only such weight as his judgment and experience counsel. *Id.* at 181 (quoting *U.S. v. Matlock*, 415 U.S. 164, 175 (1974)).
Although *Bourjaily* holds that co-conspirator hearsay statements can be used to prove the preliminary facts of the conspiracy and a defendant's involvement in it, the Supreme Court left open the question of whether the government must also produce evidence in addition to the proposed statements. Fortunately, however, the circuits that have addressed this question have held that some extrinsic evidence aside from the statement itself must be offered to establish a conspiracy. *See* *U.S. v. Castaneda*, 16 F.3d 1504, 1507 (9th Cir. 1994) (government cannot rely solely on proffered statements); *U.S. v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993) (a co-conspirator’s statement, standing alone, is insufficient to meet the standard of 801(d)(2)(E)); *U.S. v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989) (an otherwise inadmissible statement cannot provide the sole evidentiary support for its own admissibility). When some additional proof is offered, the court must evaluate such proof in light of the nature of the proffered co-conspirator statement. *U.S. v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988). In determining whether the proponent has made a showing sufficient to permit the introduction into evidence of the co-conspirator statement, the district court must bear in mind that out-of-court statements are presumptively unreliable. *Id.*

The government need not have charged a conspiracy in the indictment to invoke the applicability of Fed. R. Evid. 801(d)(2)(E). *See* *Joyner v. U.S.*, 547 F.2d 1199, 1202 (4th Cir. 1977) (prior statements could be used for more than impeachment purposes even if indictment did not state conspiracy); *U.S. v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997). Statements by unindicted conspirators also may be used, *U.S. v. Smith*, 550 F.2d 277, 281-82 (5th Cir. 1977), and statements by one conspirator may be used against others even though there is no showing that the declarant conspirator had personal knowledge of the facts about which he spoke. *U.S. v. Ammar*, 714 F.2d 238, 254 (3d Cir. 1983). However, the conspiracy statements introduced into evidence by the government, although not charged, must be factually intertwined with the offense for which the defendant is before the court. *U.S. v. Lyles*, 593 F.2d 182, 194-95 (2d Cir. 1979).

### 12.04.06.03 Statement Made During the Course of the Conspiracy

The second foundational prerequisite for Rule 801(d)(2)(E) admissibility is that the statement be made "during the course" of the conspiracy. *Bourjaily v. U.S.*, 483 U.S. at 175. The Supreme Court has restricted the duration of the conspiracy to the period necessary for the accomplishment of its main purpose. *Krulewitch v. U.S.*, 336 U.S. 440, 443-44 (1949); *Grunewald v. U.S.*, 353 U.S. 391, 401-02 (1957). Thus, efforts to conceal the conspiracy after that purpose has been accomplished often will not be considered part of the conspiracy.

For the purposes of Fed. R. Evid. 801(d)(2)(E), termination of the conspiracy occurs, as to a particular conspirator, at the time his/her involvement with the conspiracy ceases. Generally, this may occur through withdrawal, indictment, or apprehension. *See* *U.S. v. Smith*, 623 F.2d 627, 631 (9th Cir. 1980) (statements of former co-conspirator turned informant admitted); *U.S. v. Williams*, 548 F.2d 228, 232 (8th Cir. 1977) (former co-conspirator’s statements admissible).

### 12.04.06.04 Statement Made in Furtherance of Conspiracy
The third foundational requirement under Rule 801(d)(2)(E) is that the declaration must be made in furtherance of the conspiracy. *Bourjaily v. U.S.*, 483 U.S. at 175. Despite this requirement, however, the statement need not actually further the conspiracy to be admissible. Instead, it is enough that the statement be intended to advance the objectives of the conspiracy. *U.S. v. Hamilton*, 689 F.2d 1262, 1270 (9th Cir. 1982). Whether a particular statement tends to advance the objectives of the conspiracy can only be determined by examination of the context in which it was made. Compare *U.S. v. Bibbero*, 749 F.2d 581, 583-84 (9th Cir. 1984) (statement was mere idle conversation), and *U.S. v. Fielding*, 645 F.2d 719, 727 (9th Cir. 1981) (statements made to impress undercover officer not "in furtherance") with *U.S. v. Tille*, 729 F.2d 615, 620 (9th Cir. 1984) (narration of past events may be "in furtherance" of continuing conspiracy), and *U.S. v. Sandoval-Villalvazo*, 620 F.2d 744, 747 (9th Cir. 1980) (statements designed to keep heroin buyers from leaving the scene were "in furtherance").

### 12.04.06.05 Order of Proof: James Hearing

Before the prosecutor can introduce co-conspirator statements, the court must determine whether there is sufficient evidence of a conspiracy and the defendant’s involvement in the conspiracy. *Bourjaily v. U.S.*, 483 U.S. at 175. Under Rule 104, this determination is a preliminary question to be decided by the court. In *U.S. v. James*, 590 F.2d 575, 579-80 (5th Cir. 1979) (en banc), the court noted that the primary reason for this procedure is the concern that if the issue is decided by a jury, a serious danger of prejudice to the defendant follows. A pretrial hearing to determine the admissibility of co-conspirators' statements provides an orderly means for the admissibility determination outside the presence of the jury. *U.S. v. Grassi*, 616 F.2d 1295, 1300 (5th Cir. 1980). A hearing on this preliminary matter outside the presence of the jury reduces the chance of a mistrial and the risk that the jury will hear inadmissible testimony. *U.S. v. Roe*, 670 F.2d 956, 962 n.2 (11th Cir. 1982).

Alternatives to a pretrial hearing exist, but they may not provide the court and the defendant with adequate safeguards. One method requires the government to lay the appropriate foundation for the admission of the statements without using any of the statements themselves. In this manner, the jury does not hear the co-conspirators' statements unless and until the court determines that the government has fulfilled the evidentiary foundations. Under this method, there is a danger that the testifying witness might reveal some of the hearsay statements, thereby precipitating a mistrial.

The least viable alternative to a pretrial hearing is to allow the statements to be conditionally admitted upon the promise that the government will "connect them up" later. The *James* court recognized the dangers inherent in such a procedure and relied upon the decision in *U.S. v. Macklin*, 573 F.2d 1046 (9th Cir. 1978), to support its ruling. 590 F.2d at 582. The court in *Macklin* stated: "It is preferable whenever possible that the government’s independent proof of the conspiracy be introduced first, thereby avoiding the danger . . . of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes." 573 F.2d at 1049 n.3; see, e.g., *U.S. v. Gere*, 662 F.2d 1291, 1293-94 (9th Cir. 1981) (jury instructed to consider co-conspirator statement only if government later proved conspiracy beyond a reasonable doubt; judge dismissed conspiracy count but did not further instruct jurors as to hearsay testimony); *U.S. v. Petrozzello*, 548 F.2d 20, 23 n.3 (1st Cir. 1977) (court required government to present all its non-hearsay evidence before decided whether such evidence permitted reliance on the co-conspirator exception).
Subsequent cases, however, have sanctioned the "connecting up" method. *U.S. v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989) (trial court may consider co-conspirator’s statements themselves when deciding on admissibility under co-conspirator exception to hearsay rule); *U.S. v. Williams*, 837 F.2d 1009, 1014 n.9 (11th Cir. 1988) (same).

### 12.04.07 Double Jeopardy

Under the “Blockburger test” double jeopardy only applies when the elements of offenses are the same, as opposed to the conduct underlying the charges. *U.S. v. Dixon*, 509 U.S. 688, 704 (1993). See, e.g, *U.S. v. Chacko*, 169 F.3d 140 (2d Cir. 1999) (conspiracy for bank fraud, false statements in loan application); *U.S. v. Otis*, 127 F.3d 829, 833 (9th Cir. 1997) (conspiracy for cocaine distribution and money laundering). Thus, a substantive offense and a conspiracy to commit that offense are different crimes "because the 'essence' of a conspiracy offense 'is in the agreement or confederation to commit a crime.'" *U.S. v. Medina*, 992 F.2d 573, 588 (6th Cir. 1993). Thus, in *U.S. v. Felix*, 503 U.S. 378 (1992), the Supreme Court held that the Double Jeopardy Clause did not bar prosecution for conspiracy and substantive counts in one state based upon evidence which had been previously admitted as 404(b) evidence in a prosecution for a substantive count in another state.

The Double Jeopardy Clause does prohibit “subdivision of a single criminal conspiracy into multiple violations of one conspiracy statute.” *U.S. v. Bendis*, 681 F.2d 561, 563 (9th Cir. 1982) (citing *Braverman v. U.S.*, 317 U.S. 49, 52-53 (1942). However, when the government does charge a defendant with multiple conspiracies, the courts do not apply the *Blockburger* test, but the *Arnold* test. *U.S. v. Montgomery*, 150 F.3d 983, 990 (9th Cir. 1998). Thus,

> to determine whether two conspiracy counts charge the same offense . . . we consider five factors: (1) the differences in the periods of time covered by the alleged conspiracies; (2) the places where the conspiracies were alleged to occur; (3) the persons charged as coconspirators; (4) the overt acts alleged to have been committed; and (5) the statutes alleged to have been violated.

*Montgomery*, 150 F.3d at 989 (citing *Arnold v. U.S.*, 336 F.2d 347, 350 (9th Cir.1964)).

The court must consider all the factors together. *U.S. v. Stoddard*, 111 F.3d 1450, 1456-57 (9th Cir. 1997). In *Stoddard*, the defendant’s subsequent conspiracy prosecution was barred by the Double Jeopardy Clause because the two conspiracy charges rested upon the same agreement, but the Ninth Circuit warned that a new agreement to expand the narcotics enterprise would not bar subsequent prosecution. *Id.* at 1457; see also *U.S. v. Dean*, 647 F.2d 779, 788 (8th Cir. 1981) (applying the *Arnold* test to a RICO charge) and *U.S. v. Montgomery*, 150 F.3d 983, 990 (9th Cir. 1998).

### 12.04.08 Sentencing Issues
The general conspiracy statute is 18 U.S.C. §371. The penalty for conspiracy under §371 is five years and/or a fine of up to $250,000. In addition to this general conspiracy statute, Congress also enacted a number of statutes that prohibit conspiracies to commit specific substantive offenses. For example, 21 U.S.C. §§846 and 963, respectively, apply to conspiracies to distribute and import controlled substances. These statutes, effective November 1, 1987, provide that the penalties for conspiracy to violate the narcotics laws are the same as those for the underlying substantive offenses.

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6 The fines contained in 18 U.S.C. §3571 control. Supervised release of one year is authorized for this Class E felony. §§3559, 3583. U.S.S.G. §2X1.1 covers the general conspiracy statute and results, in almost every case, in the application of the Guidelines for the substantive offenses that are the object of the conspiracy.
12.05 DRUG OFFENSES -- 21 U.S.C. §§801 ET SEQ.

Title 21 U.S.C. §§801 et. seq contain the specific statutory provisions for drug offenses. The most commonly charged felony drug offenses are: (1) 21 U.S.C. §841(a)(1), including the distribution and manufacture of controlled substances and possession with the intent to do so; (2) §§952 and 960, importation of controlled substances; and (3) §§846 and 963, the special conspiracy statutes for possession/manufacturing and importation, respectively. Simple possession, a misdemeanor (in some cases), is charged under §844.

12.05.01 Mandatory Minimum Offenses


Two sweeping changes highlight the result of the 1986 and 1988 acts. First, this legislation subjected drug conspiracies to the same penalties as substantive offenses, 21 U.S.C. §§846, 963. Second, the legislation established minimum mandatory penalties of five years to 40 years and 10 years to life for first-time drug offenders whose offenses involve threshold levels of controlled substances such as cocaine, marijuana, heroin, and methamphetamine. §§841(b)(1)(A), 841(b)(1)(B).

Section 844(a), for example, was amended to provide a penalty of five to 20 years for simple possession in any of three circumstances: (1) possession of greater than five grams of a mixture or substance containing cocaine base ("crack"); (2) a second possession conviction if the amount is greater than three grams of cocaine base; or (3) a third (or further) conviction if the amount is greater than one gram of cocaine base. Congress also amended the Continuing Criminal Enterprise statute, §848, to provide for a minimum of 20 years to life imprisonment or the death penalty for an intentional killing to further the enterprise. §848(e)(1)(A). The statute provides specific procedures in cases in which the death penalty is sought. §848(g) et. seq.

One might suppose that mandatory minimum sentences for drug offenses are constitutionally unsound in light of, for example, the Eighth Amendment’s guarantee against “cruel and unusual punishment.” That argument, however, appears to have been resolved by the Supreme Court in Harmelin v. Michigan, 501 U.S. 957 (1991), where a divided court upheld a state’s life without parole minimum mandatory statute, for less than one kilogram of cocaine, in the case of a first-time offender. The Court stated that mandatory minimums “may be cruel, but they are not unusual.” Id. at 994.

In fact, Harmelin was part of a trend among circuit courts denying the validity of constitutional attacks on the mandatory minimum sentencing provisions. U.S. v. Kraitsas, 45 F.3d 63 (4th Cir. 1995) (§841(b) does not violate Eighth Amendment); U.S. v. Holmes, 838 F.2d 1175 (11th Cir. 1988) (same); U.S. v. Kinsey, 843 F.2d 383 (9th Cir. 1988) (same), overruled on other grounds, U.S. v. Nordby, 225 F.3d 1053 (9th Cir. 2000); U.S. v. Savinovich, 845 F.2d 834 (9th Cir. 1988) (mandatory five-year federal sentence warranted by two kilogram cocaine seizure).
When faced with the imposition of a mandatory minimum sentence, counsel should argue that the mandatory minimum sentence imposed on the client violates the Eighth Amendment because it does not reflect an individualized assessment of that client's culpability and circumstances. See, e.g., Kinsey, 843 F.2d at 393. Counsel might also want to exploit the confusion resulting from the Supreme Court’s divided opinion in Harmelin. Specifically, it is not at all clear what the correct test now is for determining whether a sentence is cruel and unusual, particularly in non-capital cases. Some circuits still use the three-part proportionality test set forth in Solem v. Helm, 463 U.S. 277 (1983). The Supreme Court in Solem held that proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentence that is imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. 463 U.S. at 292. However, Harmelin has thrown the continuing validity of the Solem test in doubt. See, e.g., Kratsas 45 F.3d 66-69.

Both the Holmes and Kinsey courts ruled that §841(b) does not violate the doctrine of separation of powers. Additionally, they ruled that the mandatory minimum drug provisions of §841(b) do not violate the Equal Protection Clause. The Kinsey court held that §841(b) is rationally related to the strong governmental interest in the deterrence of drug abuse and drug trafficking. 843 F.2d at 394; see Holmes, 838 F.2d at 1177 (statutory provisions contained in Anti-Drug Abuse Act of 1986 are rationally related to the Act's objective of protecting the public health and welfare by implementing stiff and certain penalties for those who violate federal drug laws); see also U.S. v. Pineda, 847 F.2d 64, 65 (2d Cir. 1988) (rational basis exists for sentencing guidelines to deter drug transactions).

The minimum mandatory provisions of §§841 and 960 mandate that a defendant facing a minimum mandatory of five years to 40 years, or 10 years to life, face enhancements of 10 years to life and 20 years to life, respectively, if previously convicted of a state or federal drug felony. If an individual had been convicted previously of two drug felonies and indicted for a quantity of drugs involving a 10-year minimum mandatory sentence for a first time offender, the person faces a mandatory sentence of life imprisonment without the possibility of parole. In order for any of the above enhancement provisions to apply, the government must file and serve notice upon the defendant that an enhancement will be sought prior to trial or plea. §851; U.S. v. LaBonte, 520 U.S. 751, 753 n.1 (1997).

Certain defendants may be entitled to relief from the onerous statutory mandatory minimum sentencing scheme after the passage of the 1994 Crime Bill. Section 80001(a) of Title VIII of the 1994 Crime Bill added a new subsection to 18 U.S.C. §3553 regarding imposition of sentence that lifts the mandatory minimum in certain instances. Title 18 U.S.C. §3553(f) exempts a defendant from the statutory minimum sentence if: (1) the defendant has no more than one criminal history point; (2) there was no use of violence or threats of such, or possession of a firearm or other dangerous weapon; (3) no death or serious bodily injury resulted; (4) the defendant was not an organizer, leader, manager or supervisor of others, nor engaged in a continuing criminal enterprise; and (5) by the time of sentencing, the defendant has truthfully provided all information and evidence concerning the offense that was part of the same course of conduct or common scheme or plan, regardless of the fact that the defendant may have no relevant or useful
information to provide or that the government is already aware of the information. The statute further provides that where the statutory minimum is five years, the applicable guideline range should provide for a term of imprisonment of no less than 24 months. The section is silent, however, as to any minimum term of imprisonment where the statutory minimum is 10 years.

12.05.02 Elements of Proof

To be convicted of possession with intent to distribute, manufacture, or import under Title 21, the defendant need not know either the precise type of drug which he possesses, its weight, or its exact location. U.S. v. Ramirez-Ramirez, 875 F.2d 772, 774-75 (9th Cir. 1989) (defendant can be convicted without knowing the exact nature of the substance with which he was dealing).

The Supreme Court’s recent opinion in Apprendi v. New Jersey, __ U.S. ___, 120 S. Ct. 2348 (2000), provides a basis to argue that the government should have to prove that a defendant knew the type and quantity of the drug that he is charged with possessing, manufacturing, or importing. In Apprendi, the Court held that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” 120 S. Ct. 2355 (quoting Jones v. U.S., 526 U.S. 227, 243 n.6 (1999). Of course, potential maximum sentences increase dramatically based on the drug type and quantity involved in drug offenses. Prior to Apprendi, the Courts of Appeals had held that drug type and quantity were sentencing factors that only needed to be determined by the district judge.

Post-Apprendi, there is a strong argument that drug type and quantity must be considered, elements of the drug offenses (or else the drug statutes are unconstitutional), and as elements they must have some mens rea attached; i.e., the government must prove that the defendant knew the type and quantity of drug involved. The courts that have addressed this argument so far have concluded that drug type and quantity must be proven to the jury. See, e.g., U.S. v. Doggett, 230 F.3d 160 (5th Cir. 2000) (drug quantity is an element of 18 U.S.C.§844 where the amount would increase the prescribed statutory maximum); U.S. v. Nordby 225 F.3d 1053 (9th Cir. 2000) (drug quantity is a sentencing factor which nevertheless must be given to the jury where the amount would increase the prescribed statutory maximum). Unfortunately, some courts also have held that the government need not prove that the defendant had any mens rea with respect to drug type and quantity. See, e.g., U.S. v. Sheppard, 219 F.3d 766, 768 n.2 (8th Cir. 2000) (reaching this holding without a convincing explanation).

12.05.03 Strategies for Defending a Drug Case

There are three basic types of drug cases: (1) possession; (2) sale to a government agent or informant; and (3) possession with intent to distribute. Looking first to simple possession, these cases sometimes involve narcotics concealed or contained in a vehicle or space not readily associated with the

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7 The “safety valve” guideline that parallels §3553(f) is §5C1.2.
defendant. In such a case, the defense is most frequently lack of personal knowledge of the presence of the drugs, or "mere presence."

In possession cases in which there are multiple defendants or persons at the scene of the alleged crime, and there is no evidence of your client's activity or involvement, the government cannot meet its burden of proof and any conviction should be overturned on a sufficiency of evidence argument. *U.S. v. Ramirez*, 176 F.3d 1179, 1181 (9th Cir. 1999) ("mere knowledge of the presence of contraband, without evidence suggesting a [car] passenger's dominion or control of the contraband, is insufficient to prove possession"); *U.S. v. Quintanar*, 150 F.3d 902 (8th Cir. 1998) (insufficient evidence that defendant had "the power to exercise control or dominion over the drugs at any given time"); *but see U.S. v. Howell*, 31 F.3d 740, 741 (8th Cir. 1994) (per curiam) (proof that defendant "maintains" the place may be sufficient to show he has dominion and control); *U.S. v. Ortiz-Ortiz*, 57 F.3d 892, 895 (10th Cir. 1995) (although "mere presence at the scene of a crime is not sufficient to sustain a conviction, presence is a material and probative factor for the jury to consider . . . .").

A second type of drug case is the direct sale of drugs to a government informant or undercover agent. A typical defense to this type of drug case is entrapment. See *Mathews v. U.S.*, 485 U.S. 58 (1988) (defendant entitled to entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment). See supra section 11.06 for a discussion of entrapment. If a defendant sold to an informant who was poorly monitored, the defenses of alibi and/or mistaken identification may exist.

Possession with intent to distribute, charged in a multi-defendant conspiracy, is a third type of narcotics-related case. All of the above defenses apply to such a situation, as well as "mere personal use." *U.S. v. Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir. 1994) (conviction for possession with intent to distribute under §841(a)(1) involves only that quantity of narcotics defendant intended to distribute), *overruled on other grounds, U.S. v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc); *U.S. v. Kipp*, 10 F.3d 1463, 1465-66 (9th Cir. 1993) (sentence under the guidelines must be based on quantity of drugs involved in the count of conviction and quantities that were part of the same course of conduct or part of a common scheme or plan as the count of conviction).

The key to defending many drug prosecutions often rests on the impeachment of a government informant or co-defendant who receives a misdemeanor or other favorable treatment in exchange for his or her testimony. Impeachment evidence is exculpatory for *Brady* purposes. See *Giglio v. U.S.*, 405 U.S. 150, 153-55 (1972) (government’s failure to disclose to jury promise of leniency to witness in return for testimony violated defendant’s due process); *Williams v. Dutton*, 400 F.2d 797, 799-800 (5th Cir. 1968) (due process required evidence denied to defense by prosecution to be examined in camera by court). Prior arrests, pending indictments, plea agreements, as well as monies being paid to informants may all be explored on cross-examination as evidence of bias, motive or prejudice. *U.S. v. Cabrera*, 116 F.3d 1243, 1244 (8th Cir. 1997) (plea agreements); *U.S. v. Cooks*, 52 F.3d 101, 102-04 (5th Cir. 1995) (prior arrests). Evidence concerning these areas must be produced to the defense at a reasonable time in advance of trial. *U.S. v. Shaffer*, 789 F.2d 682, 688-91 (9th Cir. 1986) (government’s failure to disclose witness's involvement in undercover activities and payments for such activities justified new trial). A trial court must grant wide latitude on cross-examination on bias, motive, or prejudice.
In cases involving audio tapes of the defendant or co-conspirators, assuring the accuracy of any transcripts produced by the government can prove to be a major problem. *U.S. v. Slade*, 627 F.2d 293, 302 (D.C. Cir. 1980) set forth a process for ensuring the valid use of transcripts. First, the government and the defense should stipulate to a transcript of the tapes. *Id*. If that fails, the court should make a pretrial determination of the accuracy of the tapes. *Id*. As a last resort, the court can submit two versions of the transcript, but this is the least preferred method of using transcripts. *U.S. v. Robinson*, 707 F.2d 872, 876-77 (6th Cir. 1983) (discussing the approach of various circuits); *but see U.S. v. Doyon*, 194 F.3d 207, 212 (1st Cir. 1999) (no proof required that the tape recording accurately reflects the conversation in question, although its admission is still subject to Rule 403).

In any case, the court should make clear that the tapes and *not* the transcripts are what the jury should consider as evidence. *U.S. v. Gonzalez-Maldanado*, 115 F.3d 9, 17 (1st. Cir. 1997).

12.05.04 Jury Instructions

Counsel should be aware, in advance, of any jury instructions that a trial court may give that lessen the government's burden of proving knowledge. One of the more ominous instructions is known as a *Jewell* instruction. A *Jewell* instruction is based on the concept of conscious disregard and deliberate avoidance of knowledge. *U.S. v. Jewell*, 532 F.2d 697, 703-04 (9th Cir. 1976) (en banc). *See supra* section 9.04.03.03. Such an instruction is "rarely appropriate." *U.S. v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996) ("We emphasize today, as we have in the past, that a *Jewell* instruction is rarely appropriate.").

If the defendant was the sole owner and occupant of a vehicle containing drugs, be prepared to oppose an instruction stating that these facts alone support an inference of guilt. Such an instruction is reversible error in the Ninth Circuit. *U.S. v. Rubio-Villareal*, 967 F.2d 294 (9th Cir. 1992) (en banc). If the court is inclined to give the "sole owner occupant instruction," authority that supports an equalizing defense instruction exists. This instruction states that proof of dominion or control over a vehicle in which a controlled substance is concealed, without the requisite showing that a defendant knowingly possessed the controlled substance, is insufficient to sustain a conviction under 21 U.S.C. §841(a)(1). *U.S. v. Hooks*, 780 F.2d 1526, 1531 (10th Cir. 1986).

When the defense theory is that the defendant was merely present where drugs were found, but did not know the drugs were there, or did not have dominion or control over the drugs, it is important to tailor and request a "theory of the defense" jury instruction to that effect. *See U.S. v. Sanchez-Mata*, 925 F.2d 1166, 1169 (9th Cir. 1991); *U.S. v. Penagos*, 823 F.2d 346, 350 (9th Cir. 1987) ("[a] person may not be convicted of illegal possession unless he knows contraband is present and is capable of exercising dominion and control over the contraband."). In a Ninth Circuit decision, *U.S. v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992), the court reversed the convictions of two women who knew of the presence of cocaine in a house because the court found they did not "possess" it. *Id* at 551; *but see U.S. v. Buckner*, 179 F.3d 834 (9th Cir. 1999) (rejecting the so-called "passenger doctrine").
In drug cases involving confidential informants and cooperating co-defendants, counsel should be particularly creative in drafting instructions regarding the testimony of these types of witnesses. Devitt and Blackmar contains specific instructions regarding informants, addicts, immunized witnesses, perjurers, and accomplices. These instructions are extremely useful in arguing against the credibility of the informant or cooperating co-defendant. Devitt & Blackmar, Federal Jury Practice and Instructions (Civil and Criminal) §§15.01-15.15 (4th ed. 1992 & Supp. 1997). In an entrapment case in which defense counsel presents character evidence under Fed. R. Evid. 405 that shows a lack of predisposition to engage in narcotics offenses, an instruction on evidence of the lack of predisposition is available. See, e.g., Ninth Circuit Manual of Model Jury Instructions, §6.2 (2000 ed.). An entrapment instruction must be given if the defense introduces slight evidence of inducement by a government agent and lack of predisposition by the defendant. U.S. v. Marbella, 73 F.3d 1508, 1512 (9th Cir. 1996).

12.05.05 Pretrial and Discovery Issues

Due to the proliferation of drug cases in federal courts, the sheer quantity of drug evidence seized by government agencies has become extraordinarily burdensome. As a result, counsel often finds that this physical evidence, or a significant portion thereof, is scheduled for destruction prior to the time of trial. Absent a court order, destruction usually will take place; accordingly, promises by case agents or letters from prosecutors should not be relied upon to ensure the preservation of the narcotics. This issue is of extreme importance because the U.S.S.G. and the federal narcotics statutory scheme place a premium on weight and purity in order to determine sentence. See 21 U.S.C. §§841, 960; U.S.S.G. §2D1.1. Therefore, a motion for the preservation of drug evidence is prudent at the earliest possible opportunity.

Bear in mind, also, that although the government often produces agency reports in discovery regarding the weight and purity of the drugs, a defendant is absolutely entitled to the chemist reports on the drugs. Fed. R. Crim. P. 16 (a)(1)(D). If these reports have not been produced at the time of trial, a continuance may be necessary to enable the government to produce discovery on this essential element. As a practical matter, depending on the case, it may be better strategy to stipulate to the weight and purity of the drugs in order to minimize the jury's focus on the contraband.

12.05.06 Drug Courier Profile

The Supreme Court has defined a drug courier profile as "a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." Reid v. Georgia, 448 U.S. 438, 440 (1980) (per curiam). Although such profiles have been upheld as a basis for reasonable suspicion to stop and question a suspect or to form probable cause, courts generally have denounced the use of drug courier profile evidence as substantive evidence of the defendant's innocence or guilt. See U.S. v. Lim, 984 F.2d 331, 334-35 (9th Cir. 1993); U.S. v. Jones, 913 F.2d 174, 177 (4th Cir. 1990); U.S. v. Quigley, 890 F.2d 1019, 1023-24 (8th Cir. 1989); U.S. v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983). Counsel must be careful, however, not to open the door for such evidence during trial. See U.S. v. Beltran-Rios, 878 F.2d 1208, 1211-13 (9th Cir. 1989) (court properly allowed the use of drug courier profile evidence for rebuttal purposes after the defendant emphasized his poverty and that he lacked the trappings of a drug dealer).
However, *U.S. v. Cordoba*, 104 F.3d 225 (9th Cir. 1997), has changed the landscape with respect to drug courier profile issues. In this case, the government wished to introduce expert testimony that sophisticated narcotics traffickers would not entrust 300 kilograms of cocaine to someone who did not know what he was transporting. The Ninth Circuit admitted the testimony, and held that testimony that drug traffickers do not entrust large quantities of drugs to unknowing transporters was not drug courier profile testimony. *Id.* at 229-30. The court reasoned that such testimony was probative of defendant’s knowledge that he possessed drugs and that the expert’s testimony was properly admitted to assist the jury in understanding modus operandi or a complex criminal case.

If the government attempts to introduce drug courier profile testimony through the guise of an agent testifying as an expert regarding modus operandi of the defendant, counsel should argue that such testimony should only be allowed in complex drug-smuggling conspiracies. Even in these complex cases, however, courier-related evidence is admissible solely to aid the jury’s general understanding of the "drug world," not as evidence of the defendant's guilt. *U.S. v. Klimavicius-Viloria*, 144 F.3d 1249, 1259-60 (9th Cir. 1998) (DEA specialist’s testimony about maritime drug smuggling admissible to establish modus operandi); *but see Lim*, 984 F.2d at 334-35 (error to admit agent's testimony that defendant was a "shotgun" who carried no drugs and whose job was to keep an eye on the "mule").

In addition, counsel should argue that the government’s expert witness cannot offer an opinion upon the defendant’s state of mind. *See* Fed. R. Evid. 704(b). Since the defendant must “knowingly” possess, or “knowingly” import, a controlled substance, expert opinion that all couriers know what they transport is an impermissible comment upon the defendant’s state of mind, an ultimate issue of fact that the jury alone must resolve. *Id.* The Ninth Circuit has held that Rule 704(b) applies to all experts who testify in a criminal case. *U.S. v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997) (en banc) (accounting expert). Counsel should also argue that *Cordoba* was not properly decided because the panel did not consider the application of Rule 704(b), and the *Cordoba* panel did not have the benefit of the en banc *Morales* decision.

12.05.07 Sentencing Guidelines Issues

Under the Sentencing Reform Act of 1984, the weight and purity of the drugs may have a substantial effect on the actual sentence imposed upon a convicted defendant. For instance, treating the drugs as pure, as opposed to cut or mixed, can be devastating for a defendant. *See* U.S.S.G. §2D1.1. Be aware that under 21 U.S.C. §802(40), a mixture is pure only if meets the technical requirements of the statute. It is also critical not to allow the government or United States Probation to figure weight into a mixture that should not be counted. With respect to LSD, however, the Supreme Court has held that although blotter paper may function only as a carrier for the drug, the entire weight of the paper should be counted for sentencing purposes even though the guidelines require a different method for calculating the weight of an LSD mixture. *Neal v. U.S.*, 516 U.S. 284, 296 (1996); *Chapman v. U.S.*, 500 U.S. 453, 468 (1991). In the case of methamphetamine and PCP, both the guidelines and the minimum mandatory provisions of Title 21 require the sentencing court to employ the weight only of the percentage of the mixture that is pure methamphetamine. U.S.S.G. §2D1.1; *U.S. v. Alfeche*, 942 F.2d 697, 699 (9th Cir. 1991).
With respect to marijuana, 21 U.S.C. §802(16) makes clear that seeds are to be counted in weight but that stems and stalks should not necessarily be measured. A case which supports this argument is 

Title 21 U.S.C. §841(d) commands that the statutory maximum for 50 kilograms or less of marijuana is five years. Unlike §841(b), which refers to a "mixture" containing marijuana for amounts higher than 50 kilograms, §841(d) refers only to "marijuana." Although it may be possible to convince a court to apply the five year statute to mixtures of marijuana which contain 50 kilograms or less of "pure" marijuana, the Guidelines state that the weight of the mixture of marijuana controls. In response, the defense can maintain that if a conflict between a specific offense statute and the guideline for that statute exists, the dictates of the statute should prevail. See U.S. v. Wills, 881 F.2d 823, 826 (9th Cir. 1989).

12.05.08 Phone Count

In cases in which the prosecution may have problems of proof, i.e., defendant is a passenger or the defendant may have a defense of voluntary intoxication, 21 U.S.C. §843(b) is a useful plea-bargaining option. The popular name for an indictment under the statute is a "telephone" or "phone" count. This statute makes it a crime to use a communication facility during the course of the commission of a drug trafficking offense. The statutory maximum penalty, regardless of type of drug or amount, is four years custody and only one year of supervised release. If a defendant has a prior federal drug felony, the maximum penalty is eight years only if the government files and serves an information prior to plea pursuant to §851. U.S.S.G. §2D1.6 provides that the guidelines for a telephone count are identical to those for possession with intent to distribute or conspiracy. Most frequently, a defendant sentenced for a phone count will receive the four-year statutory maximum because the applicable guideline range for possession with intent to distribute or conspiracy will be significantly higher than the statutory maximum under §843(b). U.S.S.G. §5G1.1(a).

12.06 MAIL FRAUD

Title 18 U.S.C. §1341 criminalizes, among other things, "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses" involving use of the U.S. mails. Definition of the terms fraud and false pretenses under §1341 is left chiefly to state law, as no general federal crime of fraud or false pretenses exists. Parr v. U.S., 363 U.S. 370 (1960). The basis of federal jurisdiction for mail fraud is use of the mails, and each individual act committed in a post office of taking out or putting in a letter in furtherance of such a scheme is a distinct and separate violation. U.S. v. Anderson, 59 F.3d 1323, 1337 (D.C. Cir. 1995); U.S. v. Joyce, 499 F.2d 9, 18 (7th Cir. 1974); U.S. v. Toney, 598 F.2d 1349 (5th Cir. 1979).

The statute prohibits two separate offenses: (1) schemes to defraud; and (2) schemes to make money through false statements. U.S. v. Cronic, 900 F.2d 1511, 1513-14 (10th Cir. 1990); U.S. v. Bonnett, 877 F.2d 1450, 1454-55 (10th Cir. 1989); U.S. v. Rafsky, 803 F.2d 105, 107-08 (3d Cir.
1986). If the offense charged is a scheme to defraud, the focus is on the intended result of the scheme, not on whether a false representation was necessary to effect the result. *Cronic*, 900 F.2d at 1513. Therefore, even in the absence of an affirmative misrepresentation, an allegation of a scheme to defraud may fall within the scope of the statute. *Id.* at 1513-14; *see Rafsky*, 803 F.2d at 108.

Conversely, a scheme to obtain money by means of false fraudulent pretenses, representations, or promises focuses on the means by which the defendant obtained the money. *Cronic*, 900 F.2d at 1514.

The importance of this distinction is demonstrated in *Cronic*. There, the government charged the defendant with making false statements and misrepresentations. The court instructed the jury that a necessary element of the offense was that defendant knowingly made a false statement or misrepresentation. The proof at trial, however, established only a check kiting scheme; defendant and his co-conspirators would write checks on accounts and make deposits so that they were operating on a float due to the delay in check processing. In the end the bank was left with several checks outstanding and no money left to cover them, although defendant never made any statement or misrepresentation regarding the funds in his account. *Cronic*, 900 F.2d at 1513-14. Under *U.S. v. Williams*, 458 U.S. 279 (1982), the checks could not be classified as false statements or misrepresentations. The Tenth Circuit therefore reversed the conviction because the government had failed to prove any false statement. *Cronic*, 900 F.2d at 1516-17.

In *McNally*, the Supreme Court held that the intent of §1341 was to reach only those schemes that aim to transfer something of economic value, *i.e.*, some cognizable property right. *McNally v. U.S.*, 483 U.S. 350 (1987). In *McNally* the prosecution was based on the theory that the defendant deprived citizens of honest government services. However, it is not clear whether *McNally*’s limitation on §1341 is of any lasting import, as Congress subsequently passed 18 U.S.C. §1346, which provides that the deprivation of "the intangible right of honest services" may constitute a scheme to defraud. Thus, it is not likely that §1341 continues to apply only to tangible property. *U.S. v. Christopher*, 142 F.3d 46, 52 (1st Cir. 1998); *U.S. v. Sancho*, 157 F.3d 918, 921 (2d Cir. 1998); *U.S. v. Stockheimer*, 157 F.3d 1082, 1087 (7th Cir. 1998) (intent to defraud, under §1341, does not depend on personal gain); *but see U.S. v. Moser*, 123 F.3d 813, 819-20 (5th Cir. 1997) (intent to defraud requires pecuniary loss to another or some personal financial gain).

### 12.06.01 Specific Intent Required

To obtain a conviction under §1341, the government must show specific intent. *U.S. v. Harris*, 185 F.3d 999, 1005-06 (9th Cir. 1999); *U.S. v. Stewart*, 185 F.3d 112, 126 (3d Cir.), *cert. denied*, 120 S. Ct. 618 (1999); *U.S. v. Masten*, 170 F.3d 790, 794-95 (7th Cir. 1999). Specific intent to defraud may be proved in a number of ways, including "willful blindness" or "deliberate disregard" on the part of the defendant. *Stewart*, 185 F.3d at 126. Note that the government probably does not need to prove that the defendant intended the mailing to occur, only that the defendant knew that a fraudulent mailing was likely to occur. *Id.; see also U.S. v. Fore*, 169 F.3d 104, 109 (2d Cir. 1999), *cert. denied*, 527 U.S. 1028 (1999).

### 12.06.02 Use of Mails in Furtherance of Scheme Required
Under §1341, the mailing element of the crime of mail fraud has two requirements: (1) that the defendant caused the use of the mails; and (2) "for the purposes of executing" the fraudulent scheme. With regard to the first requirement, it is not necessary that the defendant actually do the mailing himself or even specifically intend the mails be used; it is sufficient if the use of the mails was reasonably foreseeable by the defendant. Stewart, 185 F.3d at 126; Fore, 169 F.3d at 109.

With regard to the second requirement, use of the United States mails to further the scheme to defraud is an essential element of any mail fraud prosecution. But to satisfy this requirement, the government need only prove that the mailing was “incidental to an essential part of the scheme.” Schmuck v. U.S., 489 U.S. 705, 714 (1989). In Schmuck, the Court rejected the defendant’s claim that his use of the mail was not in and of itself fraudulent. Id. at 714 (holding that it is irrelevant whether the defendant’s mailings were “routine” or otherwise “innocent,” because mailings were necessary to a part of defendant’s scheme); but see U.S. v. Evans, 148 F.3d 477, 483 (5th Cir. 1998) (distinguishing Schmuck and finding that mailings were “totally incidental” to scheme). A mailing that occurs after the object of the scheme has been completed is not sufficiently related to the scheme to support a mail fraud conviction. Schmuck, 489 U.S. at 714.

In U.S. v. Maze, 414 U.S. 395 (1994), the defendant used a stolen credit card to obtain goods and services from several motels in which he stayed for short periods. The motel operators mailed the invoices to the banks which issued the credit cards, and the banks subsequently mailed the statements to the true owner of the cards. The court found that the scheme to defraud had reached fruition before the mailings had occurred because the object of the scheme had been achieved at the time the defendant checked out of the hotels. Because the mailing [of the invoices] in no way affected the success of the scheme, defendant could not be convicted under §1341. Id. at 405.

12.06.03 Defenses to Specific Intent Element

Several defenses are available to negate the specific intent requirement under §1341. First, a "good-faith" belief by the defendant in the truth of the misrepresentation may negate intent to defraud. U.S. v. Wall, 130 F.3d 739, 746-47 (6th Cir. 1997); U.S. v. Morris, 80 F.3d 1151, 1166-67 (7th Cir. 1996); but see U.S. v. Benny, 786 F.2d 1410, 1417 (9th Cir. 1986) (a "good-faith" belief that victim will be repaid and sustain no loss is not a valid defense.).

"Puffing" also may provide a defense. Courts have held that one who expresses an honestly held opinion cannot be convicted of mail fraud, even though that opinion and the belief upon which it is based are erroneous. Courts have defined "puffing" as "expressions of opinion, as opposed to knowing false statements of fact which the law proscribes." U.S. v. Gay, 967 F.2d 322, 329 (9th Cir. 1992); U.S. v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996); but see U.S. v. Cain, 128 F.3d 1249, 1252 (8th Cir. 1997) (defendant not entitled to “puffing” instruction, because defendant received “good faith” instruction); U.S. v. Shelton, 669 F.2d 446, 465 (7th Cir. 1982). Defense counsel should submit an instruction that explains the difference between "puffing" and fraudulent misrepresentation, yet many courts refuse to charge the jury accordingly.

12.06.04 Rule 29 Issues
Variance is a potential defense to a mail fraud prosecution which may be raised in a Fed. R. Crim. P. 29 motion to dismiss for insufficiency. If the government alleges in the indictment a particular scheme to defraud but proves a different scheme at trial, the conviction for the mail fraud charge may be subject to attack. The Supreme Court held that a defendant's rights to a grand jury indictment and due process are not violated simply because an indictment for mail fraud alleges other means of committing the same fraud in *U.S. v. Miller*, 471 U.S. 130, 135-36 (1985). Counsel, however, should be prepared to establish that the fraudulent scheme proved in fact differs from and is not simply narrower than the one charged.

**12.06.05 Sentencing Issues**

Most mail fraud cases are sentenced under U.S.S.G. §2F1.1 and are keyed primarily to loss intended by the scheme. There are sentencing enhancements for, *inter alia*, schemes to defraud five or more victims and frauds involving "more than minimal planning."

U.S.S.G. §2C1.7 to covers cases of fraud involving deprivation of the intangible right to the honest services of public officials under 18 U.S.C. §§1341, 1343. Examples of parties covered by this section are set forth in Application Note 2 and include prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.

**12.07 FALSE CLAIM TO UNITED STATES CITIZENSHIP -- 18 U.S.C. §911**

The Government must prove three essential elements in order to establish the offense of false claim to United States citizenship:

1. that the defendant was an alien at the time alleged in the indictment;
2. that the defendant falsely represented himself to be a citizen of the United States; and
3. that the defendant made such false representation willfully.


Convictions for falsely claiming U.S. citizenship require an unequivocal assertion by the defendant that the defendant is a United States citizen. Thus, a defendant’s statement that he was “born in McAllen, Texas” is not sufficient to prove a false claim. *U.S. v. Garcia*, 739 F.2d 440, 443 (9th Cir. 1984). However, presenting a false birth certificate to assert birth in the United States does violate §911. *U.S. v. Rodriguez-Serrate*, 534 F.2d 7, 11 (1st Cir. 1976).

Defendants have periodically objected to §911 on the grounds that a false claim of citizenship can occur for innocent reasons during innocent occasions; for example, the defendant might be boasting. To insulate §911 from such overbreadth objections, courts have construed §911 to apply only when a person has the right and a “good reason to inquire into the nationality status of the party.” *U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1137 (9th Cir. 1999) (citation omitted).
United States citizenship is, of course, a complete defense to §911. Citizenship may be acquired by birth, naturalization, special act of Congress, or derivatively. See infra section 12.10.02. On the other hand, the so-called “exculpatory no” doctrine is not a defense to a §911 charge. See U.S. v. Lopez-Iraeta, 129 F.3d 1206, 1208-09 (11th Cir. 1998). See infra section 12.09.02 for discussion of the “exculpatory no” doctrine.

12.07.01 Related Offenses

If an undocumented alien uses a false document, gives a false name, or otherwise lies to Border Patrol or Immigration agents, he may be subject to prosecution under 18 U.S.C. §1001 which prohibits the knowing and willful making of false statements to government agents. This section, a five-year felony, often is used as a blanket provision to cover any untruthful statement by an alien. See U.S. v. Rodriguez-Rodriguez, 840 F.2d 697, 700 (9th Cir. 1988) (conviction under §1001 upheld on ground that defendant's misstatement to Border Patrol agents that undocumented alien passengers of the vehicle were United States citizens was held to be material).

Other related offenses in Title 18 include §§1543 (forgery and false use of passport), 1544 (misuse of passport), and 1546 (fraud and misuse of immigration documents) are rare. U.S. v. AlJibori, 149 F.3d 125, 126 (2d Cir. 1998) (“Many individuals caught with forged passports choose to return to their country rather than face criminal charges here in the United States.”). An undocumented alien also may face prosecution under 18 U.S.C. §1028, which prohibits fraud and related activity in connection with identification documents, including the possession and use of “document-making implements.” U.S. v. Castellanos, 165 F.3d 1129, 1131 (7th Cir. 1999) (defendant convicted under §1028(d) for possessing blank identification documents; no requirement that documents be filled in). Note that a violation of §1028 does not necessarily entail an immigration violation. U.S. v. Pineda-Garcia, 164 F.3d 1233, 1235 (9th Cir.) (concerning sentencing enhancement under U.S.S.G. §2L1.2(b)), cert. denied, 526 U.S. 1059 (1999); see also U.S. v. Jackson, 155 F.3d 942, 946 (8th Cir.) (stolen driver’s licenses), cert. denied, 525 U.S. 1059 (1998).

12.08 ROBBERY, BURGLARY, AND BANK ROBBERY (18 U.S.C. §2113)

Most robbery and burglary offenses prosecuted in federal court are brought pursuant to 18 U.S.C. §§2111-2118. Those statutes cover a wide variety of actions, and provide for a wide range of penalties depending on the circumstances of the offense. Offenses against any person or property belonging to the United States, or which occurs within the special maritime and territorial jurisdiction of the United States, may be prosecuted under §§2111 and 2112. Such crimes carry maximum penalties of up to 15 years. Commission of this offense against a post office and its employees is punishable under §2115 and presently carries a penalty of up to five years. Assault with intent to commit a robbery or to steal mail, money, or other United States property is punishable under §2114 and carries a first offense penalty of up to 10 years. For a second such offense, or if the victim's life is put in jeopardy by a dangerous weapon or if the victim is wounded, a maximum penalty of 25 years applies. Robbery and burglary involving controlled substances are punishable under §2118 and carry penalties of up to life imprisonment. Car jacking under §2119 carries maximum sentences ranging from 15 years to death if a death results from the theft.
However, the most common Federal robbery offense involves theft from banks operated under the laws of the United States or insured by the Federal Deposit Insurance Corporation. Section 2113 makes it a crime to take by force, violence, or intimidation, any property, money or other thing of value from any bank, credit union or savings and loan association. The maximum penalty for unarmed bank robbery is 20 years. A theft from a bank not involving force, violence or intimidation, i.e., bank larceny, carries a maximum penalty under §2113(b) of 10 years. The receipt or possession of property stolen from a bank is punishable under §2113(c) and is a 10 year offense. Armed bank robbery is charged under §2113(d) and carries a maximum penalty of 25 years.

In determining the best approach for a bank robbery defense, it is important to understand first how the government intends to prove its case and the potential defenses which can be raised. All federally insured banks are now equipped with bank surveillance cameras which may be activated by any bank employee who discerns that a robbery is in progress. These bank surveillance cameras are designed to photograph the robber exiting the bank. In addition, all tellers are specifically instructed to supply the robber with what is known as “bait money.” Bait money is simply a stack of currency with previously registered serial numbers, often accompanied by an exploding red dye-pack. The prosecution's proof of the bank robbery case may also rely heavily on fingerprints left on the teller counters or other areas of the bank touched by the perpetrator. Finally, eyewitness testimony of the victim teller or other persons in the bank usually exists in such cases.

The preparation and filing of pretrial motions in bank robbery cases is important and should vary with a particular set of facts. See supra Chapter 6. When physical evidence such as bait money or a weapon has been seized, one must be careful to explore all potential search and seizure issues which could result in the suppression of this incriminating evidence. When the defendant is not arrested in the bank or shortly thereafter by a person following him from the bank, it is important to examine whether police had probable cause to arrest. Obviously, any statements made by the defendant at or following the arrest may be suppressible. Since a bank robbery case often relies on the eyewitness testimony of the bank employees, it is important to ascertain whether any of the witnesses have been shown a single photograph, a photo array, or have attended live lineups. Clearly, a motion to suppress pretrial identifications should always be considered. Although a pretrial hearing on the suggestivity of out-of-court identifications is not constitutionally required, Watkins v. Sowders, 449 U.S. 341, 349 (1981), sufficient authority exists suggesting that the trial court should conduct such an evidentiary hearing. For a discussion, see Dunnigan v. Keane, 137 F.3d 117, 127-28 (2d Cir. 1998). Often, bank robbery indictments also will contain various aliases which should be stricken. See supra section 6.24.

There are also a number of evidentiary issues which often arise during a robbery trial that should be raised in limine. See supra Chapter 10. Prior convictions may be introduced under Fed. R. Evid. 609 for impeachment or under Fed. R. Evid. 404(b), if relevant to prove motive, intent, identity or the like. Much of the case law surrounding the admissibility of felony convictions and prior bad act evidence has been decided in the context of bank robbery cases. In a bank robbery prosecution, for example, the previous uncharged conduct must be sufficiently "peculiar, unique or bizarre," or so unusual or distinctive as to constitute the defendant's personal signature on each crime. U.S. v. Ezzell, 644 F.2d 1304, 1306 (9th Cir. 1981); see also U.S. v. Quinn, 18 F.3d 1461, 1466 (9th Cir. 1994) ("take-over" nature of both
robberies and similarity of weapons used sufficient to justify admission of prior robbery under 404(b)).
Since identity is most often the only issue in a bank robbery case, however, Fed. R. Evid. 404(b) often
mandates exclusion of the alleged other acts of misconduct without a substantial governmental showing that
the proffered other acts are similar to the allegations at trial.  U.S. v. Luna, 21 F.3d 874, 878-79 (9th Cir.
1994).  Courts generally require something more than simply the repeated performance of the same class of
Crimes.  Id.

Title 18 U.S.C. §3559 provides for mandatory life sentences for persons convicted of a serious
vilento felony after two prior convictions for a serious felony either in state or federal court.  Counsel must
note, however, that certain types of robbery crimes do not qualify under the Act.  See 18 U.S.C.
§3559(c)(3).  Special care should be paid to this statute so that counsel can successfully demonstrate that
it is inapplicable to the defendant.

12.08.01  Aiding and Abetting in Robbery Cases

The Ninth Circuit has specifically addressed the issue of the government's burden of proof, under
an aiding and abetting theory in bank robbery cases. In U.S. v. Dinkane, 17 F.3d 1192, 1196 (9th Cir.
1994), the court reversed a defendant's conviction for armed bank robbery because the government failed
to produce sufficient evidence to establish that defendant knew, prior to the commission of the robbery,
that the co-defendants planned an armed robbery (defendant was the driver of the getaway car).  The trial
court had erroneously instructed the jury that the government need not prove that the defendant knew of
the co-defendant's possession of the weapons during the robbery.

The law, as announced by the Ninth Circuit, requires that the government prove beyond a
reasonable doubt, under the theory of aiding and abetting, that the "defendant knew the principal had and
intended to use a dangerous weapon during the robbery, and that the defendant aided or intended to aid
in that endeavor."  Id. at 1195; but see U.S. v. Easter, 66 F.3d 1018, 1023-24 (9th Cir. 1995).

12.08.02  Eyewitness Evidence in Robbery Cases

In a majority of bank robbery cases, the government's case-in-chief will rest primarily on
eyewitness identification testimony provided by bank employees.  Accordingly, if no alibi defense exists,
defense counsel's success at trial will depend on the ability to highlight weaknesses and inconsistencies in
eyewitness testimony.  Serious consideration thus should be given to calling an expert witness to testify
regarding the reliability of eyewitness identifications.

Since the Supreme Court's decision in Daubert v. Merrill Dow, 509 U.S. 579 (1993), courts
have cautiously approached requests to introduce expert testimony at trial on the issue of the psychology
and unreliability of eyewitness identification. The "screening device" utilized by the trial courts is Fed. R.
Evid. 702, which now sets the standard for the admissibility of expert testimony.  As the rule indicates,
expert testimony is only admissible if it assists the trier of fact to understand evidence or to determine a fact
at issue.  Persinger v. Norfolk & W. Ry., 920 F.2d 1185, 1187 (4th Cir. 1990).  The exclusion of such
expert testimony, under Rule 702, is within the sound discretion of the trial court.  See, e.g, U.S. v. Hall,
165 F.3d 1095, 1100-05 (7th Cir.), cert. denied, 527 U.S. 1029 (1999);  U.S. v. Hicks, 103 F.3d 837,
Due to the discretion afforded the trial court as to the admissibility of this evidence, it is essential for defense counsel to fashion the defense in such a way as to demonstrate to the trial court that the issue of the unreliability and/or psychology of eyewitness identification is an integral part of the defense case and that expert testimony is an inextricable part of that defense. See U.S. v. Amador-Galvan, 9 F.3d 1414, 1417-18 (9th Cir. 1993) (case remanded for determination of whether expert testimony should have been admitted under Daubert); see generally, “The Admissibility of Expert Eyewitness Testimony under the Federal Rules,” 29 Cumb. L. Rev. 379 (1998) (discussing eyewitness expert testimony in light of Daubert).

In short, Daubert provides a list of factors that a trial court should consider in determining whether the expert’s basis for testifying qualifies as valid scientific knowledge. These factors include: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the particular degree of acceptance within the scientific community. Daubert, 509 U.S. at 592-5. Importantly, this list is not exhaustive, and courts retain discretion in admitting or excluding expert testimony. Id.

An illustrative case applying Daubert to eyewitness expert testimony is U.S. v. Rincon, 28 F.3d 921 (9th Cir. 1994), which had earlier been reversed by the Supreme Court in light of Daubert. The government charged the defendant with two counts of bank robbery. Prior to trial, the district court denied defendant’s motion to have an expert on eyewitness identification testify at trial. The Ninth Circuit affirmed the district court’s ruling as correctly applying the Daubert standard, noting that: "(1) the testimony would not assist the trier of fact; (2) the testimony would most likely confuse the jury; and (3) there was no showing by the defense that the testimony related to an area that is recognized as a science." Id. at 923. The last point is most important for defense counsel because the court focused its decision on the Daubert factors. In Rincon, the defense failed to submit research to the district court so that it could determine if the studies were indeed scientific; (i.e., whether the reasoning or methodology underlying the testimony is scientifically valid). Id. While it is true that the court limited Rincon II to the facts of the case, it should serve as notice to defense counsel of the significant hurdle they must clear to bring expert testimony concerning eyewitness identification to the witness stand. For comparable approaches in other circuits, see U.S. v. Smith, 156 F.3d 1046, 1052 (10th Cir. 1998), U.S. v. Smith, 122 F.3d 1355, 1357 (11th Cir. 1997) and U.S. v. Kime, 99 F.3d 870, 883 (8th Cir. 1996).

Fortunately, there has been a trend in recent years to allow expert testimony on eyewitness identification. See, e.g., U.S. v. Smithers, 212 F.3d 306, 315 (6th Cir. 2000) (indicating that district court should have applied Daubert factors to determine if eyewitness expert testimony was admissible, and that if district court had applied those factors, it may have found such testimony admissible). Some courts have held that such testimony is admissible under “narrow” circumstances. U.S. v. Harris, 995 F.2d 532, 533-35 (4th Cir. 1993). The narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena, such as the
feedback factor and unconscious transference. See Stevens, 935 F.2d at 1400 (admitting testimony on the lack of correlation between confidence and accuracy in eyewitness identification); U.S. v. Sebetich, 776 F.2d 412, 418-19 (3d Cir. 1985) (holding erroneous the exclusion of expert testimony where the identification came nine months after the robbery, it was made under stressful circumstances, and it was only derived from one person's testimony), U.S. v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984) (determining that the jury could be helped by testimony on the unconscious transference between a photo spread three weeks after the robbery and a line-up four months after the robbery, stress and weapons at the bank, and cross-racial transference). In the absence of such circumstances, courts have reasoned that jurors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination. See, e.g. U.S. v. Curry, 977 F.2d 1042, 1052 (7th Cir. 1992).

In bank robbery cases, the government often will offer lay testimony from a probation or parole officer that an individual depicted in a bank surveillance photograph indeed is the defendant. See, e.g., U.S. v. Pierce, 136 F.3d 770, 773-74 (11th Cir. 1998). Courts recently have upheld the admissibility of this testimony, and have ruled that the manner in which the identification is made at trial only affects the weight of this testimony, not its admissibility. The Ninth Circuit, however, has held that such lay opinion is of "dubious value" and "runs the risk of invading the province of the jury and unfairly prejudic[ing] the defendant." U.S. v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993). Such testimony is admissible only if the witness had sustained and substantial contact with the person or if the defendant has altered his appearance. Id.; but see U.S. v. Henderson, 68 F.3d 323, 325 (9th Cir. 1995).

In preparing for trial, it is imperative that counsel for a bank robbery defendant immediately attempt to interview all witnesses to the robbery. Since the heart of any robbery trial will lie with in-court identifications, any prior inconsistent identifications are a fruitful source of impeachment. It is important to note that before governmental interviews, robbery witnesses often will talk freely to the defense; once the assistant United States attorney and the FBI have had an opportunity to question witnesses, however, many witnesses elect not to speak with defense counsel or investigators. Counsel also must obtain any descriptions of the bank robber written on specific forms provided by the bank. These bank forms which contain the witnesses' previous description are Jencks Act material and defense counsel should request these forms for possible impeachment purposes.

Jury instructions in bank robbery cases may be helpful in focusing the jury's attention on the issue of eyewitness identifications. The seminal case is U.S. v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). The so-called "Telfaire instruction" has been adopted by most circuits. See U.S. v. Tipton, 11 F.3d 602, 606 (6th Cir. 1993); U.S. v. Brooks, 928 F.2d 1403, 1405 (4th Cir. 1991), U.S. v. Cain, 616 F.2d 1056-58 (8th Cir. 1980); U.S. v. Wilford, 493 F.2d 730, 735 (3d Cir. 1974); but see U.S. v. Miranda, 986 F.2d 1283, 1285 (9th Cir. 1993).

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8 The feedback factor demonstrates "that witnesses who discuss the case with each other may unconsciously reinforce mistaken identifications" and the certainty of these identifications. U.S. v. Moore, 786 F.2d 1308, 1311 (5th Cir. 1986). Unconscious transference occurs when a witness confuses a person seen in one situation with someone seen in a different situation. Harris, at 534.
12.09 FALSE STATEMENTS--18 U.S.C. §1001

12.09.01 Elements

12.09.01.01 Statement

“By its terms, 18 U.S.C. §1001 covers any false statement -- that is, a false statement of whatever kind.” *Brogan v. U.S.*, 522 U.S. 398, 400 (1998) (internal quotations omitted). Even a simple “no” in response to a query by a federal agent will trigger liability under §1001. *Id.* at 408 (effectuating the demise of the “exculpatory no” defense). The broad scope of §1001, however, has some limits. For example, 18 U.S.C. §1920 limits §1001, exclusively pertaining to federal employees' compensation benefits and claims. *U.S. v. Richardson*, 8 F.3d 15, 17 (9th Cir. 1993).

12.09.01.02 Materiality

In a §1001 prosecution, the government must prove the “materiality” of the false statement to the jury beyond a reasonable doubt. *U.S. v. Gaudin*, 515 U.S. 506, 522-23 (1995). A material statement “must have a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed.” *Id.* at 509 (internal quotations omitted); *compare U.S. v. Wells*, 519 U.S. 482, 484 (1997) (materiality not element of 18 U.S.C. §1014, false statement to federally insured bank).

The district court violates Fifth Amendment due process and the trial rights guaranteed by the Sixth Amendment if it fails to submit the question of materiality to the jury. *Gaudin*, 515 U.S. at 522-23 (district court may not determine materiality of statement as a matter of law). An appellate court, however, need only review the failure of the district court to submit materiality to the jury for harmless error. *Compare Neder v. U.S.*, 527 U.S. 1, 4 (1999) (materiality is element of 18 U.S.C. §§1341, 1343, and 1344 but harmless error where district court determined materiality instead of jury). *See also Johnson v. U.S.*, 520 U.S. 461, 463 (1997) (perjury contains element of materiality that must go to jury but not plain error when accused fails to object to district court determining materiality).

12.09.01.03 Knowledge


The accused may present the defense of reliance on expert advice to negate the “knowingly and willfully” element of §1001. The reliance defense must establish full disclosure to the expert, and good faith reliance on the expert’s opinion. *U.S. v. Johnson*, 730 F.2d 683, 686 (11th Cir. 1984). The accused
cannot establish good faith reliance on the expert if the government proves that s/he had knowledge contrary to the conclusions of the expert. *U.S. v. Smith*, 523 F.2d 771, 778 (5th Cir. 1975).

**12.09.01.04 Within Jurisdiction of United States**

The fourth element of §1001 is that the false statement be made in regard to any matter “within the jurisdiction” of the executive, legislative, or judicial branch of the government of the United States. *U.S. v. Rodgers*, 466 U.S. 475, 479 (1984). The phrase “within the jurisdiction” means that the matter must pertain to an official, authorized function of the branch of government, and not to a matter peripheral to its business. *Id.; U.S. v. Facchini*, 874 F.2d 638, 641 (9th Cir. 1989) (en banc). Thus, jurisdiction means the branch of government has the power to exercise authority in a particular instance. *Rodgers; Facchini*. Finally, the false statement infringes on the jurisdiction of the branch of government only where “a direct relationship obtains between the false statement and an authorized function” of it. *Facchini*, 874 F.2d at 641. Actual knowledge of federal involvement, however, is not required. *U.S. v. Yermian*, 468 U.S. 63, 75 (1984).

The reach of §1001 extends to individuals who make false statements to state programs that a branch of the federal government oversees and funds. *See, e.g., U.S. v. Shafer*, 199 F.3d 826, 829 (6th Cir. 1999) (discussing cases); *Facchini*, 874 F.2d 641-43. The rule is that if a branch of the federal government retains oversight (as opposed to monitoring) powers, and funds the state program, jurisdiction exists for a §1001 prosecution. *Id.*

The Supreme Court held that “a federal court is neither a department nor an agency within the meaning of §1001” in *Hubbard v. U.S.*, 514 U.S. 695, 715 (1995) (internal quotations omitted). Counsel should note that Congress has broadened the “department” and “agency” terms of the old statute to read “executive, legislative, or judicial branch” of the United States. §1001(a); *U.S. v. Oakar*, 111 F.3d 146, 151 n.5 (D.C. Cir. 1997).
12.10 IMMIGRATION OFFENSES

12.10.01 Illegal Entry and Reentry by a Deported Alien

Congress has proscribed three misdemeanor illegal entry offenses. 8 U.S.C. §1325(a). Illegal entry may occur (1) “at any time or place other than as designated by immigration officers,” (2) by an alien who “eludes examination or inspection by immigration officers,” or (3) by an alien who obtains entry by making “a willfully false or misleading representation or the willful concealment of a material fact.” Id. Felony illegal entry requires proof of alienage, proof of one of the three modes of entry listed above, and proof of a previous conviction for illegal entry. U.S. v. Arriaga-Segura, 743 F.2d 1434, 1435-36 (9th Cir. 1984). In order to prove a prior conviction for illegal entry, the government will usually, but is not required to, introduce into evidence a certified copy of the conviction. Id. at 1436 (criminal complaint and testimony of border patrol agent who witnessed guilty plea sufficient).

To obtain a conviction for reentry after deportation, in violation of 8 U.S.C. §1326, the government must prove the individual is (1) an alien (2) whom the government previously deported (3) that has reentered, or that the government has found in, the United States (4) without permission of the Attorney General. Almendarez-Torres v. U.S., 523 U.S. 224, 226 (1998); U.S. v. Hernandez, 189 F.3d 785, 789 (9th Cir. 1999) (§1326 prohibits entering, attempting to enter, or being found in the United States), cert. denied, 120 S. Ct. 1441 (2000); U.S. v. Blanco-Gallegos, 188 F.3d 1072, 1074 (9th Cir. 1999). The provisions set forth in §1326(b) are recidivist based sentencing factors that describe higher statutory maximums for individuals who possess certain prior criminal convictions. Almendarez-Torres, 523 U.S. at 233; but see Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348, 2379 (2000) (Thomas, J. concurring and recanting his swing vote in Almendarez-Torres).

Given the complexity of current immigration law and the severe penalties individuals accused of violating §1326 face, defense counsel is well advised to consult a treatise or an attorney specializing in immigration law when tackling the questions of whether a client is or is not an United States citizen, or possesses or does not possess some form of legal immigration status in the United States. See “Current Trends In Illegal Reentry Cases,” 3 T.M. Cooley J. Prac. & Clinical L. 1, 15 (1999); Kurzban, Kurzban’s Immigration Law Sourcebook; (7th ed. 2000); “A Primer For Defending A Criminal Immigration Case,” 8 Geo. Immigr. L.J. 23, 43 (1994).

12.10.02 Elements

12.10.02.01 Alienage

A common element of 8 U.S.C. §§1325 and 1326 is the alienage of the accused. An alien is a person who is not a citizen or national of the United States. 8 U.S.C. §1101(a)(3); U.S. v. Sotelo, 109 F.3d 1446, 1448 (9th Cir. 1997). A national of the United States is a person who owes permanent allegiance to the United States. §1101(a)(22); Sotelo. In Sotelo, the Ninth Circuit held that the defendant’s subjective belief that he is a national is not sufficient to prove national status. Id. at 1448.
An accused may have a viable claim to United States citizenship by birth or by derivative citizenship. If either of the accused’s parents is an United States citizen, s/he may, in certain circumstances, derive citizenship from her or his parent’s status. Some of the factors considered in determining derivative citizenship are: when the citizen parent was born, when the accused was born, when and for what period of time the citizen parent lived in the United States, and when and for what period of time the accused lived in the United States. See 8 U.S.C. §§1401-1409.

The government must corroborate the accused’s admission of alienage with independent evidence where the only evidence of alienage presented at trial is the admission. U.S. v. Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997); but see Farrell v. U.S., 381 F.2d 368, 369 (9th Cir. 1967) (accused’s prior admission of alienage alone can suffice to support the jury's finding of alienage). In Hernandez, the government corroborated the accused’s admission of alienage through the introduction of an identical admission during looking after arrest, the circumstances of the illegal entry underlying the case, and a prior order of deportation. Id. at 1332-33. A prior order of deportation standing alone, however, will not sustain the government’s burden on proof of alienage. Sotelo, 109 F.3d at 1449; U.S. v. Ortiz-Lopez, 24 F.3d 53, 56 (9th Cir. 1994) (no reasonable jury could find accused an alien solely on basis of deportation orders). The reasoning behind this rule is the difference in the burdens of proof at a civil deportation hearing and a criminal trial. Ortiz-Lopez, 24 F.3d at 55-56. The standard in a deportation proceeding is "clear and convincing" evidence, and therefore does not suffice to establish the alienage element in a later criminal prosecution. Id. In the same vein, an admission of alien status during the deportation hearing does not collaterally estop the accused from attacking the admission. Sotelo, 109 F.3d 1449.

If the accused is acquitted of the offense of unlawful reentry following deportation, the government is collaterally estopped from relitigating the alienage issue again at a subsequent trial on new charges. U.S. v. Barragan-Cepeda, 29 F.3d 1378 (9th Cir. 1994). In Barragan-Cepeda, the accused won acquittal in a 1980 trial. Id. at 1380. In 1993, the government arrested and charged Mr. Barragan again with having illegally reentered the United States after deportation. Id. at 1379-80. The accused sought to dismiss the indictment on collateral estoppel grounds. Id. at 1380. The sole issue at trial in 1980 was alienage, and the accused also provided affidavits from two jurors who participated in the 1980 trial stating that the basis for their not guilty finding in 1980 was their belief that the accused was an United States citizen. Id. at 1381. The court reasoned that to subject the accused to prosecution again under these circumstances would violate the tenets of double jeopardy under the Fifth Amendment. Id. at 1382.

12.10.02.02 Prior Deportation

To sustain a conviction under §1326, the government must prove that the accused was arrested on a warrant of deportation, ordered deported, and, in fact, deported from the United States before s/he reentered or was found in the United States. U.S. v. Meza-Villarello, 602 F.2d 209, 211 (9th Cir. 1979). To prove these essential facts, the government usually produces the certified copies of the warrant, order of deportation, and execution of deportation (witnessed by an INS officer).

The question of the legality of a prior deportation is not one for the jury. U.S. v. Paredes-Batista, 140 F.3d 367, 380 (2d Cir.1998); U.S. v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996) (en
The defendant must challenge the legality of the alleged prior deportation with a pretrial motion. Alvarado-Delgado, 98 F.3d at 493. To effectively attack the prior deportation, defense counsel should request both the accused’s “A” file and the audio tape recording of the prior deportation hearing. If counsel fails to request the “A” file and the deportation tape, the court is not required to continue the case to allow time to collect this information. U.S. v. Gonzalez-Sandoval, 894 F.2d 1043, 1051-52 (9th Cir. 1990); U.S. v. Coronado-Navarro, 128 F.3d 568, 571-72 (7th Cir. 1997) (collateral attack against deportation order must be made within time frame set by district court).

An alien may not challenge the validity of the deportation order unless s/he shows s/he exhausted any administrative remedies that would provide relief from the order, that the deportation proceeding deprived the alien of judicial review, and that the entry of the order was fundamentally unfair. 8 U.S.C. §1326(d); U.S. v. Hinojosa-Perez, 206 F.3d 832, 835 (9th Cir. 2000) (collecting cases). Prior to the enactment of §1326(d) on April 24, 1996, U.S. v. Mendoza-Lopez, 481 U.S. 828 (1987), stated the rule with respect to a challenge to the prior deportation: the district court must entertain a collateral challenge to the use of the deportation proceeding where the deportation proceeding effectively eliminated the right of the alien to obtain judicial review. Id. 838-39. The Mendoza-Lopez court went on to state that the deportation must be fundamentally fair before it can be used to satisfy one of the elements of a §1326 violation. Id. at 840-42. Since §1326(d) imposes the additional requirement that an alien must exhaust any administrative remedies that would provide relief from the deportation order, which Mendoza-Lopez did not require, §1326(d) may be constitutionally infirm. See e.g., Dickerson v. U.S., ___ U.S. ___, 120 S. Ct. 2326, 2332 (2000) (Congress may not legislatively supercede the Supreme Court’s decisions interpreting and applying the Constitution: thus since Miranda v. Arizona, 384 U.S. 436 (1966), is a constitutional decision, Congress may not supercede it with 18 U.S.C. §3501).

The government bears the burden of proving that the deportee knowingly and intelligently waived the right to judicial review of the deportation order. U.S. v. Lopez-Vasquez, 1 F.3d 751, 754 (9th Cir. 1993). The use of an administrative proceeding to establish the deportation element of §1326, however, does not violate due process despite the fact that the administrative proceeding lacks the constitutional safeguards afforded criminal defendants during a criminal proceeding. U.S. v. Lara-Aceves, 183 F.3d 1007, 1010-12 (9th Cir. 1999), cert. denied, 120 S. Ct. 836 (2000). Furthermore, the accused must show actual prejudice for a deportation proceeding to be considered fundamentally unfair. U.S. v. Loaisiga, 104 F.3d 484, 487 & n.2 (1st Cir. 1997) (collecting cases); U.S. v. Proa-Tovar, 975 F.2d 592, 595-96 (9th Cir. 1992) (en banc).

Courts have considered the effect of numerous errors in deportation hearings. See, e.g., U.S. v. Estrada-Torres, 179 F.3d 776, 781 (9th Cir. 1999), cert denied, 121 S. Ct. 156 (2000) (proper for immigration judge to address deportees as group so long as individual inquiry made as to whether deportee wished to appeal); U.S. v. Zarate-Martinez, 133 F.3d 1194, 1197-98 (9th Cir.) (group waiver without individual inquiry insufficient to show knowing and voluntary waiver), cert. denied, 525 U.S. 849 (1998); U.S. v. Jimenez-Marmolejo, 104 F.3d 1083, 1085-86 (9th Cir. 1996) (waiver of appeal by deportee’s attorney who collectively waived appeal for all deportees at hearing invalid where deportee had valid claim to relief); U.S. v. Torres-Sanchez, 68 F.3d 227, 231 (8th Cir. 1995) (mere inability to obtain counsel for deportation proceeding does not constitute a violation of due process); Lopez-Vasquez, 1 F.3d at 754-55.
12-10.02.03 Entry

The crime of illegal entry under 8 U.S.C. §1325 is complete at the time of the entry. U.S. v. Rincon-Jimenez, 595 F.2d 1192, 1193-94 (9th Cir. 1979). Thus, the five-year statute of limitations for illegal entry begins to run at the time that the entry is complete. Id.; see 18 U.S.C. §3282.

The accused does not complete an "entry" into the United States, however, unless s/he is free from official restraint. U.S. v. Pacheco-Medina, 212 F.3d 1162, 1165 (9th Cir. 2000). The Pacheco-Medina court synthesizes several prior cases to define an “entry:” official restraint, which includes physical arrest as well as covert surveillance unknown to the accused, prevents an “entry.” Id. at 1163-65. In addition, the Pacheco-Medina court specifically declined to equate official restraint with a physical seizure. Id. at 1165 n.5. Thus, at the port of entry, individuals are subject to the restraint of United States Customs, and may not have completed an “entry.” Id. at 1163-65. Nonetheless, individuals who get no further than the port of entry may be subject to criminal sanctions because the statute criminalizes attempted illegal entry. 8 U.S.C. §1325. Such attempts are subject to the same penalty provisions as actual entries. Id.

In deported alien prosecutions under the “found in” prong of 8 U.S.C. §1326, the offense “ends when [the] alien is discovered and identified by the immigration authorities.” U.S. v. Hernandez, 189 F.3d 785, 791 (9th Cir. 1999), cert. denied, 120 S. Ct. 1441 (2000). Thus, for statute of limitations purposes, and applicability of the Sentencing Guidelines, the offense continues until the government finds the alien. Id. However, even in a “found in” case, the government must prove an entry. Pacheco-Medina, 212 F.3d at 1166. Proof of entry, though, may consist simply of presence in the United States, a prior deportation, and an admission by the accused that s/he reentered the United States. See U.S. v. Corona-Garcia, 210 F.3d 973, 979 (9th Cir. 2000); see also U.S. v. Quintana-Torres, 224 F.3d 1157, 1158 (9th Cir. 2000). Since §1326 is a continuing offense, venue lies in any district where the continuing conduct occurred. See U.S. v. Ruelas-Arreguin, 219 F.3d 1056, 1060-61 (9th Cir. 2000).

12.10.02.04 Intent and Voluntariness

Violations of 8 U.S.C. §§1325 and 1326 are general intent crimes when the alien enters, or is found in the United States. The offense of attempting to enter the United States after deportation incorporates the common law meaning of “attempt” and requires proof of specific intent to enter illegally. See U.S. v. Gracidas-Ulibarry, No. 98-50610, 2000 WL 1664283 (9th Cir. Nov. 7, 2000).

The Seventh Circuit has accepted a defense in which the defendant can claim that he reasonably believed that he possessed permission to enter the United States. U.S. v. Anton, 683 F.2d 1011, 1015-18 (7th Cir. 1982); but see U.S. v. Leon-Leon, 35 F.3d 1428, 1433 (9th Cir. 1994) (reasonable belief by accused that he possessed permission to enter United States not relevant); U.S. v. Miranda-Enriquez, 842
F.2d 1211, 1213 (10th Cir. 1988) (mistake is not a valid defense). In *Anton*, the defendant, after having been deported, contacted immigration authorities, obtained a visa, and reentered the United States through an immigration checkpoint. *Id.* at 1013. The defendant was prosecuted under 8 U.S.C. §1326. *Id.* at 1012. The Seventh Circuit held that the defendant's reasonable belief that he had the Attorney General's consent to reenter constituted a defense to the charge. *Id.* at 1018.

12.10.02.05 Permission of the Attorney General

“To establish a case of . . . illegal reentry after deportation, the government must prove that the Attorney General had not consented to the alien’s application for reentry.” *U.S. v. Blanco-Gallegos*, 188 F.3d 1072, 1074 (9th Cir. 1999). The government may prove lack of consent by offering a “certificate of non-existence,” which states that the alien’s “A” file does not contain a request for permission to reapply for entry, and testimony by an INS agent who would state that it is INS’s duty to maintain complete records on all aliens in the United States and if the alien on trial had requested permission to reapply for entry the request would appear in the “A” file. *Id.* at 1074-75.

12.10.03 Pretrial Motions in Prosecutions under §§1325 And 1326

12.10.03.01 Discovery

Every person processed by immigration authorities is given an “A” number and a corresponding file is opened. The first pretrial motion in an illegal entry case should always be to discover the immigration “A” file. This file should contain every document related to the immigration, and often criminal, actions involving the accused. The “A” file may be lengthy, but it provides a wealth of information for use at trial. For example, judicial recommendations against deportation are usually in the file. An identity issue may arise if the INS has failed to maintain fingerprints and other data to connect the accused to the “A” file. The file may also contain evidence to support a good faith belief in citizenship or right to remain in the United States, *i.e.*, applications for resident status.

However, the tape recording of the prior deportation hearing is not stored in the “A” file and must be specifically requested. These tapes will reveal the number of individuals who may have been present at a prior "mass deportation." The tape will also reveal potential problems with the Spanish translation of the immigration judge's recitation and the responses by the individuals being deported. Finally, the tape will reveal any deficiencies which may render the deportation hearing fundamentally unfair.

12.10.03.02 Suppression of Evidence

An illegal seizure of the accused does not result in the suppression of her or his identity at trial. *U.S. v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *U.S. v. Guzman-Bruno*, 27 F.3d 420, 421-22 (9th Cir. 1994). Moreover, the Fifth Amendment does not require *Miranda* warnings at the commencement of a deportation hearing despite the fact the accused may make a potentially incriminating statement. *U.S. v. Solano-Godines*, 120 F.3d 957, 960-961 (9th Cir. 1997); *U.S. v. Valdez*, 917 F.2d 466, 469 (10th Cir. 1990). Defense counsel, however, should challenge any other evidence that derives
from an illegal seizure or interrogation. For example, the district court may suppress statements as to alienage and unlawful entry obtained in violation of the accused’s Fourth and Fifth Amendment rights. See U.S. v. Perez-Castro, 606 F.2d 251 (9th Cir. 1979); U.S. v. Casimiro-Benitez, 533 F.2d 1121 (9th Cir. 1976).

When Border Patrol agents apprehend an undocumented person, they generally ask certain "biographical data" questions about the person’s citizenship status and mode of entry. Initial questioning about citizenship generally takes place in a non-custodial or “open field” situation. Absent a seizure of the person, the agents may question anyone believed to be an illegal alien about her or his citizenship status; the agents may even conduct “factory surveys” to determine the workers’ citizenship status. See INS v. Delgado, 466 U.S. 210, 216-17 (1984) (workers were “free to leave” even though agents guarded exits and questioned all workers leaving); but see Orhorhaghe v. INS, 38 F.3d 488, 496-97 (9th Cir. 1994) (egregious violation of Fourth Amendment which required suppression when INS arrested accused in his hallway). Arrest or detention without sufficient cause requires suppression of statements under the Fourth Amendment. See Brown v. Texas, 443 U.S. 47 (1979). See also Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (Fourth Amendment requires suppression of statements taken after Miranda warning if confession quickly follows illegal arrest and no intervening event occurs).

After detention, immigration officials routinely fill out Immigration Form I-213 (Record of Deportable Alien). Because the INS simply deports most undocumented persons it apprehends, many agents do not bother with Miranda warnings before taking "background" information on the I-213 form. Agents usually complete the I-213 and run a quick records check. If this "background questioning" relates "directly to an element of a crime that [the agent] had reason to suspect," then the statements should be suppressed under the Fifth Amendment for failure to comply with Miranda. U.S. v. Gonzalez-Sandoval, 894 F.2d 1043, 1046 (9th Cir. 1990); see also U.S. v. Mata-Abundiz, 717 F.2d 1277, 1279-80 (9th Cir. 1983).

Also, agents frequently violate Miranda in the course of conducting the "jail sweeps" pursuant to C.A.R.P. (Criminal Alien Return Program). The standard procedure in these jail sweep interviews is to ask the “suspect” her or his place of birth, whether s/he has ever been arrested and deported before, and when and where s/he last entered. After receiving all this obviously incriminating information, the agent will warn the suspect under Miranda and ask the same questions again. Although the procedure differs slightly from case to case, the preliminary questions concerning citizenship are almost always asked prior to Miranda warnings. Such questions, when asked of a suspected illegal alien, are asked in violation of Miranda even if they are characterized as standard booking questions. Mata-Abundiz, 717 F.2d at 1279-80.

12.10.03.03 Cumulative Punishment for a Single Act

An accused charged with illegal entry may also be charged with reentry or presence in the United States after deportation as well. An accused may not receive consecutive sentences for simultaneous violations of §§1325 and 1326. U.S. v. Ortiz-Martinez, 557 F.2d 214, 216-17 (9th Cir. 1977).

12.11  8 U.S.C. §§1324 AND 1327: BRINGING IN AND HARBORING CERTAIN ALIENS
Title 8 U.S.C. §1324 “contains two different provisions making it illegal to ‘bring in’ aliens to the United States.” *U.S. v. Barajas-Montiel*, 185 F.3d 947, 951 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 123 (2000). The first, §1324(a)(1)(A), criminalizes bringing in, or attempting to bring in, an alien at a place other than a designated port of entry. *Id.* The second, §1324(a)(2), makes it a crime to bring in, or attempt to bring in, an alien knowing or in reckless disregard of the fact the alien has no official permission to enter. *Id.* Thus, the former provision focuses on the place of entry, while the latter on the alien’s lack of permission to enter. *Id.*

Section 1324(a)(1)(A) requires that the accused know that the person the accused brings in is an alien, and §1324(a)(2) requires the accused to know or recklessly disregard the fact that the person the accused brings in has not received official permission to enter. *Barajas-Montiel*, 185 F.3d at 951; see also *U.S. v. Barajas-Chavez*, 162 F.3d 1285, 1287 (10th Cir.) (en banc), *cert. denied*, 120 S. Ct. 76 (1999). In addition, the government must prove specific intent to obtain a conviction under both statutes: *i.e.*, “the intent to violate United States immigration laws.” *Barajas-Montiel*, 185 F.3d at 951; see also *U.S. v. Nguyen*, 73 F.3d 887, 893 (9th Cir. 1995). Moreover, since “criminal intent is required for a conviction of the felony offenses of [§1324(a)(2)(B)],” defense counsel should request a special verdict by the jury as to whether the accused committed one of the aggravating factors in §1324(a)(2)(B) which enhances the punishment of §1324(a)(2) from a misdemeanor to a felony. *Barajas-Montiel*, 185 F.3d at 952-53.

An individual faces criminal sanctions for aiding or assisting an alien who has suffered a conviction for an aggravated felony to enter the United States. 8 U.S.C. §1327. The government need not prove that the accused know that the alien has a conviction for an aggravated felony. *U.S. v. Flores-Garcia*, 198 F.3d 1119, 1122-23 (9th Cir. 2000); *U.S. v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998). Since §1327 “complements” §1324 by providing for enhanced penalties for those who aid or assist a particular class of aliens, however, the government must prove that the accused knew the person was an alien, and that the accused specifically intended to violate the immigration law. *See Flores-Garcia*, 198 F.3d at 1122.

In order to be convicted for bringing an alien to the United States, the accused need not have direct control over a vehicle, nor have personally operated it. *U.S. v. Washington*, 471 F.2d 402, 404-05 (5th Cir. 1973). One who uses a public conveyance to bring an alien into the United States may be convicted. *Id.*

The government must also prove that the individual being brought into the United States has “entered.” *U.S. v. Aguilar*, 883 F.2d 662, 680-81 (9th Cir. 1989). In *Aguilar*, the Ninth Circuit held that the definition of “enter” in *U.S. v. Oscar*, 496 F.2d 492 (9th Cir. 1974), *i.e.*, free from restraint, applies to prosecutions for violations of §1324. *Aguilar*, 883 F.2d at 681-82. For further discussion of the definition of “entry,” *see supra* section 12.10.02.03 Entry.

It is a violation of §1324 to transport aliens already illegally in the United States to an area where there are employment opportunities. *U.S. v. Kim*, 193 F.3d 567, 572-73 (2d Cir. 1999) (finding the accused guilty of “harboring” aliens, under §1324, by employing them despite the specific provision against employing aliens under §1324a); *Barajas-Chavez*, 162 F.3d at 1289-90; *U.S. v. Gonzalez-Hernandez*,
534 F.2d 1353, 1354 (9th Cir. 1976). However, the Ninth Circuit has also held that the mere transportation of a person known to be an undocumented alien is not sufficient to constitute a violation of §1324. The transportation must be “in furtherance of such violation of law.” See U.S. v. Moreno, 561 F.2d 1321, 1322-23 (9th Cir. 1977) (“where the transportation of . . . an alien occurs, there must be a direct or substantial relationship between that transportation and its furtherance of the alien’s presence in the United States.”).

In Moreno, the accused, a foreman on a ranch, was arrested for transporting undocumented aliens as part of the “ordinary and required course of his employment as a foreman.” Id. at 1322. The Moreno court noted that the accused’s transportation of the aliens was only incidentally connected to the furtherance of their violation of law, if at all, and that this connection was too attenuated to come within the boundaries of §1324. Id. The court concluded that “where the transportation of such an alien occurs, there must be a direct or substantial relationship between that transportation and its furtherance of the alien’s presence in the United States.” Id. at 1323.

A conviction for encouraging or inducing an alien to come into the United States may be sustained when the accused’s acts of inducement or encouragement took place outside of the United States. U.S. v. Beliard, 618 F.2d 886, 887 (1st Cir. 1980). Whether the accused actually took part in the illegal entry is irrelevant under this section. The offense is committed when the encouragement or inducement to enter is given, even if no entry is ultimately made. U.S. v. Kavazanjian, 623 F.2d 730, 736 n.12 (1st Cir. 1980).

Aiding and abetting illegal entry under 8 U.S.C. §1325 and 18 U.S.C. §2 is not a lesser included offense of transporting aliens. U.S. v. Mussaleen, 35 F.3d 692, 697 (2d Cir. 1994); U.S. v. Pruitt, 719 F.2d 975, 978-79 (9th Cir. 1983). The Pruitt court stated that a violation of §1325 occurs only at the time of entry and does not continue thereafter. Id. at 978. Thus, the elements of illegal entry are not contained within the elements transporting aliens. Id. Counsel may distinguish Pruitt when the lesser offense argued for is aiding and abetting the alien to elude examination and inspection, as opposed to one of the other illegal entry offenses. Compare 8 U.S.C. §1325(a)(2) with §§1325(a)(1) and (a)(3).

12.11.01  Pretrial Motions for Prosecutions under 8 U.S.C. §§1324 and 1327

12.11.01.01  Motion to Depose Material Witness Prior to Trial

To prevent the government from putting favorable testimony by material witnesses beyond the jurisdiction of the district court by deporting them, the accused may move to depose the material witnesses. Fed. R. Crim. P. 15(a). Although the district court retains broad discretion in granting such a motion, it must consider each case on an individual basis and grant the motion where exceptional circumstances show that it is in the interest of justice to preserve the testimony of material witnesses for possible use at trial. U.S. v. Olafson, 213 F.3d 435, 442 (9th Cir. 2000), cert. denied, 121 S. Ct. 269 (2000); U.S. v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998). Counsel must remind the district court that “it is unjust to deprive a defendant of what may be crucial exculpatory evidence.” U.S. v. Sanchez-Lima, 161 F.3d 545, 548 (9th Cir. 1998). The party moving for the deposition must show that exceptional circumstances exist, that the deponent will come to the deposition, and that the deponent will testify at it. Olafson, 213 F.3d
at 442; Omene, 143 F.3d at 1170. Counsel must make any objection to deposition testimony during the deposition. Fed. R. Crim. P. 15(f); U.S. v. Santos-Pinon, 146 F.3d 734, 736-737 (9th Cir. 1998).

A party may use videotaped depositions of deported or unavailable material witnesses as substantive evidence during trial if the witness was available for cross examination and the deposition complies with the Federal Rules of Evidence. 8 U.S.C. §1324(d). The proponent of the deposition testimony must show that the witness is unavailable to testify at trial. Santos-Pinon, 146 F.3d at 736. Admission of the videotaped deposition does not violate the Confrontation Clause where the opposing party attended the deposition, the opposing party cross-examined the declarant, and the proponent of the deposition demonstrates the unavailability of the declarant. U.S. v. Perez-Sosa, 164 F.3d 1082 1085 (8th Cir. 1998).

Defense counsel should depose favorable witnesses on videotape even in the face of an unjust denial of a motion to depose them. So long as counsel complies with Rule 15 and the Federal Rules of Evidence, the defense may admit the deposition testimony under the “catch-all” exception to the hearsay rule. Fed. R. Evid. 807; Sanchez-Lima, 161 F.3d 547-48. Failure to admit the testimony violates the accused’s Sixth Amendment right to present a defense. Id.

12.11.01.02 Motion to Dismiss Due to the Government's Release of Material Witnesses

In prosecutions under 8 U.S.C. §1324, the government will often detain the aliens involved as material witnesses necessary to provide a non-hearsay basis for establishing that the accused brought in, transported, harbored or concealed illegal aliens. In cases in which there are several illegal aliens involved, however, the government will often detain only one or two of the witnesses and deport the others. The government may even deport all of the alien witnesses. Whenever alien witnesses are deported, the defense attorney should bring a motion to dismiss the indictment on the grounds that the deportation of the alien witnesses violated the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.

In U.S. v. Valenzuela-Bernal, 458 U.S. 858 (1982), the Supreme Court held that the deportation or voluntary return of alien witnesses whose testimony would be both “material and favorable” to the defense constitutes a violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. The Court held that sanctions may be imposed on the government for deporting witnesses if the accused “makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.” Id. at 873.

The defense attorney should argue that the holding in Valenzuela-Bernal sets forth a two-step analysis: the government must establish that a good faith determination was made that the alien witnesses who were deported possessed no evidence material or favorable to the defense; it is only after such a good faith determination has been made that the burden shifts to the defense to show that the lost evidence is material and favorable to the defense. See Valenzuela-Bernal, 458 U.S. at 872-73. If there is no
indication in government discovery reports that a member of the Executive Branch made a determination as to whether deported alien witnesses possessed evidence material and favorable to the defense, the defense attorney should argue that the government cannot satisfy the first prong of the Valenzuela-Bernal test, and thus the indictment should be dismissed without the defense being required to make a showing that the lost evidence would be material or favorable to the defense.

Even if the facts indicate that the government has made a good faith determination that the deported witnesses possess no evidence material or favorable to the defense, sanctions may be imposed on the government if the defendant makes a "plausible showing" that the testimony of the deported witnesses would have been material and favorable to the defense in ways not merely cumulative to the testimony of available witnesses. Valenzuela-Bernal, 458 U.S. at 873.

Often, the Border Patrol Agents obtain the defendant’s signature on a waiver based on the Ninth Circuit case U.S. v. Lujan-Castro, 602 F.2d 877 (9th Cir. 1979), which Valenzuela-Bernal arguably overruled. This waiver essentially states that the accused waives her or his right to compel the material witnesses to testify at trial and does not object to their return to Mexico. Defense counsel should contest the validity of the waivers and any attempted reliance upon them to vitiating the Valenzuela-Bernal issue. Lujan-Castro approves the waiver of the right to retain any eyewitness, without regard to the nature or degree of exculpation the witnesses’ testimony might provide. Under Valenzuela-Bernal, that right no longer exists. With or without the waiver, the government may, under Valenzuela-Bernal, deport the material witnesses that it determines have no material or favorable testimony to give on behalf of the accused. Valenzuela-Bernal renders waivers as to these witnesses meaningless. If Lujan-Castro continues to bear any relevance, it is only as a waiver of the right to retain material and favorable witnesses, as defined in Valenzuela-Bernal.

In Lujan-Castro, the trial court held an evidentiary hearing to determine whether the waiver was knowingly and intelligently made, and the Ninth Circuit specifically placed upon the government the burden of proving a valid waiver. Lujan-Castro, 602 F.2d at 878-79. Counsel should, therefore, request an evidentiary hearing to determine whether the waiver, even if presumptively invalid under Valenzuela-Bernal, was knowingly and intelligently made. Id.

12.11.01.03 Motion In Limine to Exclude Hearsay Statement

Usually, the government attempts to introduce hearsay statements of material witnesses whom it has deported, or who have failed to appear to testify at trial, to prove that the material witness is an alien. As a threshold matter, the government must show that the material witness is "unavailable." Fed. R. Evid. 804(a)(5). Defense counsel should argue that the material witness is not "unavailable” if the absence “is due to the procurement or wrongdoing of the proponent of [the] statement.” Id. Thus, the government may not introduce the material witness’ hearsay statement in the event that the government deports the witness. Likewise, the government may not introduce the hearsay statement of a material witness who has posted bond and disappeared. At the very least, the government must undertake good faith efforts prior to trial to locate and present the witness. See Ohio v. Roberts, 448 U.S. 56, 74 (1980); see also Olafson, 213 F.3d at 441. However, “the extent of the effort the prosecutor must make is a question of reasonableness,” and typically the district court will not require the prosecutor to make much of an effort at all. Id.
(government’s efforts reasonable where government deported two material witnesses, Border Patrol agent contacted one by telephone, but could not induce witness to return despite repeated promises of witness’ safety); see also U.S. v. Winn, 767 F.2d 527, 530 (9th Cir. 1985) (reasonable for government to make no effort to locate alien witnesses it deported since government had no addresses or other information on which to act).

The government’s first theory of admissibility of hearsay statements of unavailable alien witnesses is that the statements are against the declarant’s interest. Fed. R. Evid. 804(b)(3). The government must show (1) unavailability, (2) a reasonable person would not have made the statement because it tended to incriminate her or him, and (3) corroborating circumstances that indicate trustworthiness of the statement. U.S. v. Paguio, 114 F.3d 928, 932 (9th Cir. 1997). Usually, if the material witness concealed herself somewhere in the vehicle, the district court will find that the circumstances support the trustworthiness of the hearsay statement. Olafson, 213 F.3d at 442; Winn, 767 F.2d at 530-31. In addition, hearsay statements made in such circumstances do not violate the Confrontation Clause. Winn, at 530-31. However, a statement by a material witness given in exchange for leniency would not be admissible under 804(b)(3). See, e.g., U.S. v. Beydler, 120 F.3d 985 (9th Cir. 1997). In the case of a self-incriminating statement coupled with a statement exonerating the accused, the district court should not parse out the exoneration. Paguio, 114 F.3d at 934-35 (discussing Williamson v. U.S., 512 U.S. 594 (1994)).

The government’s second theory of admissibility is that the material witness’ hearsay statement regarding his alienage concerns his personal or family history. Fed. R. Evid. 804(b)(4)(A); Olafson, 213 F.3d at 441. In the appropriate case, counsel should argue that the hearsay statements are unreliable and thus inadmissible because the circumstances suggest that the declarant lied about his role in the offense. Winn, 767 F.2d at 530 (agent testified that sometimes alien smugglers legally in the United States represent themselves as illegal aliens to avoid prosecution for smuggling).

Admission of a material witness’ hearsay statements may not only violate Rules 804(b)(3) and 804(b)(4), but it may also violate the Confrontation Clause. Winn, 767 F.2d at 530. See also Lilly v. Virginia, 527 U.S. 116 (1999) (admission of non-testifying accomplice’s hearsay statements violated Confrontation Clause because statements inherently unreliable). The Lilly rule applies to statements by the persons the accused allegedly smuggled because those persons are accomplices under an aiding and abetting, attempt, or conspiracy theory. Thus, a hearsay statement to the effect of “I am illegally here, but s/he smuggled me,” violates the Confrontation Clause under Lilly as an inherently unreliable statement that shifts the blame from one alleged participant in the offense to another.

Defense counsel should argue that any statements of an alien witness regarding the nationality of his parents are even further removed from directly incriminating the alien witness. Such statements are double hearsay because the information presumably would have been provided to the witness by the hearsay statements of his parents. While Fed. R. Evid. 804(b)(4)(A) provides that a statement regarding the "declarant's own birth . . . or . . . ancestry" is not excluded by the hearsay rule, counsel should argue that reliability requires statements of ancestry to include identification of relatives by name, and to include statements regarding the place of birth of those relatives.
CHAPTER 13

FEDERAL FIREARMS OFFENSES

by

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13.01 INTRODUCTION

This chapter describes the basic federal firearms offenses, their elements, and the common issues arising in the defense of these charges. It includes a discussion of the crimes of unlawful possession of a firearm, the statutory sentencing enhancement provided in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), as well as Title 18 U.S.C. §924(c), which provides severe penalties for using guns during and in relation to drug trafficking and crimes of violence. Other weapons related offenses are referenced as well.

13.02 DEFINITION OF A FIREARM

"Firearms" are defined in 18 U.S.C. §921(a)(3) as:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
(B) the frame or receiver of any such weapon;
(C) any firearm muffler or firearm silencer; or
(D) any destructive device. Firearms do not include an antique firearm. Firearms made in or before 1898 are excluded from the Act's coverage. 18 U.S.C. §921(a)(16)(A).

The above definition applies to all federal firearms offenses.

The firearm need not be operational or loaded in order to satisfy the definition of a firearm. See U.S. v. Hunter, 101 F.3d 82, 83-86 (9th Cir. 1996) (§921(a)(3) covers unloaded semiautomatic pistol with bent firing pin); U.S. v. Brown, 117 F.3d 353, 355 (7th Cir. 1997) (statute covers unloaded gun with firing pin removed). In fact, receipt, possession or transportation of firearms is unlawful whether or not the firearm is operable, or indeed whether or not the item is complete. See U.S. v. Gometz, 879 F.2d 256,
259 (7th Cir. 1989) (functionality of a weapon is not prerequisite as long as there is intention that item be used as weapon). However, if the defendant is charged with possession of a destructive device such as a hand grenade or a bomb, authorities support the argument that the defendant must possess all the parts necessary to make such a device operable before he is subject to prosecution under §922(g). See U.S. v. Fredman, 833 F.2d 837 (9th Cir. 1987) (possession of mere components of commercial explosives, absent proof of intent to use as a weapon, is not "destructive device" under §5845); U.S. v. Blackburn, 940 F.2d 107 (4th Cir. 1991) (interpreting 26 U.S.C. §5845(f) which contains almost identical definition of destructive device as contained in 18 U.S.C. §921(a)(3)); U.S. v. Malone, 546 F.2d 1182 (5th Cir. 1977) (same).

The definition of "ammunition" includes "ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm." U.S.C. §921(a)(17)(A).

13.03 UNLAWFUL POSSESSION OF FIREARMS

13.03.01 Introduction

Congress has deemed the possession of certain firearms and the possession of any firearms by certain individuals to be so “dangerous” as to warrant criminal charges. The most commonly encountered categories of prohibited weapons are: machine guns, short-barreled shotguns and rifles, hideable guns, destructive devices and prohibited ammunition. Congress originally “regulated” possession of these types of firearms by use of the tax-based approach adopted in the 1934 National Firearms Act based upon the Commerce Clause. In 1986, however, Congress abandoned this “regulatory” approach in favor of prohibiting possession of certain types of firearms. Title 26, the Internal Revenue Code, sets forth the tax-based firearm regulations, while more recent gun provisions are found at Title 18 U.S.C. §921, et. seq.

13.03.02 Prohibited Weapons

The weapons provisions of Title 18 ban outright the possession, manufacture and sale of various classes of firearms and munitions. The provisions and descriptions of the various proscribed articles are hyper-technical, and it is essential to carefully compare the article charged with the definitions in Title 18.

13.03.02.01 Machine Guns

Title 18 U.S.C. §922(o) outlaws the private transfer or possession of a machine gun. Title 26 U.S.C. §5845(b) sets out the statutory definition of a machine gun. Essentially, a machine gun is a gun which shoots, is designed to shoot, or can be readily restored to shoot more than one shot, without manual reloading, with a single pull of the trigger. The §5845(b) definition goes on to include parts of a machine gun and disassembled machine guns. It should be noted, however, that in 1994, the Supreme Court issued a watershed decision in Staples v. U.S., 511 U.S. 600 (1994), which required that the government prove beyond a reasonable doubt that the accused knew that the firearm was capable of automatic fire. The Staples decision significantly impacts machine gun prosecutions.
13.03.02.02 Hideable Guns

Title 18 U.S.C. §922(p) proscribes guns which are non-detectable by metal detectors and x-rays and sets a minimum standard of detectability.

13.03.02.03 Prohibited Ammunition

Title 18 U.S.C. §922(a)(7) and (8) prohibit the manufacture, importation, sale or delivery of armor-piercing ammunition, defined in §921(a)(17)(B).

It would seem under Staples that the mens rea element, requiring “knowing” possession, should apply to the possession of these other prohibited weapons as well. However, the Court emphasized that its holding in Staples was limited. See Staples, 511 U.S. at 619 (“We emphasize that our holding is a narrow one . . . our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.”). Thus, it remains to be seen whether its reasoning will be extended to other prohibited weapons, such as short-barrel shotguns, hideable guns and/or prohibited ammunition.

13.03.03 Failure to Register Offenses

The National Firearms Act of 1934 ("The Firearms Act"), restricts the use of certain firearms and paraphernalia, such as machine guns, shotguns, rifles, and silencers. It requires that firearms be registered and provides for taxation of the weapons as well. 26 U.S.C. §§5821; 5841. This Act's provisions originated from Congress’ taxation powers under the Constitution, art. I, §8, cl. 1. Prohibited acts are described in §5861. Section 5871 provides for a statutory maximum term of 10 years imprisonment and/or a maximum $10,000 fine.

In 1986, Title 18's provisions were passed, banning outright most of the firearm categories previously subject only to taxation and registration requirements. When that occurred, these tax code regulations were subject to constitutional challenges on the grounds that the outright ban made the registration and taxation of the now-banned weapons an impossibility. Compare 18 U.S.C. §922(o) (illegal to possess machine gun not lawfully possessed before May 19, 1986) with 26 U.S.C. §5812 (registration application denied where possession of firearm illegal). These challenges have had limited success. In U.S. v. Dalton, 960 F.2d 121 (10th Cir. 1992), the Tenth Circuit held that due process bars the conviction of a defendant under 26 U.S.C. §5861(d) for possessing and transferring an unregistered machine gun, since such registration is now impossible in light of the outright prohibition on machine guns found in 18 U.S.C. §922(o). See also U.S. v. Gambill, 912 F. Supp. 287, 288 (S.D. Ohio 1996) (due process prohibits conviction under statute that punishes failure to register weapon when law precludes such registration). However, the Tenth and Second Circuit have refused to extend this reasoning to convictions for unregistered sawed-off shotguns because no law bans the possession of sawed-off shotguns. See U.S. v. McCollom, 12 F.3d 968, 968-71 (10th Cir. 1993) (although shotgun would most likely be rejected for
registration, such registration not legally impossible, therefore conviction valid); *U.S. v. Shepardson*, 167 F. 3d 120, 123-24 (2d Cir. 1999) (same).

Other circuits have not been as receptive to the argument of "implied repeal." See, e.g., *Hunter v. U.S.*, 73 F.3d 260, 261 (9th Cir. 1996) (conviction for possessing “unregistered” machine gun under 26 U.S.C. §5861(d) constitutional even though ban on machine gun possession renders registration impossible); *U.S. v. Ardoin*, 19 F.3d 177, 179-80 (5th Cir. 1994) (adopting Fourth Circuit analysis that convictions for possessing unregistered machine guns constitutional because Congress possesses power to tax illegal activity); *U.S. v. Jones*, 976 F.2d 176, 183 (4th Cir. 1992) (absent an affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable) (citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); see also *U.S. v. Gresham*, 118 F.3d 258, 260-64 & n.8 (5th Cir. 1997) (conviction for possessing unregistered pipe bomb constitutional when registration impossible as practical matter although not legally impossible), *cert. denied*, 522 U.S. 1052 (1998); *U.S. v. Aiken*, 974 F.2d 446, 448-50 (4th Cir. 1992) (same with regards to short-barreled shotgun). Since the *Dalton* decision, the Tenth Circuit has limited its own rule to hold that a defendant may escape §5861 liability only upon a showing that the machine gun was acquired after enactment of §922(o) on May 19, 1986. *U.S. v. Staples*, 971 F.2d 608 (10th Cir. 1992), *rev’d on other grounds*, 511 U.S. 600 (1994); see also *U.S. v. Kurt*, 988 F.2d 73, 76 (9th Cir. 1993) (requiring showing that defendant specifically unconstitutionally affected by §922(o)).

### 13.04 PERSON PROHIBITED FROM POSSESSING FIREARMS

#### 13.04.01 Introduction

Title 18 U.S.C. §922(g) prohibits any person listed in §§922(g)(1) - (9), convicted felons, drug addicts, illegal aliens, etc.\(^1\) from shipping or transporting in interstate or foreign commerce or from receiving

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\(^1\) Section 922(g) makes it unlawful for any person-

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to any controlled substance (as defined in §102 of the Controlled Substances Act (21 U.S.C. §802));
(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
(5) who, being an alien,
   (A) is illegally or unlawfully in the United States; or
   (B) except as provided in subsection (y)(2), has been admitted to the United States under a non-immigrant visa (as that term is defined in §101(a)(26) of the Immigration and Nationality Act (8 U.S.C. §1101(a)(26)));
(6) who has been discharged from the Armed Forces under dishonorable conditions;
(7) who, having been a citizen of the United States, has renounced his citizenship;
(8) who is subject to a court order that--
   (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
   (B) restrains such person from harassing, stalking, or threatening an intimate
any firearm or ammunition which has been shipped or transported in interstate or foreign commerce or from possessing, in or affecting commerce, any firearm or ammunition. This latter prohibition is widely known as the “felon in possession of a firearm” statute. There are three elements which must be proven in order to obtain a conviction under §922(g): a prior felony conviction, “knowing” possession of a “firearm” as defined at section 13.02, supra,2 which has “affected” interstate commerce.

13.04.01.01 Felons

Those individuals previously convicted of felony offenses are those most often prosecuted for weapons offenses. A “convicted felon” is defined as any person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year[,]” 18 U.S.C. §922(g)(1). The sentencing court must look to state law to determine whether defendant could previously have been convicted of a crime punishable by imprisonment in excess of one year. U.S. v. Frushon, 10 F.3d 663 (9th Cir. 1993).

13.04.02 Knowledge

The government must prove “knowing possession” if the charge is possession of a firearm by a prohibited person. This has been interpreted to mean that the defendant must “know” that he possesses a gun, not that he must know either that he is a convicted felon or otherwise a prohibited person, U.S. v. Langley, 62 F.3d 602, 604 (4th Cir. 1995) (proof that defendant knew he was a felon not required), or that his status precludes his possession of a firearm. U.S. v. Kafka, 222 F.3d 1129 (9th Cir. 2000) (government not required to prove knowledge that possession of firearm violates domestic violence restraining order); U.S. v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988) (government not required to prove knowledge of illegality of possession). “Knowing possession,” as expected, can be proven by both direct and circumstantial evidence. See U.S. v. Hernandez, 972 F.2d 885 (8th Cir. 1992) (finding that defendant knowingly possessed gun was supported by evidence that pawn ticket found in apartment in which defendant was staying was receipt for pawn of gun); U.S. v. Winchester, 916 F.2d 601 (11th Cir.

partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) if includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, 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.

2 As an aside, a separate provision, §922(h), makes it unlawful for any agent of a prohibited person, i.e., any person who is employed by a person listed in the categories above, to possess a firearm in the course of that employment provided that the employee knows of his or her employer’s prohibited status.
(1990) (evidence of travel bag which contained firearm and papers and photographs identifying it as belonging to defendant was sufficient to show knowledge). Where the government has charged shipping and transporting firearms in violation of §922(g) the "transportation," within the meaning of §922(g), involves elements of both possession and movement. If the government's theory for criminal liability under §922(g)(1) is aiding and abetting possession of a firearm by a felon, the government must prove that the defendant knew or had cause to believe that he was aiding and abetting possession by a convicted felon. U.S. v. Xavier, 2 F.3d 1281 (3d Cir. 1993); U.S. v. Murray, 988 F.2d 518, 521 (5th Cir. 1993). But see U.S. v. Canon, 993 F.2d 1439 (9th Cir. 1993) (government not required to prove that aider and abettor knew of possessor’s felon status).
13.04.02.01 Possession

The defendant can have either actual, constructive, joint or sole possession. See, e.g., U.S. v. Staula, 80 F.3d 596, 605 (1st Cir. 1996); U.S. v. Wight, 968 F.2d 1393 (1st Cir. 1992); U.S. v. Richards, 967 F.2d 1189 (8th Cir. 1992). A person has possession of something "if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it." U.S. v. Perez, 67 F.3d 1371, 1380 n. 8 (9th Cir. 1995), withdrawn in part on reh’g by 116 F.3d 840 (9th Cir. 1997); Ninth Circuit Model Criminal Jury Instructions, §3.18 (2000 ed). A person “in constructive possession of an item knowingly holds the power and ability to exercise dominion and control over it.” U.S. v. Massey, 687 F.2d 1348, 1354 (10th Cir. 1982). However, "mere presence on the scene plus association with illegal possessors is not enough" to establish constructive possession. U.S. v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976). Convictions have been reversed based on the government's failure to sufficiently connect the defendant to the weapon allegedly possessed. See, e.g., U.S. v. Casterline, 103 F.3d 76, 78-79 (9th Cir. 1996) (while ownership may be circumstantial evidence, it cannot substitute for actual or constructive possession requirement); U.S. v. Blue, 957 F.2d 106 (4th Cir. 1992) (conviction reversed where evidence showed only that gun found in car under defendant's seat and no other evidence linked gun to defendant other than police officer's testimony that he saw defendant's shoulder dip down after stopping car); U.S. v. Evans, 950 F.2d 187, 192 (5th Cir. 1991) (evidence of knowledge insufficient where defendant drove car that had been driven immediately before by other drug dealers, gun found on rear floorboard and officer observed him lean onto the floorboard); U.S. v. Beverly, 750 F.2d 34 (6th Cir. 1984) (conviction reversed due to insufficient evidence of possession despite fact gun with defendant's fingerprint found in wastebasket located near defendant); U.S. v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983) (mere presence as passenger does not establish possession, but testimony that defendant placed something in spot where weapon was later found can support such a finding).

13.04.03 Interstate Commerce: Quantum of Proof

In a prosecution under 18 U.S.C. §922 the government must prove an interstate commerce nexus for the weapon in question. See U.S. v. Shelton, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam) (concluding that §922(g) contains interstate-commerce requirement to ensure that firearm in question affects interstate commerce). A firearm or ammunition is in or affecting commerce within the meaning of the statute if at some time after it was manufactured and before the offense was committed, that firearm or ammunition was transported between states or between a state and a foreign country or a foreign country and state. U.S. v. Joost, 133 F.3d 125, 131 (1st Cir. 1998). The Government does not have to prove that the firearm was in the Defendant's possession at the time it traveled in interstate or international commerce, or at the time it crossed the state line. The interstate commerce requirement has been rendered ineffectual because courts have allowed virtually any nexus to meet the requisite quantum of proof. But in U.S. v. Lopez, 514 U.S. 549 (1995), the Supreme Court held that §922(a) was beyond the legitimate scope of Congress’ Commerce Clause power because the Gun-Free School Zones Act made no findings that established a nexus between interstate commerce and the possession of guns in school. Lopez suggested that the interstate commerce movement should be “recent” and that some past interstate movement does not give Congress regulatory power over the firearm for an eternity. Id. However, post-Lopez decisions generally hold “that 18 U.S.C. §922(g) requires only that the firearm was at some time in interstate commerce.”
commerce.” *U.S. v. Casterline*, 103 F.3d 76, 77 (9th Cir. 1996); see also *Scarborough v. U.S.*, 431 U.S. 563, 575 (1977) (firearms possessed in state other than state of manufacture meet minimal nexus of interstate commerce); *U.S. v. Bonat*, 106 F.3d 1472, 1478 (9th Cir. 1997) (§922 does not violate the Commerce Clause in light of *Lopez*); *U.S. v. Michael R.*, 90 F.3d 340 (9th Cir. 1996) (upholding §922(x)(2), which prohibits juvenile possession of a handgun); *U.S. v. Fish*, 928 F.2d 185, 186 (6th Cir. 1991) (evidence that a firearm was manufactured outside state was sufficient to prove interstate commerce nexus); *U.S. v. Wolak*, 923 F.2d 1193, 1197-98 (6th Cir. 1991) (sufficient nexus even though military serviceman supplied initial interstate transport; interpreting §925(a)(1)); *U.S. v. Singleton*, 902 F.2d 471, 473 (6th Cir. 1990); *U.S. v. Clawson*, 831 F.2d 909 (9th Cir. 1987); *U.S. v. Lowe*, 860 F.2d 1370, 1374 (7th Cir. 1988); *U.S. v. Harper*, 802 F.2d 115 (5th Cir. 1986).

13.04.03.01 Opinion Testimony

The prosecution will generally seek to meet its burden of proof as to the interstate commerce element through the testimony of a Bureau of Alcohol, Tobacco and Firearms (ATF) agent. The agent will attempt to testify, as an expert, that after examining the firearm and noting its manufacturer, that the weapon was manufactured in a state other than the state where prosecution is brought. Thus, the agent will opine that the weapon alleged in the indictment traveled in interstate commerce based on a review of plant sites of the gun's manufacturer and the agent's knowledge of geography. This type of evidentiary presentation has been accepted by the courts. *U.S. v. Gann*, 732 F.2d 714 (9th Cir. 1984); *U.S. v. Harper*, 802 F.2d 115 (5th Cir. 1986). Accordingly, the prosecution generally need not show that the defendant actually moved the firearm in interstate commerce. *Scarborough*, 431 U.S. at 576; *U.S. v. Wallace*, 889 F.2d 580, 584 (5th Cir. 1989) (testimony by agent that markings of gun established that it was made by company which did not manufacture or assemble guns within the state was admissible expert testimony); *U.S. v. Pedigo*, 879 F.2d 1315, 1319 (6th Cir. 1989) (government not required to prove defendant transported weapon across state lines because firearm not manufactured in state); cf. *U.S. v. Langley*, 62 F.3d 602, 609 (4th Cir. 1995) (no mens rea requirement that firearm traveled in interstate commerce).

However, the expertise of the witness called by the government and the basis of his opinion may be subject to challenge. In *Wallace*, such a challenge was raised but was unsuccessful because the court ruled that the ATF agent was qualified as an expert under Fed. R. Evid. 702. See also *U.S. v. Ware*, 914 F.2d 997, 1001-03 (7th Cir. 1990) (expert testimony allowed). Using the recently articulated standard for the admissibility of all expert testimony in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), however, defense counsel always should challenge the government's attempt to qualify ATF agents as expert witnesses to testify as to the interstate passage of a particular weapon.

13.04.03.02 ATF Reports and Trace Forms

ATF requires manufacturers to keep records of their activities and regularly forward them to the Bureau. Use of such ATF reports in the federal courts has met with a mixed reception from the circuits. In *U.S. v. Johnson*, 722 F.2d 407 (8th Cir. 1983), the defendant challenged, under Fed. R. Evid. 803(8), the use of ATF reports to prove the interstate commerce element. The court accepted part of defendant's claim and rejected part. That portion of the ATF reports which contained the serial number of the weapon
was held admissible because it was not made for purposes of litigation. The certification portion of the report was, however, held to have been made for litigation and included matters beyond the scope of Fed. R. Evid. 902(4) and was therefore inadmissible.

In *U.S. v. Houser*, 746 F.2d 55 (D.C. Cir. 1984) and *U.S. v. Davis*, 571 F.2d 1354 (5th Cir. 1978), the government offered particular ATF forms which are prepared by ATF employees to trace the history of a weapon from manufacture through all sales based on information submitted by manufacturers, wholesalers and retailers. In both cases, the forms were held to be inadmissible under Fed. R. Evid. 803(8) (the public records exception to the hearsay rule) and Fed. R. Evid. 803(6) (the business records exception to the hearsay rule) because they were not made at or about the time of the event, were not made by a person with direct knowledge, and were not made in the regular course of business. However, in *U.S. v. Simmons*, 773 F.2d 1455 (4th Cir. 1985), that court distinguished *Davis* and admitted the forms under Fed. R. Evid. 803(24), the residual exception to the hearsay rule.

13.04.03.03 Inscriptions on Firearms

Courts have held that the prosecution may rely upon an inscription on the firearm indicating its point of origin and that this out-of-court written statement is not hearsay. In *U.S. v. Alvarez*, 972 F.2d 1000, 1004 (9th Cir. 1992), the government admitted a firearm into evidence and argued that its inscription, "Garnika, Spain," was evidence of manufacture in Spain in order to satisfy the element of transportation in foreign commerce. The court of appeals affirmed the district court's ruling that the inscription was merely a mechanical trace and not a statement for purposes of Fed. R. Evid. 801(c).

13.04.04 Special Defenses

Certain specialized defenses have arisen in §922(g) prosecutions. The most prevalent are discussed below.

13.04.04.01 Legal Justification for Possession

Defenses to unlawful possession of a firearm include establishing that the defendant was “legally justified” in possessing this weapon by virtue of duress, necessity or self defense. Various courts have upheld one or all of the following defenses in felon-in-possession prosecutions. See, e.g., *U.S. v. Paul*, 110 F.3d 869, 871-72 (2d Cir. 1997) (recognizing both duress and necessity defenses in §922(g) prosecutions). The elements of a duress defense to firearms charges were set forth in *Paul*. That court found duress was a legal excuse for possessing the firearm where the defendant was, at the time of the conduct, subject to actual or threatened force of such a nature as to induce a well-founded fear of impending death or serious bodily harm from which there was no reasonable opportunity to escape other than by engaging in the illegal activity. See id.; *U.S. v. Harris*, 104 F.3d 1465, 1473 (5th Cir. 1997) (in general, duress requires that defendant show that he was “[1] under an unlawful, present, imminent and impending threat of . . . death, or serious bodily injury; [2] he had not recklessly or negligently placed himself in such a situation; [3] he had no reasonable legal alternative to violating the law; and [4] there is a direct causal relationship between the criminal action taken and the avoidance of the threatened harm”); *U.S. v. Perrin*, 45 F.3d 869, 873 (4th Cir. 1995) (same); *U.S. v. Paolello*, 951 F.2d 537, 540-41 (3d
Cir. 1991) (same); U.S. v. Lemon, 824 F.2d 763, 765 (9th Cir. 1987) (same); U.S. v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982) (same). But see U.S. v. Wofford, 113 F.3d 977, 981 (9th Cir. 1997) (felon in possession of firearm can establish a justification defense only if defendant first sought aid from law enforcement); U.S. v. Etheridge, 932 F.2d 318 (4th Cir. 1991) (court rejected defense that defendant was told by state court judge that it was permissible to possess firearm); U.S. v. Paolello, 951 F.2d 537 (3d Cir. 1991); U.S. v. Singleton, 902 F.2d 471 (6th Cir. 1990) (justification defense in rare circumstances; instruction unwarranted because defendant failed to show that he did not maintain the weapon longer than absolutely necessary); U.S. v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989) (need more than generalized threat).

Some courts will recognize a “fleeting or momentary possession” defense in these type of cases. See U.S. v. Panter, 688 F.2d 268, 271 (5th Cir. 1982) (interpreting a statute virtually identical to §922(g), Fifth Circuit recognized fleeting possession defense where possession was both temporary and justified for self-defense purposes).

Some prosecutors attempt to anticipate the defense and move for a pretrial hearing requesting that the court determine whether the defendant’s proposed evidence “is sufficient as a matter of law to establish the defense.” See Paul, 110 F.3d at 871 (“we have recognized that it is appropriate for a court to hold a pretrial evidentiary hearing to determine whether a defense fails as a matter of law.”). However, counsel should argue against this practice since prosecutors do not have to pre-try their evidence in court and it is for the jury to decide if the elements of the offense are satisfied. If required to make such a presentation in order to present one of these defenses, counsel should request to do so by way of proffer, ex parte and in camera.

13.04.04.02 Entrapment by Estoppel

In some prosecutions under 18 U.S.C. §922(g), the doctrine of “entrapment by estoppel” may provide a defense. U.S. v. Abcasis, 45 F.3d 39, 44 (2d Cir. 1995). Entrapment by estoppel focuses on the conduct of the government agents, leading one to reasonably believe that the illegal act, i.e., possession of a weapon, was authorized. U.S. v. Tallmadge, 829 F.2d 767 (9th Cir. 1987) (reversing conviction of firearms possession by a convicted felon where defendant reasonably relied on assurances by federally licensed firearms dealer that purchase was lawful because conviction had been subsequently reduced to misdemeanor, on theory that licensed firearms dealer became agent of government by reason of duties imposed on him by law); U.S. v. Nichols, 21 F.3d 1016, 1018 (10th Cir. 1994) (although defense is warranted where the defendant’s reliance is reasonable "in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation," defense was rejected because the government agent spoke ambiguously rather than inaccurately); U.S. v. Bazargan, 992 F.2d 844 (8th Cir. 1993); U.S. v. Timmins, 464 F.2d 385, 387 (9th Cir. 1972) (evidence must show that government official provided false and misleading information on which defendant reasonably relied).

However, counsel should be aware that reliance may only provide a defense to prosecution if it is based on the conduct of a federal government agent. In U.S. v. Funches, 135 F.3d 1405, 1407-08 (11th Cir. 1998), the defendant attempted to invoke an entrapment by estoppel defense to a §922(g) charge.
based upon information given to him by a member of the Florida Department of Corrections. In rejecting the defense, the Eleventh Circuit held that to provide a defense to a federal §922(g) charge, the reliance must be based on a misstatement by a federal official or agent. *Id.*; *see also U.S. v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996) (same).
13.04.04.03 Counterfeit Weapons

Many counterfeit weapons are manufactured in the United States. If the government has not done a thorough search of the history of a particular weapon, it may be possible to raise a defense that the weapon is a counterfeit and that, even though legitimate manufacturing of weapons does not exist within the state in which the prosecution is taking place, counterfeit manufacturing does. This defense thus could defeat the interstate nexus required for conviction.

13.04.05 Pretrial and Trial Issues

13.04.05.01 Discovery/Sentencing Discovery

Section §922(g) prosecutions are difficult cases due to potential juror bias against “gun-toting felons,” thus defense counsel must recognize and capitalize upon technical failures of proof by the government. For this reason, defense counsel may want to avoid asking for certain discovery items lest the motion remind the prosecutor of all the elements it needs to prove for trial.

In contrast to the suggestion above regarding pretrial discovery, aggressive discovery and investigation regarding sentencing issues is critical. Efforts to obtain court records, transcripts and attorney files of the prior convictions are often time-consuming and difficult. The use of discovery may enable counsel to shift some of the burden to the prosecution. Counsel should also try to obtain those records independently.

In most situations, the prosecution will obtain only certified copies of court records for its own use. In some cases, however, the prosecution also may have obtained trial transcripts and court pleading files. As these are essential to a collateral attack, the defense should move for their production.

Discovery motions should include a Sentencing Guidelines section. The prosecution should be asked to state whether they have information revealing that the prior convictions alleged do not constitute crimes of violence or controlled substance offenses within the meaning of §§4B1.1, 4B1.2 of the Sentencing Guidelines. Such exculpatory information is discoverable under Brady v. Maryland, 373 U.S. 83 (1963).

In addition, counsel should move for a pre-plea or pretrial determination by the court as to whether particular prior convictions qualify the defendant for treatment as a career offender, see U.S.S.G. §4B1.2, or as an Armed Career Criminal under 18 U.S.C. §924(e)(1). This information is critical if one is to effectively advise a client about a trial/plea decision. Support for such a determination can be found in Weaver v. Graham, 450 U.S. 24, 32 (1981); Carter v. McCarthy, 806 F.2d 1373, 1376 (9th Cir. 1986) (defendant must be advised of a mandatory parole term before pleading guilty).

13.04.05.02 Nature of Proof of the Prior

The prosecution will ordinarily meet its burden of proving the prior felony element of §922(g) by introducing certified copies of court records. This may include a certified copy of a judgment of conviction,
and perhaps court records of a plea proceeding. See U.S. v. Torres, 663 F.2d 1019 (10th Cir. 1981); see also U.S. v. Garrett, 712 F. Supp. 1327 (N.D. Ill. 1989) (certified copies of conviction orders, fingerprint records, and defendant's prior use of names were sufficient although the defendant testified that plea of guilty was entered in his absence by attorney), aff'd on other grounds, 903 F.2d 1105 (7th Cir. 1990). The government may also establish the prior conviction element through a defendant's parole officer, U.S. v. Hines, 943 F.2d 348, 353-54 (4th Cir. 1991), through an uncertified copy of a jury verdict, U.S. v. Dougherty, 895 F.2d 399, 403-04 (7th Cir. 1990), or through the testimony of the defendant's former attorney that the defendant had pled guilty to the prior charge. U.S. v. Cochran, 546 F.2d 27, 29 (5th Cir. 1977).

The prosecution also must establish that the individual named in the prior conviction is the individual on trial. This ordinarily will be done through fingerprint records and testimony from a fingerprint expert that a comparison was done between the fingerprints of the individual named in the prior judgment order and those of the individual on trial. See U.S. v. Lewis, 910 F.2d 1367, 1373-74 (7th Cir. 1990) (hearsay fingerprint records from prison where defendant had been previously incarcerated allowed to prove predicate ACCA priors at sentencing hearing); U.S. v. Savage, 863 F.2d 595, 599 (8th Cir. 1988) ("rap sheet" admitted for limited purpose of establishing that convictions belonged to the defendant); McCandless v. Beyer, 835 F.2d 58, 62 (3d Cir. 1987) (it is impractical for the state to prove the non-issuance of handgun permit, and is thus not required); Garrett, 712 F. Supp. at 1327.

The courts have not been receptive to chain of custody, authenticity, and hearsay arguments in opposition to proof of prior convictions. In U.S. v. Darveaux, 830 F.2d 124 (8th Cir. 1987), the government offered authenticated records of the Texas Department of Corrections, including judgments of conviction and a fingerprint card. The court rejected the defendant's objection that the county clerk who certified the records could not provide the necessary foundation for admissibility and held that the records were admissible as self-authenticating documents under Fed. R. Crim. P. 27. See also U.S. v. Huffhines, 967 F.2d 314, 320 (9th Cir. 1992) (same).

At trial in §922(g) prosecutions, the government’s right to introduce prior felony conviction can be limited if the defendant is willing to stipulate to the prior conviction. In Old Chief v. U.S., 519 U.S.172 (1997), the defendant was charged with violating §922(g)(1). In an attempt to mitigate the prejudice from the prior conviction, defendant offered to stipulate that he had a prior felony conviction. Id. at 172. The government refused, claiming it had a right to present detailed evidence of the prior conviction in its case-in-chief. Id. The district court allowed the government to introduce evidence of the prior felony conviction. Id. The Ninth Circuit affirmed the conviction, finding that the government could introduce probative evidence notwithstanding the defendant’s stipulation offer. Id. Justice Souter, writing for a 5-4 majority, reversed the Ninth Circuit. The Court opined that when the government’s sole purpose is to prove the existence of a prior conviction, and it refuses an offer to stipulate to that element, the probative value of a full record is outweighed by its prejudicial effect. Id. at 177-90. The Court held that it is unfairly prejudicial when the presentation of prior criminal acts presents the risk that the “jury will convict for crimes other than those charged” or, when uncertain of guilt, will convict due to the defendant’s criminal history. Id. at 181-182. In almost all circumstances, defense counsel should vigorously oppose the introduction of the nature of the underlying facts of the prior offense. U.S. v. Barker, 20 F.3d 365, 366 n.3 (9th Cir. 1994) (“proof
of the felony conviction is essential to the proof of the offense -- be it proof through stipulation or contested evidence. The underlying facts of the prior conviction are completely irrelevant under §922(g)(1); the existence of the conviction itself is not.

13.04.05.03 Minimizing the Harm

Although the Due Process Clause does not preclude the prosecution from alleging prior convictions in an indictment, trial courts retain the discretion to minimize the prejudice inherent in an Armed Career Criminal indictment. This can be accomplished through one of several pretrial motions.

13.04.05.03.01 Motion to Strike or Redact Indictment and Preclude Proof of More Than One Felony Prior

Under 18 U.S.C. §922, the prosecution need only prove one prior conviction in order to obtain a guilty verdict. *U.S. v. Stone*, 139 F.3d 822, 833 n.11 (11th Cir. 1998); *U.S. v. McGatha*, 891 F.2d 1520, 1521-22 (11th Cir. 1990) (prior felony convictions did not have to be set forth in indictment or proved beyond reasonable doubt at trial); *U.S. v. Runney*, 867 F.2d 714, 719 (1st Cir. 1989) (indictment charging defendant with being felon in possession of firearm did not have to allege all predicate offenses in order for sentence to be enhanced under Armed Career Criminal Act (“ACCA”)); *U.S. v. Blannon*, 836 F.2d 843, 844 (4th Cir. 1988) (ACCA created only an enhanced punishment); *U.S. v. Affleck*, 861 F.2d 97 (5th Cir. 1988) (statute establishing a minimum sentence of 15 years was merely sentence enhancement provision, and propriety of prior convictions thus did not have to be submitted to jury); *U.S. v. Brewer*, 853 F.2d 1319 (6th Cir. 1988) (ACCA was not intended to create separate offense); *but see Apprendi v. New Jersey*, 530 U.S.____, 120 S. Ct. 2348 (2000) (because of sentence enhancement provided by §922, counsel argued that the prior convictions are elements of the underlying crime that must be indicted by the grand jury and proven to the jury beyond a reasonable doubt).

If the prosecution has alleged more than one prior in the indictment, the defendant may seek to have the other convictions stricken as surplusage. See Fed. R. Crim. P. 7(d). The decision whether to strike lies in the discretion of the trial court. See *Marshall v. Lonberger*, 459 U.S. 422, 438 (1983). As noted in *U.S. v. Dunn*, 946 F.2d 615, 615-20 (9th Cir. 1991), however, there is prejudice from introducing evidence of more than one prior conviction at trial.

In *U.S. v. Breitkreutz*, 8 F.3d 688 (9th Cir. 1993), the Ninth Circuit held that the trial court erred in permitting the government to prove a defendant had three prior felony convictions when proof of one was sufficient. Id. at 693. Accord *Old Chief*, 519 U.S. 172 (1997); *U.S. v. Hernandez*, 109 F.3d 1450 (9th Cir. 1997); *U.S. v. Blake*, 107 F.3d 651 (8th Cir. 1997); *U.S. v. Quintero*, 872 F.2d 107, 111 (5th Cir. 1989). See also *U.S. v. Jackson*, 824 F.2d 21, 25 (D.C. Cir. 1987); *U.S. v. Romero*, 603 F.2d 640, 641 (7th Cir. 1979); *U.S. v. Barfield*, 527 F.2d 858, 861 (5th Cir. 1976).

As noted above, other cases have permitted the government to introduce multiple prior felony convictions. See *U.S. v. Diggs*, 82 F.3d 195, 197-98 (8th Cir. 1996) (government not precluded from introducing evidence of two other prior felonies); *U.S. v. Lloyd*, 981 F.2d 1071, 1073 (9th Cir. 1992) (district court may, in its discretion, allow the prosecution to introduce evidence of more than one felony
conviction if defendant refuses to stipulate); U.S. v. Timpani, 665 F.2d 1, 6 (1st Cir. 1981) (absence of stipulations makes the recitations reasonable). Each of these cases, however, were decided prior to Old Chief, 519 U.S. 172 (1997). Defense counsel therefore must consider, in light of Old Chief, whether a stipulation to avoid the prejudice inherent with the introduction with multiple convictions would be proper.

13.04.05.03.02 Stipulation

In many cases, the defense may wish to stipulate that the defendant has a prior felony conviction. In some cases it may be desirable to stipulate to the prior offense charged in an indictment and to make an agreement concerning cross-examination if the defendant testifies. In many situations, it is likely that the court will permit the government to cross-examine a testifying defendant about some of his prior convictions. In these situations, an agreeable stipulation should be sought so that the details of the convictions are not brought out in front of the jury. See Old Chief, 519 U.S. 172; see also U.S. v. Tavares, 21 F.3d 1 (1st Cir. 1994) (en banc) (error to introduce the specific facts of the prior felony conviction); U.S. v. Daniel, 134 F.3d 1259 (6th Cir. 1998). According to the D.C. Circuit Court of Appeals, Old Chief demands only that the court accept the defendant’s stipulation and keep from the jury the name and nature of the prior offense. U.S. v. Clark, 184 F.3d 858 (D.C. Cir. 1999). The defendant in Clark had suggested bifurcating a trial so as to prevent the jury from hearing about his prior felony until it had found him guilty of possessing a gun or stipulating that he was a “prohibited person.” While the court accepted his stipulation, keeping the name and nature of the prior felony from the jury, it did not adopt the defendant’s alternatives. Id. at 866. To warrant appellate relief under Old Chief, the error asserted must not be harmless. U.S. v. Harris, 137 F. 3d 1058, 1060 (8th Cir. 1998).

Before stipulating to a prior conviction, counsel must consider whether the defense of expungement, pardon, or restoration of civil rights might be available.

13.04.05.03.03 Bifurcation

One of the most significant procedural victories a defendant can achieve in a §922(g) prosecution is bifurcation of the trial. In such a situation, the jury first would consider questions related to possession, and interstate transportation and would then be asked to return a special verdict on those elements. The presentation of evidence regarding the defendant’s prior record then would occur only if the jury returned a verdict of guilty on the other elements of the underlying offense.

Support for bifurcation comes from several sources. In McGautha v. California, 402 U.S. 183 (1971), vacated sub nom., Crampton v. Ohio, 408 U.S. 941 (1972), the Court noted that although the Constitution does not require a bifurcated trial, such a procedure may be more fair because it prevents a jury from hearing evidence about prior convictions until it has decided whether the defendant is guilty of the underlying offense. Id. at 221. While a bifurcated trial is not required under the Due Process Clause, the supervisory power which the federal courts have over federal prosecutions can be employed to control the conduct of the trial and the order of proof. See Fed. R. Evid. 611; Geders v. U.S., 425 U.S. 80, 86-89 (1976) (judge has broad power to control the progress and, within the limits of the adversary system, the shape of the trial).
Additional support for bifurcation comes from 18 U.S.C. §3575(a), the former dangerous special offender statute. That statute provided that "in no case" shall a jury or judge be made aware of the fact that an accused is alleged to be a dangerous special offender prior to a finding of guilty. This procedure has been held necessary to preserve an accused's right to a fair trial. See U.S. v. Vigil, 743 F.2d 751, 758 (10th Cir. 1984).

Bifurcation may require the use of special jury interrogatories on the elements of possession and interstate transportation. Special interrogatories have been approved in federal criminal cases. See U.S. v. Coonan, 839 F.2d 886, 889-91 (2d Cir. 1988) (use of special interrogatories regarding discrete issues to avoid prejudicial spillover); U.S. v. Jones, 763 F.2d 518 (2d Cir. 1985) (guilty verdict reinstated when jury’s answers to special interrogatories reflected positive findings as to all necessary elements to one of the two charges).

A defendant also may be prejudiced when a §922(g) offense is charged with other substantive offenses that do not require proof of a previous conviction. One remedy is to sever the trial into two parts, reserving the possession charge until verdicts have been rendered on the other charges. See U.S. v. Dean, 76 F.3d 329, 332 (10th Cir. 1996) (bifurcation of offense not granted to determine existence of elements of offense); U.S. v. Nguyen, 88 F.3d 812, 818 (9th Cir. 1996) (severance or bifurcation is preferred when defendant is indicted on felon in possession and another felony charge). But see U.S. v. Vastola, 670 F. Supp. 1244, 1263 (D. N.J. 1987) (bifurcation ruling limited to preclusion of prior conviction evidence for proving 18 U.S.C. §1202 offenses and not applied to submission of prior conviction evidence for any other purpose). The better practice, from the defense standpoint, is to sever the counts requiring proof of a prior conviction and to schedule two separate trials with two separate juries. U.S. v. Edwards, 700 F. Supp. 837 (W.D. Pa. 1988).

However, several circuits have rejected a defendant's attempt to bifurcate the felon-in-possession crime itself, reversing district court orders bifurcating the possession element from the prior convictions element. See U.S. v. Barker, 1 F.3d 957, 959 (9th Cir. 1993) (en banc) (district court may not bifurcate single offense into multiple proceedings), amended, 20 F.3d 365, 366 (9th Cir. 1994); U.S. v. Collarmore, 868 F.2d 24, 28 (1989) (same).

**13.04.05.03.04 Restoration of Civil Rights**

The prior felony element of a §922(g)(1) charge may be challenged under certain circumstances. The definitional statute provides that:

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.

Thus, if the alleged prior conviction has been the subject of an expungement, pardon, or restoration of rights, the defendant enjoys a complete defense. See, e.g., U.S. v. Caron, 77 F.3d 1 (1st Cir. 1996) (en banc); U.S. v. Dahms, 938 F.2d 131 (9th Cir. 1991); U.S. v. Cassidy, 899 F.2d 543 (6th Cir. 1990). The Fourth Circuit has held that the government bears the burden of proving that the defendant's civil rights have not been restored. U.S. v. Essick, 935 F.2d 28, 31 (4th Cir. 1991) (government must go beyond mere introduction of commitment order).

The issue of restoration of civil rights is evaluated under the law of the jurisdiction in which the conviction was suffered. U.S. v. McElyea, 158 F.3d 1016 (9th Cir. 1998) (court looks to state law to determine whether a convicted felon's civil rights have been restored); U.S. v. Gomez, 911 F.2d 219, 220 (9th Cir. 1990) (same); Cassidy, 899 F.2d at 546, 549 (“[i]f state law has restored civil rights to a felon . . . that felon is not subject to federal firearms disabilities”). Therefore, it is essential that defense counsel research the law of any jurisdiction in which the defendant has suffered prior convictions that the government may seek to use.

In Gomez, the Ninth Circuit construed §921(a)(20) with a general provision under Idaho law that restores rights to convicted felons who have completed their prison, parole, and probation terms. That statute provides, in part: "[u]pon the final discharge of a person convicted of any felony except treason, a person shall be restored the full rights of citizenship." Gomez, 911 F.2d at 221. Gomez interpreted this provision to preclude prosecution under §922(g) because the defendant's civil rights were restored upon discharge from his prior conviction. Id. at 220-21. The Ninth Circuit has also considered the Nevada procedure for restoring a felon's civil rights. In U.S. v. Simpson, 27 F.3d 355, 356 (9th Cir. 1994), the defendant completed his probation, received an "order" releasing him from "all penalties and disabilities," but did not apply for a "restoration" of his civil rights. The Ninth Circuit held that, because the defendant did not follow the statutory procedure to request restoration of his civil rights, his rights were not restored. Id. at 355. Although the statute required the probation officer to tell the defendant of that procedure, there was no evidence that the probation officer in Simpson failed to tell the defendant of the appropriate procedures. Id. at 357. See also U.S. v. Lloyd, 184 F.3d 695 (7th Cir. 1999) (examination of Illinois statute that restored rights upon completion of probation).

Though state law determines when one's rights are restored, a federal rule of law has been applied to hold that under the “unless clause,” the Federal Government has an interest in a single, national, protective policy, which may be broader than that required by a given state. Caron v. U.S., 524 U.S. 308 (1998). In Caron, the parties agreed that Massachusetts law had restored the civil rights of the petitioner. With respect to the “unless clause,” however, state law prohibited a defendant from possessing any handguns, but allowed him to possess rifles and shotguns. Id. The Court held that any state weapons limitation activates the federal ban on possessing all firearms. Id. In U.S. v. Qualls, 172 F.3d 1136, 1138 (9th Cir. 1999), the Ninth Circuit applied the Caron all-or-nothing rule to a prior California conviction. In U.S. v. Meza-Corrales, 183 F.3d 1116, 1129 (9th Cir. 1999), however, Arizona law was at issue and the Ninth Circuit was not required to apply Caron because the petitioner’s civil rights had been restored to him, without restricting his right to possess a firearm. However, Arizona substantially amended its laws in 1994 to restrict firearms privileges for convicted felons; but, the decision is relevant for all those
There is a split in the circuits as to whether a state must take affirmative action to restore a person's civil rights for purposes of §921(a)(20) or whether automatic restoration will suffice. Those cases holding that the state must affirmatively restore civil rights include \textit{U.S. v. Thomas}, 991 F.2d 206, 208-13 (5th Cir. 1993) (defendant violated federal law although not prohibited under state law); \textit{Essick}, 935 F.2d at 29-31; \textit{U.S. v. Erwin}, 902 F.2d 510, 513 (7th Cir. 1990) (absent a pardon or restoring rights, the right to carry guns not restored by law). \textit{But see Gomez}, 911 F.2d at 221 (“a person shall be restored the full rights of citizenship”) (emphasis added). Others have alluded to an automatic restoration. \textit{See U.S. v. Dupacquer}, 74 F.3d 615, 617-18 (5th Cir. 1996) (restriction on defendant’s right to possess firearm terminated before present offense was committed); \textit{U.S. v. Herron}, 45 F.3d 340, 341-42 (9th Cir. 1995) (restoration document must expressly prohibit the carrying of firearms). Several cases have expressly declined to reach these issues. \textit{U.S. v. Essig}, 10 F.3d 968, 976 n.22 (3d Cir. 1993); \textit{U.S. v. Sanders}, 18 F.3d 1488, 1490 (10th Cir. 1994).

A review of a particular state's civil restoration statutes and review of the cases deciding these issues is necessary. \textit{See U.S. v. McBryde}, 938 F.2d 533 (4th Cir. 1991); \textit{U.S. v. Ellis}, 949 F.2d 952 (8th Cir. 1991); \textit{U.S. v. Brebner}, 951 F.2d 1017 (9th Cir. 1991); \textit{U.S. v. Dahms}, 938 F.2d 131 (9th Cir. 1991); \textit{U.S. v. Swanson}, 947 F.2d 914 (11th Cir. 1991); \textit{U.S. v. Cassidy}, 899 F.2d 543 (6th Cir. 1990); \textit{U.S. v. Whitley}, 905 F.2d 163 (6th Cir. 1990). If a prior is a federal felony, the restoration of rights must be under federal law. \textit{Beecham v. U.S.}, 511 U.S. 368 (1994). The Supreme Court has not made clear how, or if ever, a felon may have his rights restored under federal law.

13.05 THE ARMED CAREER CRIMINAL ACT

Generally, a violation of §922(g) can lead to a maximum term of incarceration of 10 years. \textit{18 U.S.C. §924(a)(2)}. However, under the Armed Career Criminal Act (ACCA), a statutory penalty enhancement scheme for recidivists convicted of §922(g) charges, a defendant can face a mandatory minimum fifteen year sentence if he or she has three previous felony convictions for serious drug offenses or crimes of violence, committed on occasions different from one another. \textit{18 U.S.C. §924(e)(1)}.

When originally enacted on October 12, 1984, the ACCA was codified in §1202 of the Second Appendix to Title 18. The Act was added to the two-year felon in possession statute which appeared in that section. acts of possession, receipt or transportation of firearms by felons occurring between October 12, 1984 and November 15, 1986. Because the prior convictions may have occurred during times when different versions of the ACCA existed, it is important to focus on the dates alleged in an Armed Career Criminal indictment because the various incarnations of the Act require the prosecution to prove slightly different elements and offer the defense several different strategies.

13.05.01 History of the ACCA
The Armed Career Criminal Act initially was introduced as H.R. 6386 and S. 1688 in the 97th Congress in 1982 and was added onto the Comprehensive Crime Control Act of 1984 at the eleventh hour in October 1984. Its legislative history is reported at U.S.C.C.A.N., 98th Cong. Vol. 4, p. 3661-67 and Senate Report 98-225, October 11, 1984. It reveals that the bill's primary sponsors, Senator Specter and Congressmen Hughes and Wyden, believed that a limited number of career offenders were responsible for a significant proportion of crime committed in this country. The drafters expanded upon the existing federal role in gun regulation as the jurisdictional vehicle for increasing federal involvement to combat what they perceived as an unacceptable increase in crime. See H.R. Rep. 98-1073, p. 4-5, 98th Cong. 2d Sess. 4 reprinted in 1984 U.S.C.C.A.N. 3661, 3664.

The Act was intended to be used against the "worst, or at least among the worst [criminals], in the country." Remarks of Senator Specter, Subcommittee on Crime, September 23, 1982, pp. 4-5 (H.R. 6386, S. 1688). The legislative history reveals that the Act's sponsors were aware that they were intruding on the traditional role of the state prosecution. As a compromise, the sponsors indicated that the Act should be enforced through cooperation between federal and state law enforcement authorities. See, e.g., H.R. 99-849 at pp. 2-3.

One major change resulting from the first amendment of the Act in 1986 was clarification that proof of the three prior convictions was a part of the penalty enhancing provision of the Act rather than necessary elements of the offense. In the new version, the penalty provisions appear in 18 U.S.C. §924, the general penalty provision for 18 U.S.C. §922 which defines various aspects of the federal gun regulation scheme.

Congress also substituted the language of 18 U.S.C. §1202 App. II which made it unlawful for a person, inter alia, to "receive, possess, or transport [firearms] in commerce or affecting commerce . . . ." Instead, Congress retained the language of 18 U.S.C. §922(g) which provided three distinct means by which a person can violate the firearm law, including:

1. to ship or transport in interstate or foreign commerce;
2. possess in or affecting commerce;
3. to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

On its face, the interstate nexus required by the statute for receipt, possession and transportation is different. This distinction has not generally been acknowledged by the courts.

In its current form, the ACCA is a sentence enhancement device. To make out the elements of proof on a charge brought under 18 U.S.C. §§922(g)(1) and 924(e)(2)(B), the government need only allege and prove one prior felony conviction during the guilt phase of the trial.

However, for prosecutions under §1202 (offenses which occurred between October 12, 1984 and November 15, 1986), some circuits held that the prosecution must prove at least three prior felony convictions during the guilt phase. See U.S. v. Brewer, 841 F.2d 667, 668 (6th Cir. 1988) (because ACCA created a new offense and is not merely a sentence enhancement provision, defendant could not
be sentenced where he was not indicted for offense created); U.S. v. Davis, 801 F.2d 754, 755 (5th Cir. 1986) (same). The Sixth Circuit, sitting en banc, subsequently overturned the earlier panel decision in Brewer. U.S. v. Brewer, 853 F.2d 1319, 1322 (6th Cir. 1988) (en banc) (existence of three convictions is not an element of a distinct offense, but the additional convictions serve to enhance the penalty). The Fifth Circuit distinguished § 924(e)(1) from §1202 and held that §924(e)(1) is a sentence enhancement provision. U.S. v. Affleck, 861 F.2d 97, 99 (5th Cir. 1988). See U.S. v. Quintero, 872 F.2d 107 (5th Cir. 1989). The Seventh Circuit noted that because of the recodification of §1202 to §924(e)(1), any conflict that existed in the circuit on this issue has been ironed out. U.S. v. Dougherty, 895 F.2d 399, 405 (7th Cir. 1990). See also U.S. v. Dombrowski, 877 F.2d 520, 522 n.2 (7th Cir. 1989) (court construed § 924(e)(1) as a sentence enhancement provision).

The following circuits hold that even in its previous form, the ACCA did not create a new offense but merely added a sentence enhancement provision. In these circuits, the prosecutor need prove beyond a reasonable doubt only one prior conviction for an offense arising between 1984 and 1986. U.S. v. Palacios-Casquete, 55 F.3d 557, 559-60 (11th Cir. 1995); U.S. v. Presley, 52 F.3d 64, 67 (4th Cir. 1995); U.S. v. Affleck, 861 F.2d 97 (5th Cir. 1988); U.S. v. Brewer, 853 F.2d 1319 (6th Cir. 1988) (en banc); U.S. v. Karlin, 852 F.2d 968 (7th Cir. 1988); U.S. v. Rush, 840 F.2d 574 (8th Cir. 1988) (en banc); U.S. v. Jackson, 824 F.2d 21 (D.C. Cir. 1987); U.S. v. Hawkins, 811 F.2d 210 (3d Cir. 1987); U.S. v. West, 826 F.2d 909 (9th Cir. 1987); U.S. v. Gregg, 803 F.2d 568 (10th Cir. 1986). At least at present, the government must prove all three priors to impose a sentence under the ACCA only at sentencing. However, in light of the Supreme Court’s decision in Apprendi, 102 S. Ct. 2348, there is some indication that any fact proof of which increases the statutory maximum sentence must be proven to a jury beyond a reasonable doubt.

The ACCA, as amended in 1986, does appear to require different proof on the interstate commerce element depending on whether the charge is possession, receipt, or transportation. The statutory language clearly distinguishes the three acts and the type of relationship to interstate commerce. The “receipt” section includes an interstate commerce element which is drafted in the past tense. The requirement in that section appears to permit a conviction if the weapon had ever been transported in interstate commerce. See U.S. v. Bell, 524 F.2d 202, 203 (2d Cir. 1975) (contemporaneous interstate nexus is necessary for a "possession" conviction). In a charge involving possession, however, the language of the statute is in the present tense. The rules of statutory construction therefore should require the court to give meaning to the separate components of the statute and to assume that Congress meant what it said when it distinguished among the three acts it prohibited. See Evans v. U.S., 504 U.S. 255, 259 (1992) ("it is a familiar ‘maxim that a statutory term is generally presumed to have its common-law meaning’") (quoting Taylor v. U.S., 495 U.S. 575, 592 (1990); U.S. v. Campos-Serrano, 404 U.S. 293, 301 n.14 (1971) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (quoting Market v. Hoffman, 101 U.S. 112, 115-16 (1879); Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100, 106-107 (1941) ("[the Court] cannot assume that Congress, in thus revising [a] statute, was unaware of the history . . . or certainly that [Congress] regarded [it] without significance").
After 18 U.S.C. §1202 App. II was repealed and reenacted as part of 18 U.S.C. §924, Congressmen Wyden, Hughes and McCollum and Senator Specter further expanded the types of felonies which could be used to enhance a sentence. H.R. 849, September 19, 1986 contains a discussion of the Congressmen's desire to "add to [the law's] effectiveness" by expanding predicate offenses to include "serious drug-trafficking offenses" and "violent felonies, generally." H.R. Rep. 849, 98th Cong., 2d Sess. at 3 (1986); H.R. 4639, 99th Cong. 2d Sess. (1986). The November 15, 1986 amendments expanded the scope of the legislation to cover persons with three prior convictions for any violent felony or drug-trafficking offenses which carried a potential penalty of at least 10 years.

Two additional changes were made to the ACCA by the Anti-Drug Abuse Act of 1988. Both amendments expanded the predicate offenses which qualify an offender for a mandatory minimum 15-year sentence. First, 18 U.S.C. §924(e)(2)(B) was amended by §6451 of the Anti-Drug Abuse Act to include certain juvenile offenses as convictions qualifying an individual for an enhanced sentence. Acts of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device which would be punishable by imprisonment for a term in excess of one year if committed by an adult may now be used to enhance a sentence. See 135 Cong. Rec. S10268-01 (daily ed. Aug. 4, 1988). Second, 18 U.S.C. §924(e)(1) was amended by §7056 of the Anti-Drug Abuse Act to specify that two violent felony or drug offenses must have been "committed on occasions different from one another" in order to qualify as separate convictions for enhancement purposes. The meaning of this statutory section has yet to be defined specifically by the courts. The statutory history contains language which would not support an expansive meaning of "separate occasions" requiring conviction and an opportunity for rehabilitation before another conviction can be considered. See 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988).

### 13.05.02 Qualifying Crimes Under the ACCA

#### 13.05.02.01 1984-1986

Under the version of the ACCA in effect from 1984 through November of 1986, an individual qualified as an armed career criminal only if he had three prior robbery or burglary convictions. Robbery and burglary were defined in the statute as follows:

- **‘robbery’** means any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury; and

- **‘burglary’** means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct consisting of a Federal or State offense.

Thus, only a burglary of a building qualifies under the version of the Act in effect from June 1984 to November 1986. Conviction under a state statute for burglary of a tent, automobile, or other structure that is not a building did not satisfy the requirements of 18 U.S.C. §1202 App II. *Taylor v. U.S.*, 495
U.S. 575 (1990); see also U.S. v. Martinez, 954 F.2d 1050 (5th Cir. 1992) (attempted burglary did not qualify as a violent felony under ACCA because there is no use or threat of physical force).

13.05.02.02  1986 to Present

The 1986 and 1988 Amendments to the Act broadened the scope of the Act. In the present form of the Act, any three convictions for a "violent felony" or "serious drug offense" qualify an individual for treatment as an armed career criminal. "Violent felony" is defined in 18 U.S.C. §924(e)(2)(B) as:

(A) the term `violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(B) the term ‘conviction’ includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

"Serious drug offense" is defined in 18 U.S.C. §924(e)(2)(A) as:

(A) the term ‘serious drug offense’ means–

(i) an offense 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.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in §102 of the Controlled Substances Act (21 U.S.C. §802), for which a maximum term of imprisonment of ten years or more is prescribed by law; . . . .

13.05.03  Juvenile Adjudications
The prosecution may attempt to use juvenile adjudications as ACCA predicates based on §924(e)(2)(B). The statute limits the use of such adjudications to incidents which involved the use of weapons. Even with this "limitation," the validity of this provision is questionable and should be vigorously challenged on due process grounds involving the nature of juvenile proceedings. Use of any juvenile adjudication of delinquency obtained without the full panoply of due process protection (i.e., right to counsel, jury trial, etc.) as an enhancing predicate would conceivably violate Burgett v. Texas, 389 U.S. 109, 114-15 (1967) (where certified records did not show that defendant was represented by counsel or that he waived counsel, records raise a presumption of a violation of Sixth Amendment; convictions should have been deemed void in subsequent prosecution). Unfortunately, similar arguments have been rejected under the Sentencing Guidelines. See U.S. v. Connor, 947 F.2d 1018, 1020 (2d Cir. 1991) (all offenses committed when defendant was eighteen or older are to be considered adult convictions for purposes of the criminal history category determination); U.S. v. Davis, 929 F.2d 930, 932-33 (3d Cir. 1991) (enhancement based on prior juvenile convictions proper under statute); U.S. v. Daniels, 929 F.2d 128,130 (4th Cir. 1991) (notwithstanding juvenile proceedings sealed pursuant to state law, that law could not bar consideration of them by a federal court in determining a sentence, when federal law provides otherwise); U.S. v. Booten, 914 F.2d 1352, 1354-55 (9th Cir. 1990) (consideration of juvenile adjudication in judgment of adult criminal court did not violate due process).

Moreover, the statute places more stringent requirements on the prosecution than those placed upon the use of adult felony convictions. The government must demonstrate that the juvenile adjudication involved the "use or carrying of a firearm, knife, or destructive device" before any such adjudication could be used. Because the government should be required to provide such "use or carrying" through a categorical analysis of the juvenile adjudication, see Taylor v. U.S., 495 U.S. 575 (1990) (categorical analysis to be employed to determine whether prior burglary conviction came within "generic" burglary), this conduct must be demonstrated only by the "fact of conviction and the statutory definition of the prior offense." Id. at 602 (footnotes omitted). Thus, a juvenile adjudication of unarmed robbery may not suffice while an adult felony conviction likely would because the juvenile adjudication would require the additional element of the "use or carrying" of some weapon.

In U.S. v. Owens, 15 F.3d 995 (11th Cir. 1994), the Eleventh Circuit considered three prior juvenile convictions, all obtained in the same proceeding, for burglary, armed robbery, and attempted strong arm robbery. The appellant in Owens apparently did not raise the issue of whether burglary and attempted strong armed robbery involved the "use or carrying of a firearm, knife, or destructive device." Because the priors were committed on occasions different from one another, the 11th Circuit considered them three different "violent felonies," and affirmed the sentence under ACCA. In U.S. v. Cure, 996 F.2d 1136 (11th Cir. 1993), the Eleventh Circuit also held that, although defendant's priors were committed when he was 17 years old, because the defendant had been transferred and tried as an adult under state law, the priors qualified as "violent felonies." Id. at 1139-40. The federal sentencing court must refer to the state court's determination of whether the defendant was previously prosecuted as a juvenile or as an adult. U.S. v. Lender, 985 F.2d 151, 155-56 (4th Cir. 1993).

13.05.04 Staleness of Prior Convictions
The statute does not set a limit on the age of a conviction that can be used for enhancement purposes. Counsel should object to ancient convictions. But see U.S. v. Preston, 910 F.2d 81, 89 (3d Cir. 1990) (holding that there are no restrictions on the age of a prior conviction under §924(e)); U.S. v. McConnell, 916 F.2d 448 (8th Cir. 1990) (expressing displeasure that even a 25-year-old conviction could be used and indicating that Congress should address problem); U.S. v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989) (mandatory sentence of 15 years was not unreasonable, nor was it a violation of the Eighth Amendment despite the fact that all of the defendant's prior convictions occurred more than 15 years before and since that time he had been a law abiding citizen); U.S. v. Swiatek, 819 F.2d 721, 729 (7th Cir. 1987) (17-year-old conviction acceptable under §§922, 924, 842, 844, 1202, 5861 and 5871 indicating that even a 38-year-old conviction would be acceptable).

Support for barring the use of ancient convictions can be found in §4A1.2(e) of the Guidelines (15-year time limit for prior convictions), Fed. R. Evid. 609(b) (10 year time limit for use of prior conviction for impeachment purposes), and Application Note 1.8 to the Salient Factor Index in the United States Parole Manual, page 63 (1988). However, some circuits have ruled that time limits on prior convictions under §4A1.2(e) do not apply to 18 U.S.C. §924(c). See, e.g., U.S. v. Wright, 48 F.3d 254, 255-56 (7th Cir. 1995); U.S. v. Riddle, 47 F.3d 460, 462 (1st Cir. 1995).

13.05.05 ACCA Predicates: The Categorical Approach

Only "violent felonies" or "serious drug offenses" may qualify as predicate prior convictions under the ACCA. The Supreme Court, in U.S. v. Taylor, 495 U.S. 575 (1990), set forth the analysis for determining when prior felony convictions can qualify as predicate offenses under the ACCA. The Court stated that the prior conviction must be analyzed under a "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." Id. at 600. Thus, "the trial court [may] look only to the fact of conviction and the statutory definition of the prior offense" to see whether such offense is either a violent felony or a serious drug offense.” Id. at 602.

However, Taylor noted a narrow exception to this categorical approach. The sentencing court may look behind the mere fact of conviction in a “narrow range of cases where a jury was actually required to find all the elements of [the offense].” Id. Notwithstanding the exception, Taylor apparently envisioned a relatively straightforward analysis for the vast majority of prior convictions.

Post-Taylor, however, several courts have disregarded the categorical approach, instead broadening the exception. See, e.g., U.S. v. Houston, 187 F.3d 593 (6th Cir. 1999) (court looked to “conduct presenting serious potential risk of physical injury to another”); U.S. v. Sweeten, 933 F.2d 765, 769 (9th Cir. 1991) (sentencing court may consider signed guilty plea, indictment or jury instructions but does not limit court’s review to post-jury verdict). These cases are inconsistent with the Supreme Court’s requirement that sentencing courts consider only the fact of conviction and the statutory definition of the offense "except in a narrow range of cases where a jury was actually required to find all the elements of [the offense]." See Taylor, 495 U.S. at 602. Considering this inconsistency, counsel should continue to object to the consideration of information other than the statutory definition of the offense in prior convictions that were not the result of jury trials. See U.S. v. Sacko, 178 F.3d 1 (1st Cir. 1999) (error to inquire into facts
of prior statutory rape conviction to determine whether a predicate offense under ACCA); U.S. v. Bull, 182 F.3d 1216 (10th Cir. 1999) (court could look to statute); U.S. v. Parker, 5 F.3d 1322 (9th Cir. 1993) (California second degree burglary prior not proper ACCA predicate where charging papers as well as the statute failed to show unprivileged or unlawful entry). But see U.S. v. Bonat, 106 F. 3d 1472 (9th Cir. 1997) (district court properly considered plea transcript in making Taylor determination); U.S. v. White, 997 F.2d 1213 (7th Cir. 1993) (affirming district court's review of preliminary hearing transcript to confirm the defendant committed generic burglary); U.S. v. O'Neal, 937 F.2d 1369, 1373 (9th Cir. 1990) (jury findings and guilty pleas to charges that contain all the elements to the offense may be used for enhancement purposes).

Certain offenses present recurring problems in this area. Several are discussed below.

13.05.05.01 Burglary

A previous burglary conviction is often alleged as an armed career criminal predicate. Burglary is not defined in the ACCA and is defined in significantly different terms in state laws throughout the country. In Taylor, the Supreme Court discussed the issues presented by these varying definitions and ultimately defined the term "burglary" for purposes of the ACCA. Taylor held that in enacting §924(e), Congress intended that "burglary" have its generic meaning. The Court concluded that a person has been convicted of generic burglary for purposes of a §924(e) enhancement, "if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Taylor, 495 U.S. at 599.

The Supreme Court noted that if the state statute is more narrowly defined than the "generic" offense, for instance, in cases of burglary convictions in common law states or convictions of first degree or aggravated burglary, that defendant necessarily has been found guilty of generic burglary. If the defendant is convicted of burglary in a state that has the generic definition of burglary, all the trial court need find is that the state statute corresponds in substance with the generic meaning of burglary.

However, there are instances where the state statute defines burglary more broadly than the generic definition of burglary, thus the Taylor inquiry is triggered. Examples of such state statutes include statutes eliminating the requirement that the entry be unlawful, or include "unlawful" entry into non-buildings, such as automobiles and vending machines. In such cases applying the Taylor analysis, the sentencing court can look only to the fact of conviction and the statutory definition of the prior offense:

an offense constitutes `burglary' for purposes of a §924(e) sentence enhancement if either its statutory definition substantially corresponds to `generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.

Taylor, 495 U.S. at 602.

As noted above, in U.S. v. Parker, 5 F.3d 1322 (9th Cir. 1993), the district court properly refused to look beyond the face of the charging documents in a California second degree burglary prior,
where neither the statute nor the charging document charged unlawful or unprivileged entry and the jury instructions and verdict forms were unavailable. \textit{Id.} at 1327. Likewise, auto burglary is not a qualifying prior offense. \textit{See Ye v. INS}, 214 F.3d 1128 (9th Cir. 2000) (auto burglary not a “violent felony”); \textit{U.S. v. Chatman}, 869 F.2d 525, 530 (9th Cir. 1989) (same). Attempted burglary is not a crime of violence unless the charging documents in the plea form or instructions show entry or near entry. \textit{U.S. v. Weekley}, 790 F. Supp. 223 (E.D. Wash. 1992) \textit{aff'd}, 24 F.3d 1125 (9th Cir. 1994); \textit{see also U.S. v. Martinez}, 954 F.2d 1050, 1053-54 (5th Cir. 1992) (attempted burglary not a "crime of violence" under Texas law); \textit{U.S. v. Permenter}, 969 F.2d 911, 913 (10th Cir. 1992) (attempted burglary under Oklahoma law not "violent felony"); \textit{U.S. v. Strahl}, 958 F.2d 980, 985-86 (10th Cir. 1992) (attempted burglary under Utah law not "violent felony").

Both commercial and residential burglary are generally considered “violent felonies” under \textit{Taylor}. \textit{See U.S. v. Groce}, 999 F.2d 1189, 1191-92 (7th Cir. 1993) (conviction for burglary as party to crime qualified as "violent felony" for purposes of ACCA enhancement); \textit{U.S. v. Spring}, 80 F.3d 1450, 1462 (10th Cir. 1996) (generic burglary “violent felony” within the meaning of ACCA); \textit{U.S. v. White}, 997 F.2d 1213, 1217 (7th Cir. 1993) (same); \textit{U.S. v. Canon}, 993 F.2d 1439, 1441 (9th Cir. 1993) (same); \textit{U.S. v. Fish}, 928 F.2d 185, 187-88 (6th Cir. 1991) (same); \textit{U.S. v. Gibson}, 928 F.2d 250, 254 (8th Cir. 1991) (same); \textit{U.S. v. Hill}, 863 F.2d 1575, 1582-83 (11th Cir. 1989) (same).

\subsection*{13.05.05.02 Firearm Possession}

In the past, prosecutors sought to use prior convictions for being a felon in possession of a firearm as predicate convictions under §924(e). However, the weight of authorities and U.S.S.G. §4B1.2 appear to have foreclosed this approach. \textit{See, e.g., U.S. v. Garcia-Cruz}, 40 F.3d 986 (9th Cir. 1994) (prior felon-in-possession conviction not ACCA prior); \textit{U.S. v. Doe}, 960 F.2d 221 (1st Cir. 1992) (such a prior conviction does not qualify as predicate prior); \textit{see also Stinson v. U.S.}, 508 U.S. 36, 47-48 (1993) (amended commentary stating that unlawful possession of firearm by felon is not "crime of violence" is binding); \textit{U.S. v. Gary}, 74 F.3d 304, 316 (1st Cir. 1996) (§4B1.2 language precludes felon-in-possession as crime of violence); \textit{U.S. v. Oliver}, 20 F.3d 415, 417-18 (11th Cir. 1994) (same); \textit{U.S. v. Sahakian}, 965 F.2d 740, 742-43 (9th Cir. 1992) (being felon in possession of firearm is not "crime of violence" for purposes of applying career offender guideline); \textit{U.S. v. Chapple}, 942 F.2d 439 (7th Cir. 1991) (same); \textit{U.S. v. Whitfield}, 907 F.2d 798, 800 (8th Cir. 1990) (same).

\subsection*{13.05.05.03 Expunged and Set-Aside Convictions, Restoration of Civil Rights, and Convictions Entitled Misdemeanors}

As previously noted, the prior felony element of 18 U.S.C. §922(g)(1) may be contested if the prior conviction urged had been set aside or expunged, or if the defendant's civil rights had been restored. 18 U.S.C. §921(a)(20).

A restoration of rights, pardon, or expungement defense is also available to challenge convictions urged as ACCA predicates. Section 924(e) only applies to individuals with "three previous convictions by any court . . . for a violent felony or a serious drug offense" as defined in §922(g)(1). Since §922(g)(1)
specifically exempts expunged or set aside convictions, that exception applies to §924(c) as well. See §§922(g)(1) and 921(a)(20) (convictions for which there has been an expungement, pardon, or restoration of civil rights are not applicable as predicates).

However, the Seventh Circuit has held that where a conviction was expunged ab initio prior to trial, but subsequent to commission of the §922(g) violation, the defendant may still be found to have violated §922. *U.S. v. Lee*, 72 F.3d 55, 58 (7th Cir. 1995).

### 13.05.05.04 Number of Incidents

In order to qualify as a sentence enhancement, each of the predicate crimes must have occurred at different times. In *U.S. v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated by* 481 U.S. 1034 (1987), *remanded to* 828 F.2d 2 (8th Cir. 1987), the government sought to enhance the defendant’s sentence through the use of six robbery convictions which were based on the robbery of separate victims in the same place at the same time. On appeal, the government conceded error and the Armed Career Criminal portion of the sentence was stricken. *Id.; see also U.S. v. Rice*, 43 F.3d 601, 606 n.7 (11th Cir. 1995) (discussion of *Petty*).

It is not clear how far *Petty* can be extended. In *U.S. v. Wicks*, 833 F.2d 192, 193-94 (9th Cir. 1987), the government utilized two prior convictions which were obtained in one plea and sentence proceeding, although the underlying offenses had occurred several hours apart on the same night. Wicks contended that the Armed Career Criminal Act was intended to enhance punishment only for those people who have shown themselves not to be amenable to rehabilitation after three such opportunities. The court rejected his contention. *Id.* The court also held *Petty* inapplicable, distinguishing between simultaneous robberies and those which were distinct in time. *Id.* *Wicks* was followed in *U.S. v. Thornton*, 23 F. 3d 1532, 1534 (9th Cir. 1994); *U.S. v. Herbert*, 860 F.2d 620 (5th Cir. 1988); and *U.S. v. Harden*, 846 F.2d 1229 (9th Cir. 1988).

The Fourth Circuit has held that under the current version of the ACCA, the government must simply show that the prior offenses occurred at different times; it is not necessary that a defendant have had an opportunity for punishment and rehabilitation between convictions. Other circuits have followed this analysis. *U.S. v. Mason*, 954 F.2d 219 (4th Cir. 1992); *see U.S. v. Phillips*, 149 F.3d 1026, 1031 (9th Cir. 1998) (offenses occurring at different times, in different locations, and involving different victims are “temporally distinct” even if separated by a short span of time); *U.S. v. Jackson*, 113 F.3d 249 (D.C. Cir. 1997) (three housebreaking convictions committed within eight days were sufficiently distinct); *U.S. v. Bernier*, 954 F.2d 818 (2d Cir. 1992) (incidents in same indictment properly counted as separate convictions); *U.S. v. Anderson*, 921 F.2d 335 (1st Cir. 1990) (conviction of one predicate offense need not precede the commission of the next according to the language of statute).

Other courts have held that the qualifying prior convictions need not be separately prosecuted or separately sentenced as long as the conduct underlying each conviction is distinct. *See U.S. v. Andrews*, 75 F.3d 552, 557-58 (9th Cir. 1996) (more than one such conviction can occur in a single proceeding); *U.S. v. Owens*, 15 F.3d 995, 998 (11th Cir. 1994) (same); *U.S. v. Lewis*, 991 F.2d 524, 526 (9th Cir. 1993).
In *U.S. v. Balascak*, 873 F.2d 673 (3d Cir. 1989) (en banc), the defendant argued that a finding of conviction between separate offenses was required. There, two burglaries occurred the same night several hours apart but were consolidated for trial and the subject of one sentencing. The dissent in the panel decision accepted Balascak's position; however, the *en banc* court did not. *Id.* at 683-84. However, the court reversed the sentence based on the requirement that a defendant have two prior convictions for prior felonies before he commits the third felony. *Id.*

In *U.S. v. Maxey*, 989 F.2d 303 (9th Cir. 1993), even where prior "violent felonies" were committed within hours of each other, were similar in nature, and were consolidated at trial and sentencing, they were distinct priors under ACCA. Likewise, under *U.S. v. Arnold*, 981 F.2d 1121 (9th Cir. 1992), prior convictions that were distinct criminal episodes but were consolidated for sentencing represented separate convictions for the purposes of ACCA. The court noted that under the Guidelines, those convictions could be treated as only one conviction, but the result is different under the ACCA. *Id.* at 1122. *See also U.S. v. Frushon*, 10 F.3d 663, 666-67 (9th Cir. 1993) (same); *U.S. v. Rideout*, 3 F.3d 32, 34-35 (2d Cir. 1993) (same); *U.S. v. Kelley*, 981 F.2d 1464, 1474 (5th Cir. 1993) (same); *U.S. v. Godinez*, 998 F.2d 471, 472 (7th Cir. 1993) (same); *U.S. v. White*, 997 F.2d 1213, 1219 (7th Cir. 1993) (same); *U.S. v. Hamell*, 3 F.3d 1187, 1191 (8th Cir. 1993) (same); *U.S. v. Harris*, 964 F.2d 1234, 1237 (1st Cir. 1992) (same).

The ACCA may be attacked because it lacks clarity in defining what convictions can be used for enhancement, and that lack of clarity renders the Act void for vagueness in violation of the Due Process Clause. It should also be argued that any ambiguity in the statute should be construed in defendant’s favor. *See Hughey v. U.S.*, 495 U.S. 411, 422 (1990) ("longstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant.").

### 13.05.05.05 Notice

Presently, in light of the prevailing law that §924(e) is just a sentencing enhancement, it is not clear what type of notice is required if the prosecution intends to seek an enhanced sentence under 18 U.S.C. §924(e)(1), or even whether any notice at all from the prosecution is necessary. A strong argument can be made that since the definition of the offense appears in 18 U.S.C. §922 and separate sentencing provisions exist in 18 U.S.C. §924, the prosecution is required to specify the appropriate sentencing provision in its indictment or a separate sentencing information provided to the defendant at arraignment.

The Third Circuit addressed the notice issue in *U.S. v. Hawkins*, 811 F.2d 210, 220 (3d Cir. 1987), but concluded that it did not have to decide what type of notice was required because the notice in that case was adequate. The *Hawkins* court cited to *Oyler v. Boles*, 368 U.S. 448, 452 (1962), for the proposition that a defendant must be reasonably informed of the government's intention to seek an
enhanced sentence. Oyler arose under a West Virginia recidivist statute. The Court stated that West Virginia was not required to provide notice of its intent to seek habitual offender treatment prior to trial on the substantive offense as long as adequate notice was given prior to sentencing. Reference to the legislative history may help support a claim that the notice required must be provided before a conviction is obtained. Several cases have held that no notice need be provided in the indictment. See U.S. v. Mauldin, 109 F.3d 1159, 1162-63 (6th Cir. 1997) (no notice required); U.S. v. Hardy, 52 F.3d 147 (7th Cir. 1995) (same); U.S. v. Gibson, 64 F.3d 617, 625 (11th Cir. 1995) (same).

Procedural due process requires only that a defendant be given reasonable notice of and an opportunity to be heard concerning the prior convictions that are used to enhance. Thus, courts have reasoned that such notice need only be given prior to the time of sentencing. See U.S. v. Craveiro, 907 F.2d 260, 264-65 (1st Cir. 1990) (lack of notice not a violation of ACCA or Due Process Clause); U.S. v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990) (career offender); U.S. v. Wallace, 895 F.2d 487, 490 (8th Cir. 1990) (same). Generally, notice is sufficient where it is in writing and delivered before trial. U.S. v. Gilles, 851 F.2d 492 (1st Cir. 1988) (defendant adequately notified of prior convictions where government listed the convictions in indictment filed prior to trial); U.S. v. Wilson, 7 F.3d 828, 838 (9th Cir. 1993) (notice filed five months before trial in PSR sufficient).

13.05.05.06 Attack on Prior Convictions

In a penalty enhancement scheme, such as the ACCA, the government must prove the continuing constitutional validity of the prior convictions. See Baldasar v. Illinois, 446 U.S. 222 (1980), overruled on other grounds, Nichols v. U.S., 511 U.S. 738, 746-48 (1994); Burgett v. Texas, 389 U.S. 109 (1967); U.S. v. Clawson, 831 F.2d 909 (9th Cir. 1987). The certificate of conviction which the government presents for the predicate convictions has a presumption that the convictions were obtained constitutionally. See generally Autry v. Estelle, 464 U.S. 1, 3 (1983) (when process of direct review ends, a “presumption of finality and legality attaches to the conviction and sentence”). It is therefore incumbent on the defendant to obtain records about the prior conviction and review them to determine whether collateral attack on the conviction is possible.

Notwithstanding this principle, in Custis v. U.S., 511 U.S. 485 (1994), the Supreme Court held that a defendant in a federal case may not collaterally attack a prior state conviction used to enhance his sentence under the ACCA. A defendant can attack the state prior in state court or through federal habeas review and if successful, the defendant could apply to reopen any federal sentence "enhanced by the state sentences." Id. at 497. However, the Supreme Court expressed no opinion "on the appropriate disposition of such an application.” The sole exception to the Supreme Court's bright line rule precluding attack on prior convictions at ACCA sentencing proceedings is where the prior conviction was obtained in violation of the right to counsel. Id. at 494-95.

13.05.06 The ACCA & The Sentencing Guidelines

ACCA cases raise significant issues under the Sentencing Guidelines. Although the guidelines are discussed elsewhere in this Manual, counsel faced with an ACCA conviction should be aware of the
interplay between §4B1.1 (career offender) and §4B1.4 (ACCA). Section 4B1.1, the career offender guidelines, provide for significant sentencing enhancements if: (1) the defendant is at least 18 years old at the time of the offense; (2) the offense of conviction is a crime of violence or controlled substances offense; and (3) the defendant has two prior felony convictions for crimes of violence or controlled substance offenses.

The applicability of the career offender provisions of the guidelines has been extensively litigated. A conviction for being a felon in possession of a firearm is not a "crime of violence" under the guidelines. See, e.g., U.S. v. Crabtree, 109 F.3d 566, 570 (9th Cir. 1997) (felon in possession "nonviolent" crime); Sahakian (same). For the career offender guideline to apply, the offense of conviction, as opposed to the prior predicate crimes, must be a "crime of violence." U.S.S.G. §4B1.1. Defendant convicted in ACCA prosecutions cannot be sentenced as a career offender because the ACCA offense, unlawful possession of a firearm, is not a "crime of violence." See U.S.S.G. §4B1.2, comment. (n.1) (the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon.").

In cases involving violent conduct in connection with the possession of the firearm in the offense of conviction, there is some risk that a court may apply the career offender guidelines. See U.S.S.G. §4B1.2, comment. (n.1) (certain "offenses are included where . . . the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved the use of explosives . . . or, by its nature, presented a serious risk of physical injury to another"). In the event that a court attempts to apply §4B1.1 under these circumstances, counsel must keep in mind that ACCA prior convictions are not necessarily career offender predicate convictions under §4B1.2. For example, burglary convictions do not appear to qualify under career offender guidelines unless they involve a "dwelling." U.S.S.G. §4B1.2, comment. (n.1). Also, while the ACCA includes even remote convictions as predicate priors, career offender guidelines do not. See U.S.S.G. §4B1.2(A) (career offender prior convictions must count under time limits of §4A1.1(a), (b), and (c)); 4B1.4, comment. (n.1); U.S. v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999).

On November 1, 1990, the ACCA Sentencing Guidelines were amended to provide for sentencing ranges even greater than the 15 year mandatory minimum. See U.S.S.G. §4B1.4. Clearly, these guidelines should apply only to offenses occurring after the date of the amendment. See Sweeten, 933 F.2d at 772 (on remand, district court directed to apply guidelines in effect at the time of the offense, not the then newly promulgated §4B1.4).

In light of these amendments, in order to minimize the risk of the imposition of greater than a 15 year sentence, the only alternative may be reaching a plea agreement for the minimum mandatory 15-year sentence. However, one should also consider the risks that the probation department and the court in a particular district may disregard the agreement.

13.05.07 ACCA Predicates Deemed Non-jury Issues

The question of whether a jury can be asked to consider whether a person qualifies as an armed career criminal has been addressed and rejected in a number of cases. U.S. v. Yeagin, 927 F.2d 798,
801 (5th Cir. 1991) (court, not jury, should consider proof of armed career criminal status under §924(e)); U.S. v. Wolak, 923 F.2d 1193, 1199 (6th Cir. 1991) (sentencing under ACCA is not separate offense, no jury trial or jury finding is required); U.S. v. Taylor, 882 F.2d 1018, 1031-32 (6th Cir. 1989) (validity of prior convictions for purposes of applying ACCA is not a jury question); see also U.S. v. Vidaure, 861 F.2d 1337 (5th Cir. 1988) (court held that whether prior felonies were "violent" for ACCA purposes was issue of law to be decided by judge.); Almendarez-Torres v. U.S. 523 U.S. 224 (1998) (Congress intended prior felony conviction aspect of 8 U.S.C. §1326 statute to be sentencing enhancement, not separate crime). However, these decisions precede the Supreme Court's decision in Apprendi which ultimately, as intimated, may require reconsideration of the principle that "recidivism" is merely a sentencing enhancement not subject to jury trial requirements. See Apprendi, 120 S. Ct. 2348.

13.05.08 Appeal

The government's right to appeal a district court's decision not to enhance a sentence under the Armed Career Criminal Act is unsettled. In U.S. v. Hundley, 858 F.2d 58 (2d Cir. 1988), the government appealed from a district court's grant of a motion under 28 U.S.C. §2255 setting aside a 15-year sentence under the Armed Career Criminal Act after a finding that one of the three predicate convictions was constitutionally infirm. The court dismissed the appeal on the ground that it was actually the five-year sentence and Congress had conferred no authority for such an appeal on the government. The court noted that contrary decisions had been reached in the Fourth, Ninth and Tenth Circuits. Id. at 62. The court further noted that the amendment of Title 18 in the Sentencing Reform Act of 1984, found at 18 U.S.C. §3742(b)(1), authorized appeals from sentences imposed "in violation of law." The court stated that the statutory amendment reflected congressional understanding that pre-existing law did not provide for government appeal of sentencing orders under 18 U.S.C. §3731. Id. Thus, for offenses committed prior to November 1, 1987, it may be that the government cannot appeal. However, the government may proceed by way of mandamus to challenge improper application of the Armed Career Criminal Act by the district court. U.S. v. Palmer, 871 F.2d 1202, 1209 (3d Cir. 1989). See U.S. v. Anderson, 921 F.2d 335 (1st Cir. 1990) (government appeal valid because sentence below ACCA minimum of §924(e)(1) was "in violation of law" under 18 U.S.C. §3742(b)(1)).

13.05.09 Constitutional Challenges

Prior to passage of the Armed Career Criminal Act, 18 U.S.C. §922 and §1202 App. II were challenged on a variety of grounds. Since enactment of the Armed Career Criminal Act, additional constitutional challenges have been raised and uniformly rejected.

13.05.09.01 The Commerce Clause Nexus

In Scarborough, the Court was asked to declare that Congress had no power to prohibit possession of firearms by felons merely upon a showing that at some point the possessed firearm has previously traveled in interstate commerce. The Court refused. After reviewing the legislative history and statutory findings, the Court found a sufficient nexus between the act sought to be prohibited, possession of a firearm, and interstate commerce to justify congressional action under Article I, §8 of the Constitution,

There was some hope that this argument would be revived when the Court decided *U.S. v. Lopez*, 514 U.S. 549 (1995), holding that the Gun Free School Zone Act, 18 U.S.C. §922(a) was beyond the legitimate scope of Congress’s Commerce Clause power. *Id.* The Court opined that because Congress did not make any findings nor create any legislative history as to the jurisdictional issue, there was an insufficient nexus between interstate commerce and the possession of guns in schools. *Id.* The Court also noted that the Act failed to specify that only guns which had traveled in interstate commerce fell within the ambit of the statute. *Id.* Without the establishment of this required nexus, the Act exceeded Congress’ Commerce Clause power. *Id.*

Constitutional challenges to the ACCA continued to be raised on Commerce Clause grounds. Noting its scant legislative history and the absence of congressional findings similar to those included in the two-year version of 18 U.S.C. §1202 App II, litigants attempted to liken their cases to *Lopez* and distinguish them from *Scarborough*. While an interstate commerce nexus need only be minimal to support federal jurisdiction, it is difficult to find such a nexus to justify the classifications of any of the versions of the Armed Career Criminal Act. These arguments, however, have been rejected by a number of courts. See *Paul*, 110 F.3d at 872 (notwithstanding *Lopez*, under *Scarborough*, Congress did not exceed Commerce Clause authority in passing §922); *U.S. v. Murphy*, 107 F.3d 1199, 1211 (6th Cir. 1997) (same); *Casterline*, 103 F.3d at 77 (same); *U.S. v. Lewis*, 100 F.3d 49, 50-53 (7th Cir. 1996) (same); *U.S. v. Wells*, 98 F.3d 808, 810 (4th Cir. 1996) (same); *U.S. v. Blais*, 98 F.3d 647, 649 (1st Cir. 1996) (same); *U.S. v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996) (same); *U.S. v. Rawls*, 85 F.3d 240, 242-43 (5th Cir.1996) (same); *U.S. v. McAllister*, 77 F.3d 387, 389-90 (11th Cir. 1996) (same); *U.S. v. Bates*, 77 F.3d 1101, 1104 (8th Cir. 1996) (the interstate commerce element of §922(g) is met if there exists “the minimal nexus that the firearm [has] been, at some time, in interstate commerce”); *U.S. v. Poole*, 929 F.2d 1476, 1479 (10th Cir. 1991) (same); *U.S. v. Palozie*, 166 F.3d 502 (2d Cir. 1999)(same).

**13.05.09.02 Equal Protection**

In *U.S. v. Bass*, 404 U.S. 336 (1971), the Court noted that it was not resolving the question of whether the classification established by the two-year penalty version of 18 U.S.C. §1202 (App. II) was unconstitutional. Equal protection challenges focusing more closely on particular aspects of the prohibition of possession by felons have been addressed in a number of circuit cases under both the two- and five-year penalty provisions of 18 U.S.C. §1202 (App. II) and 18 U.S.C. §922. *Cf. U.S. v. Phelps*, 17 F.3d 1334, 1344-45 (10th Cir. 1994) (noting “legislation subject to rational basis review is presumptively constitutional”).

In *U.S. v. Ransom*, 515 F.2d 885, 891-92 (5th Cir. 1975), the court held that the prohibition on possession of firearms by felons did not create an invidious classification prohibited by the Equal Protection Clause. The rationality of including persons convicted of nonviolent offenses within the classification of "felon" was challenged and rejected in *U.S. v. Giles*, 640 F.2d 621, 626-27 (5th Cir. 1981) (statute did not violate equal protection by not distinguishing between persons convicted of violent and nonviolent
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In *U.S. v. Clawson*, 831 F.2d 909 (9th Cir. 1987), the defendant contended that no rational basis existed for the Act to single out persons convicted of robbery or burglary offenses. His challenge was summarily rejected by the Ninth Circuit. *Id.* at 915. Similar challenges were rejected in *U.S. v. Baker*, 850 F.2d 1365, 1372 (9th Cir. 1988) (holding that it is within Congress' power to make the distinction between “three-time burglars and robbers as opposed to other three time felons who commit dangerous crimes”); *U.S. v. Hawkins*, 811 F.2d 210, 216-17 (3d Cir. 1987) (rational basis exists for distinguishing between three-time robber/burglar and three-time other category felon -- incapacitating particular repeat offenders). And more recently in *U.S. v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995) (ACCA . . . is rationally related to a valid purpose of criminal law -- incapacitation -- and therefore does not violate the Equal Protection Clause).

In *U.S. v. Bregnard*, 951 F.2d 457, 461 (1st Cir. 1991), the court rejected an equal protection challenge based on the fact that predicate convictions are defined by state law which, of course, varies from state to state. *See also U.S. v. Argo*, 925 F.2d 1133 (9th Cir. 1991) (same); *U.S. v. McKenzie*, 99 F.3d 813 (7th Cir. 1996) (same).

### 13.05.09.03 Double Jeopardy and the Petite Policy

The Armed Career Criminal Act is susceptible to double jeopardy challenges on at least two grounds. First, the Act provides for enhanced punishment for conduct which already has resulted in punishment. Second, in some cases, a person will face prosecution for possession in federal court at the same time that he is facing prosecution for an underlying robbery, assault or other charge in a state court.

The first challenge to use of a prior conviction to enhance punishment under the ACCA is indistinguishable from challenges to other recidivist statutes which have been uniformly rejected. *See Graham v. West Virginia*, 224 U.S. 616, 630-31 (1912) (sentencing of a habitual criminal to imprisonment for life is not double jeopardy).

The second type of double jeopardy challenge, involving multiple prosecutions of the same criminal conduct, was raised and rejected in *U.S. v. Gourley*, 835 F.2d 249, 250-51 (10th Cir. 1987), and *U.S. v. Bouthot*, 685 F. Supp. 286 (D. Mass. 1988), aff’d on other grounds, 878 F.2d 1506 (1st Cir. 1989). In *Bouthot*, the defendant, with others, entered a home and stole a number of items, including guns. They were charged in the state court with breaking and entering, larceny, receipt of stolen property and carrying a firearm without a license. After the state charges were brought, the federal government became interested in Bouthot as a potential armed career criminal. After consultation between the federal and state authorities, the state agreed to dismiss the weapons charge it had brought and proceed against Bouthot only on the other charges. Bouthot was eventually convicted in the state court.

Bouthot challenged the subsequent charges brought in the federal court on double jeopardy grounds, alleging that the state prosecution charges arising out of the same incident, including possession
of a gun, precluded the federal charges. The court rejected this claim, holding that because the Massachusetts gun laws protected a different interest than the federal gun laws, double jeopardy was not violated by state and federal prosecutions of burglary and possession of a gun. This is consistent with existing double jeopardy case law which permits multiple prosecutions for the same conduct in different jurisdictions. See Heath v. Alabama, 474 U.S. 82, 92-93 (1985) (when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct offenses for double jeopardy purposes).

In U.S. v. Williams, 892 F.2d 296 (3d Cir. 1989) (superseded on other grounds, Stinson v. U.S., 508 U.S. 36 (1993)), the defendant's argument that he had been exposed to double jeopardy under the Act failed when the Third Circuit ruled that the application of the §924(c) sentence enhancement in addition to application of enhanced punishment provisions of the Career Offender Guidelines did not constitute double punishment for the same offense. See also U.S. v. Newton, 65 F.3d 810, 811 (9th Cir. 1995) (cumulative punishment does not violate the Double Jeopardy Clause if Congress clearly intended to authorize such punishment).

In U.S. v. Dickerson, 857 F.2d 414 (7th Cir. 1988), the district court imposed separate 4- and 8-year sentences to run concurrently and a 15-year sentence enhancement under 18 U.S.C. §§922(g) and 924(c). The court held that imposition of multiple sentences in that manner violated the Double Jeopardy Clause. In contrast to Dickerson, the Second Circuit held that the Double Jeopardy Clause is not violated when the statutory scheme required the district court to impose consecutive sentences for firearms offenses. U.S. v. Lawrence, 928 F.2d 36, 38-39 (2d Cir. 1991).

Double jeopardy does not bar resentencing if sentencing under the Armed Career Criminal Act is reversed due to insufficiency of proof of prior violent felonies. Woodall v. U.S., 72 F.3d 304, 313 (1st Cir. 1996). Woodall’s sentence was reversed because his attorney failed to object to a pre-sentence report’s description of his prior burglaries. Id. The court found that this was error but held that double jeopardy did not bar resentencing. Id. at 80.

The United States Department of Justice has a policy in effect, commonly called the Petite policy, named for Petite v. U.S., 361 U.S. 529 (1960) (per curiam). This is a practice of the Department of Justice requiring individual prosecutors to obtain approval from the appropriate Assistant Attorney General before an Assistant United States Attorney may prosecute an offense arising from the same acts which are or have been the subject of a state prosecution. Although the Department of Justice has established an internal appeals mechanism, the Petite policy created no rights and for defendants is not judicially enforceable. See United States Attorney's Manual, Volume 7, pp. 9-2.142 et seq. (1994); U.S. v. Gary, 74 F.3d 304, 313 (1st Cir. 1996) (Petite policy “does not confer substantive rights on criminal defendants”); U.S. v. Moore, 822 F.2d 35, 38 (8th Cir. 1987) (Petite policy “is strictly internal and confers no substantive rights on the accused”). In some circumstances, a request for dismissal by the United States Attorney based on the Petite policy may be available. See Rinaldi v. U.S., 434 U.S. 22, 24-25 (1977) (“Petite policy . . . is applied most frequently against duplicating federal-state prosecutions, but also encompasses successive federal prosecutions arising out of the same transaction”); U.S. v. Collamore, 751
13.05.09.04 Ex Post Facto Clause

Article I, §9, cl. 3 of the United States Constitution prohibits Congress from passing any "ex post facto" law. A law violates the Ex Post Facto Clause if it is retrospective and disadvantages the offender. See Weaver v. Graham, 450 U.S. 24, 29 (1981) (application of change in statute with respect to good time or gain time credits violated the Ex Post Facto Clause where crime was committed before its effective date).

The Armed Career Criminal Act is susceptible to ex post facto challenges on three grounds. First, a defendant may contend that he came into possession of the weapon charged in the indictment prior to enactment of the law. Second, a defendant may contend that the weapon charged in the indictment moved in interstate commerce prior to enactment of the law. Third, a defendant may contend that his prior convictions occurred before the law was passed. These challenges, however, have been rejected by every court which has considered them under the Armed Career Criminal Act, the two- and five-year felon in possession provisions of the United States Code, and in challenges to federal and state recidivist statutes. See, e.g., U.S. v. Collins, 61 F.3d 1379, 1383 (9th Cir. 1995) (amendment was part of larger statutory scheme designed to regulate possession of firearms, and did not constitute punishment); U.S. v. Leonard, 868 F.2d 1393, 1399 (5th Cir. 1989) (noting that §924(e) is not retrospective because it bases enhancement upon prior convictions as opposed to enhancing the sentences of prior convictions); U.S. v. Jordan, 870 F.2d 1310, 1314-15 (7th Cir. 1989) (same); Wey Him Fong v. U.S., 287 F.2d 525, 526 (9th Cir. 1961) (enhancement provision did not violate); McDonald v. Mass., 180 U.S. 311, 312 (1901) (statute, imposing a punishment on none but future crimes, is not ex post facto).

Because of what the courts call the “continuing nature” of the offense of possessing a firearm, the time when a defendant came into possession of a firearm is irrelevant. Nonetheless, timing is critical both for ex post facto and statute of limitations purposes if an indictment alleges receipt or transportation as the actus reus. In those cases, the government must prove that the act of receipt or transportation occurred after passage of the law and within the relevant statute of limitations.

Courts appear to have rejected the argument that there is no ex post facto if the weapon traveled in interstate commerce prior to the date the law was passed. See Scarborough, 431 U.S. at 576-77, (firearm that traveled in interstate commerce at some time was sufficient to satisfy the required nexus); U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974) (§1202 did not violate ex post facto laws). In Scarborough, the Supreme Court reasoned that Congress intended to broadly prohibit possession of weapons by felons and intended a minimal nexus to interstate commerce. See U.S. v. Gillies, 851 F.2d 492, 495 (1st Cir. 1988) (no violation because in or affecting commerce refers to kind of gun felons may not possess, not the act of possession); U.S. v. D'Angelo, 819 F.2d 1062, 1065-66 (11th Cir. 1987) (since possession is a continuing offense, it is irrelevant under ACCA that firearm was transported in interstate commerce prior to enactment of statute).

An issue which has not been addressed involves the distinction between the Armed Career Criminal Act as it existed between 1984 and 1986 and most recidivist statutes. A number of circuits have held that the Armed Career Criminal Act, as it existed during that period, made proof of the prior convictions an
element of the offense rather than a factor to be considered in sentencing. In those circuits which required proof of the priors as an element of the offense, an *ex post facto* challenge to the use of convictions which were obtained before October 12, 1984, may have a better chance of success. *But see U.S. v. Karnes*, 437 F.2d 284 (9th Cir. 1971) (rejecting *ex post facto* challenge to two- and five-year provisions of 18 U.S.C. §922 and 18 U.S.C. §1202 App. II).

**13.05.09.05 Proportionality**

The Eighth Amendment's prohibition against cruel and unusual punishment requires that a sentence be proportionate to the crime. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court identified a three-part test for determining proportionality. This test requires: (1) review of the gravity of the offense and the harshness of the penalty; (2) comparison with sentences imposed on other persons in the same jurisdiction; and (3) comparison of sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-92.\(^3\)

The Armed Career Criminal Act calls for a mandatory minimum punishment which is greater than the maximum term imposed on many persons convicted of homicide. When the possession charged in a case indicted under the Act does not involve any active risk of danger or involvement in commission of any other offense, a proportionality challenge may lie. Some of the cases rejecting proportionality challenges have involved charges of possession during violent crimes and may be distinguishable from non-violent instances of possession. *See, e.g.*, *Gourley*, 835 F.2d 249 (10th Cir. 1987) (shotgun pressed against police officer's neck during struggle). Some, however, have not. *See U.S. v. Gilliard*, 847 F.2d 21 (1st Cir. 1988) (investigation of drug offense, defense asked for identification of weapon); *see also U.S. v. Dombrowski*, 877 F.2d at 530 (mandatory minimum sentence of 15 years was not constitutionally disproportionate, nor did it deprive the defendant of due process when the defendant fired a gun, randomly and without damage to persons or property, and his prior offenses did not, for the most part, involve any weapons or the likelihood of injury to persons). *U.S. v. Pedigo*, 879 F.2d 1315, 1320 (6th Cir. 1989) (looking to the relative harshness of the sentence imposed); *U.S. v. Baker*, 850 F.2d at 1372 (after analyzing severity of ACCA conviction in relation to sentences for other offenses, the court found no violation).

**13.05.09.06 Due Process**

Any case charged under the Act may be brought with an indictment alleging one or more prior convictions. The indictment must allege only one prior felony conviction to state a crime under 18 U.S.C. §922. The remaining convictions may be proved at sentencing. However, the prosecutor has the discretion to allege in the indictment the three or more predicate felonies required for treatment as an armed career criminal. In *U.S. v. Ford*, 872 F.2d 1231 (6th Cir. 1989), the court held that although the government

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\(^3\) In a subsequent opinion, *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Scalia, who wrote for the majority, was joined only by the Chief Justice, in opining that the Eighth Amendment contains no proportionality guarantee. An opinion concurring with the judgment held that the Eighth Amendment encompasses a narrow proportionality principle, and a dissent suggests a less limited proportionality principle.
need prove only one felony conviction as an element of the offense, it was not limited to proving only one prior felony.

An allegation which puts before a jury the defendant's prior record is inherently unfair and prejudicial. However, the courts have not held that the Due Process Clause precludes providing the jury with information about an accused's prior record. While the problem cannot be addressed through a constitutional challenge, the court does have the discretion to address the problem. See supra section 13.04.05.03 at p.13-573 to 13-574.

13.05.09.07 Prior Crimes As Offense Elements

In Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct 2348 (2000), the Supreme Court held that if the existence of a certain factor, even if labeled in the statute as a penalty or a sentencing enhancement, increases the statutory maximum sentence, it must be considered an element of the offense, pled in the indictment, submitted to a jury and proved beyond a reasonable doubt. Id. (quoting Jones v. U.S., 526 U.S. 227, 242 n.6 (1999)); see Jones, 526 U.S. at 252-53 (Stevens, J., concurring) (“I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. . . . Indeed, in my view, a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence . . . .”); id. at 253 (Scalia, J., concurring) (“it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed”); Castillo v. U.S., ___ U.S. ___, 120 S. Ct 2090 (2000) (holding that type of weapon in §924(c) charge is element of offense, not sentencing enhancement).

In Apprendi, the Supreme Court addressed the issue of a purported sentencing enhancement in the New Jersey statutes criminalizing “hate crimes” which increased the statutory maximum sentences faced by the petitioner from 20 years to 30 years with a 15-year period of parole ineligibility. Id. at 2352. The petitioner argued that the finding of “bias” upon which this hate crime “enhancement” was imposed must be proven to a jury beyond a reasonable doubt. The Supreme Court agreed, holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 2362; see also id. at 2363 (“[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”); Macmillan v. Pennsylvania, 477 U.S. 79 (1986) (upholding finding that weapon enhancement could trigger mandatory minimum sentence, but distinguishing circumstance where the “maximum penalty” is “alter[ed]”); In re Winship, 397 U.S. 358, 364 (1970) (“the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

The logical and fair reading of the Apprendi case is that where the existence of three prior convictions for violent crimes increases the statutory maximum punishment under §§922(g) and 924(e), then notwithstanding their present characterization as “sentencing factors,” they must be treated as offense elements and proven as such at jury trial. See Apprendi, 120 S. Ct. at 2361; see also id. at 2372 (J.
Thomas, concurring) (citing 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872)) ("the indictment must allege whatever is in law essential to the punishment sought to be inflicted."). The flaw in this analysis, however, is that previously, a splintered majority of the Court held that "recidivism" is the exception to this rule. See Almendarez-Torres v. U.S., 523 U.S. 224 (1998). The Fourth Circuit, accordingly, has held that the "ACCA is a sentence enhancement statute and does not create a separate offense." U.S. v. Mack, 229 F.3d 226 (9th Cir. 2000). Mack went on to hold that Apprendi does not apply to the ACCA, citing the recidivism exception recognized in Almendarez-Torres and repeated in Apprendi. Id. at *15 n.7. However, the Apprendi majority appears willing to reconsider this exception when presented with the proper opportunity. See Apprendi 120 S.Ct at 2361 ("it is arguable that Almendarez-Torres was incorrectly decided); see also id. at 2379 (J. Thomas, concurring) (indicating that he would now vote to overrule Almendarez-Torres, thus converting the Almendarez-Torres dissent into the majority). Alternatively, Apprendi should be read as limiting Almendarez-Torres to its specific facts. See Apprendi, 120 S.Ct at 2361-62. But see U.S. v. Powell, 109 F.Supp 2d 381 (E.D.Pa. 2000) ( holding that Apprendi does not require the fact of a criminal defendant’s prior conviction, which increases the penalty for a crime beyond the statutory maximum, to be charged in the indictment, and rejecting argument that Almendarez-Torres should be limited to its specific facts).

13.06 GUNS AND DRUGS: TITLE 18 U.S.C. §924(C)

13.06.01 Introduction

Larry Daniel Harris, a young man on a football scholarship to Fresno State University, committed several armed robberies of restaurants and hotels in the Fresno, California, region. After a jury trial which ended in convictions on five counts of interference with interstate commerce by robbery under 18 U.S.C. §1951(a), Mr. Harris, who the district court noted had an insignificant prior record, was sentenced to 1141 months (95 years) in custody. U.S. v. Harris, 154 F.3d 1082, 1083 (9th Cir. 1998). The sentence consisted of 121 months for each of the five robbery counts (to be served concurrently), 60 months on the first count of use of a firearm, and 240 months for each of the other four counts of use as a firearm (each to be served consecutively as required by §924(c)(1)). Id. After affirming the district court sentence, the Ninth Circuit wrote:

We reluctantly find that we must affirm Harris' . . . sentence[] given the precedents established by our court and by the Supreme Court. We publish this opinion to urge Congress to reconsider its scheme of mandatory minimum sentences and to grant district court judges the discretion to set sentences at the level appropriate for the circumstances of a particular defendant and his or her crimes.

Id. at 1085.

The pointed comments of Judge Wiggins have fallen on deaf ears in Congress. The era of mandatory, draconian federal sentences for offenses involving firearms has continued, effectively ending the lives of young men like Mr. Harris. Judge Posner summed up the sensibility of our current firearm sentencing scheme: "[a] civilized society locks up such people until age makes them harmless but it does

Congress enacted 18 U.S.C. §924(c)(1) to eliminate a judge’s discretion in granting parole or probation to anyone who “uses or carries” a firearm “during and in relation to any crime of violence or drug trafficking crime." This is an offense, separate and apart from any other charges, which criminalizes the addition of the firearm to an otherwise “ordinary” robbery or narcotics trafficking crime. This separate crime carries an entirely separate minimum mandatory sentence which runs consecutive to the underlying offense with punishment ranging from five years imprisonment to life without parole. Section 924(c)(1) is most frequently used in conjunction with drug trafficking offenses, and it can transform a case that would involve a short or moderate term under the Sentencing Guidelines into a case with a mandatory, and very lengthy, term of imprisonment. Prosecutors now routinely charge both the underlying crime, *i.e.*, robbery or drug trafficking, and the §924(c) charge, claiming that a firearm was “used” or “carried” “during” and “in relation to” the underlying offense. With the advent of these lengthy, consecutive sentences, the prosecutors have the perfect negotiating tool in order to compel a guilty plea to even the most defensible underlying offense in exchange for a dismissal of the §924(c) charge.

### 13.07 THE ELEMENTS OF §924(c)

Section 924(c) imposes specific penalties if the defendant:

1. uses or carries a firearm;
2. during and in relation to;
3. any crime of violence; or
4. drug trafficking offense.

#### 13.07.01 Uses or Carries a Firearm

There are two separate prongs under the §924(c) statutes by which one can be prosecuted: (1) by either the “use” of the firearm during and in relation to the drug trafficking crime or crime of violence or, (2) by “carrying” the weapon during and in relation to the underlying crime. The meanings of both the terms “use” and “carry” have been widely litigated and some of the resulting principles are set forth below.

#### 13.07.01.01 Interpretation of the “Use” Prong of §924(c)

Following the enactment of §924(c), courts were divided regarding what constituted “use” of a firearm during and in relation to one of the underlying crimes. Some courts held that hiding a gun under the mattress near drugs constituted such a “use,” *U.S. v. McFadden*, 13 F.3d 463, 465 (1st Cir. 1994), while other courts refused to find “use” under similar circumstances. *See U.S. v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988) (presence of gun in dresser in apartment with drugs, drug proceeds and paraphernalia insufficient “use” under §924(c)).
In 1995, the Supreme Court decided the seminal case of *Bailey v. U.S.*, 516 U.S. 137, 144, 146, 148-150 (1995), holding that “use” of a firearm under §924(c) requires more than a defendant’s mere possession or intended use of a firearm. Rather, the government must specifically show “active employment” of a firearm during and in relation to the underlying offense. *Id.* at 144.\(^4\) Active employment includes firing, attempting to fire, displaying, brandishing, bartering and striking with a firearm. *Id.* at 148. Referring to a firearm or placing a firearm on display may constitute active employment if such acts facilitate the underlying offense. *Id.* at 146, 148. By contrast, stashing a gun nearby, even intending to use it, if necessary, falls short of “use,” unless the defendant discloses the firearm’s proximity to the alleged victim. *Id.* at 148-50.

Post *Bailey*, courts have continued to address what does and does not constitute “use” of a firearm under this statute. Compare *U.S. v. Stotts*, 176 F.3d 880, 888 (6th Cir. 1999) (explosive device displayed in the course of offense is “used”); *U.S. v. Washington*, 106 F.3d 1488, 1490 (9th Cir. 1997) (victim’s knowledge of gun actively displayed by fellow robber falls within “use”); *U.S. v. Czeck*, 105 F.3d 1235, 1240-41 (8th Cir. 1997) (testimony, by two government informants, concerning defendant’s frequent references to guns were “calculated to bring about a change in the circumstances,” satisfying “use” prong), with *U.S. v. Guess*, 203 F.3d 1143 (9th Cir. 2000) (patrolling a drug lab with a firearm but dropping it upon discovering police officers outside does not constitute “use”); *U.S. v. Castillo*, 179 F.3d 321, 324-25 (5th Cir. 1999) (rejecting “fortress theory,” where defendant may be convicted of using or carrying a firearm where large numbers of guns were readily available in strategic locations near drugs and money and remanding for determination of “active employment”), rev’d on other grounds, 120 S. Ct. 2090 (2000); *U.S. v. Manning*, 79 F.3d 212, 216 (1st Cir. 1996) (evidence of two handguns located in closet with drugs insufficient to support conviction for use of firearm in drug offense); *U.S. v. Jackson*, 103 F.3d 548, 550 (2d Cir. 1996) (evidence of two handguns located in closet with drugs insufficient to support conviction for use of firearm in drug offense); *U.S. v. Bermudez*, 82 F.3d 548, 550 (2d Cir. 1996) (evidence of two handguns located in closet with drugs insufficient to support conviction for use of firearm in drug offense); *Objio-Sarraff v. U.S.*, 927 F. Supp. 30 (D. Puerto Rico 1996) (concealment of firearm in trunk to provide individual protection is not “using” firearm during and in relation to drug trafficking crime), rev’d on other grounds, 108 F.3d 421 (1st Cir. 1997); *U.S. v. Guess*, 203 F.3d 1143, 1147 (9th Cir. 2000) (was not “use” of firearm when defendant drew loaded weapon, clicked off its safety, and held it for protection of his methamphetamine lab).

Even though the Supreme Court has significantly restricted the definition of using a firearm, the "carry" prong remains a rather inclusive theory of prosecution for §924(c) cases. Indeed, the Court in *Bailey* specifically stated that its more restrictive interpretation of “use” enhanced the potential role for “carries” in §924(c) cases. *Bailey*, 516 U.S. at 146.

13.07.01.02 Interpretation of the “Carry” Prong of §924(c)

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Generally, §924(c) “carry” cases can be categorized as either “non-vehicular” or “vehicular” carrying cases. In “non-vehicular carrying” cases, courts have moved away from the stringent legal definition of the term “carry,” and have recognized an “ordinary or natural meaning.” See U.S. v. Hernandez, 80 F.3d 1253, 1257 (9th Cir. 1996) (noting that term “carry” must be given its “ordinary or natural meaning”); U.S. v. Richardson, 86 F.3d 1537, 1548 (10th Cir. 1996) (stating that conviction under “carry” prong of §924(c)(1) requires possession of firearm through dominion and control, and transportation or movement of the weapon).

Various circuit courts have held that a firearm need not be located on one’s person in order for the defendant to be charged under the “carry” prong of §924(c). Generally, in “vehicular” carrying cases, the carry-prong of §924(c) is simply met by the defendant’s use of the vehicle. See U.S. v. Loaiza-Diaz, 96 F.3d 1335, 1337 (9th Cir. 1996) (defendant can be convicted of “carrying” firearm under §924 if firearm in vehicle and accessible to defendant); U.S. v. Baker, 78 F.3d 1241, 1247 (7th Cir. 1996) (transporting gun in car within reasonable reach constitutes “carrying” for the purposes of §924(c)(1)). The circuit courts are split in cases involving inaccessible firearms found within the defendant’s vehicle. Compare U.S. v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996) (firearm must be immediately available for use by defendant or within defendant’s reach); U.S. v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996) (“carrying” requires the firearm be within immediate reach); U.S. v. Cleveland, 106 F.3d 1056, 1066 (1st Cir. 1997) (carry-prong of §924(c)(1) may be met where firearm in vehicle even “without it necessarily being immediately accessible to the defendant while it is being transported”); U.S. v. Mitchell, 104 F.3d 649, 652-54 (4th Cir. 1997) (gun is carried if it is knowingly possessed and transported in vehicle, even if firearm inaccessible); U.S. v. Pineda-Ortuno, 952 F.2d 98, 104 (5th Cir. 1992) (in context of §924(c) vehicular case, term “carrying” is synonymous with “constructive possession”); U.S. v. Miller, 84 F.3d 1244, 1260-61 (10th Cir. 1996) (jury could find carry prong met where transported firearm is simultaneously possessed through dominion and control); U.S. v. Molina, 102 F.3d 928, 930-32 (7th Cir. 1996) (gun is carried if knowingly possessed and transported in vehicle in relation to drug trafficking crime, even if firearm inaccessible).

In 1998, the Supreme Court affirmed these interpretations of the above circuits regarding the phrase “carries a firearm.” In Muscarello v. U.S., 524 U.S. 125 (1998), the Court held that “carries a firearm” applies not only to a person who carries firearms on their person, but also to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of the car. Id. at 1913-14. In dissent, Justice Ginsburg states that reading “carries” to mean “on or about [one’s] person” is what was intended by the firearms statutes. Id. at 1923. The Ninth Circuit subsequently has held that carrying a handgun in the bed of a truck is “carrying a firearm” for purposes of the statute. U.S. v. Foster, 165 F.3d 689, 692 (9th Cir. 1999) (was not plain error for district court to have found that gun in pick-up bed was "carried" by defendant).

In cases in which both "use" and "carry" are alleged in the indictment, a conviction will be upheld on appeal even if the acts proven at trial do not satisfy both prongs of §924(c). See Castillo v. U.S., 200 F.3d 735, 737 (11th Cir. 2000) (although evidence was insufficient to convict under “use” prong, conviction affirmed because sufficient evidence was set forth to convict under the “carry” prong). Defense counsel must be aware, however, that where the indictment alleges only use or carry, but not both theories.
of §924(c) culpability, insufficient proof as to the charged theory will result in reversal irrespective of whether sufficient proof existed for the other prong. See U.S. v. Romero, 183 F.3d 1145, 1146 (9th Cir. 1999) (defendant's conviction under use prong which was not supported by Bailey could not be upheld under the carry theory where defendant was charged only with use, and not carrying, a firearm).

13.07.01.03 During and In Relation To

In Smith v. U.S., 508 U.S. 223 (1993), the Supreme Court specifically addressed the “in relation to” prong under §924(c)(1). There, the defendant offered to trade a gun for two ounces of cocaine to an undercover police officer posing as a pawnbroker. The use of the firearm (a fully automatic MAC-10 equipped with silencer) satisfied the “in relation to” element because, according to the Court, it was an integral part of the transaction: “[w]ithout it, the deal would not have been possible.” Id. at 238. This use was found to be within the meaning of the statute. The Court did, however, point out that “in relation to” means the firearm “at a minimum . . . must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence . . . the gun at least must ‘facilitat[e], or ha[ve] the potential of facilitating,’ the drug trafficking offense.” Id. (quoting U.S. v. Stewart, 779 F.2d 538, 539, 540 (9th Cir. 1985)). Thus, mere presence of a firearm, even if carried, without some further purpose, is insufficient to fulfill the “in relation to” element of the statute. Id.

Other courts have been somewhat inconsistent on this point. Some courts strictly interpret the phrase “in relation to.” See, e.g., U.S. v. Cooke, 110 F.3d 1288, 1294 (7th Cir. 1997) (no use in relation to underlying offense where gun inside compartment of garment bag placed in bed of pickup truck in which defendant was passenger); U.S. v. Malcuit, 104 F.3d 880, 885 (6th Cir. 1997) (unloaded gun in zipped gym bag behind driver’s seat not carrying in relation to drug trafficking crime). Other courts have been more expansive in their interpretation of this element. See, e.g., U.S. v. Loaiza-Diaz, 96 F.3d 1335, 1337 (9th Cir. 1996) (shotgun found in a truck carrying drugs and driven by defendant was deemed use in relation to the crime); U.S. v. Kristofferson, 926 F. Supp. 939 (N.D. Cal. 1996) (armed defendant found in truck with no drugs deemed to have had constructive possession of drugs carried by defendant in other vehicle); U.S. v. Williams, 104 F.3d 213, 215 (8th Cir. 1997) (gun in waistband during drug transaction constitutes use in relation to crime); U.S. v. Cleveland, 106 F.3d 1056, 1065-68 (1st Cir. 1997) (placing of weapons in trunk of car for the purposes of robbing another dealer during drug transaction was use during and in relation to crime). But see U.S. v. Stott, 176 F.3d 880, 888 (6th Cir. 1999) (proximity to the explosive device with intent to put a firearm to a future active use is not “during and in relation to”).

13.07.01.04 Any Crime of Violence

For §924(c) purposes, a crime of violence is an offense that is a felony which:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) 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.
18 U.S.C. §924(c)(3).

Just as the "in relation to" language requires that the firearm have some purpose or effect with respect to drug trafficking crimes, for §924(c) prosecutions, the firearm must have some connection to the underlying crime of violence. "To prove this necessary relation, the Government's evidence must support a finding that the defendant intended the weapon to be available for use during the [crime of violence]." U.S. v. Nicholson, 86 F.3d 1537, 1548 (10th Cir. 1996); see U.S. v. Shuler, 181 F.3d 1188, 1189-90 (10th Cir. 1999) (guns that were transported out of store as loot of a robbery that were neither loaded nor brandished were not carried "in relation to" robbery).

Whether a particular offense is a "crime of violence" is something that, when possible, can and should be contested by defense counsel. For example, engaging in a continuing criminal enterprise involving the possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute is not a crime of violence under §924(c). U.S. v. Cruz, 805 F.2d 1464, 1474 (11th Cir. 1986). Similarly, most narcotics offenses in general are not "crimes of violence" within the meaning of §924(c). U.S. v. Arrellano-Rios, 799 F.2d 520, 523 (9th Cir. 1986). Likewise, possession of a firearm by a felon is not a "crime of violence" for the purposes of §924(c). Downey v. Crabtree, 100 F.3d 662, 667 (9th Cir. 1996); U.S. v. Canon, 993 F.2d 1439, 1441 (9th Cir. 1993). Involuntary manslaughter, however, is a crime of violence under §924(c)(3) because, under §924(c)(3)(B) it involves a substantial risk of force against the person of another. U.S. v. Springfield, 829 F.2d 860, 863 (9th Cir. 1987).

13.07.01.05 Drug Trafficking Crime

For purposes of §924(c), a "drug trafficking crime" means:

[A]ny felony punishable under [21 U.S.C. §801, et seq. (manufacture, distribution, or possession with intent of controlled substances), §951, et seq. (importation, transhipment of controlled substances), or 46 U.S.C. App. §1901, et seq. (manufacture, distribution or possession with intent of controlled substances on board vessels)].

Again, whether a particular crime qualifies as a "drug trafficking crime," for purposes of §924(c), is an issue that may be litigated by defense counsel. See, e.g., U.S. v. Casarez-Bravo, 181 F.3d 1074, 1077-78 (9th Cir. 1999) (because statutory definition of Cal. H&S Code §11360 permits a conviction to be based on transportation of marijuana for personal use, conviction could not be predicate felony for career offender purposes).

13.07.02 Penalties

The term of punishment provided under §924(c)(1) depends upon the type of weapon used or carried and whether the defendant had ever previously violated this subsection. While most courts had held that the type of weapon used was a sentencing enhancement and not an offense element, see, e.g., U.S. v. Alborola-Rodriguez, 153 F.3d 1269, 1271 (11th Cir. 1998) (type of firearm not an element of the offense, but a sentencing question), the Supreme Court recently decided that the type of weapon was
indeed an offense element, not a sentencing element. Castillo v. U.S., 120 S. Ct. 2090 (2000). The penalty for a first §924(c)(1) offense is five years, consecutive to any other term of imprisonment. If the weapon is a short barreled rifle, shotgun, or a semi-automatic weapon, however, the additional consecutive term is 10 years. If the weapon is a machine gun, destructive device, or a firearm with an attached silencer or muffler, there is a mandatory consecutive term of 30 years. See U.S. v. Thompson, 82 F.3d 849 (9th Cir. 1996) (conviction for use of silencer could not stand where silencer in locked case in hall closet). A person who, while violating §924(c), causes the death of a person may be subject to the death penalty if that killing was a murder, or subject to the penalties under 18 U.S.C. §1112 if it was manslaughter. 18 U.S.C. §924(j)(1) and (2).

In the case of a "second or subsequent offense," an additional consecutive 20 years imprisonment is mandatory. If a machine gun or destructive device is used or carried, or if the firearm is equipped with a silencer or muffler, the mandatory additional term for a second or subsequent offense is life. In Deal v. U.S., 508 U.S. 129 (1993), the defendant committed six armed bank robberies on different dates. At trial, a jury convicted the defendant on all six bank robbery counts and six §924(c)(1) counts. The Supreme Court held that the second through sixth §924(c)(1) counts were "second and subsequent," and therefore upheld the five-year sentence for the first count and the 20-year consecutive sentences for the second through sixth counts, for a total of 105 years in custody. Id. In U.S. v. Andrews, 75 F.3d. 552 (9th Cir. 1996), four §924(c) offenses were charged to a single defendant arising from a single occurrence and the latter three charges were deemed subsequent offenses qualifying for repeat offender sentencing. But see U.S. v. Fontanilla, 849 F.2d 1257, 1258-59 (9th Cir. 1988) (because the murder and assault were properly charged as separate crimes, it was permissible to charge appellant with a separate firearm for each such crime); see also U.S. v. Medina, 181 F.3d 1078, 1083 (9th Cir. 1999) (district court may not impose concurrent sentences for third and subsequent convictions where defendant convicted under ten counts); U.S. v. Smith, 924 F.2d 889, 894-95 (9th Cir. 1991) (sentence vacated where multiple 924 counts not supported by separate predicate offenses); U.S. v. Henning, 906 F.2d 1392, 1399 (10th Cir. 1990) (same); U.S. v. Privette, 947 F.2d 1259, 1262-63 (5th Cir. 1991) (same); U.S. v. Henry, 878 F.2d 937, 943 (6th Cir. 1989) (same).

If a defendant simply possesses more than one gun in a single criminal episode, only one §924(c)(1) enhancement is proper. However, where a defendant is convicted of violating §924(c)(1) by actually using multiple weapons, the sentencing court must sentence using the most serious weapon involved. U.S. v. Martinez, 7 F.3d 146 (9th Cir. 1993). But see U.S. v. Freisinger, 937 F.2d 383 (8th Cir. 1991) (concurrent sentences for a §924(c) violation appropriate where defendant convicted separately for four weapons found in single stash). At sentencing, defendants can raise, as a defense, “sentencing entrapment,” thus permitting the district court to sentence the defendant based upon the type of weapon the defendant believed to be involved as opposed to the weapon supplied by the government. U.S. v. Ramirez-Rangel, 103 F.3d. 1501, 1507 (9th Cir. 1997) (in drugs-for-guns transaction, defendants unaware that weapons supplied by undercover police were machine guns).
A defendant involved in a conspiracy to commit either a violent act or a drug transaction commits a “crime of violence or drug trafficking crime” under §924(c). Conspirators are liable for their own weapons as well as their accomplices’ weapons, providing the accomplice’s use was “reasonably foreseeable.”6 In *U.S. v. Douglass*, 780 F.2d 1472 (9th Cir. 1986), the Ninth Circuit applied the factors set forth in *Pinkerton v. U.S.*, 328 U.S. 640 (1946), to subject a co-conspirator to liability under §924(c)(1) based upon “foreseeability.” *Douglass*, 780 F.2d 1472; see also *U.S. v. Fonseca-Caro*, 114 F.3d 906 (9th Cir. 1997) (where subsequent offense within scope of the crime and reasonably foreseeable, *Pinkerton* applies to §924), *cert. denied*, 522 U.S. 1097 (1998); *U.S. v. Giraldo*, 80 F.3d 667, 675-76 (2d Cir. 1996) (insufficient evidence because no *Pinkerton* charge given); *U.S. v. Pazos*, 993 F.2d 136, 141 (7th Cir. 1993) (*Pinkerton* doctrine governed §924(c) issue in drug conspiracy case); *U.S. v. Christian*, 942 F.2d 363, 367 (6th Cir. 1991) (same); *U.S. v. Bancalari*, 110 F.3d 1425, 1429-30 (9th Cir. 1997) (aiding and abetting under §924(c) requires that the defendant “must have ‘directly facilitated or encouraged the use’ of the firearm and not simply be aware of its use”) (quoting *U.S. v. Medina*, 32 F.3d 40, 45 (2d Cir. 1994)); *U.S. v. Dean*, 59 F.3d 1479, 1490 n.20 (5th Cir. 1995) (“[w]e do not go as far as to presume that the presence of a weapon in a drug transaction is always foreseeable”); *U.S. v. Friend*, 50 F.3d 548, 553 (8th Cir. 1995) (“[t]he government must prove criminal conduct beyond a reasonable doubt . . . [that the defendant had] knowledge of and role in the conspiracy, [and] was such that he could reasonably have foreseen the [co-conspirator’s] use of the firearm”); but see *U.S. v. Castaneda*, 9 F.3d 761 (9th Cir. 1993) (Due Process Clause forbids §924(c) liability when the relationship between co-conspirator and acts upon which the liability is based become too attenuated and although courts recognize the nexus between drugs and firearms, there is no presumption of foreseeability, and the burden of foreseeability remains on the government).

Although “reasonable foreseeability” is intended to limit the scope of liability in some cases, the standard has been applied broadly enough to mimic that of strict liability. See, e.g., *U.S. v. Pimentel*, 83 F.3d 55, 58-59 (2d Cir. 1996) (testimony that defendant “had reason to believe” that gun in compartment was sufficient to support jury’s inference that carrying of gun foreseeable); *U.S. v. Dean*, 59 F.3d 1479, 1490 (5th Cir. 1995) (under *Pinkerton*, defendants were properly convicted for violating §924(c) based on another’s violation of the statute in furtherance of the conspiracy, even though defendants unaware that other person was armed before they accompanied him into motel room); *U.S. v. Edwards*, 36 F.3d 639, 644 (7th Cir. 1994) (inherently violent nature of drug trade makes presence of firearms in large transactions reasonably foreseeable); *U.S. v. Odom*, 13 F.3d 949, 959 (6th Cir. 1994) (nexus between drugs and firearms has been acknowledged when large quantities of cocaine are involved in a conspiracy).

### 13.07.04 Carjacking, Title 18 U.S.C. §2119

The federal carjacking statute, added to Title 18 in 1992, makes it illegal to possess a firearm and take a motor vehicle which has moved in interstate commerce from the person or presence of another by force and violence or by intimidation. The statute provides for increased penalties if either serious bodily

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6 Co-conspirators are not strictly liable for each others’ criminal acts. “If in the course of a conspiracy there occur other illegal acts not specifically contemplated by an individual conspirator but reasonably akin to the anticipated illegality and in the furtherance or in consequence of the scheme, the conspirator may not on that account escape liability for participation in the conspiracy.” *U.S. v. Gleason*, 616 F.2d 2, 17 (2d Cir. 1979).
injury or death results. 18 U.S.C. §2119. Most litigation concerning the federal carjacking statute has
centered on the issue of double jeopardy, where the defendant is charged, convicted, and then sentenced
separately for carjacking, and for the use of a firearm during and in relation to a crime of violence. All
circuit courts addressing this issue have ruled that multiple punishment for §2119 and for §924(c) does not
violate the constitutional prohibition against double jeopardy. U.S. v. Seawood, 172 F.3d 986 (7th Cir.
1999); U.S. v. Bishop, 66 F.3d 569 (3d Cir. 1995); U.S. v. Mohammed, 27 F.3d 815 (2d Cir. 1994);
U.S. v. Singleton, 16 F.3d 1419 (5th Cir. 1994); U.S. v. Johnson, 22 F.3d 106 (6th Cir. 1994).

However, on a different point, in 1999, the Supreme Court handed down a decision significantly
affecting not only prosecutions under §2119, the statute addressed in the decision, but potentially numerous
other federal criminal statutes as well. In Jones v. U.S., 526 U.S. 227 (1999), the Court addressed the
issue of whether the federal carjacking statute comprises three separate offenses or a single crime with a
choice of three maximum penalties. Id. at 1217. As the statute sets forth, enhanced penalties lie if serious
bodily injury (25 year maximum) or death (life maximum) results from the carjacking. Instead of holding,
as did every circuit court considering the issue, that these were merely permissible sentencing
enhancements, the Court held that the carjacking statute encompasses three distinct offenses, each of which
must be charged by indictment, proven beyond a reasonable doubt, and submitted to the jury for its verdict.
Id. at 1227. For purposes of defending prosecutions in which heightened maximum penalties are included
in the statute based on specific conduct or results of a crime, counsel always should consider using Jones
to attack what may be insufficient indictments, proof, or jury findings to support enhanced sentences.
13.07.05 Drive-by Shootings

Under 18 U.S.C. §36, any person who fires a weapon into a group of two or more persons while escaping from or furthering a major drug offense, and with the intent to intimidate, harass, injure, or maim may be punished by up to 25 years if no one is injured, and may be subject to the death penalty if the killing is a first degree murder.

13.08 WEAPONS OFFENSES BY SALES, IMPORTS, AND EXPORTS

13.08.01 Importation and Sales of Weapons

The prohibitions and restrictions on the sales of weapons are found in Title 26 of the Internal Revenue Code and at 18 U.S.C. §921, et seq. Title 26 requires the registration of weapons importers, manufacturers and dealers, and provides for a transfer application process as well as transfer taxes. Failure to comply with these strict requirements subjects the individual to a prospective sentence of up to 10 years imprisonment.

13.08.02 Exporting Weapons

Title 22 U.S.C. §§2778 and 2779 provide the statutory authority for prosecuting illegal exportation of arms, as well as uranium (the precursor for nuclear weaponry). Section 2778 proscribes the exportation of "defense articles or defense services" without a license; violations can lead to a maximum term of 10 years imprisonment. Only products of the United States are covered by this section.

13.08.03 Smuggling Firearms in the Aid of Drug Trafficking

Under 18 U.S.C. §924(j), any person who, with the intent to engage and/or promote conduct that is a crime of violence or a drug trafficking offense, smuggles, or knowingly brings into the United State a firearm is subject to a sentence of 10 years.

13.09 SENTENCING ENHANCEMENTS FOR POSSESSION OF WEAPONS

While each of these listed below purports to constitute a sentencing enhancement, they may be considered offense elements pursuant to Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348 (2000).

13.09.01 Use of Weapon while Assaulting Federal Officers

Title 18 U.S.C. §111 increases the maximum custodial term from three to 10 years where a defendant uses a deadly or dangerous weapon while assaulting, resisting, opposing, impeding, intimidating or interfering with an officer or employee of the United States (defined in 18 U.S.C. §1114) while the victim is engaged in the performance of official duties, or where the attack is motivated by the victim's performance of his or her official duties. As set forth above, counsel always should argue that to reach the enhanced penalties of §111, the government should be required to indict and prove beyond a reasonable
doubt the "use of a deadly or dangerous weapon" element. See U.S. v. Chestaro, 197 F.3d 600, 607-08 (2d Cir. 1999) (holding, post-Jones, that §111 defines three separate offenses that must be charged in the indictment and proven to the jury beyond a reasonable doubt).

13.09.02 Use of Weapon while Assaulting Foreign Official

Title 18 U.S.C. §112 increases the maximum term of imprisonment from three to 10 years where the defendant uses a deadly or dangerous weapon during an attack or threatened attack on a foreign official, official guest, or internationally protected person.

13.09.03 Use of Weapon during Bank Robbery

Title 18 U.S.C. §2113(d) increases from 20 to 25 years the maximum penalty for bank robbery where the defendant uses a dangerous weapon or device during the commission or attempted commission of a bank robbery.

13.09.04 Use of Weapon during Assault on Mail Carrier

Title 18 U.S.C. §2114 increases from 10 to 25 years the maximum penalty for assault upon a mail carrier where the defendant wounds or jeopardizes the life of the victim by the use of a dangerous weapon.
CHAPTER 14

FEDERAL SENTENCING

by

Judy Clarke and Gerald R. Smith*

14.01 INTRODUCTION

The Sentencing Reform Act of 1984 was passed by the 98th Congress on October 11, 1984 and signed into law the following day. The sentencing reform provisions became Chapter II of the massive 23 chapters of the Comprehensive Crime Control Act of 1984. Certain changes were effective immediately, others were delayed until November 1, 1986 and even this date was extended by the Sentencing Reform Amendments Act (Pub. L. No. 99-217, December 26, 1985) to November 1, 1987. While the statutory amendments were massive, the critical "sentencing reform" was the shift to sentencing guidelines and the creation of the United States Sentencing Commission.

The Sentencing Commission is composed of seven members, no more than four of whom can belong to the same political party. At least three of the members must be federal judges. 28 U.S.C. §991. In its short history, the Commission has suffered at least twice from the possibility that problems with appointments could affect the legitimacy of its decisions. From October 31, 1989 until July 24, 1990, the Commission had only two judicial members and the statute requires at least four such members. The 1994 amendments were adopted by a Commission composed of five members, two of whom stayed active even though their terms had expired.1 There were only six 1994 amendments, many of which may be viewed as "pro-defense" and not likely to be challenged.


1 In August 1992, Congress amended 28 U.S.C. §991 to extend the otherwise expiring terms of sitting Commissioners pending the confirmation of their successors. See Pub. L. No. 102-349, 106 Stat. 933 (1992). However, when signing the bill, President Bush made comments about how it affected future appointments. The Commission took the legal position that its actions were proper.
For six years the Commissioners were all full-time. Apparently, Congress envisioned that the start up years would require full-time attention by Commissioners, and thereafter part-time Commissioners would suffice. So, as of November 1993, the statute required that the Commissioners, other than the Chair, take on a part-time status. The 1994 Crime Bill modified this part-time provision to permit not only a full-time chairperson, but also three full-time vice chairs.

The Commission and the guidelines came under strong and serious attack from virtually the moment the guidelines took effect. Many district courts and one circuit found the composition of the Commission violated the doctrine of separation of powers and as a result, the guidelines were unconstitutional. Then, in January 1989, the United States Supreme Court settled the issue by holding the Sentencing Reform Act and structure of the Sentencing Commission did not violate the doctrine of separation of powers and did not constitute an excessive delegation of legislative power to the Sentencing Commission. See Mistretta v. U.S., 488 U.S. 361 (1989).

Some sixteen years and 18 guideline versions later, the Sentencing Commission has adopted 607 amendments (as of November 200) to the guidelines. The courts of appeals have issued over 10,000 published opinions interpreting guidelines, amended guidelines and the impact of amendments on earlier opinions. The Commission also publishes documents noting circuit conflicts that have been addressed by amendments.

Recognizing the impossibility of a definitive work on the topic, this article will highlight some critical areas and alert the federal criminal defense practitioner about federal sentencing statutes (including some from the 1994 Crime Bill) and the federal sentencing guidelines. For summaries of published guideline cases, counsel can consult the Guideline Grapevine (discontinued 1998) or the Federal Sentencing and Forfeiture Guide.

14.02 LEGISLATION

There are several statutes that control federal sentencing and several effective dates involved. The following sections are the major sentencing provisions. It is IMPORTANT to check the dates of the offense and the statutes in effect at the time. Many of the sentencing statutes (as well as the guidelines) have been repeatedly amended. The 1994 Crime Bill also addresses sentencing in a variety of ways, many of which are mentioned in this article.

14.02.01 Title 28 Provisions (Sentencing Commission)

28 U.S.C. §§991 through 998. The statutory authority which created and provided direction to the Sentencing Commission is found in 28 U.S.C. §§991 through 998, the provisions of which took effect October 12, 1984. These statutes have been amended, in mostly minor ways, several times since adoption.

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2 All references in this article are to the November 1, 2000 version of the guidelines unless otherwise specified.

3 Information on how to obtain these and other resources is included at section 14.09, infra.
28 U.S.C. §994 is the heart of the enabling legislation and sets forth the duties of the Commission. In general, the Commission is to promulgate and distribute to all federal courts and the United States Probation System guidelines and general policy statements regarding application of the guidelines. This section directs the Commission to consider the relevance of a variety of factors and to reflect the appropriateness or inappropriateness of imprisonment in certain situations. It provides the direction that the top of each guideline range not exceed the bottom of the range by the greater of 25% or six months (except where the lower end is 30 years, the top can be life).

14.02.02 Title 18 Provisions

The vast majority of federal sentencing statutes are set forth in Title 18. Other sentencing provisions are contained in the various statutes penalizing the offense, e.g., the filing of enhancing drug priors is found in 21 U.S.C. §851.

The core sentencing provision in Title 18 is 18 U.S.C. §3553. This statute sets forth the factors to be considered in imposing sentence and then mandate the court to impose a guideline sentence unless the court finds an "aggravating or mitigating factor, of a kind or to a degree not adequately considered by the Sentencing Commission" exists. The section requires a statement of reasons for a particular sentence, provides for the order of notice to victims and grants limited authority to impose a sentence below the statutory minimum. The 1994 Crime Bill amended §3553 by adding subsection (f), the mandatory minimum "safety valve."

Classification. 18 U.S.C. §3559 sets forth classification of offenses by penalties as follows:

(A) maximum life or death penalty, a Class A felony;
(B) 25 years\(^4\) or more, Class B felony;
(C) less than 25 years, but 10 years or more, Class C felony;
(D) less than 10 years, but five or more, Class D felony;
(E) less than five years, but more than one year, Class E felony;
(F) one year or less but more than six months, Class A misdemeanor;
(G) six months or less but more than 30 days, Class B misdemeanor;
(H) 30 days or less but more than five days, Class C misdemeanor;
(I) five days or less, or if no imprisonment is authorized, as an infraction.

14.02.03 Federal Rules of Criminal Procedure

(1) Rule 32 provides sentencing procedures for the federal courts. This rule has been repeatedly amended with the version contained at section 14.10, infra, taking effect April 24, 1996.

\(^4\) Until November 18, 1988, a class B felony was one that carried a maximum penalty of 20 years or more. The Anti-Drug Abuse Act of 1988 amended the section to increase the maximum to 25 years. The amendment is significant because defendants convicted of Class A and B felonies are not eligible for probation. A term of zero months may still be permitted. See U.S. v. Elliott, 971 F.2d 620 (10th Cir. 1992).
(2) **Rule 35** provides for correction of a sentence on remand from the court of appeals and for the court, within one year of imposition of sentence, to reduce a sentence upon a government motion which is based upon subsequent, substantial assistance of a defendant in the prosecution of another. The government motion can be made after the one year period if the substantial assistance is provided after the one year period. The earlier version of Rule 35 which provided for correction of an illegal sentence and the discretionary motion to modify within 120 days of sentencing is available only for offenses committed prior to November 1, 1987.

### 14.03 BASIC SENTENCING OPTIONS UNDER THE SENTENCING REFORM ACT

The Title 18 provisions set forth the various sentencing options which include imprisonment, probation, fines, restitution, criminal forfeiture, and supervised release.

#### 14.03.01 Probation

**The Statute**

The court imposes probation by sentencing the defendant to a certain term of probation. The court no longer suspends imposition or execution of sentence when imposing probation. The court simply sentences the defendant to a specified term of probation. 18 U.S.C. §3561.

An individual convicted of an offense may be sentenced to a term of probation unless (1) the offense is a class A or B felony; (2) the statute expressly precludes probation; or (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense (no consecutive probation when sentenced on multiple counts at the same time). See 18 U.S.C. §3561(a). The term of probation for a felony is not less than one nor more than five years; for a misdemeanor, not more than five years; and, for an infraction, not more than one year. 18 U.S.C. §3561(b). One court has held that a term of zero months is not "probation" and may be imposed where probation is otherwise prohibited by statute. *U.S. v. Elliott*, 971 F.2d 620 (10th Cir. 1992).

In determining whether to impose a term of probation the court is to consider the factors set forth in 18 U.S.C. §3553(a).

Title 28 U.S.C. §994(j) directed the Sentencing Commission to insure the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first-time, non-violent, non-serious offender. The Commission's response to this directive was to classify as "serious" many offenses for which probation was typically given under the "old law."

**The Guidelines**

Probation is authorized under the guidelines if (1) the minimum term of imprisonment in the sentencing range is zero months (zone A) or (2) the minimum term of imprisonment in the range is at least
one but not more than six months (zone B), provided the court imposes a condition or combination of conditions requiring home detention, intermittent confinement or community confinement. §5B1.1; U.S. v. Delloiacono, 900 F.2d 481 (1st Cir. 1990) (required confinement cannot be replaced by community service).

The guidelines provide that the term of probation "shall" be at least one year but not more than five years if the offense level is six or more and no more than three years in any other case. §5B1.2; U.S. v. Harry, 874 F.2d 248 (5th Cir. 1989) (vacated and remanded because term of probation too long for level four offense; court must justify departure).

The guidelines do not set forth any factors to consider in imposing probation as the system is geared to whether the low end of the applicable sentencing range is zero to six months.

The guidelines track the language of 18 U.S.C. §3561 in also precluding probation if the offense of conviction is a class A or B felony; if the offense of conviction expressly precludes probation; and, if the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. §5B1.1(b).

14.03.01.01 Conditions of Probation

The Statute

Title 18 sets forth certain mandatory and discretionary conditions of probation. 18 U.S.C. §3563. In all cases, it must be a condition of probation that the defendant not commit another Federal, State or local crime during the term of probation. For all probation sentences imposed after December 31, 1988, the court must also impose as a condition that the defendant not possess any illegal controlled substances. See 18 U.S.C. §3563(a)(3). In all felony cases, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, the defendant must be ordered to either pay a fine or restitution or perform community service. 18 U.S.C. §3563(a)(2). Where the court exempts the defendant from one of these mandatory conditions, it must impose one or more of the discretionary conditions set forth in 18 U.S.C. §3563(b).

There are a variety of discretionary conditions set forth in 18 U.S.C. §3563(b). Generally the conditions must be relevant to the conduct involved in the offense. See U.S. v. Voda, 994 F.2d 149 (5th Cir. 1993) (firearm restriction improper in misdemeanor case that had no relevance to or connection with firearms). A defendant probably cannot refuse the conditions of probation unless they are illegal or ambiguous. See U.S. v. Vroman, 795 F. Supp. 324 (N.D. Cal.), aff'd, 975 F.2d 669 (9th Cir. 1992).

The court can modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term. 18 U.S.C. §3563(c). The court is to direct the probation officer to provide the defendant with a written statement of all the conditions of probation that is sufficiently clear and specific to serve as a guide for the defendant. 18 U.S.C. §3563(d).
The Guidelines

The guidelines generally track the statute in recommending conditions of probation, both mandatory and discretionary. §§5B1.3 and 5B1.4. The guidelines recommend standard conditions of probation (slight variations on the discretionary statutory conditions) but also suggest that the standard conditions include two additional conditions: (1) that the defendant not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the probation officer; and (2) that the defendant notify third parties of risks that may be occasioned by the defendant's criminal record or characteristics. §5B1.4(12) and (13). The guidelines also recommend "standard" as well as "special" conditions of probation.

The guidelines provide that community confinement, home detention or community service may be imposed as conditions of probation. §§5F1.1, 5F1.2. If the defendant is convicted of a felony, either a fine, restitution or community service must be imposed. §5B1.3(c). If restitution is called for and the victim consents, the court may order the defendant to perform services for the victim in lieu of monetary restitution. §5E1.1(c). Finally, the court may prohibit (or place limits on) the defendant from engaging in a specified occupation, business or profession. §5F1.5. Before so restricting the defendant, the court must determine there is a reasonably direct relationship between the business and the offense, a risk the defendant will continue the unlawful conduct and that the restriction is reasonably necessary. If the court imposes this type of restriction, it is to be for the minimum time and extent necessary to protect the public. §5F1.5.

Supervision of Probationers

A person sentenced to probation is to be supervised by a probation officer "to the degree warranted by the conditions specified by the sentencing court." 18 U.S.C. §3601. After imposing a sentence of probation the court may direct the United States Marshal to furnish the probationer with transportation to the place he/she is to live and money for subsistence expenses while traveling to the destination. 18 U.S.C. §3604. The court may transfer jurisdiction over a probationer to the district court where the person is going to live. 18 U.S.C. §3605.

If there is probable cause to believe the probationer has violated a condition of probation, he/she may be arrested and, upon arrest, shall be taken "without unnecessary delay" before the court having jurisdiction. The arrest may be with or without a warrant and may be made wherever the probationer is found. 18 U.S.C. §3606.

14.03.01.02 Revocation of Probation

The Statute

Before a change made in the 1994 Crime Bill, if a defendant violated a condition at any time prior to expiration or termination of the term of probation the court could (1) continue the probation, with or without extending the term or modifying or enlarging the conditions; or (2) revoke the probation and impose any other sentence that was available at the time of the initial sentencing. 18 U.S.C. §3565(a). The circuits
determined that the revocation term had to be within the originally applicable guideline range. See *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) (court cannot impose revocation sentence that exceeded the sentence originally available under the guidelines at the time of initial sentencing); *U.S. v. Boyd*, 961 F.2d 434 (3d Cir. 1992) (to extent §7B1.4 permits revocation range higher than originally applicable guideline range, it is invalid); *U.S. v. Alli*, 929 F.2d 995 (4th Cir. 1991) (revocation sentence limited to original guideline range); *U.S. v. Von Washington*, 915 F.2d 390 (8th Cir. 1990) (same); *U.S. v. White*, 925 F.2d 284 (9th Cir. 1991) (same); *U.S. v. Maltais*, 961 F.2d 1485 (10th Cir. 1992).

The 1994 Crime Bill amended §3565(a) to provide that, upon revocation, the court may "resentence the defendant under subchapter A," thus appearing to overrule the above cited case law. A split in the Circuits has developed. The Eighth and Ninth Circuits have held that even after the Crime Bill, a sentence on revocation must be in the original range. *U.S. v. Plunkett*, 94 F.3d 517 (9th Cir. 1996); *U.S. v. Iverson*, 90 F.3d 1340 (8th Cir. 1996). The Fifth Circuit has held to the contrary. *U.S. v. Pena*, 125 F.3d 285 (5th Cir. 1997).

Also, between November 18, 1988 (the Anti-Drug Abuse Act of 1988) and September 13, 1994 (the 1994 Crime Bill), where the defendant was found by the court to be in possession of a controlled substance the statute required the court to revoke probation and impose not less than one-third of the original sentence. 18 U.S.C. §3565.

An issue arose over whether the one-third requirement applied to the length of the probation term or to the originally applicable guideline range and the circuits split. Compare *U.S. v. Gordon*, 961 F.2d 426 (3d Cir. 1992) ("original sentence" refers to original guideline range, not length of probation term); with *U.S. v. Corpuz*, 953 F.2d 526 (9th Cir. 1992) (one-third of original sentence for mandatory revocation purposes is one-third of term of probation) and *U.S. v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992) (same). In *U.S. v. Granderson*, 511 U.S. 39 (1994), the Supreme Court resolved the split holding that the minimum revocation term is one-third the maximum of the original guideline range.

The 1994 Crime Bill deleted the one-third requirement for violations of probation based on possession of controlled substances. New 18 U.S.C. §3565(b) provides that if the defendant: (1) possesses a controlled substance in violation of the conditions of probation; (2) possesses a firearm in violation of federal law or otherwise in violation of probation; or (3) refuses to comply with drug testing in violation of probation conditions "the court shall revoke the sentence of probation and resentence the defendant under subchapter A to a sentence that includes a term of imprisonment."

The power of the court to revoke probation and 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 a warrant or summons has issued on the basis of an allegation of violation. 18 U.S.C. §3565(b).
Chapter Seven of the guidelines contains policy statements recommending procedures to follow in determining whether to revoke a term of probation and how much time to impose.

Under these provisions, probation officers are required to "promptly report" any alleged violation of a condition of probation that constitutes new criminal conduct, other than a petty offense. §7B1.2(a). Any other alleged violation of a condition of probation is to be reported promptly unless the probation officer determines: (1) the violation is minor, not part of a continuing pattern of violation and not indicative of a serious adjustment problem; and (2) not reporting will not present an undue risk to the public or be inconsistent with any directive of the court. §7B1.2(b).

Upon a finding of violation based upon new criminal conduct, other than a petty offense, the guidelines require the court to revoke probation. §7B1.3(a)(1). Upon finding a violation based upon other conduct, the guidelines permit the court to (1) revoke probation; or (2) extend the term and/or modify the conditions. §7B1.3(b)(2).

The guidelines also provide that upon revocation of probation, no credit can be given toward any sentence of imprisonment for any portion of the term of probation served prior to revocation. §7B1.5(a).

Guideline §7B1.4 contains a revocation table setting forth sentencing ranges for the various classes of violations at the various criminal history categories. The originally applicable criminal history category is to be used in the revocation decision.

Chapter Seven itself notes it was promulgated as non-binding policy statements to permit greater flexibility in the revocation decision. Most of the circuits have held the Chapter Seven policy statements to be non-binding. See, e.g., U.S. v. Mathena, 23 F.3d 87 (5th Cir. 1994); U.S. v. Forrester, 19 F.3d 482 (9th Cir. 1994); U.S. v. Jones, 907 F.2d 605 (8th Cir. 1992); U.S. v. Brooks, 976 F.2d 1358 (10th Cir. 1992); U.S. v. Thompson, 976 F.2d 1380 (11th Cir. 1992); but see U.S. v. Lewis, 998 F.2d 497 (7th Cir. 1993) (district court bound by revocation policy statements).

However, a 1994 Crime Bill amendment to 18 U.S.C. §3553(a)(4) provides that the sentencing court must consider, in the case of a violation of probation or supervised release, the applicable guidelines and policy statements of the Sentencing Commission. This change could be viewed as making the Chapter Seven policy statements binding like guidelines. This is because the language in §3553(b) requires the court to impose a sentence "within the range, referred to in subsection (a)(4) . . . ." The Third Circuit has held, however, that the policy statements and ranges remain advisory. U.S. v. Schwegel, 126 F.3d 551 (3d Cir. 1997).

14.03.02 Fines

Fines are governed by a variety of statutes which depend largely upon the date of the offense. For offenses committed before January 1, 1985, old 18 U.S.C. §3565 provided for the collection and payment of fines and penalties. Old 18 U.S.C. §3569 provided for the discharge of indigent prisoners. Other than
those provisions and isolated other provisions, e.g., old 18 U.S.C. §3613 (fines for setting grass and timber fires) and §3614 (fine for seduction), the various criminal statutes contained the applicable fines.

The Criminal Fine Enforcement Act was passed October 30, 1984 applicable to all offenses committed after December 31, 1984. These provisions were repealed on the effective date of the Sentencing Reform Act of 1984.

The Sentencing Reform Act of 1984 contained new fine provisions that took effect with the remainder of the Sentencing Reform Act provisions.

Not content to leave enough confusion alone, on December 11, 1987 the Criminal Fine Improvement Act of 1987 was passed and took effect for all offenses committed on or after December 11, 1987.

The Anti-Drug Abuse Act of 1988 contained minor amendments allowing the Attorney General to waive interest (18 U.S.C. §3612(h)) and petition for modification or remission (18 U.S.C. §3573) regardless of which law the fine was imposed under.

The 1994 Crime Bill deletes references to certain statutory fines that are different than the alternative fine provisions of 18 U.S.C. §3571.

From the above, it appears there are four basic time periods to consider: (1) pre-January 1, 1985; (2) January 1, 1985 to October 31, 1987 (Criminal Fine Enforcement Act); (3) November 1, 1987 to December 10, 1987 (Sentencing Reform Act of 1984); and (4) December 11, 1987 onward. Because most offenses at this time are post 1987, the article discusses only the current fine provisions.

**The Statute**

Under the Criminal Fine Improvements Act of 1987, a defendant found guilty of an offense may be sentenced to pay a fine as follows:

- **For an individual**, not more than the greatest of the amount specified in the law setting forth the offense; twice the gross gain or loss (unless imposition of such would unduly complicate or prolong the sentencing process); not more than $250,000 for a felony or for a misdemeanor resulting in death; not more than $100,000 for a Class A misdemeanor that does not result in death; not more than $5000 for a Class B or C misdemeanor that does not result in death; or not more than $5000 for an infraction.

- **For an organization**, not more than the greatest of the amount specified in the law setting forth the offense; twice the gross gain or loss (unless such would unduly complicate or prolong the sentencing process); not more than $500,000 for a felony or for a misdemeanor resulting in death; not more than $200,000 for a Class A misdemeanor that does not result in death; not more than $10,000 for a Class B or C misdemeanor that does not result in death; not more than $10,000 for an infraction. 18 U.S.C. §3571.
The 1994 Crime Bill deletes from the various penalty provisions the fines that are different from the fines now set forth in §3571.

Factors in Imposing Fines

In determining whether to impose a fine and the amount, time for payment and method of payment, the court is to consider, in addition to the factors in 18 U.S.C. §3553(a):

(1) the defendant's income, earning capacity and financial resources;

(2) the burden the fine will impose upon the defendant, any person financially dependent on the defendant, or any other person (including the government) that would be responsible for the welfare of any person financially dependent on the defendant;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether and how much restitution is ordered or made;

(5) the need to deprive the defendant of illegally obtained gains;

(6) whether the defendant can pass on to consumers or others the expense of the fine; and,

(7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any person of the organization responsible for the offense and to prevent a recurrence. 18 U.S.C. §3572(a).

The 1994 Crime Bill added the cost of imprisonment and supervision as a factor to be considered.

If the defendant has the obligation to make restitution to a victim of the offense, the court must impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution. 18 U.S.C. §3572(b).

Collection Procedures

Fines are due immediately unless, in the interest of justice, the court provides for payment on a date certain or in installments. Any installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule. The payment period cannot exceed five years, excluding any period served by the defendant as imprisonment for the offense. 18 U.S.C. §3572(d).

If a fine is stayed pending appeal, absent exceptional circumstances, the court must: (1) require the defendant to deposit any amount of the fine that is due; (2) require the defendant to provide a bond or other security in ensure payment of the fine; or (3) restrain the defendant from transferring or dissipating assets. 18 U.S.C. §3572(g).
Fines imposed on organizational defendants must be paid by each individual authorized to make disbursements for the organization from the assets of the organization. Fines imposed on an officer, director, etc. of an organization may not be made directly or indirectly from assets of the organization unless the court finds that such payment is expressly permissible under applicable state law. 18 U.S.C. §3572(f).

A fine is delinquent if a payment is more than 30 days late. It is in default if a payment is delinquent for more than 90 days. 18 U.S.C. §§3572(h) and (i). When a fine is in default, the entire amount is due within 30 days after notification of the default notwithstanding any installment schedule. §3572(i).

Where to pay. Although the regulations regarding where to pay have changed over the recent years, generally, fines for offenses after December 31, 1984 are paid to the Attorney General.

The person designated to receive the fines shall notify the Attorney General of each receipt of a payment. The judgment or order imposing, modifying or remitting a fine of more than $100 shall include the name, social security number, mailing address and residence of the defendant, the docket number of the case, the original amount of the fine and the amount that is due and unpaid, the schedule of payments, the description of any modification or remission and a requirement the defendant notify the Attorney General of any change in mailing or residence address within 30 days of the change. 18 U.S.C. §3612(b).

The defendant must pay interest on any fine of more than $2500 unless the fine is paid in full before the fifteenth day after the date of the judgment (excepting Saturdays, Sundays and holidays). Interest on a fine is to be computed daily and at a rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of 52-week United States Treasury bills. If the court determines the defendant does not have the ability to pay interest, the court may waive the requirement, limit the total to a specific dollar amount or limit the length of the period during which interest accrues. 18 U.S.C. §3612(f).

Modification or Remission

The Criminal Fine Improvements Act of 1987 eliminated the defendant's right to petition for modification or remission of a fine and limits such petitions to those filed by the government. Upon petition of the government showing that reasonable efforts to collect are not likely to be effective, the court may remit all or part of the unpaid portion, defer payment to a date certain or pursuant to an installment schedule or extend a date certain or an installment schedule previously ordered. 18 U.S.C. §3573.

Failure to Pay

If a fine becomes delinquent the defendant must pay, as a penalty, an amount equal to 10 percent of the principal amount that is delinquent. If a fine is in default, the defendant shall pay, as a penalty, an additional amount equal to 15% of the principal amount that is in default. The Attorney General may waive all or part of any interest or penalty if reasonable efforts to collect the interest or penalty are not likely to be effective. 18 U.S.C. §3612.
Criminal Penalty for Willful Failure to Pay

Title 18 U.S.C. §3615 provides that whoever willfully does not pay an amount due after having been sentenced to pay a fine, shall be fined not more than the greater of $100,000 or twice the unpaid balance of the fine or penalty or imprisoned not more than one year or both (in the case of an individual).

In the case of a person other than an individual, the penalty is not more than the greater of $250,000 or twice the unpaid balance of the fine or penalty.

It is a defense to this criminal charge if the defendant was unable to make the payment because of responsibility to provide necessities for himself or herself or to other individuals financially dependent upon the defendant. The defendant has the burden of establishing the defense under this section by a preponderance of the evidence.

If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances require some type of security for the stayed fine. 18 U.S.C. §3572.

Counsel should be aware that the collection department of the United States Attorney's Office will contact the defendant directly regarding nonpayment of a fine. This letter from the government alerts the defendant to the potential penalties (interest penalties, criminal default) and requires the defendant to appear either with the payment or with financial records including tax returns.

Indigent Defendants

The statutes allow for the discharge of an indigent prisoner confined solely for the nonpayment of the fine. 18 U.S.C. §3569.

The Guidelines

The Sentencing Commission adopted guidelines applicable to fines effective November 1, 1987. With a limited exception for defendants not able and not likely to become able to pay all or part of a fine or for those whose dependents would be unduly burdened (§5E1.2(f)), the guidelines require the court to impose a fine in all cases.

The defendant carries the burden of showing an inability to pay. See U.S. v. Amato, 15 F.3d 230 (2d Cir. 1994); U.S. v. Carr, 25 F.3d 1194 (3d Cir. 1994) (must show no future ability to pay); U.S. v. Bradley, 922 F.2d 1290 (6th Cir. 1991); U.S. v. Rafferty, 911 F.2d 227 (9th Cir. 1990); U.S. v. Nez, 945 F.2d 341 (10th Cir. 1991) (defendant must raise inability to pay at sentencing hearing). The defendant may be able to rely on the presentence report that concludes he or she is not able to pay, if the court adopts the presentence report. U.S. v. Turner, 998 F.2d 534 (7th Cir. 1993) (setting forth rules for determining fines and ability to pay); U.S. v. Fair, 979 F.2d 1037 (5th Cir. 1992) (opinion sets forth procedure for determining ability to pay).
A defendant can be fined based on earning capacity upon release from prison. *U.S. v. Wells Metal Finishing*, 922 F.2d 54 (1st Cir. 1991); *U.S. v. Seminole*, 882 F.2d 441 (9th Cir. 1989). However, a court should not fine a defendant who has little chance of paying. *U.S. v. Walker*, 900 F.2d 1201 (8th Cir. 1991). §5E1.2(a).

The minimum fine must be the greater of that set forth in a table developed by the Commission or the pecuniary gain to the defendant less restitution made or ordered. The maximum fine is to be the greater of that set forth in the table or twice the gross pecuniary loss caused by the offense or three times the gross pecuniary gain to all participants in the offense. Departures from the fine table must be justified. *U.S. v. Pippin*, 903 F.2d 1478 (11th Cir. 1990) (remanded because district court failed to sentence within the range of the fine table or justify its departure). A defendant’s affluence should not justify a higher fine. *U.S. v. Graham*, 946 F.2d 19 (4th Cir. 1991). The limits on the maximum fine do not apply if the defendant is convicted under a statute authorizing a maximum fine greater than $250,000 or a fine for each day of violation. §5E1.2(c)(4); *U.S. v. Roberts*, 881 F.2d 95, 102-103 (4th Cir. 1989) (fine table not applicable to offense that provided for up to $2 million fine).
### The Table

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<tr>
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<tr>
<td>38 and above</td>
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<td>$250,000</td>
</tr>
</tbody>
</table>

### Fine Table

Factors to consider

The guidelines direct the court to consider:

1. the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

2. the ability of the defendant to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

3. the burden that the fine places on the defendant and his dependents relative to alternative punishments;

4. any restitution or reparation that the defendant has made or is obligated to make;

5. any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

6. whether the defendant previously has been fined for a similar offense; and
(7) any other pertinent equitable considerations.

§5E4.1(d); U.S. v. Walker, 900 F.2d 1201 (8th Cir. 1990) (remanded because district court failed to consider seven factors).

Installment schedules

The guidelines direct the court to consider an installment schedule if a lump sum fine would have an unduly severe impact on the defendant or his/her dependents. The length of the installment schedule should generally not exceed 12 months and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a "substantial installment" at the time of sentencing and if placed on supervision, payment shall be a condition. The court may also impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he/she is in compliance with the schedule. §5E1.2(g).

Costs of imprisonment, probation or supervised release

In addition to the fine table or loss calculation the guidelines require the court to impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. §5E1.2 (i). Imposition of a punitive fine may be a prerequisite to imposition of a fine for costs of incarceration. U.S. v. Estrella, 930 F.2d 824 (10th Cir. 1991); U.S. v. Labat, 915 F.2d 603 (10th Cir. 1990).

During 2000, these costs were $21,684.00/year for imprisonment and $235.52/month for supervision. The presentence report usually contains the most recent costs. The exception provision for the defendant unable to pay also applies to this requirement. §5E1.2 (f); U.S. v. Francies, 945 F.2d 851 (5th Cir. 1991) (discussing difference between regular fine and cost of incarceration). Counsel should be aware that even if the court waive these costs, the Bureau of Prisons will still "charge" subsistence costs in the halfway house. The court may also specifically waive these subsistence costs.

A split developed in the circuits over the validity of the costs of imprisonment fine in the guidelines. See U.S. v. Carrozza, 4 F.3d 70 (1st Cir. 1993) (noting split). This split was resolved legislatively by the 1994 Crime Bill which amends 18 U.S.C. §3572(a) to include the cost of imprisonment and supervision as a factor to be considered in imposing a fine. In addition, the 1994 bill amends 28 U.S.C. §994 to authorize the Sentencing Commission to include as a component of a fine the expected cost to the government of any imprisonment, supervised release or probation.

14.03.03 Restitution

The Statutes

A court must acquire the power to order restitution from a specific statute. See U.S. v. Snider, 957 F.2d 703 (9th Cir. 1992) (neither VWPA or FPA authorized restitution for violation of 18 U.S.C. §5322).
Under the Victim Witness Protection Act of 1982 and now the Sentencing Reform Act of 1984, restitution is an independent sentencing option.\(^5\) The Victim Witness Protection Act has been upheld against Fifth, Seventh and Eighth Amendment challenges. \textit{U.S. v. Feldman}, 853 F.2d 648 (9th Cir. 1988); \textit{U.S. v. Keith}, 754 F.2d 1388 (9th Cir. 1985).

If the defendant is placed on probation, any restitution ordered is also a condition of the probation. It also becomes a mandatory condition of supervised release. Probation and/or supervised release may be revoked if the defendant fails to comply with the restitution order. 18 U.S.C. §3663(g). The statute specifically provides that the court must consider the defendant's employment status, earning ability, financial resources, willfulness of the failure to pay and any other special circumstances in deciding whether to revoke probation or parole for failure to pay restitution. \textit{See also Bearden v. Georgia}, 461 U.S. 660 (1983).

A defendant must be advised of potential restitution at the time of a plea of guilty. Fed. R. Crim. P. 11(c)(1); \textit{see U.S. v. Grewal}, 825 F.2d 220 (9th Cir. 1987).

The heart of the restitution provisions is found at 18 U.S.C. §§3663 and 3664. The statute provides for restitution to "any victim of the offense." Where the offense results in the damage to or loss or destruction of property, the court may require that the defendant return the property to the owner or owner's designee or if such is impractical, impossible or inadequate, pay an amount equal to the greater of the value of the property on the date of the loss or the value of the property on the date of sentencing less whatever value of the property is returned. Where the offense results in bodily injury to a victim, the court may require the defendant to pay an amount equal to the cost of necessary medical and related professional services and reimburse the victim for income lost as a result. 18 U.S.C. §3663(b)(1) and (2). This does not appear to include damages for mental anguish, pain and suffering, and loss of prospective earnings. \textit{See U.S. v. Husky}, 924 F.2d 223 (11th Cir. 1991) (no restitution for mental anguish); \textit{U.S. v. Casamento}, 887 F.2d 1141 (2d Cir. 1989) (same); \textit{U.S. v. Keith}, 754 F.2d 1388 (9th Cir. 1985) (same); \textit{U.S. v. Satterfield}, 743 F.2d 827 (11th Cir. 1984). The cost of necessary funeral services may be ordered. 18 U.S.C. §3663(b)(3). The costs of prosecution may be ordered on non-indigent defendants unless the statute under which the defendant was convicted provides otherwise. \textit{See U.S. v. Gering}, 716 F.2d 615 (9th Cir. 1983) (and cases cited therein). Restitution may be made to a designated person or organization if the victim consents. 18 U.S.C. §3663(b)(4). The government may be a victim within the statute. \textit{U.S. v. Ruffen}, 780 F.2d 1493 (9th Cir. 1986); \textit{U.S. v. Dudley}, 739 F.2d 175 (4th Cir. 1984). The statute is not limited to human victims. \textit{U.S. v. Youpee}, 836 F.2d 1181 (9th Cir. 1988) (insurance company); \textit{U.S. v. Durham}, 755 F.2d 511 (6th Cir. 1985) (insurance company); \textit{U.S. v. Florence}, 741 F.2d 1066 (8th Cir. 1984) (bank and insurer); \textit{U.S. v. Richard}, 738 F.2d 1120 (10th Cir. 1984) (bank).

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\(^5\) At least until November 1, 1987, restitution could be imposed under two distinct authorities, the Federal Probation Act and the Victim Witness Protection Act. The Sentencing Reform Act repealed 18 U.S.C. §3651 but still authorizes restitution to be a condition of probation. It also remains a separate sentencing option.

Restitution under the VWPA is limited to the loss caused by the specific conduct that is the basis of the offense of conviction. *Hughey v. U.S.*, 495 U.S. 411 (1990) (resolving split in circuits regarding the court's ability under the Victim Witness Protection Act (VWPA) to order restitution for acts other than those underlying the offense of conviction); *but see U.S. v. Baker*, 25 F.3d 1452 (9th Cir. 1994) (guidelines different than VWPA because "relevant conduct" can be considered in imposing restitution). The decision in *Hughey* did not address whether restitution in an amount greater than the count of conviction could be ordered if contained in a plea agreement. *See, e.g.*, *U.S. v. Whitney*, 785 F.2d 1028 (4th Cir. 1982) amended, 838 F.2d 404 (9th Cir. 1988); *U.S. v. Black*, 767 F.2d 1334 (9th Cir. 1985); *U.S. v. Johnson*, 700 F.2d 699 (11th Cir. 1983); *U.S. v. Orr*, 691 F.2d 431, 433-34 (9th Cir. 1982). *See also U.S. v. Mischler*, 787 F.2d 240, 245 (7th Cir. 1986) (restitution may be ordered under 18 U.S.C. §3651 (pre-November, 1987) or Victim Witness Protection Act as to offenses occurring after January 1, 1983). A broadly worded indictment may permit restitution to unnamed investors. *U.S. v. Bailey*, 975 F.2d 1028 (4th Cir. 1992).

Restitution is proper only for losses directly resulting from the defendant's offense. *Gall v. U.S.*, 21 F.3d 107 (6th Cir. 1994) (restitution may not be imposed to repay government for investigative costs); *U.S. v. Mullins*, 971 F.2d 1138 (4th Cir. 1992) (restitution under the VWPA cannot include consequential damages); *U.S. v. Kenney*, 789 F.2d 783 (9th Cir. 1986) (restitution cannot include wages for bank employees while they testified); *U.S. v. Tyler*, 767 F.2d 1350 (9th Cir. 1985); *U.S. v. Burger*, 739 F.2d 805 (2d Cir. 1984); *U.S. v. Gering*, 716 F.2d 615 (9th Cir. 1983); *U.S. v. Johnson*, 700 F.2d 699 (11th Cir. 1983). A defendant who creates the circumstances under which the harm or loss occurred, even though not directly causing the injury, is subject to a restitution order. *U.S. v. Spinney*, 795 F.2d 1410 (9th Cir. 1986) (conspiracy to assault conviction); *U.S. v. Richard*, 738 F.2d 1120, 1123 (10th Cir. 1984).

Restitution ordered pursuant to either 18 U.S.C. §§3556 or 3663 is not mandatory. However, if the court does not order restitution or orders only partial restitution, it must state on the record the reasons for its order. 18 U.S.C. §3553(d). In determining whether to order restitution, the court must consider:

1. the amount of the loss sustained by any victim;
2. the financial resources of the defendant;

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6 There may be some mandatory restitution provisions in the 1994 Crime Bill, particularly in sex and domestic violence offenses. Counsel should compare the amended version of §3663 and the particular statutes of conviction for offenses occurring after September 13, 1994.
(3) the financial needs and earning ability of the defendant and dependents; and

(4) other appropriate factors.


While §3664(a) appears to mandate consideration of the financial resources of the defendant at the time of sentencing, at least the Second Circuit has determined that such consideration is relevant at the time of execution of the order as well. *U.S. v. Brown*, 744 F.2d 905 (2d Cir. 1984); *see also U.S. v. Blanchard*, 9 F.3d 22 (6th Cir. 1993) (restitution order proper for "broke" defendant with excellent earning capacity). Although financial resources of the defendant are a consideration, a sentencing judge may order an indigent to pay restitution. *U.S. v. Ruffen*, 780 F.2d 1493 (9th Cir. 1986); *U.S. v. Keith*, 754 F.2d 1388 (9th Cir. 1985). Ability to pay must be considered. *U.S. v. Newman*, 6 F.3d 623 (9th Cir. 1993) (remanding for failure to consider future ability to pay); *U.S. v. Kelley*, 929 F.2d 582 (10th Cir. 1991) (restitution order reversed because nothing in record supported court's finding of future employment opportunities that would make defendant able to pay); *U.S. v. Mitchell*, 893 F.2d 935 (8th Cir. 1990) (failure to make informed decision on defendant's ability to pay an abuse of discretion); *U.S. v. Clark*, 901 F.2d 855 (10th Cir. 1990) (reversed restitution order and remanded because court ignored evidence of defendant's inability to pay). Personal bankruptcy does not prohibit an order of restitution. *U.S. v. Roberts*, 783 F.2d 767 (9th Cir. 1985).

Restitution ordered pursuant to §3663 must be paid not later than the end of the period of probation, if probation is imposed; five years after the end of the term of imprisonment if no probation was imposed; and, five years after the date of sentencing in any other case. If not otherwise provided by the court, restitution shall be made immediately. 18 U.S.C. §3663(f)(2).

The 1994 Crime Bill amended 18 U.S.C. §3663 to require the suspension of federal benefits to defendant's delinquent in making restitution as ordered by the court.

Any dispute regarding the proper amount of restitution must be resolved by the court by a preponderance of the evidence. The question of how much restitution to pay should not be left open. *U.S. v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992). The government has the burden of demonstrating the amount of the loss and the defendant has the burden of demonstrating financial resources and needs of the defendant and dependents.

The courts have uniformly rejected the right to a jury trial on the issue of liability. *U.S. v. Brown*, 744 F.2d 905 (2d Cir. 1984); *U.S. v. Florence*, 741 F.2d 1066 (8th Cir. 1984); *U.S. v. Watchman*, 749 F.2d 616 (10th Cir. 1984); *U.S. v. Satterfield*, 743 F.2d 827 (11th Cir. 1984).

The defendant must be given ample opportunity to contest the restitution amount and the amount must be supported by the evidence and judicially determined. *U.S. v. Pomazi*, 851 F.2d 244 (9th Cir. 1988), *overruled in part by, Hughey v. U.S.*, 495 U.S. 411 (1990) (restitution limited to count of conviction); *U.S. v. Black*, 767 F.2d 1334, 1343 (9th Cir. 1985); Phillips v. U.S., 679 F.2d 192, 194-95.
Advance notice of the intent to seek a restitution order is probably not required. *U.S. v. Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992).

The Sentencing Reform Act provides for an order of notice to victims in cases involving fraud or other intentionally deceptive practices. 18 U.S.C. §3555. This section provides the court can order the defendant to give reasonable notice and explanation of the conviction to the victims of the offense. The maximum cost of the notice to the defendant cannot exceed $20,000. Before imposing such an order, the court shall give the parties notice of its consideration of such an order and allow a hearing. 18 U.S.C. §3553(d).

**The Guidelines**

The guidelines address restitution at §5E1.1 and provide that restitution shall be ordered under Title 18 or 49 U.S.C. §1472(h), (I), (j) or (n) unless the court determines that the complication of the sentencing process that will result in fashioning a restitution order outweighs the need for restitution, 18 U.S.C. §3663(d), restitution may be ordered as a condition of probation or supervised release in any other case. However, the defendant's ability to pay should be considered. *U.S. v. Mitchell*, 893 F.2d 935 (8th Cir. 1990) (abuse of discretion to fail to make informed decision whether defendant able to pay); *U.S. v. Clark*, 901 F.2d 855 (10th Cir. 1990) (remanded where district court ignored evidence of the defendant's inability to pay); see also cases cited above under statutory considerations.

Again the guidelines make mandatory what the statute makes discretionary. Compare 18 U.S.C. §3663(a) ("The court . . . may order . . .") with §5E1.1 ("Restitution shall be ordered . . ."). The Eighth Circuit has found the statute controls. *U.S. v. Owens*, 901 F.2d 1457 (8th Cir. 1990) (mandatory language requires only that restitution orders be imposed in accordance with VWPA).

**14.03.04 Imprisonment**

**14.03.04.01 Imposition of a Term of Imprisonment**

**The Statute**

**Authorized Terms.** 18 U.S.C. §3581 sets forth the authorized terms of imprisonment based on the designated classes:

1. any period of time to life, Class A felony;
2. not more than 25 years, Class B felony;
3. not more than 12 years, Class C felony;
4. not more than six years, Class D felony;
5. not more than three years, Class E felony;
6. not more than one year, Class A misdemeanor;
7. not more than six months, Class B misdemeanor;
8. not more than 30 days, Class C Misdemeanor;
(9) not more than five days, an infraction.

Factors. In determining whether to impose a term of imprisonment and what length of term to impose, the court is directed to consider the factors set forth in 18 U.S.C. §3553(a) recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. 18 U.S.C. §3582(a). In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court is directed to consider any pertinent policy statements issued by the Sentencing Commission (none have been promulgated yet).

Modification. The court can only modify a sentence that has been imposed if: (1) the Director of the Bureau of Prisons moves for modification and the court finds that extraordinary and compelling reasons warrant such a reduction and that reduction is consistent with policy statements of the Sentencing Commission; (2) the Court of Appeals remands the case for resentencing pursuant to Rule 35; (3) the government files a motion for reduction based on subsequent, substantial assistance of a defendant (must be done within one year of sentencing); or (4) the sentencing guideline range the defendant was sentenced under has been lowered. 18 U.S.C. §3582 (c).

Restrictions on Associations. In imposing a term of imprisonment in a racketeering, RICO, or drug case, or at any time after sentencing upon motion of the Director of the Bureau of Prisons or a United States Attorney, the court may include as part of the sentence an order requiring the defendant not associate or communicate with a specified person, other than his/her attorney. 18 U.S.C. §3582(d). The court may enter this order upon a showing of probable cause to believe that the association or communication is for the purpose of enabling the defendant to control or participate in an illegal enterprise. Id.

Mandatory Minimum Penalties. Certain statutes call for mandatory terms of imprisonment, e.g., 18 U.S.C. §924(c) (consecutive term of five years for using or carrying a firearm during, and in relation to, a crime of violence or drug trafficking offense); 18 U.S.C. §924(e) (15 year mandatory minimum for "armed career criminals"); 21 U.S.C. §841 (5, 10 and 20 year mandatory minimum terms for certain drug offenses); 18 U.S.C. §1111 (mandatory life for first degree murder).

Title 18 U.S.C. §3553(e) provides authority for a court to sentence below a mandatory term in certain instances where the government has made a motion for departure based on substantial cooperation. A split developed in the circuits over whether a government motion under §5K1.1 of the guidelines (departure based on substantial assistance) also "lifts" the mandatory minimum statutory penalty. Compare U.S. v. Willis, 37 F.3d 313 (7th Cir. 1994) (§5K1.1 also lifts statutory minimum); U.S. v. Beckett, 996 F.2d 70 (5th Cir. 1993) (same); U.S. v. Ah-Kai, 951 F.2d 490 (2d Cir. 1991) (same); U.S. v. Keene, 933 F.2d 711 (9th Cir. 1991) with U.S. v. Rodriguez-Morales, 958 F.2d 1441 (8th Cir. 1992). The Supreme Court resolved the question by deciding a §5K1.1 motion does not lift the mandatory minimum. Melendez v. U.S., 518 U.S. 120 (1996).

The 1994 Crime Bill provides a limited "safety valve" in certain drug cases. New subsection (f) is added to 18 U.S.C. §3553 as follows:
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. §961, §963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under §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 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 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.

The provision also directed the Sentencing Commission to promulgate guidelines, or amendments to guidelines, to carry out the purposes of this section and the amendment made by this section. The statute (28 U.S.C. §994(a)(l) and (p)(B)) now directs the Commission, in the case of a defendant for whom the statutorily required minimum sentence is five years, to set the guideline range such that the lowest term of imprisonment is at least 24 months. Nothing appears to require a sentence of 24 months, but just a guideline range calling for at least 24 months. It would appear a court could depart below the guideline range.

The Sentencing Commission has already promulgated the guideline, §5C1.2. The Congress gave emergency authority to the Commission to promulgate the guideline before the next amendment cycle.
The Guidelines

The guidelines contain a "Sentencing Table" that sets forth various sentencing ranges covering 43 offense levels and six criminal history categories. See Chapter 5. A copy of the sentencing table is reproduced infra at section 14.12. Absent "departure" from the guidelines, imprisonment must be imposed if the lower end of the applicable guideline sentencing range is more than 10 months. §5C1.1(f). If the lower end of the applicable range is six to 10 months, the court may impose a "split" sentence but, in doing so, must impose at least one-half of the minimum term in prison and the other one-half in home detention or community confinement as a condition of supervised release. §5C1.1(d); U.S. v. Delloiacono, 900 F.2d 481 (1st Cir. 1990) (community service cannot replace required confinement). Imprisonment may be imposed in any other case and complies with the guidelines for imprisonment if the term is within the minimum and maximum terms of the guideline range. §5C2.1(a).

If application of the guidelines results in a sentence greater than the statutory maximum, the statutory maximum is to be the sentence. §5G1.1(a). If the guidelines call for a sentence less than the statutory minimum, the statutory minimum is to be the sentence. §5G1.1(b); U.S. v. Savage, 863 F.2d 595 (8th Cir. 1988).

Mandatory Minimum Safety Valve. As noted above, the 1994 Crime Bill gave the Sentencing Commission authority to promulgate a guideline to effectuate the new mandatory minimum "safety valve." The Commission has §5C1.2 to permit sentencing within the guideline range if it is below the mandatory minimum, in the cases defined by the new statute.

The Commission also adopted §2D1.1(b)(6), effective November 1, 1995. This section provides for a two-level decrease in the offense level for a defendant eligible for the safety valve if the offense level is 26 or more.

14.03.04.02 Concurrent or Consecutive

The Statute

The statute provides that multiple terms of imprisonment imposed at the same time, or a term imposed on a defendant already subject to an undischarged term of imprisonment, may run concurrently or consecutively except that the terms for an attempt and the object of the attempt may not run consecutively. 18 U.S.C. §3584(a). Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates the terms to be consecutive. Multiple terms imposed at different times run consecutively unless the court orders the terms to be concurrent. Id.

This statute gives federal courts authority to order federal sentences to run concurrently with state sentences. For a discussion of the difference in the authority under the "old law" and the new provisions, see U.S. v. Terrovona, 785 F.2d 767 (9th Cir.), overruled in part, U.S. v. Hardesty, 977 F.2d. 1347 (9th Cir. 1992).
The Guidelines

The guidelines provide a variety of rules to determine the appropriate term of imprisonment when the conviction involves multiple counts. §3D1.1-1.5; see infra section 14.04.05.04. If, under these multiple count rules the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts are to run concurrently (unless the statute requires otherwise). §5G1.2(c). If the statutory maximum on one count is not sufficient to achieve the total imprisonment called for by the multiple count rules, then the sentence on the counts are to be consecutive but only to the extent necessary to produce a combined sentence equal to the total imprisonment required under the rules. The remainder of any multiple counts are to run concurrently. §5G1.2(d).

The guideline for determining whether sentences should be consecutive or concurrent to an undischarged term of imprisonment has undergone several massive changes. See various versions of §5G1.3. For a review of the changes and their impact, see U.S. v. Redman, 35 F.3d 437 (9th Cir. 1994).

This particular guideline has resulted in substantial litigation, including ex post facto questions, because of the number of changes and the impact on sentencing. Generally, the 1991 version has been viewed as more restrictive on consecutive sentencing; later versions have returned more discretion to the district courts. See, e.g., U.S. v. Conkins, 987 F.2d 564 (9th Cir. 1993) (district court had discretion to impose consecutive sentence before 1991 amendment to §5G1.3); U.S. v. Fagan, 996 F.2d 1009 (9th Cir. 1993) (more favorable 1991 amendment to §5G1.3 not retroactively applicable to invalidate consecutive sentence); U.S. v. Warren, 980 F.2d 1300 (9th Cir. 1992) (earlier version of §5G1.3 permitted more discretion to court to impose consecutive sentence).

14.03.04.03 Calculation of the Term

A sentence of imprisonment commences when the defendant is received in custody awaiting transportation to or arrives voluntarily at the facility where the sentence is to be served. 18 U.S.C. §3585(a). Credit must be given for any time spent in "official" detention prior to sentencing as a result of the offense for which sentence was imposed or as a result of any other charge for which the defendant was arrested after the offense for which sentence was imposed and that has not been credited against another sentence. 18 U.S.C. §3585(b). The Attorney General is responsible for determining presentence credits. U.S. v. Wilson, 503 U.S. 329 (1992). A defendant must exhaust administrative remedies before asking the district court to determine credits. U.S. v. Checchini, 967 F.2d 348 (9th Cir. 1992).

The question of pretrial credits depends largely on the interpretation of whether the defendant was in "official detention." See U.S. v. Edwards, 960 F.2d 278 (2d Cir. 1992) (electronic monitoring not official detention); U.S. v. Wickman, 955 F.2d 592 (8th Cir. 1992) (house arrest not official detention); Grady v. Crabtree, 958 F.2d 874 (9th Cir. 1992) (defendant on bond with condition of residence in community treatment center under conditions of confinement like incarceration entitled to credit); U.S. v. Zackular, 945 F.2d 423 (1st Cir. 1991) (no credit for home confinement).

Good time credits
A person serving a term of imprisonment of more than one year, other than life imprisonment, shall receive credit of 54 days per year at the end of each year of the term of imprisonment, beginning at the end of the first year of the term. 18 U.S.C. §3624(b). This credit must be given unless during the year, the person has not satisfactorily complied with approved institutional disciplinary regulations. If the person has not satisfactorily complied, all or part of the credit can be withheld. The determination of credit must be made within 15 days after the end of each year and vests at the time it is received. Credit for the last year is to be prorated and credited within the last six weeks of the sentence. Id. A good time chart is included, infra at 14.13.

The 1994 Crime Bill amended §3624 to provide that prisoners serving sentences for crimes of violence are able to earn the 54 days per year good time, if the Bureau of Prisons determines that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary rules.

In addition, §3624 is further amended to provide that credit cannot vest unless the prisoner has earned or is making satisfactory progress toward a high school diploma or equivalent degree.

14.03.04.04 Place of Service of Sentence

Sentences of imprisonment imposed under the Sentencing Reform Act of 1984 are to the "custody of the Bureau of Prisons." 18 U.S.C. §3621(a). The Bureau of Prisons designates the place of imprisonment and may designate any available penal or correctional facility meeting minimum standards of health and "habitability" established by the Bureau. §3621(b). For a listing of most of the current federal facilities, see infra section 14.13. The Bureau of Prisons is not limited to facilities maintained by the federal government and does not have to designate a place within the district of conviction. Id.

The 1994 Crime Bill amended §3621 to provide that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment.

In addition, under the 1994 amendments, any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

Early out for non-violent offenders with drug treatment. The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

The Director of the Bureau of Prisons must order a prisoner charged with or convicted of a state felony to be transferred to an official detention facility within the state prior to his federal release if the
transfer is requested by the state governor, the state has presented a certified copy of the indictment and
the Director of the Bureau of Prisons finds the transfer would be in the public interest. 18 U.S.C. §3623.

14.03.04.05 Furloughs and Pre-Release Custody

Under limited circumstances, the Bureau of Prisons may temporarily release a person for a limited
time to: (1) visit a designated place for 30 days to see a dying relative, attend a relative's funeral, obtain
medical treatment, contact a prospective employer, establish ties or engage in a "significant activity"
consistent with the public interest; (2) participate in a training or educational program in the community; or
(3) work at paid employment in the community. 18 U.S.C. §3622.

To the extent practicable, the Bureau of Prisons is to assure that a prisoner serving a term of
imprisonment spends a "reasonable part," not to exceed six months of the last 10% of the term under
conditions that will allow the individual to adjust and prepare to re-enter the community. 18 U.S.C.
§3624(c).

14.03.05 Supervised Release

14.03.05.01 Title 18 Supervised Release Provisions

In imposing a sentence of imprisonment for a felony or a misdemeanor, the court may include as
part of the sentence a requirement that the defendant be placed on a term of supervised release after
imprisonment. 18 U.S.C. §3583. If the statute mandates a term of supervised release, the court must
impose such. Id. The authorized terms of supervised release are (1) not more than five years for a Class
A or B felony; (2) not more than three years for a Class C or D felony; (3) not more than one year for a
Class E felony or a misdemeanor, other than a petty offense. 18 U.S.C. §3583 (b).

A term of supervised release is in addition to the term authorized by statute and the combined terms
can exceed the statutory maximum for the offense of conviction. U.S. v. Montenegro-Rojo, 908 F.2d 425
(9th Cir. 1990) (rejecting defendant's argument that supervised release is part of the sentence and together
with incarceration cannot exceed the offense's statutory maximum). See U.S. v. Jamison, 934 F.2d 371
(D.C. Cir. 1991); U.S. v. West, 898 F.2d 1493 (11th Cir. 1990); U.S. v. Vanover, 888 F.2d 1117 (6th
Cir. 1989). The Montenegro-Rojo court also recognized that because §3583 itself provides authorization
for periods of supervised release in excess of the maximum imprisonment terms of specific criminal statutes,
it implicitly allows for any such supervised release time to be spent in jail. However, the issue of
incarceration beyond the statutory maximum for the offense was not raised in Mr. Montenegro's case
because he had not yet faced a violation of supervised release. Id. at n.8.

In determining whether to include a term of supervised release, the length of the term and
appropriate conditions, the court is to consider the factors set forth in 18 U.S.C. §3553 concerning: (1)
the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the
need for the sentence to afford adequate deterrence to criminal conduct; (3) the need for the sentence to
protect the public; (4) the need for the sentence to provide the defendant with educational or vocational
training; (5) the kinds of sentence and range established by the Sentencing Commission, (6) policy statements of the Sentencing Commission and (7) the need to avoid unwarranted sentence disparities. 18 U.S.C. §3583(c).

A term of supervised release commences on the day the person is released and runs concurrently with any other supervision to which the person is subject. 18 U.S.C. §3624(e). A term of supervised release does not run while the defendant is incarcerated on another offense unless the incarceration is for less than 30 days. Id.

A defendant must be advised of the effect of any term of supervised release at the time of a plea of guilty. Fed. R. Crim. P. 11(c)(1); U.S. v. Barry, 895 F.2d 702 (10th Cir. 1989); U.S. v. Carey, 884 F.2d 547 (11th Cir. 1989); U.S. v. Sanclemente-Bejarano, 861 F.2d 206 (9th Cir. 1988). Failure to adequately advise may be harmless error. Id.; U.S. v. Bachynsky, 934 F.2d 1349 (5th Cir. 1991) (en banc); U.S. v. Barry, 895 F.2d 702 (10th Cir. 1990); U.S. v. Carey, 884 F.2d 547 (11th Cir. 1989). But see U.S. v. Bounds, 943 F.2d 541 (5th Cir. 1991) (failure to mention possibility of supervised release where it plus prison sentence was longer than explained maximum reversible error); U.S. v. Garcia-Garcia, 939 F.2d 230 (5th Cir. 1991) (same); U.S. v. Syal, 963 F.2d 900 (6th Cir. 1992) (failure to advise of supervised release not harmless here).

Conditions of Supervised Release

The statute provides that the court shall order as a condition of supervised release that the defendant not commit another federal, state or local crime during the term of supervision. 18 U.S.C. §3583(d). Effective for all defendants whose supervised release began after December 31, 1988, it became a mandatory condition that the defendant not possess illegal controlled substances.

Certain discretionary conditions may also be ordered as long as they consider the nature and circumstances of the offense and the history and characteristics of the defendant and the need for the sentence to afford adequate deterrence, protect the public and provide needed training or medical care. For example, it is permissible to order a defendant to remain continuously employed during supervision, U.S. v. Austin, 957 F.2d 44 (1st Cir. 1992); to require a defendant to advise a probation officer of financial obligations incurred by the defendant's spouse, U.S. v. Kosth, 943 F.2d 798 (7th Cir. 1991); to require a defendant to not associate with a neo-nazi organization, U.S. v. Showalter, 933 F.2d 573 (7th Cir. 1991) or other associations, U.S. v. Bolinger, 940 F.2d 478 (9th Cir. 1991); to restrict a defendant's employment, U.S. v. Burnett, 952 F.2d 187 (8th Cir. 1991). If an alien defendant is subject to deportation, the court may provide that he/she be deported and remain outside the United States and order that the alien be delivered to an authorized immigration official for deportation. Id.; U.S. v. Chukwura, 5 F.3d 1420 (11th Cir. 1993) (court had authority to order deportation as condition of supervised release).

The court should be careful to make the conditions those necessary to meet the purposes of the supervision. U.S. v. Mills, 959 F.2d 516 (5th Cir. 1992) (occupational restriction proper but court should not have required sale of business). It is not proper to order restrictions that do not relate to the goals of
rehabilitation and protection, see U.S. v. Prendergast, 979 F.2d 1289 (8th Cir. 1992) (improper restrictions on alcohol).

The court may terminate a term of supervised release after one year if it is satisfied that such is warranted by the conduct of the person and the interest of justice. 18 U.S.C. §3583(e)(1). The court may also extend a term of supervised release if less than the maximum was originally imposed. Id. at (e)(2).

The defendant cannot be released on supervised release unless he/she agrees to an installment schedule, not to exceed two years, to pay any fine that was imposed. 18 U.S.C. §3624(e).

Violation of Supervised Release

The court may treat a violation of a condition of supervised release as a contempt of court pursuant to 18 U.S.C. §401(3). 18 U.S.C. §3583(e)(3). The court may also revoke a term of supervised release and require the person to serve in prison all or part of the term without credit for time previously served on post release supervision. Id. at (e)(4).

The 1994 Crime Bill made substantial changes in the supervised release revocation procedures. The 1994 bill amended 18 U.S.C. §3583(g) to delete the requirement that a defendant found in possession of a controlled substance be required to serve not less than one-third of the term of supervised release. New subsection (g) provides that if: (1) the defendant possesses a controlled substance in violation of the condition of supervised release; (2) possesses a firearm in violation of federal law or in violation of a condition of supervised release; 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 the statute.

Section 3583(e)(3) is amended to provide a revocation term of imprisonment not more than five years if the underlying offense was a Class A felony (maximum penalty of life or death) (new provision), not more than three years if the underlying offense was a Class B felony (25 years or more) (same as old provision), not more than two years if the underlying offense was a Class C or D felony (five-25 years) (same as old provision) and not more than one year in any other case (new provision).

The amendments also overruled the law in several circuits that upon revocation of supervised release, the defendant could either receive time in prison or more supervised release, but not both. See, e.g., U.S. v. Rockwell, 984 F.2d 1112 (10th Cir. 1993); U.S. v. Bermudez, 974 F.2d 12 (2d Cir. 1992); U.S. v. Behnezhad, 907 F.2d 896 (9th Cir. 1990); U.S. v. Barry, 895 F.2d 702 (10th Cir. 1989). It confirms the law previously existing in at least two circuits. See U.S. v. O'Neil, 11 F.3d 292 (1st Cir. 1993); U.S. v. Stewart, 7 F.3d 1350 (8th Cir. 1993). The new language provides:

(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.

New §3583(i) also extends the power of the court to revoke a term of supervised release for any "reasonably necessary" period beyond the expiration of the term of supervised release, if before expiration of the term a warrant or summons has been issued.

**Ex Post Facto Considerations.** At least two circuits ruled that the supervised release revocation law in effect at the time the underlying offense was committed controls for purposes of *ex post facto*. See *U.S. v. Meeks*, 25 F.3d 1117 (2d Cir. 1994); *U.S. v. Paskow*, 11 F.3d 873 (9th Cir. 1993). The Supreme Court held in *Johnson v. U.S.*, ___ U.S. ___, 120 S.Ct. 1795 (2000), that application of the amendment to a defendant whose offense was committed prior to the amendment would violate *ex post facto* rights. The Court, however, concluded in *Johnson* that the previous version of the statute gave courts authority to impose a new term of supervised release upon revocation.

In order to revoke the supervised release, the court must find by a preponderance of the evidence that the person violated a condition of the supervised release.

The circuit courts have split over whether a magistrate has the power to revoke a supervised release term. *Compare U.S. v. Williams*, 919 F.2d 266 (5th Cir. 1990) (magistrate can impose supervised release term but does not have power to revoke defendant's supervised release) *with U.S. v. Crane*, 979 F.2d 687 (9th Cir. 1992).

**14.03.05.02 Title 21 Supervised Release Provisions**

Before October 12, 1984, many drug offenses carried a mandatory special parole term. With the Comprehensive Crime Control Act of 1984, Congress amended 21 U.S.C. §841(b) and eliminated special parole for offenses committed after the effective date of the Sentencing Reform Act, which was then scheduled for November 1, 1986. *See U.S. v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir. 1988). For some reason, the major penalty section of 21 U.S.C. §841(b)(1)(A) (then carrying a maximum of 20 years) did not contain a special parole provision (whereas §841(b)(1)(B) and (c) did) and as a result, neither special parole nor supervised release can be imposed for crimes covered by §841(b)(1)(A) committed between October 12, 1984 and October 27, 1986, the date of the Anti-Drug Abuse Act of 1986. *See U.S. v. Gozlon-Peretz*, 894 F.2d 1402 (3d Cir. 1990), *affd*, 498 U.S. 395 (1991). The Anti-Drug Abuse Act of 1986 again amended 21 U.S.C. §841(b) by, among other changes, including mandatory terms of supervised release. The Act also deleted references to special parole and substituted "supervised release," specifically providing it would take effect with 18 U.S.C. §3583 of the Sentencing Reform Act (SRA). The effective date of the SRA was later postponed from November 1, 1986 to November 1, 1987.


### 14.03.05.03 The Guidelines

The guidelines require the court to order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute. §5D1.1(a). The court may order a term of supervised release to follow imprisonment in any other case. §5D1.1(b).

If the statute itself requires a term of supervised release, the guidelines require that the term be at least three years but not more than five years, or the minimum required by statute, whichever is greater. §5D1.2(a). Where the statute does not require supervised release, the length of the term of supervised release required by the guidelines is: (1) at least three years but not more than five years for Class A or B felonies; (2) at least two years but not more than three years for Class C or D felonies; and (3) one year for a Class E felony or a Class A misdemeanor.

#### Conditions of Supervised Release

The guidelines track the language of the statute in requiring conditions that the defendant not commit another federal, state or local crime and in imposing other reasonably related discretionary conditions. §5D1.3. A November 1989 amendment conformed the guideline to the 1988 Drug Act requiring the court to order the condition the defendant not possess illegal "controlled substances," §5D1.3(a) and to consider conditions that will protect the public, deter the defendant and provide needed treatment to the defendant. §5D1.3(b).
Revocation of Supervised Release

The guidelines require the court to revoke supervised release upon finding a violation of supervised release involving new criminal conduct, other than a petty offense. §7B1.3(a)(1). If the violation of supervised release involves other than new criminal conduct, the court may: (1) revoke; or (2) extend the term of supervised release and/or modify the conditions. §7B1.3(a)(2). Upon a revocation of supervised release, the guidelines provide that no credit shall be given for time previously served on post-release supervision. §7B1.5(b).

Chapter Seven of the guidelines manual contains policy statements governing supervised release violation cases. The procedures and guideline ranges applicable to probation revocations are applicable to supervised release revocations. At least before the 1994 Crime Bill, the Chapter seven policy statements were not binding but should be considered by the courts. U.S. v. Headrick, 963 F.2d 777 (5th Cir. 1992); U.S. v. Cohen, 965 F.2d 58 (6th Cir. 1992); U.S. v. Lee, 957 F.2d 770 (10th Cir. 1992). The length of incarceration resulting from a supervised release revocation is not restricted by the original sentencing range. The defendant may receive all or part of the term in custody without credit for time on the street. U.S. v. Scroggins, 910 F.2d 768 (11th Cir. 1990).

A 1994 Crime Bill amendment to 18 U.S.C. §3553(a)(4) provides that the sentencing court must consider, in the case of a violation of probation or supervised release, the applicable guidelines and policy statements of the Sentencing Commission. This change could be viewed as making the Chapter Seven policy statements binding like guidelines. This is because the language in §3553(b) requires the court to impose a sentence "within the range, referred to in subsection (a)(4) . . . ."

14.03.06 Special Assessments

The Statute


The statute now requires the court to assess on any person convicted of an offense against the United States according to the following: for an individual $5 for an infraction or a Class C misdemeanor, $10 for a Class B misdemeanor, $25 for a Class A misdemeanor, and $100 for a felony; for other than an individual $25 for an infraction or a Class C misdemeanor, $50 for a Class B misdemeanor, $125 for a Class A misdemeanor, and $400 for a felony. 18 U.S.C. §3013. The assessments are to be collected

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7 The Ninth Circuit upheld the statute as against an equal protection claim. U.S. v. Smith, 818 F.2d 687 (9th Cir. 1987).

8 These amounts became effective April 24, 1996. Prior to that date, the special assessment for felonies were $100 for individuals and $200 for others.
as fines and the obligation to pay ceases five years after the date of the judgment. Offenses under the Assimilative Crimes Act, 18 U.S.C. §13 are subject to the mandatory assessment. This provision was added in 1987 apparently to overcome *U.S. v. Mayberry*, 774 F.2d 1018 (10th Cir. 1986) which held that the assessments did not apply to convictions under the Assimilative Crimes Act.

The imposition of the assessment on an indigent does not appear per se unconstitutional. Constitutional principles would be implicated only if the government seeks to enforce collection when the defendant is unable, through no fault of his/her own, to comply. *U.S. v. Pagan*, 785 F.2d 378 (2d Cir. 1986). The court in *Pagan* also rejected the argument that only one assessment may be imposed on a given defendant at a time, regardless of the number of counts involved in the conviction. *Id.* at 381. *See also U.S. v. Donaldson*, 797 F.2d 125 (3d Cir. 1986); *U.S. v. Dobbins*, 807 F.2d 130 (8th Cir. 1986).

**The Guidelines**

The guidelines also address special assessments, requiring such to be imposed as prescribed by statute. §5E1.3.

**14.03.07 Expungement Procedures**

The only federal statute authorizing expungement is 18 U.S.C. §3607. This section completely replaced the old provisions of 21 U.S.C. §844(b) and took effect with the Sentencing Reform Act. It provides special procedures for persons found guilty of misdemeanor possession of a controlled substance under 21 U.S.C. §844. If the individual has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances and has not previously gotten the benefit of this provision, the court may defer entry of judgment and place the person on probation for up to one year. The court may dismiss the proceedings at any time before expiration of the term of probation and must dismiss at the end of the term if the person has not violated any of the conditions of the probation. If the person whose case is dismissed under this section is under 21 years old at the time of the offense, the court shall, upon application of the person, enter an order of expungement.

The statute provides limitations on the use of the records of cases handled under the special procedures.

Federal courts also have supervisory authority to expunge in cases where there has been an unlawful arrest or where the statute has subsequently been determined to be unconstitutional or where necessary to vindicate a person's "substantive rights." *See U.S. v. G.*, 774 F.2d 1392 (9th Cir. 1985) (and cases cited therein); *Livingston v. U.S. Dept. of Justice*, 759 F.2d 74 (D.C. Cir. 1985). The non-statutory expungement power is narrow and can be used only in very limited and extreme circumstances. *U.S. v. Smith*, 940 F.2d 395 (9th Cir. 1991).

The common law writ of *audita querela* may be available to vacate a valid conviction for equitable reasons. *See U.S. v. Fonseca-Martinez*, 36 F.3d 62 (9th Cir. 1994) (did not reach issue, but discussed
writ and cited several cases where the writ was found to be not available to vacate an otherwise valid conviction).
14.03.08 Death Penalties

The 1994 Crime Bill adds 18 U.S.C. §§3591-3593 to provide procedures for implementing the sentence of death in a variety of federal offenses. The federal statutes do not permit a sentence of death for people under age 18. Most of the federal death penalties require that a death result from the offense; however, in the instance of particular violations of 21 U.S.C. §848 (continuing criminal enterprise), a death need not result in order for the death penalty to be imposed. There are two major statutes:

(1) General Death Penalty. For defendants convicted of a violation of 18 U.S.C. §794 (gathering or delivering defense information to aid a foreign government) or any other offense where death is authorized by statute, 18 U.S.C. §3591 provides for a sentence of death if it is justified after a hearing under §3593, the defendant is at least 18 years old and it is determined beyond a reasonable doubt that the defendant:

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

(2) CCE Offenses. A defendant who is at least 18 years old, shall be sentenced to death, if justified after a hearing under §3593, considering various factors in §3592 and that defendant:

(A) has been found guilty of violating 21 U.S.C. §848(c)(1) involving certain higher quantities of drugs or certain gross receipts where the defendant is a principal organizer or leader of the enterprise, and

(B) in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to
attempt to kill any public officer, juror, witness, or members of the family or household of such a person.

18 U.S.C. §3592 sets forth various mitigating and aggravating factors to be considered in determining whether a sentence of death is "justified."

Mitigating factors include impaired capacity, duress, minor participation, equally culpable defendants will not be sentenced to death, no prior criminal record, mental or emotional disturbance, victim's consent to the criminal conduct, and other mitigating factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

Aggravating factors in espionage and treason cases are prior espionage or treason offenses, grave risk to national security and grave risk of death, and any other aggravating factor for which notice has been given exists.

Aggravating factors in homicide cases are death during commission of specified other crimes, previous conviction of a violent felony involving firearm, previous conviction of an offense for which a sentence of death or life imprisonment was authorized, previous conviction of two or more other serious offenses, grave risk of death to additional persons, heinous, cruel, or depraved manner of committing offense, procurement of offense by payment, pecuniary gain, substantial planning and premeditation, previous conviction for two felony drug offenses, vulnerability of victim, previous conviction for serious federal drug offenses involving sentences of five years or more, continuing criminal enterprise involving drug sales to minors, the offense was committed against certain high public officials, previous conviction of sexual assault or child molestation, and any other aggravating factor for which notice has been given exists.

Aggravating factors in drug offenses are previous conviction of an offense which resulted in death, previous conviction of other serious offenses, previous serious drug felony conviction, use of firearm in committing the offense, distribution to persons under 21, distribution near schools, using minors in trafficking, the offense involved a lethal adulterant and the defendant was aware of the presence of the adulterant, or any other aggravating factor for which notice has been given.

Title 18 U.S.C. §3593 provides for a special hearing to determine whether a sentence of death is justified. Notice of intent to seek the death penalty including the aggravating factors is required "a reasonable time" before the trial or guilty plea. Unless the defendant and the government agree, the death sentence issue is to be determined by a jury (either the guilt phase jury or another, in certain circumstances). No presentence report is prepared and the rules of evidence do not apply, except to the extent that the information may be more prejudicial than probative, misleading or confusing. Special procedures for finding aggravating and mitigating circumstances are also set forth. Finally, a provision is added to "ensure against discrimination."

Other provisions (18 U.S.C. §§3594 et. seq.) govern the imposition of the death sentence, review of the sentence by the court of appeals and implementation of the sentence.
Indian Country exception to death penalty. The new capital sentence provisions do not apply to Indian Country cases unless the governing body of the tribe has elected to subject the land and persons to such criminal jurisdiction.

Specific Offenses Subject to the Death Penalty. The death penalties already set forth in Title 18 (destruction of aircraft and motor vehicles, espionage, explosives, murder, killing foreign officials, kidnaping, nonmailable injurious articles, wrecking trains, bank robbery, hostage taking, murder for hire, racketeering, genocide, carjacking, aircraft piracy) are maintained with conforming amendments to refer to the new procedures in §3591 \textit{et. seq.} In addition, several new death eligible offenses are added: murder by a federal prisoner, civil rights murders, murder of federal law enforcement officials, drive by shootings resulting in death and involving major drug offenses, foreign murder of U.S. nationals, rape and child molestation murders, sexual abuse resulting in death, sexual exploitation of children resulting in death, murder by escaped federal prisoners, gun murders during federal crimes of violence and drug trafficking crimes, homicides and attempted homicides involving firearms in federal facilities, murder of state or local official assisting federal law enforcement and state correctional officers, murder of court officers and jurors, retaliatory killings of witnesses, victims and informants, murder of federal witnesses, homicides resulting from violence against maritime navigation and maritime fixed platforms, torture, death resulting from violence at international airports, terrorism, deaths resulting from use of weapons of mass destruction, deaths resulting from alien smuggling.

Many of the above offenses now subject to the penalty of death also contain new and increased penalties for the particular crime when death does not result. For example, drive-by shootings in major drug cases not resulting in death carries up to 25 years; general penalties for alien smuggling not resulting in death are increased.

Juror Lists. The court can refuse to provide the list of jurors and witnesses if it provides by a preponderance of the evidence that doing so may jeopardize the life or safety of any person.

Appointment of Counsel. The defendant in death cases is entitled to two lawyers, at least one of whom must be "learned in the law applicable to capital cases." The lawyers shall have free access to the defendant at all reasonable hours. In assigning counsel, the court is to consider the recommendation of the federal defender or the Administrative Office of the U.S. Courts.

14.04 OVERVIEW OF THE SENTENCING GUIDELINES

14.04.01 What Guidelines Apply?\footnote{The guidelines do not apply to offenses committed before November 1, 1987, even if sentencing is scheduled for hearing after that effective date. \textit{U.S. v. Morrison}, 938 F.2d 168 (10th Cir. 1992); \textit{U.S. v. Hadley}, 918 F.2d 848 (9th Cir. 1990); \textit{U.S. v. Argitakos}, 862 F.2d 423 (2d Cir. 1988); \textit{U.S. v. Haines}, 855 F.2d 199 (5th Cir. 1988); \textit{U.S. v. Stewart}, 865 F.2d 115 (7th Cir. 1988); \textit{U.S. v. Rewald}, 835 F.2d 215 (9th Cir. 1987), amended, 902 F.2d 18 (9th Cir. 1990). In addition, the courts can probably rely upon the guidelines for advisory purposes. \textit{U.S. v. Twomey}, 845 F.2d 1132 (1st Cir. 1988); \textit{U.S. v. Bullock}, 857 F.2d 367 (7th Cir. 1988), but are not required to do so. \textit{U.S. v. Burgess}, 858 F.2d 1512 (11th Cir. 1988).}
The issue of what guidelines apply has been complicated by the number of amendments promulgated by the Sentencing Commission. As of November 1997, the guideline book has been amended 18 times, with 607 separate amendments (with subparts). Many of the amendments overruled existing case law; many amendments are substantive changes and many are only clarifying changes in the guidelines. Some amendments have been made retroactive; others are prospective only.

**Ex Post Facto Considerations.** The governing statute requires that the guidelines in effect at the time of sentencing apply. See 18 U.S.C. §3553(a)(4). The Sentencing Commission has taken the view that "subject to ex post facto limitations," the courts should apply new amendments to all sentencings after the effective date of the amendments. See §1B1.11.

Guideline §1B1.11 provides that the court use the sentencing manual in effect on the date of sentencing. However, if the court finds that use of the sentencing date guidelines would violate the Ex Post Facto Clause, the policy statement directs use of the manual in effect on the date of the offense. §1B1.11(b)(1). The policy statement further directs that the manual be applied in its entirety. In other words, courts should not apply an earlier version of one guideline and a later version of another in the same case. The manuals are to be considered as an integrated whole. §1B1.11(b)(2). Finally, the policy statement provides that if the date of the offense guideline manual is used, clarifying (as opposed to substantive) amendments in effect at sentencing should be considered. §1B1.11(b)(2).

Until early 1992, the Department of Justice took the policy position that if the amended guidelines are more detrimental to a defendant whose offense occurred before the effective date of the amendments, the guidelines in effect on the date of the offense should apply. Compare U.S. v. Barel, 939 F.2d 26 (3d Cir. 1991) (Department of Justice policy to apply older guidelines if newer have harsher result) and 1987 Prosecutors Handbook with U.S. v. Bell, 788 F. Supp. 413 (N.D. Iowa 1992), aff’d, 991 F.2d 1445 (8th Cir. 1993) (court rejected Department’s reevaluated position on ex post facto). Department of Justice policy covers those guidelines where there have been substantive changes and not merely clarifying changes or changes to the commentary.

Defense counsel should be aware of the ex post facto issue as raised in Miller v. Florida, 482 U.S. 423 (1986). Most courts have found the guidelines subject to ex post facto limitations. See, e.g., U.S. v. Seacott, 15 F.3d 1380 (7th Cir. 1994); U.S. v. Collins, 957 F.2d 72 (2d Cir. 1992); U.S. v. Kwong-Wah, 924 F.2d 298 (D.C. Cir. 1991); U.S. v. Kopp, 951 F.2d 521 (3d Cir. 1991); U.S. v. Morrow, 925 F.2d 779 (4th Cir. 1991); U.S. v. Keller, 947 F.2d 739 (5th Cir. 1991); U.S. v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991); U.S. v. Sweeten, 933 F.2d 765 (9th Cir. 1991); U.S. v. Underwood, 938 F.2d 1086 (10th Cir. 1991); U.S. v. Harotunian, 920 F.2d 1040 (1st Cir. 1990); U.S. v. Marin, 916 F.2d 1536 (11th Cir. 1990).

**Straddle Crimes.** Questions have arisen regarding the applicability of the guidelines to crimes that began before November 1, 1987 but continued past that date. The circuits to address this issue have been unanimous that "continuing offenses" that straddle the November 1, 1987 date are subject to guideline sentencing. U.S. v. Butler, 954 F.2d 114 (2d Cir. 1992) (RICO); U.S. v. Story, 891 F.2d 988 (2d Cir. 1989) (conspiracy); U.S. v. Mosconi, 927 F.2d 742 (3d Cir. 1991) (RICO); U.S. v. Rosa, 891 F.2d

The logical extension of this view is that it is also proper to consider pre-November 1, 1987 conduct in determining the guideline offense level. *U.S. v. Cusack*, 901 F.2d 29 (4th Cir. 1990); *U.S. v. Ykema*, 887 F.2d 697 (6th Cir. 1989); *U.S. v. Allen*, 886 F.2d 143 (8th Cir. 1989). One district court found it inappropriate to apply the guidelines to a conspiracy count where the great bulk of criminal activity took place before the effective date of the guidelines. *U.S. v. Davis*, 718 F. Supp. 8 (S.D.N.Y. 1988).

**Guidelines not applicable to certain offenses.** The guidelines do not apply to Class B or C misdemeanors, §1B1.9. They apply only to federal crimes. *U.S. v. Cutchin*, 956 F.2d 1216 (D.C. Cir. 1992).


**Retroactivity.** Where an amended guideline would be favorable to a defendant who has already been sentenced, counsel should consult 18 U.S.C. §3582(c)(2) and guideline §1B1.10. In §1B1.10 the Sentencing Commission sets forth the guidelines it believes should be applied retroactively. The statute grants discretion to the district court to determine whether guidelines should apply retroactively. See discussion in *U.S. v. Colon*, 961 F.2d 41 (2d Cir. 1992) (remanding to district court to determine retroactivity of new application note to §1B1.3); *U.S. v. Park*, 951 F.2d 634 (5th Cir. 1992) (remanding for application of §2S1.4). Guideline §1B1.10 purports to contain the limiting policy statements referenced in §3582(c)(2). A due process argument may be made that the Commission has not given the district court enough guidance as to why certain amendments are retroactive and others are not retroactive. A court should also be able to depart from the policy statement or choose not to follow it. 18 U.S.C. §3553(b); see infra section 14.04.03.04 for discussion of policy statements.

Generally, the Commission’s retroactivity policy statement has been held to limit the power of the court to apply guidelines retroactively. See e.g. *U.S. v. Dullen*, 15 F.3d 68 (6th Cir. 1994) (modification of sentence based on amended guideline is proper only if a reduction is consistent with applicable policy statements); *U.S. v. Dowty*, 996 F.2d 937 (8th Cir. 1993). Even though the policy statement dictates
whether a guideline can be applied retroactively, the district court has the discretion in deciding whether a retroactive guideline should apply retroactively. *See e.g. U.S. v. Wales*, 977 F.2d 1323 (9th Cir. 1992).

**14.04.02 The Basic Scheme**

The sentencing guidelines utilize a *sentencing table* comprised of 43 offense levels (increasing in severity) and six criminal history levels (which also increase in severity). *See infra* section 14.12. There are 19 separate sections which cover most federal offenses and assign a *base offense level* as well as points for *specific offense characteristics* to each crime. This base offense level is then subject to various *adjustments* relating to the victim of the crime, the defendant's role in the offense, whether or not there was obstruction of justice involved, multiple counts and acceptance of responsibility. The *criminal history category* is determined by adding points for most prior sentences served by the defendant. Career offenders and armed career criminals, which are specifically defined in the guidelines, are assigned enhanced offense levels and the highest criminal history category.

The Guideline Manual is divided into eight chapters, a statutory index and three appendices.

Chapter One is the introduction and contains the basic application procedures, definitions of a variety of terms and a description of the conduct to be considered in determining the applicable guideline range.

Chapter Two is divided into 19 sections and sets forth the offense levels and specific offense characteristics of most federal crimes.

Chapter Three sets forth various adjustments to the guidelines pertaining to the victim, the defendant's role, whether the defendant obstructed justice, rules for multiple counts and acceptance of responsibility.

Chapter Four contains the rules for calculating criminal history, criminal livelihood, career offender and armed career criminal.

Chapter Five contains the Sentencing Table and guidelines for determining the sentence, including the various sentencing options, procedures for implementing sentences, specific offender characteristics, and departures.

Chapter Six contains the guidelines for sentencing procedures and plea agreements.

Chapter Seven contains policy statements for violation of probation and supervised release.

Chapter Eight contains the organizational sanctions.
Appendix A is the Statutory Index, the tool for determining which guideline in Chapter Two is applicable. The other appendices are the statutes affecting the guidelines (Appendix B) and the amendments to the guidelines (Appendix C).

West Publishing has published different Guideline Manuals (reacting to the amendments) that also contain model sentencing forms, sentencing worksheets, the “Questions Most Frequently Asked About the Guidelines” and the applicable Federal Rules of Criminal Procedure. The most current guideline manual may be obtained from West Publishing, 1-800-328-9352. The cost is usually around $21.00.
14.04.03 Chapter One of the Guidelines

Chapter One contains an introduction and the general application guidelines. The introduction recognizes that Congress sought three objectives in the new sentencing law -- honesty, uniformity and proportionality--and concludes that the guidelines were developed "as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system."

The introduction also addresses the major issues the Commission faced and its resolution of these issues. The first major issue was whether to adopt a "real offense" or "charge offense" sentencing system. According to the introductory comments, the result is closer to a "charge offense" system, with a number of "real offense" elements.

The second major issue was when a court should depart from the guidelines. The resolution was that the Commission intends the court to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct each guideline describes. With certain exceptions, the Commission decided not to limit the kinds of factors that could constitute grounds for departure in an unusual case. However, the Commission states in the introduction it believes that the courts will not depart very often.

The third major issue was plea agreements. The Commission decided the initial guidelines would not make significant changes in current plea agreement practices. The fourth major issue, probation and split sentences, was resolved by significantly limiting probation as an option. The fifth major issue, multi-count convictions, was resolved by the development of technical and somewhat complicated rules providing for incremental punishment for unrelated multi-count convictions.

Regarding the sixth major issue, regulatory offenses, the Commission found it could not comprehensively treat all regulatory violations in the initial guidelines. As a result it sought to determine which such offenses were particularly important and addressed them in the initial guidelines.

To resolve the seventh major issue, that of determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences then being served for the various offenses. The introductory comments acknowledge the guidelines (rather than legislated mandatory minimum or career offender sentences) will lead to an estimated 10% increase in the prison population over the next 10 years.

The final major issue, the sentencing table, was resolved by the creation of a grid with 43 offense levels and six criminal history categories. The sentence roughly doubles every six levels.

The guidelines in Chapter One govern general application procedures and definitions, §1B1.1; selection of the applicable guideline, §1B1.2; rules regarding relevant conduct, §1B1.3; consideration of information, §1B1.4; cross references, §1B1.5; structure of the guidelines, §1B1.6; significance of

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10 The Supplementary Report shows how the sentences were averaged. The basic problem with the averaging process is that only sentences of imprisonment were averaged, thus ignoring the numbers of cases that received probationary terms. See Supplementary Report at p.21.
commentary, §1B1.7; cooperation, §1B1.8; applicability to misdemeanors, §1B1.9; a policy statement on retroactivity, §1B1.10; a policy statement on \textit{ex post facto} issues, §1B1.11; and, a policy statement regarding application of the guidelines in juvenile delinquency cases, §1B1.12.

\textbf{14.04.03.01 What Conduct Counts?}

The Sentencing Commission acknowledged that one of the most important questions it had to decide was whether to base sentences upon the actual conduct involved, regardless of the charges, or upon the conduct constituting the offense of conviction. (See Chapter One, Part A, paragraph 4(a)). During the guideline development process, the Commission shifted from an initial decision to go with a "real offense" system to its ultimate position of being "closer to a charge offense system" with a "number of real elements." Recognizing that this decision could place great power in the hands of the prosecutor, the Commission developed detailed rules for handling multiple count convictions and took further solace in the sentencing court's ability to control "any inappropriate manipulation of the indictment" by departing from the specific guideline range.

Three guideline sections of Chapter One address the issue of what conduct counts in determining the guideline range: (1) §1B1.2; (2) §1B1.3; and (3) §1B1.4.

\textbf{§1B1.2 Selection of Applicable Guideline}

Guideline §1B1.2 contains the rules for determining which guideline from Chapter Two applies to a particular case. Prior to November 1, 2000, it requires the court to determine the offense guideline section in Chapter Two "most applicable" to the offense of conviction unless a plea of guilty or \textit{nolo contendere} contains a stipulation establishing a more serious offense than the offense of conviction.

An amendment effective on November 1, 2000, struck the word "most" and makes the statutory index in Appendix A mandatory, thus overruling the practice of some courts to exercise a great deal of discretion in selecting a guideline. \textit{See, e.g.}, \textit{U.S. v. Smith}, 186 F.3d 290 (3d Cir. 1999) (fraud guideline most applicable despite conviction for money laundering). Only if the index lists more than one guideline may the court select the most applicable one. Nothing, however, would preclude a departure in the appropriate case.

Where there is a plea agreement containing a stipulation establishing a more serious offense, the court is to determine the guideline most applicable to the stipulated offense. The guideline also directs the court to determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct). In addition, §1B1.2 provides the rules for calculating the guidelines where there is a conspiracy conviction that involved a conspiracy to commit more than one offense.

This guideline has been upheld against a challenge that it is unconstitutionally vague because it does not define "more serious offense" or set criteria for determining the relative seriousness of offenses. \textit{U.S. v. Roberts}, 898 F.2d 1465 (10th Cir. 1990). Absent a stipulation to a more serious offense, §1B1.2 requires application of the guideline most applicable to the offense of conviction. A split in the circuits over
the meaning of the word stipulation was dodged by the Supreme Court in *Braxton v. U.S.*, 500 U.S. 344 (1991). Instead, the court deferred to the authority of the Sentencing Commission to straighten out conflicts by amendment. *Id.* The Commission took the hint by adopting a clarifying amendment effective November 1, 1992 which provides that the stipulation must be part of the plea agreement before the more serious guideline applies. This amendment should avoid problems of implied stipulations or unknowing admissions to more serious conduct at the time of the guilty plea. *See, e.g., U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988) (failure of defendant to dispute the government's statement as to the amount of cocaine involved in "telephone count" permitted court to depart based on the amount of cocaine); *U.S. v. Rios*, 893 F.2d 479 (2d Cir. 1990) (guilty plea established greater quantity of cocaine than the jury found in co-defendant's case and as a result, proper to base guidelines on higher amount).

§1B1.3  Relevant Conduct

Although §1B1.2 appears to resolve the question of what conduct to consider, i.e., the offense of conviction or a more serious stipulated offense, the issue is not quite so simple. Immediately following §1B1.2 is Guideline §1B1.3 which is entitled "Relevant Conduct (Factors that Determine the Guideline Range)." The relevant conduct guideline underwent a massive "clarifying" overhaul effective November 1, 1992. According to trainers at the Sentencing Commission, the "clarification" was necessary to assist courts in applying the guidelines in cases involving multiple defendants and in distinguishing various levels of culpability. The application notes now specify that the "principles and limits of sentencing accountability are not always the same as the principles and limits of criminal liability." *See Application Note 1, §1B1.3.*

Section 1B1.3 provides as follows:

(a) Chapter 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

2. (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

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11 This position seemingly overruled those circuits that found sentencing liability coextensive with *Pinkerton* conspiratorial liability. *See, e.g., U.S. v. Joyner*, 924 F.2d 454 (2d Cir. 1991) (reasonable foreseeability test not narrower than *Pinkerton*); *U.S. v. Campbell*, 935 F.2d 39 (4th Cir. 1991) (defendant punished commensurate with scale of conspiracy and not personal participation).
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) 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.

Uncharged, dismissed or acquitted counts. The major impact of the relevant conduct provision is that dismissed or uncharged counts or conduct do not disappear. For example, a defendant who pleads guilty to an unarmed bank robbery will still have his or her sentence increased for the possession of a gun during the bank robbery even though the gun was not charged. See U.S. v. Frierson, 945 F.2d 650 (3d Cir. 1991). The gun "counts" under §1B1.3(a)(A) as an act committed by the defendant during the offense of conviction.

Because of the lowered standard of proof, even conduct of which the defendant has been acquitted can count. See U.S. v. Foster, 19 F.3d 1452 (D.C. Cir. 1994) (gun increase may be based on conduct for which the defendant has been acquitted); U.S. v. Patino, 962 F.2d 263 (2d Cir. 1992) (acquittal did not bar consideration of facts); U.S. v. Carter, 953 F.2d 1449 (5th Cir. 1992) (sentencing court may rely on facts underlying acquitted count); U.S. v. Blankenship, 954 F.2d 1224 (6th Cir. 1992) (court may rely on facts of acquitted counts); U.S. v. England, 966 F.2d 403 (8th Cir. 1992) (acquittal did not bar consideration of gun); U.S. v. Morrison, 946 F.2d 484 (7th Cir. 1991) (court may consider drugs in acquitted counts); U.S. v. Manor, 936 F.2d 1238 (11th Cir. 1991) (court may rely on facts underlying acquitted counts); U.S. v. Talbott, 902 F.2d 1129 (4th Cir. 1990) (acquittal of offense does not bar consideration of underlying conduct); U.S. v. Mocciola, 891 F.2d 13 (1st Cir. 1989) (acquittal on firearm count did not preclude two-level increase in drug case).

The only circuit to reject consideration of acquitted conduct either for purposes of departure or calculation of the range was the Ninth Circuit. U.S. v. Brady, 928 F.2d 844 (9th Cir. 1991) (upward departure may not be based on acquitted conduct); U.S. v. Pinkney, 15 F.3d 825 (9th Cir. 1994) (firearm enhancement precluded where defendant acquitted of armed robbery). But see U.S. v. Duran, 15 F.3d 131 (9th Cir. 1994) (okay to consider conduct a hung jury did not resolve); U.S. v. Diaz-Rosas, 13 F.3d 1305 (9th Cir. 1994) (consideration of foreseeable amounts of drugs even though a defendant acquitted of a drug count). In general, the Ninth Circuit's position was that it will not permit consideration of conduct about which a jury has made specific findings.
However, the Supreme Court resolved the conflict in U.S. v. Watts, 519 U.S. 148 (1997), holding that acquittal conduct may be considered. The Court referred to the lesser burden of proof and also concluded that an acquittal is not a finding of any fact.

A related issue involves cases in which a defendant is found guilty on a general verdict of conspiracy involving multiple drugs. The question presented is whether the defendant must be sentenced on the basis of the criminal objective carrying the lesser penalty (or given a new trial) when the jury verdict does not disclose the object of the conspiracy of which the defendant is guilty. Five circuits have held that when a jury returns a general verdict to a charge of conspiracy involving multiple drugs, the defendant must be sentenced as if the conspiracy covered only the drug carrying the lower penalty. U.S. v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984); Newman v. U.S., 817 F.2d 635 (10th Cir. 1987); U.S. v. Owens, 904 F.2d 411 (8th Cir. 1990); U.S. v. Bounds, 985 F.2d 188 (5th Cir. 1993); U.S. v. Garcia, 37 F.3d 1359 (9th Cir. 1994).

Only the Seventh Circuit has held that the defendant may be sentenced on kinds and quantities of drugs not considered by the jury. U.S. v. Edwards, 105 F.3d 1179 (7th Cir. 1997). In Edwards, the court affirmed a sentenced imposed after the defendants were found guilty of a conspiracy that “involved measurable amounts of cocaine or cocaine base.” The court rejected the defendants’ argument that they should have been sentenced as if all of the drug had been powder cocaine or, in the alternative, they should be granted a new trial. The court reasoned that under the guidelines, the sentencing judge alone determines relevant conduct and which drug was distributed and in what quantity.

All of these cases were decided before Watts. The reasoning in Watts should have some impact on this issue. The Supreme Court will answer the question definitely as it has granted certiorari in Edwards to resolve the conflict. Edwards v. U.S., 522 U.S. 931 (1997).


Same Course of Conduct. The relevant conduct provision hits especially hard in drug, fraud and other cases where the guidelines are quantity driven, e.g. quantity of drugs or amount of loss. Under §1B1.3(2), conduct which would be otherwise added together under the multiple count rules (quantities) if there were convictions will be considered even absent conviction if the conduct was part of the same course of conduct or common scheme as the offense of conviction. See, e.g., U.S. v. Galloway, 976 F.2d 414 (8th Cir.1992) (en banc) (proper to consider uncharged relevant conduct); U.S. v. Fine, 975 F.2d 596 (9th Cir. 1993) (en banc) (distinguishing between "groupable" and "non-groupable" counts); U.S. v. Clark, 928 F.2d 639 (4th Cir. 1991) (defendant properly held accountable for drugs possessed or distributed by brother); U.S. v. Williams, 917 F.2d 112 (3d Cir. 1990) (consider drugs outside offense of conviction); U.S. v. Woods, 907 F.2d 1540 (5th Cir. 1990) (consider relevant conduct); U.S. v. Miller, 910 F.2d 1321 (6th Cir. 1990) (proper to consider uncharged relevant conduct); U.S. v. Ebbole, 917 F.2d 1495 (7th Cir. 1990); U.S. v. Blanco, 888 F.2d 907 (1st Cir. 1989) (consider dismissed drug courts); U.S. v. Fernandez, 877 F.2d 1138 (2d Cir. 1989) (guideline range based on amount seized, not
lesser amount charged in indictment). However, where the conduct is not "groupable", it should not count unless part of the offense of conviction. See U.S. v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1991) (dismissed bank robbery counts should not be considered).

In U.S. v. Hahn, 960 F.2d 903 (9th Cir. 1992), the court set forth a test for determining whether conduct is part of a common scheme or the same course of conduct as the offense of conviction. In order to avoid constitutional difficulties with a broad definition of relevant conduct, the Ninth Circuit determined that the essential components of a §1B1.3(a)(2) (1991 version) (now §1B1.3(2)) analysis are similarity, regularity and temporal proximity. When one component is absent, the court must look to a stronger presence of another. See also U.S. v. Mullins, 971 F.2d 1138 (4th Cir. 1992) (uncharged fraud not sufficiently similar, regular or related to be relevant conduct); U.S. v. Fermin, 32 F.3d 674 (2d Cir. 1994) (drug transactions occurring five years before offense of conviction were not relevant conduct). A 1994 amendment to the guidelines adopts the Hahn test.

Jointly Undertaken Criminal Activity. With regard to jointly undertaken criminal activity, §1B1.3(1)(B), the Commission has distributed training materials which provide:

(a) For guideline application to be based upon the "conduct of others" in (B), the conduct must have been both in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

(b) "Jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as conspiracy.

(c) Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. Correct application of relevant conduct requires determination of the scope of the criminal activity the particular defendant agreed to jointly undertake, (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of the criminal activity that the defendant agreed to jointly undertake and that was reasonably foreseeable to the defendant is also relevant conduct for purposes of determining the defendant's guideline range.

(d) Reasonable foreseeability is to be considered only in relation to the "conduct of others" that is in furtherance of the defendant's
jointly undertaken criminal activity. The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes.

(e) "Common scheme or plan" as used in §1B1.3(a)(2) includes two or more offenses that are substantially connected by at least one common factor, (e.g., common victims, common accomplices, common purpose, and similar modus operandi).

(f) "Same course of conduct" as used in §1B1.3(a)(2) can include offenses that do not qualify as part of a "common scheme or plan" if they are 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. Factors to be considered in making this determination include the similarity of the offenses and the time interval between offenses. Because (a)(2) only applies to offenses that would be grouped under §3D1.2(d), such offenses by their nature will usually be similar. There is no absolute standard that can be used to consider the appropriate interval of time; this will vary by offense type. For example, many tax offenses only occur annually and the appropriate interval of time would be at least a year. Multiple thefts in contrast, would typically occur within days or weeks of each other. Multiple thefts committed years apart typically would not be considered part of the "same course of conduct" because of the interval of time between offenses.

The bottom line is the sentencing court must determine the individual culpability of those involved in joint conduct. *U.S. v. Castellone*, 985 F.2d 21 (1st Cir. 1993) (defendant sufficiently detached from third sale so that it was not relevant conduct); *U.S. v. Petty*, 992 F.2d 887 (9th Cir. 1993) (relevant conduct in conspiracy case has individual orientation). Both the foreseeability of the conduct and the scope of the defendant's agreement must be determined. *U.S. v. Jenkins*, 4 F.3d 1338 (6th Cir. 1993) (case remanded for district court to determine scope of defendant's agreement). Failure to make adequate findings will result in a remand. See, e.g., *U.S. v. Saro*, 24 F.3d 283 (D.C. Cir. 1994) (failure to find drug quantity was "in furtherance of" the conspiracy was plain error); *U.S. v. Foy*, 28 F.3d 464 (5th Cir. 1994) (individualized findings of reasonable foreseeability are required); *U.S. v. Medina*, 992 F.2d 573 (6th Cir. 1993) (remand required for foreseeability findings); *U.S. v. DePriest*, 6 F.3d 1201 (7th Cir. 1993) (remand required because district court did not clearly address reasons defendant responsible for entire amount of conspiracy).
The "reasonable foreseeability" standard does not apply when the defendant is directly involved. \textit{U.S. v. Cochran}, 14 F.3d 1128 (6th Cir. 1994); \textit{U.S. v. Corral-Ibarra}, 25 F.3d 430 (7th Cir. 1994) (reasonable foreseeability not in issue where defendant aided and abetted full amount).

A split developed in the circuits over whether a defendant is responsible for conduct involved in the conspiracy before the defendant joined the conspiracy. \textit{See U.S. v. Carreon}, 11 F.3d 1225 (5th Cir. 1994) (noting split). A 1994 amendment adding an application note to §1B1.3 resolved this split by providing that a defendant is not responsible for conduct of the conspiracy before joining.

\textbf{§1B1.4 Information to be Used in Imposing Sentence}

The final section in Chapter One that addresses relevant conduct is §1B1.4 which provides

\textit{[i]n determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.}

The language simply tracks that of 18 U.S.C. §3661 and has been interpreted to place no limitation on information available to the district court as long as the information was not already considered by the Sentencing Commission in formulating the guideline. \textit{U.S. v. Fairman}, 927 F.2d 1079 (11th Cir. 1991). At least one court has found no conflict between 18 U.S.C. §3661/§1B1.4 and the restrictions on consideration of offender characteristics, \textit{see, e.g.}, §5H1.1-1.6, holding that offender characteristics can be considered in selecting the appropriate sentence within the guideline range. \textit{U.S. v. Boshell}, 952 F.2d 1101 (9th Cir. 1991). The Commentary to §1B1.4 states that the section distinguishes between factors that determine the applicable guideline range and information that a court may consider in imposing sentence. \textit{See U.S. v. Duarte}, 901 F.2d 1498 (9th Cir. 1990). The Commentary also recognizes that situations do exist where other criminal acts would not be considered, \textit{e.g.}, "if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range." \textit{See U.S. v. Castro-Cervantes}, 927 F.2d 1079 (9th Cir. 1991).

\textbf{14.04.03.02 Cross References (§1B1.5)}

Several guidelines contain cross references to other offense guidelines, \textit{e.g.}, §2K1.4 (if death results from an arson, there is a cross reference to the most analogous guideline from Chapter Two, Part A, if the resulting offense level is greater than that determined under §2K1.4), §2K2.2 (if a defendant convicted of trafficking in unlawful firearms has a prior felony conviction, there is a cross reference to §2K1.1 if the resulting offense level is greater), §2E1.1 (cross reference to the offense level applicable to the underlying racketeering activity).
Guideline §1B1.5 now makes clear that a cross reference refers to the entire offense guideline. An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline unless a particular subsection or table is referenced and then only those provisions are considered.

The reference to "another offense" in §2K2.1(c)(2) has been held to permit consideration of a state offense, U.S. v. Mun, 928 F.2d 323 (9th Cir. 1991); U.S. v. Carroll, 3 F.3d 98 (4th Cir. 1993) (cross-reference to state offense did not violate principles of federalism); offenses of which the defendant has not been charged, U.S. v. Chapman, 7 F.3d 66 (5th Cir. 1993) (proper to cross-reference firearm false statement to assault and drug guidelines); U.S. v. Mason, 974 F.2d 897 (7th Cir. 1992) (cross reference to sexual abuse proper where gun involved in rape); U.S. v. Smith, 997 F.2d 396 (8th Cir. 1993) (cross reference does not require conviction for substantive underlying crime); and, offenses of which the defendant was acquitted, U.S. v. Milton, 27 F.3d 203 (6th Cir. 1994) (proper to cross reference to second degree murder even though defendant acquitted of murder).
14.04.03.03 Use of Cooperation Information

The initial set of guidelines did not provide for a limitation on the use of information that a cooperating defendant may provide during the course of the cooperation. This void meant that a defendant cooperating with the government could end up with an increased guideline range based upon information provided during the cooperation. Given that such could significantly hamper cooperation attempts, the Commission adopted a guideline to restrict the use of specified self-incriminating information.

The guideline, §1B1.8, provides that self-incriminating information provided during a defendant's cooperation with the government will not be used in determining the applicable guideline range, except as agreed to with the government. An agreement with the agent to tell the prosecutor about the cooperation probably will not provide §1B1.8 coverage. *U.S. v. Evans*, 985 F.2d 497 (10th Cir. 1993).

The court can consider the cooperation induced information in determining whether, and to what extent, a downward departure is warranted. See §1B1.8(b)(5)(as amended November 1, 1992) and dissent by Judge/Commissioner Wilkins in *U.S. v. Malvito*, 946 F.2d 1066 (4th Cir. 1991). This amendment effectively overruled the majority opinion in Malvito which had held that the district court should not consider the cooperation information in deciding whether to depart downward. At least one other court had held that the information should not be considered in deciding to depart upward. *U.S. v. Robinson*, 898 F.2d 1111 (6th Cir. 1990).

Although the courts initially split on the issue, the guideline now makes clear that cooperation information repeated to a probation officer is also covered. See §1B1.8, note 5; compare *U.S. v. Marsh*, 963 F.2d 72 (5th Cir. 1992) (§1B1.8 protects information provided to probation) with *U.S. v. Miller*, 910 F.2d 1321 (6th Cir. 1990) (statements made to probation officer cannot be construed as information provided to the "government" within §1B1.8).

14.04.03.04 Commentary (§1B1.7) and Policy Statements

According to §1B1.7, the Commentary (1) may interpret the guideline or explain how it is to be applied (and failure to follow this Commentary could constitute an incorrect application); (2) may suggest circumstances which may warrant departure from the guidelines (treated as the legal equivalent of a policy statement and helps assess the reasonableness of a departure); and (3) may provide background information or reasons underlying the guideline. After a great deal of litigation over the impact of the commentary, the Supreme Court held that commentary is generally authoritative. *Stinson v. U.S.*, 508 U.S. 36 (1993). The limited exceptions to this general rule are where the commentary is contrary to the Constitution, a federal statute or is inconsistent with the guideline itself.

Policy Statements

Policy Statements are referenced in §1B1.7 but only in comparison to Commentary. They are more clearly described in the introduction to Chapter Seven as permitting more flexibility to the courts than a binding guideline. Certain policy statements have been viewed as binding. See, e.g., *U.S. v. Kelley*, 956
F.2d 748 (8th Cir. 1992) (en banc) (§5K1.1 policy statements binding) and others advisory only; U.S. v. Lee, 957 F.2d 770 (10th Cir 1992) (policy statements in Chapter Seven are advisory only); U.S. v. Cohen, 946 F.2d 430 (6th Cir. 1992) (distinguishing between Chapter Five and Chapter Seven policy statements); but see U.S. v. Lewis, 998 F.2d 497 (7th Cir. 1993) (revocation policy statements binding absent departure); U.S. v. Johnson, 964 F.2d 124 (2d Cir. 1992) (some policy statements, e.g., §5H1.6 are "soft").

In Williams v. U.S., 503 U.S. 193 (1992), the Supreme Court held that policy statements are an authoritative guide to the meaning of a guideline. An error in interpreting a policy statement could lead to an incorrect application of the guidelines.

14.04.04 Chapter Two--Offense Conduct

The guidelines set forth 19 separate categories of offense conduct which cover most federal criminal behavior. A statutory index included with the guidelines connects most all of the federal criminal provisions to a specific guideline. See §1B1.2. If more than one guideline section is referenced for the particular statute, the court is to select the guideline most appropriate for the conduct of which the defendant was convicted. For offenses not listed in the statutory index, the court is to select the most analogous guideline. See §2X5.1.

The 19 basic categories of offense conduct are:

-- **Offenses Against the Person** (e.g., homicide, assault, criminal sexual abuse, kidnapping, abduction or unlawful restraint, air piracy, threatening communications); see Chapter 2A.

-- **Offenses Involving Property** (e.g., theft, embezzlement, receipt of stolen property and property destruction, burglary and trespass, robbery, extortion and blackmail, commercial bribery and kickbacks, counterfeiting, motor vehicle identification numbers); see Chapter 2B. Much case law has developed over the meaning of loss.

-- **Offenses Involving Public Officials** (e.g., bribery, conflict of interest); see Chapter 2C.

-- **Offenses Involving Drugs** (e.g., manufacturing, importing, exporting, trafficking, possession, CCE, regulatory violations); see Chapter 2D. Much case law has developed over determining quantity, particularly in multi-defendant cases.

-- **Offenses Involving Criminal Enterprises and Racketeering** (e.g., racketeering, extortion and extension of credit, gambling, trafficking in contraband cigarettes, labor racketeering); see Chapter 2E.

-- **Offenses Involving Fraud or Deceit** (e.g., fraud, deceit, insider trading); see Chapter 2F. There have been major amendments to the definition of loss in the context of fraud and theft and much conflicting case law has developed.
--Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity; see Chapter 2G.

--Offenses Involving Individual Rights (e.g., civil rights, political rights, privacy and eavesdropping, peonage, involuntary servitude and slave trade); see Chapter 2H.

--Offenses Involving Administration of Justice (e.g., contempt, obstruction of justice, perjury, failure to appear, bribery of a witness); see Chapter 2J.

--Offenses Involving Public Safety (e.g., explosives and arson, firearms, transportation of hazardous materials); see Chapter 2K.

--Offenses Involving Immigration, Naturalization and Passports; see Chapter 2L.

--Offenses Involving National Defense (e.g., treason, sabotage, espionage, evasion of military service, prohibited financial transaction and exports, atomic energy); see Chapter 2M.

--Offenses Involving Food, Drugs, Agricultural Products and Odometer Laws (e.g., tampering with consumer products, violations of statutes and regulations dealing with food, drugs and other products, and odometer violations); see Chapter 2N.

--Offenses Involving Prisons and Correctional Facilities (e.g., escape, contraband in prison, inciting a riot in detention facility); see Chapter 2P.

--Offenses Involving the Environment (e.g., polluting the environment, mishandling toxic wastes, conservation and wildlife cases); see Chapter 2Q.

--Antitrust Offenses; see Chapter 2R.

--Offenses Involving Money Laundering and Monetary Transaction Reporting; see Chapter 2S.

--Offenses Involving Taxation (e.g., income taxes, alcohol and tobacco taxes, customs taxes); see Chapter 2T.

--Other Offenses (e.g., conspiracies, attempts, solicitations, aiding and abetting, accessory after the fact, misprison of felony); see Chapter 2X.

14.04.04.01 The Base Offense Level/Specific Offense Characteristics

All offenses are assigned a base offense level and additional points for certain specific offense characteristics. For example:

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12 Definitions for many terms in Chapter Two are found in the Commentary sections that follow each guideline or in the Application Notes to §1B1.1.
The base offense level for **aggravated assault** is 15; however, if the assault involved more than minimal planning, two levels must be added; if a firearm was discharged, the base offense level is increased by five; if a firearm was "otherwise used," the base offense level is increased by four, and if a firearm was brandished or its use was threatened, the base offense level is increased by three.

The base offense level for **theft** is four but the levels increase depending upon the value of the property taken, e.g., the base offense level for the theft of property valued at $21,000 is ten (four plus six). If a controlled substance or firearm is taken, the base offense level is increased by one but in no event is less than seven.

The base offense level for **robbery** is 20 and if a financial institution is involved (e.g., bank robbery), increase by two levels. The levels increase depending upon the loss involved. Also, if a firearm is discharged during the course of the robbery, the base offense level is increased by seven; if the firearm was simply "brandished, displayed or possessed" the level increases by six levels; if a dangerous weapon is "brandished, displayed or possessed", the level increases by three levels.

The base offense level for **drug offenses** depends upon the quantity of the drugs involved. With the exception of PCP and methamphetamine, the quantity is generally determined by the weight of any mixture containing a detectable amount of the drug. Both PCP and methamphetamine allow for offense levels based either on the weight of a mixture or the amount of pure substance, with the greater offense level to apply. The various levels are set forth in a "drug quantity table." Where the number of doses, but not the weight is known, there is a "dosage equivalency table" to be used.

### 14.04.05 Chapter Three--Adjustments

Chapter Three of the Sentencing Guidelines contains the rules and procedures for determining adjustments to the offense level determined from an application of Chapter Two. The Sentencing Commission has acknowledged five adjustments to the Guidelines: (1) victim related adjustments; (2) adjustments for the defendant's role in the offense; (3) adjustments for obstructing the administration of justice; (4) adjustments for multiple count convictions; and (5) adjustment for a defendant's acceptance of responsibility. Application of the adjustments to the Guidelines in single count convictions could result in increases or decreases of several years depending upon which adjustment factors apply. Multiple count convictions bring into play a series of detailed rules defense counsel must understand in order to properly advise a client of the "advantages" or "disadvantages" of going to trial.

### 14.04.05.01 Victim Related Adjustments

#### Vulnerable Victim (§3A1.1)

The offense level is increased by two levels

1. "if the defendant knew or should have known that a victim of the offense was unusually vulnerable" due to:

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The base offense level for **aggravated assault** is 15; however, if the assault involved more than minimal planning, two levels must be added; if a firearm was discharged, the base offense level is increased by five; if a firearm was "otherwise used," the base offense level is increased by four, and if a firearm was brandished or its use was threatened, the base offense level is increased by three.

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### 14.04.05.01 Victim Related Adjustments

#### Vulnerable Victim (§3A1.1)

The offense level is increased by two levels

1. "if the defendant knew or should have known that a victim of the offense was unusually vulnerable" due to:
(a) age
(b) physical condition
(c) mental condition

or

(2) if the defendant knew or should have known "that a victim was otherwise particularly susceptible to the criminal conduct."

If a large number of vulnerable victims were involved, the offense level is increased by an additional two levels.

The Commentary urges application of this adjustment in cases where an unusually vulnerable victim is made a target of criminal activity by the defendant. See U.S. v. White, 903 F.2d 457 (7th Cir. 1990); U.S. v. Boult, 905 F.2d 1137 (8th Cir. 1990). Arguably, there should be a nexus between the victim and the crime. U.S. v. Wright, 12 F.3d 70 (6th Cir. 1993) (§3A1.1 only applies to victim of offense of conviction); U.S. v. Lee, 973 F.2d 832 (10th Cir. 1992) (victim adjustment improper because no nexus between elderly bank depositors and embezzlement); but see U.S. v. Roberson, 872 F.2d 597 (5th Cir. 1989) (no required nexus between offense of conviction and the victim). The adjustment should be counted only once in fraud cases involving more than one victim. U.S. v. Caterino, 957 F.2d 681 (9th Cir. 1992).

Otherwise, the multiple count rules control. Id.

Usually the victim must be chosen because of the vulnerability in order for the adjustment to apply. See U.S. v. Gary, 18 F.3d 1123 (4th Cir. 1994) (increase not proper unless victim chosen because of particular vulnerability); U.S. v. Newman, 965 F.2d 206 (7th Cir. 1992) (defendant must know of victim's vulnerability); U.S. v. Sutherland, 955 F.2d 25 (7th Cir. 1992) (determination of vulnerability must focus on who defendant targeted and why); U.S. v. Greer, 939 F.2d 1076 (5th Cir. 1991) (§3A1.1 is available for limited use by courts where racial and ethnic characteristics of victims plays a significant role in their being targeted); U.S. v. Paige, 923 F.2d 112 (8th Cir. 1991); U.S. v. Cree, 915 F.2d 352 (8th Cir. 1990) (reversed because no evidence defendant chose victim because of vulnerability); U.S. v. Creech, 913 F.2d 780 (10th Cir. 1990) (victim must be chosen because of some unusual personal vulnerability); U.S. v. Boult, 905 F.2d 1137 (8th Cir. 1990) (victim selected because of mental condition and age); but see U.S. v. Boise, 916 F.2d 497 (9th Cir. 1990) (§3A1.1 applies to crimes against children regardless of whether vulnerability the basis for selection).

According to the Commentary, the "vulnerable victim" adjustment is not applied if the offense conduct guideline specifically incorporates it as a factor. See U.S. v. Hershkowitz, 968 F.2d 1503 (2d Cir. 1992) (civil rights violation did not consider vulnerability of victim); U.S. v. Skillman, 922 F.2d 1370 (9th Cir. 1990) (race not built into civil rights statute; proper to find black couple vulnerable); U.S. v. Moree, 897 F.2d 1329 (5th Cir. 1990) (victim's indictment made obstruction of justice crime possible, but did not make victim vulnerable).

A November 1992 amendment to the application note clarified that a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in the bank. This amendment should overrule the
decision in *U.S. v. Jones*, 899 F.2d 1097 (11th Cir. 1990) which had held the bank teller was a vulnerable victim in a robbery case.

**Official Victim (§3A1.2)**

The offense level is increased three levels if the victim was:

(1) a government officer or employee;
(2) a former government officer or employee; or
(3) a member of the immediate family of the above

and the offense of conviction was motivated by such status. §3A1.2(a). The three-level increase also applies if there is an assault that involves a substantial risk of serious bodily injury during the offense or immediate flight from the offense. §3A1.2(b).

The Commentary limits "victim" to "an individual directly victimized by the offense" and does not include an organization, agency or the government. *See U.S. v. Schroeder*, 902 F.2d 1469 (10th Cir. 1990) (victim must be the one who is the object of the threat). The Commentary now recognizes that certain high level officials, e.g., the President and Vice President, may be covered but suggests an upward departure because they do not represent the heartland case. The pre-1992 language suggesting a 3-level departure has been stricken. The Seventh Circuit applied a 3-level departure in a case involving threats against the President, even though the President never knew of the threatening letter. *U.S. v. McCaleb*, 908 F.2d 176 (7th Cir. 1990). The court found a threat against the President may be enormously disruptive and involves substantial costs.

As with the adjustment for "vulnerable victim," the Commentary provides that this adjustment factor does not apply if the offense Guideline specifically incorporates this factor. *U.S. v. Pacione*, 950 F.2d 1348 (7th Cir. 1991) (victim's official status as revenue agent not incorporated into guideline); *U.S. v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990) (proper to use official victim in case involving assault on federal officer); *U.S. v. McNeill*, 887 F.2d 448 (3d Cir. 1989) (soliciting a person to commit a crime of violence in violation of 18 U.S.C. §373(a) did not incorporate official status of victim). Again, no examples are provided. Arguably, this adjustment should not apply where the offense itself requires the "victim" to be a law enforcement officer, e.g., assault on a federal officer.

Whether the offense of conviction was "motivated by such status" is open to debate and litigation. Such language indicates some level of knowledge and intent must be shown before the adjustment would apply. *U.S. v. Bailey*, 961 F.2d 180 (11th Cir. 1992) (postmistress was official victim even though not robbed of personal belongings); *U.S. v. Telemaque*, 934 F.2d 169 (8th Cir. 1991) (defendant was motivated by victim's status in government); *U.S. v. McNeill*, 887 F.2d 448 (3d Cir. 1989) (soliciting a person to commit a crime of violence in violation of 18 U.S.C. §373(a) did not incorporate official status of victim).

**Restraint of Victim (§3A1.3)**
The offense level is increased two levels if the victim was:

(1) physically restrained
(2) in the course of the offense.

The Commentary provides that this adjustment will not apply where "such restraint" is an element of the offense, is specifically incorporated into the base offense level, or is listed as a specific offense characteristic. See *U.S. v. Tholl*, 895 F.2d 1178 (7th Cir. 1990); *U.S. v. Myers*, 733 F. Supp. 1307 (D. Minn. 1990). While no examples are listed, an example could be a robbery (§2B3.1) that is already aggravated by physical restraint or possibly kidnaping (§2A4.1). *But see U.S. v. White*, 903 F.2d 457 (7th Cir. 1990) (applied adjustment to kidnap; defendant failed to object).

Questions will arise regarding the definition of "physically restrained," see, e.g., *U.S. v. Mikalajunas*, 936 F.2d 153 (4th Cir. 1991) (brief holding as part of stabbing not restraint of victim); *U.S. v. Roberts*, 898 F.2d 1465 (10th Cir. 1990) (victim restrained by knife to face during demand for money); *U.S. v. Stokley*, 881 F.2d 114 (4th Cir. 1989) (victim need not be tied, bound or injured to be restrained). Issues may arise with whether the restraint occurred "in the course of the offense," see, e.g., *U.S. v. Nelson*, 740 F. Supp. 1502 (D. Kan. 1990); *U.S. v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (restraint foreseeable part of conspiracy). The plain language would seem to restrict application to restraint during the commission of the crime and not to restraint that occurred after the crime was complete.

**14.04.05.02 Role in the Offense**

**Aggravating Role (§3B1.1)**

This adjustment factor can result in an increase of two, three, or four levels depending upon whether the defendant was an "organizer or leader" or "manager or supervisor" and the number of "participants" involved. The terms used in this guideline have survived a vagueness challenge. *U.S. v. Backas*, 901 F.2d 1528 (10th Cir. 1990); *U.S. v. Mays*, 902 F.2d 1501 (10th Cir. 1990).

The offense level is increased by four levels if the defendant was:

(1) an organizer or leader
(2) of a criminal activity
(3) that involved five or more participants or was otherwise extensive.

The offense level is increased by three levels if the defendant was:

(1) a manager or supervisor (but not an organizer or leader) and
(2) the criminal activity

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13 The Introductory Commentary was amended November 1, 1990 to make clear that a defendant's role is considered in light of all relevant conduct.
(3) involved five or more participants or was otherwise extensive.

The offense level is increased by two levels if the defendant was:

(1) an organizer, leader, manager, or supervisor
(2) in any criminal activity
(3) other than those involving five or more participants and other than those that were otherwise extensive.

A 1991 amendment to the Introductory Commentary, providing that role is based on relevant conduct, effectively overruled substantial case law to the contrary. See, e.g., U.S. v. Furlow, 952 F.2d 171 (8th Cir. 1991); U.S. v. Lillard, 929 F.2d 500 (9th Cir. 1991); U.S. v. Saucedo, 950 F.2d 1508 (10th Cir. 1991).

A 1993 amendment to the commentary clarified that to qualify for the adjustment, the defendant must organize, lead, manage or supervise participants, not simply the property or assets of a criminal organization. See Note 2 (added November 1, 1993). However, an upward departure may be warranted. This amendment resolved a split in the circuits over the issue. Compare U.S. v. Fuentes, 954 F.2d 151 (3d Cir. 1992) (requiring control over others to qualify for increase); U.S. v. Fuller, 897 F.2d 1217 (1st Cir. 1990) (same); U.S. v. Carroll, 893 F.2d 1502 (6th Cir. 1990) (same); U.S. v. Mares-Molina, 913 F.2d 770 (9th Cir. 1990) (same); and with U.S. v. Chambers, 985 F.2d 1263 (4th Cir. 1993) (defendant may be a "manager" even though he did not directly supervise other persons).

Most circuits agree that the defendant is to be considered a "participant," e.g., U.S. v. Panet-Collazo, 960 F.2d 256 (1st Cir. 1992); U.S. v. Walker, 931 F.2d 631 (10th Cir. 1991); U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990). However, the increase should not apply if the defendant is the sole participant, e.g., U.S. v. Helmy, 951 F.2d 988 (9th Cir. 1991); U.S. v. Streeter, 907 F.2d 781 (8th Cir. 1990), or supervised only government agents, e.g., U.S. v. Fells, 920 F.2d 1179 (4th Cir. 1990) (agent and informants do not count as participants); U.S. v. Carroll, 893 F.2d 1502 (6th Cir. 1990).

"Participants" need not be charged to be considered. U.S. v. Boutte, 13 F.3d 855 (5th Cir. 1994); U.S. v. Nelson, 5 F.3d 254 (7th Cir. 1993). An acquitted defendant may be a participant. U.S. v. Dota, 33 F.3d 1179 (9th Cir. 1994). The defendant need not exercise authority over five people where other indications of leadership exist. U.S. v. Barnes, 993 F.2d 680 (9th Cir. 1993).

The mere sale of drugs to customers should not justify a role increase, e.g., U.S. v. Gibson, 985 F.2d 860 (6th Cir. 1993); U.S. v. Belletiere, 971 F.2d 961 (3d Cir. 1992); U.S. v. Moore, 919 F.2d 1471 (10th Cir. 1990).

Unwitting outsiders can be considered in determining whether an activity is "otherwise extensive." See U.S. v. Dietz, 950 F.2d 50 (1st Cir. 1991). To be "otherwise extensive", the crime does not have to have five criminally responsible participants. U.S. v. Cojab, 978 F.2d 341 (7th Cir. 1992). The
involvement of unknown others and the sophistication of the conduct can make it "otherwise extensive."  
U.S. v. Leung, 35 F.3d 1402 (9th Cir. 1994).

Whether or not a defendant is an organizer, leader, manager or supervisor and whether the activity involved five or more participants or was otherwise extensive are viewed as factual questions to be resolved by the sentencing court. U.S. v. Fuentes-Moreno, 895 F.2d 24 (1st Cir. 1990); U.S. v. Thomas, 870 F.2d 174 (5th Cir. 1989). The adjustment should not be based on a hunch or instincts, U.S. v. Ortiz, 966 F.2d 707 (1st Cir. 1992), and it should not be based on unsworn information in the presentence report. U.S. v. Patterson, 962 F.2d 409 (5th Cir. 1992). It may, however, be based on reliable hearsay. U.S. v. Bernaugh, 969 F.2d 858 (10th Cir. 1991); U.S. v. Manuel, 912 F.2d 204 (5th Cir. 1990).

High purity of the drugs may indicate a managerial role. U.S. v. Wichmann, 958 F.2d 240 (8th Cir. 1992); U.S. v. Iguaran-Palmar, 926 F.2d 7 (1st Cir. 1991). The central concern of §3B1.1 is relative culpability and the mere fact of a defendant's status as a distributor or a middleman should not control. U.S. v. Brown, 944 F.2d 1377 (7th Cir. 1991). More than one defendant may receive the increase but the court must indicate who is supervised by whom. U.S. v. England, 966 F.2d 403 (9th Cir. 1992); U.S. v. Jewel, 947 F.2d 224 (7th Cir. 1991); U.S. v. Lawson, 947 F.2d 849 (7th Cir. 1991). The adjustment should not be applied to a defendant who is "only important or essential" but rather the defendant must be an "organizer or leader." U.S. v. Litchfield, 959 F.2d 1514 (10th Cir. 1992). There probably does not need to be a hierarchical relationship for the increase to apply. U.S. v. Varela, 993 F.2d 686 (9th Cir. 1993) (arranger of transaction can have aggravating role without retaining supervisory role).

A split has developed over whether the aggravating role adjustment includes "more than minimal planning." Compare U.S. v. Myerson, 18 F.3d 153 (2d Cir. 1994) (increases for more than minimal counting and aggravating role not double counting); U.S. v. Curtis, 934 F.2d 553 (4th Cir. 1991) (same); U.S. v. Godfrey, 25 F.3d 263 (5th Cir. 1994) (same); U.S. v. Willis, 997 F.2d 407 (8th Cir. 1993); U.S. v. Kelly, 993 F.2d 702 (9th Cir. 1993) with U.S. v. Romano, 970 F.2d 164 (6th Cir. 1992) (aggravating role increase includes more than minimal planning); U.S. v. Chichy, 1 F.3d 1501 (6th Cir. 1993) (same).

One circuit noted that it might be permissible to both increase for aggravating role and decrease for mitigating role in the same case. U.S. v. Tsai, 954 F.2d 155 (3d Cir. 1992).

Mitigating Role (§3B1.2)

The offense level is to be decreased four levels if the defendant was:

(1) a minimal participant  
(2) in any criminal activity.

The offense level is to be decreased two levels if the defendant was:
(1) a minor participant
(2) in any criminal activity.

The offense level is to be decreased three levels in cases falling between "minimal and minor."

(1) Minimal

The Application Notes provide that "minimal role" covers those defendants who are "plainly among the least culpable of those involved in the conduct of a group." A defendant's lack of knowledge or understanding of the scope and structure of the enterprise and activities of others indicates "minimal participant." See Application Notes to §3B1.2. The Commentary further states the Commission's intent that the downward adjustment for a minimal participant will be used infrequently, see, e.g., U.S. v. Christman, 894 F.2d 339 (9th Cir. 1990), and cites as an example a defendant who played no other role in a very large drug smuggling operation than to off-load part of a single shipment or someone who was recruited as a courier for a single transaction involving a small amount of drugs.
(2) Minor

The Commentary describes a "minor participant" as one who is "less culpable than most other participants, but whose role could not be described as minimal." The Background section explains that the guideline on mitigating role provides adjustments for the defendant who plays a part that makes him "substantially less culpable than the average participant." The determination of "minimal" vs. "minor" is "heavily dependent" upon the facts of each case. The background section appears to place greater limitation on the use of the mitigating role adjustment than the language of the actual guideline. The guideline does not require the defendant play a part that is "substantially less culpable" than the "average participant." There may be a fine line between minor and minimal participant. U.S. v. Vega-Encarnacion, 914 F.2d 20 (1st Cir. 1990).

Group conduct is probably required in order to apply the mitigating role adjustment. U.S. v. Thompson, 990 F.2d 301 (7th Cir. 1993) (defendant only participant in felon in possession case not eligible for role reduction); U.S. v. Bierley, 922 F.2d 1061 (3d Cir. 1990) (role reduction not proper for sole participant but may depart by analogy -- but decision before amendment clarifying definition of participant); U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990); U.S. v. Nunley, 873 F.2d 182 (8th Cir. 1989). However, relevant conduct can be considered in granting the role reduction even where the defendant is the sole participant in the offense of conviction. U.S. v. Hatley, 15 F.3d 856 (9th Cir. 1994). Before the 1991 amendment providing for consideration of relevant conduct in determining role, the Ninth Circuit relied on downward departures to account for the mitigating role of a sole participant. U.S. v. Valdez-Gonzalez, 957 F.2d 643 (9th Cir. 1992); U.S. v. Webster, 996 F.2d 209 (9th Cir. 1993) (discussing change in guidelines and case law).

A defendant is not entitled to the reduction simply by being less culpable than another defendant. U.S. v. Daniel, 962 F.2d 100 (1st Cir. 1992); U.S. v. Lopez, 937 F.2d 716 (2d Cir. 1991); U.S. v. Rexford, 903 F.2d 1280 (9th Cir. 1990); U.S. v. Tholl, 895 F.2d 1178 (7th Cir. 1990); U.S. v. Mueller, 902 F.2d 336 (5th Cir. 1989); U.S. v. Miller, 891 F.2d 1265 (7th Cir. 1989). The courts have struggled with whether the relevant comparison is to actual co-participants or to the hypothetical average participant. Compare U.S. v. Daughtrey, 874 F.2d 213 (4th Cir. 1989) (compare acts of each participant to relevant conduct for which defendant is accountable and measure each participant's individual acts against elements) with U.S. v. Petti, 973 F.2d 1441 (9th Cir. 1992) (proper to compare defendant to co-defendants). The decision should turn on culpability, not status. U.S. v. Donaldson, 915 F.2d 612 (10th Cir. 1990); U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990). However, the existence of more culpable defendants will not always result in a role reduction. U.S. v. Thomas, 963 F.2d 63 (5th Cir. 1992); U.S. v. Molina, 934 F.2d 1440 (9th Cir. 1991); U.S. v. Andrus, 925 F.2d 335 (9th Cir. 1991); U.S. v. Miller, 891 F.2d 1265 (7th Cir. 1989).

A distributor is not necessarily less culpable than a manufacturer of contraband. U.S. v. Goebel, 898 F.2d 675 (8th Cir. 1990); U.S. v. Daughtery, 874 F.2d 213 (4th Cir. 1989); U.S. v. Wright, 873 F.2d 437 (1st Cir. 1989). A "steerer" is not automatically a minimal participant because of the importance of such role in street level distributions. U.S. v. Sostre, 967 F.2d 728 (1st Cir. 1992); U.S. v. Colon, 884 F.2d 1550 (2d Cir. 1989); U.S. v. Brick, 905 F.2d 1092 (7th Cir. 1990). The quantity of drugs involved
may be considered. *U.S. v. Lui*, 941 F.2d 844 (9th Cir. 1991); *U.S. v. Garvey*, 905 F.2d 1144 (8th Cir. 1990); *U.S. v. Velasquez*, 868 F.2d 714 (5th Cir. 1989) (three tons of marijuana).


**Abuse of Position of Trust or Use of Special Skill (§3B1.3)**

The offense level is to be increased by two levels if the defendant:

1. abused a position of public or private trust or
2. used a special skill in a manner that
3. significantly facilitated
4. the commission or concealment of the offense.

This adjustment may be used in addition to the aggravating role adjustment if based on abuse of trust, but not if based on use of a special skill and not where the trust or skill is included in the base offense level or specific offense characteristics.


**Abuse of Trust**

Whether a defendant holds a position of trust is probably viewed from the perspective of the victim. *U.S. v. Castagnet*, 936 F.2d 57 (2d Cir. 1991). The position of trust must facilitate the commission of

**Special Skill**

The skill must be used to facilitate the offense charged in the indictment and not other crimes. *U.S. v. Foster*, 876 F.2d 377 (5th Cir. 1989). A loan clerk with authority over a large and important bank account was found to have used a "special skill." *U.S. v. Ehrlich*, 902 F.2d 327 (5th Cir. 1990). A special skill in manufacturing pipe bombs can invoke this guideline. *U.S. v. Talbott*, 902 F.2d 1129 (4th Cir. 1990). Printing skills may or may not be a "special skill" in a counterfeiting case. See *U.S. v. Sharpsteen*, 913 F.2d 59 (2d Cir. 1990) (yes); *U.S. v. Green*, 962 F.2d 938 (9th Cir. 1992) (no); *U.S. v. Foster*, 876 F.2d 377 (5th Cir. 1989) (no). A defendant's knowledge of chemistry may be a special skill in a drug manufacturing case. *U.S. v. Fairchild*, 940 F.2d 261 (7th Cir. 1991). However, someone who has only "boned up" on chemistry probably does not have a special skill. *U.S. v. Young*, 932 F.2d 1510 (D.C. Cir. 1991). Piloting can be a special skill. *U.S. v. Mettler*, 938 F.2d 764 (7th Cir. 1991); *U.S. v. Culver*, 929 F.2d 389 (8th Cir. 1991). A special skill as a stockbroker in a financial transaction case may justify an increase. *U.S. v. Connell*, 960 F.2d 191 (1st Cir. 1992).

**No Adjustment (§3B1.4)**

This Guideline provides that "in any other case, no adjustment is made for role in the offense."

The Commentary explains that many offenses are committed by a single individual or by people with equal culpability. In such instances, the defendant is not to receive an adjustment for role in the offense. It also indicates, without example, that there may be instances in multi defendant cases where no role adjustment is made for some participants. Arguably, this situation would arise for "average" participants, whoever they may be.

**14.04.05.03 Obstruction**

**Willfully Obstructing or Impeding Proceedings (§3C1.1)**

The offense level is to be increased by two levels if the defendant

1. willfully impeded or obstructed
2. or attempted to impede or obstruct
3. the administration of justice
(4) during the investigation or prosecution
(5) of the instant offense.

The Commentary explains that this adjustment is for the defendant who engages in conduct
calculated to mislead or deceive authorities or those involved in a judicial proceeding or otherwise to
willfully interfere with the disposition of criminal charges. The adjustment is probably not restricted solely
to post-offense conduct. See U.S. v. Irabor, 894 F.2d 554 (2d Cir. 1990); U.S. v. Patterson, 890 F.2d
69 (8th Cir. 1989); U.S. v. Cain, 881 F.2d 980 (11th Cir. 1989) (throwing stolen checks under a parked
car). However, the conduct must be willful. U.S. v. Altman, 901 F.2d 1161 (2d Cir. 1990).

The obstruction should be connected to the offense of conviction. U.S. v. Polland, 994 F.2d 1262
(7th Cir. 1993); U.S. v. Yates, 973 F.2d 1 (1st Cir. 1992) (court reversed where obstruction did not relate
to offense of conviction); U.S. v. Barry, 938 F.2d 1327 (D.C. Cir. 1991).

A defendant's perjury at trial can certainly result in an obstruction adjustment. U.S. v. Dunnigan,
507 U.S. 87 (1993). The district court must actually make a finding that the defendant committed perjury.
U.S. v. Tincher, 14 F.3d 603 (6th Cir. 1993) (sparse findings on perjury required remand); U.S. v.
Burnette, 981 F.2d 874 (6th Cir. 1992) (failure to make finding of perjury required reversal of obstruction
increase); U.S. v. Austin, 948 F.2d 783 (1st Cir. 1991); U.S. v. Akitoye, 923 F.2d 221 (1st Cir. 1991).
Once the finding is made, the increase is probably mandatory. U.S. v. Humphrey, 7 F.3d 1186 (5th Cir.
1993).

A misrepresentation of facts in pretrial motions or motions to suppress will justify the obstruction
increase. U.S. v. Aymelek, 926 F.2d 64 (1st Cir. 1991); U.S. v. Barnett, 939 F.2d 405 (7th Cir. 1991);
U.S. v. Matos, 907 F.2d 274 (2d Cir. 1990). A defendant's false statements at a sentencing hearing may
also justify the increase. U.S. v. Hamilton, 929 F.2d 1126 (6th Cir. 1991). However, the testimony must
be viewed in a light most favorable to the defendant. U.S. v. Bueno, 21 F.3d 120 (6th Cir. 1994)
(defendant's testimony at suppression hearing did not justify obstruction increase).

The destruction of evidence will justify the obstruction increase. U.S. v. Font-Ramirez, 944 F.2d
42 (1st Cir. 1991); U.S. v. Ainsworth, 932 F.2d 358 (5th Cir. 1991); U.S. v. Bakhtiari, 913 F.2d 1053
(2d Cir. 1990); U.S. v. Brown, 900 F.2d 1098 (7th Cir. 1990). Even a spontaneous act of disposing of
the contraband may warrant the increase. U.S. v. Garcia, 34 F.3d 6 (1st Cir. 1994). An attempt to
destroy evidence that is not ultimately destroyed can also be obstruction. U.S. v. Revel, 971 F.2d 656
(11th Cir. 1992).

The use of an alias should justify the increase only if there is actual obstruction involved. U.S. v.
Bell, 953 F.2d 6 (1st Cir. 1992); U.S. v. McDonald, 964 F.2d 390 (5th Cir. 1992) (use of an alias before
the magistrate); U.S. v. Rogers, 917 F.2d 165 (5th Cir. 1990) (use of alias at arrest that briefly impeded
police justified increase); but see U.S. v. Blackman, 904 F.2d 1250 (8th Cir. 1990) (use of alias
warranted increase whether or not authorities were foiled); but see dissenting opinion. Typically, the false


Providing false information to a probation officer, if material, will result in an increase. *U.S. v. Montano-Silva*, 15 F.3d 52 (5th Cir. 1994) (false information to probation officer preparing presentence report justified increase); *U.S. v. García*, 20 F.3d 670 (6th Cir. 1994) (falsely denying cocaine use was obstruction); *U.S. v. Smaw*, 993 F.2d 902 (D.C. Cir. 1993) (increase proper where defendant failed to disclose zero equity interest in property to probation officer); *U.S. v. Biyaga*, 9 F.3d 204 (1st Cir. 1993) (false information to probation officer preparing presentence report justified increase); *U.S. v. Donine*, 985 F.2d 463 (9th Cir. 1993) (false information about priors justified increase). At least one court has found that lies to a probation officer need not be material to the offense. *U.S. v. Aideyan*, 11 F.3d 74 (6th Cir. 1993) (lying to probation officer about fraudulent marriage, even though not related to crime justified increase). An unworn denial of guilt to a probation officer should not be obstruction. *U.S. v. Johns*, 27 F.3d 31 (2d Cir. 1994).

**Reckless Endangerment (§3C1.2)**

This guideline provides for a two level increase if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in course of fleeing from a law enforcement officer. In order to show that the conduct was reckless, the government must demonstrate that the defendant had a *mens rea* more akin to that for second degree murder. See *U.S. v. Hernandez-Rodriguez*, 975 F.2d 622 (9th Cir. 1992). A high speed chase from an arrest may be covered under §3C1.2. *U.S. v. Estrada*, 965 F.2d 651 (8th Cir. 1992). A momentary hesitation in submitting to arrest should not constitute reckless endangerment. *U.S. v. Bell*, 953 F.2d 6 (1st Cir. 1992).

**14.04.05.04 Multiple Counts**

Perhaps the most difficult part of the Sentencing Guidelines is the section providing the rules for determining the offense level where the defendant is convicted of more than one count. Understanding of these rules is essential to determining the potential impact of a trial on several counts as opposed to a guilty plea to one count. Under the guidelines on multiple counts, there will be many instances where the
sentencing range should be the same regardless of the number of counts of conviction. The multiple count rules should apply even where the defendant is convicted in separate trials. *U.S. v. Lechuga*, 975 F.2d 397 (7th Cir. 1993).

The guidelines for determining the offense level for multiple counts are found at §3D1.1 through §3D1.5. The basic rules are as follows:

1. the various counts of conviction must be grouped into "groups of closely related counts";
2. the offense level for each group of closely related counts is then determined;
3. the combined offense level for all of the groups is then determined.

*See* §3D1.1. Any count for which the statute requires a consecutive sentence is excluded from the multiple count rules. *Id.*

The victim, role and obstruction adjustments apply to each count before the multiple count grouping rules apply. *U.S. v. Eng*, 14 F.3d 165 (2d Cir. 1994); *U.S. v. Kleinebreil*, 966 F.2d 945 (5th Cir. 1992). The acceptance of responsibility reduction considers the total offense behavior and reduces the total offense level. *U.S. v. Kleinebreil; U.S. v. Evans*, 27 F.3d 1219 (7th Cir. 1994) (acceptance of responsibility for some counts, but not others, is insufficient to warrant reduction).

**Determining Groups of Closely Related Counts (§3D1.2)**

All counts involving substantially the same harm are to be grouped together. The Commission has identified four basic categories of cases that involve substantially the same harm:

1. counts involving the same victim and the same act or transaction;

According to the Commentary, counts under this section are grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim, *e.g.*, forging and uttering the same check; kidnapping and assaulting the same victim during the course of the kidnapping; bid rigging and mail fraud for signing and mailing a false statement that the bid was competitive; two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension; three counts of unlawfully bringing aliens into the United States all of which arise out of a single incident. Examples of where the counts would not be grouped are where the defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days; defendant convicted of two counts of unlawfully bringing one alien into the United States but on different occasions. *See also U.S. v. Hernandez-Coplin*, 24 F.3d 312 (1st Cir. 1994) (multiple counts of bringing aliens into the United States on different occasions are not to be grouped); *U.S. v. Miller*, 993 F.2d 16 (2d Cir. 1993) (separate mailings of threatening communications were separate harms that did not "group").
(2) counts involving the same victim and two or more acts or transactions connected by a common criminal objective or part of a common scheme or plan;

The Commentary states that this section reflects the principle that counts that are part of a single course of conduct with a single criminal objective represent essentially one composite harm to the same victim and are to be grouped together even if they constitute legally distinct offenses occurring at different times, *e.g.*, conspiracy to commit extortion and extortion; two counts of mail fraud, one count of wire fraud, each in furtherance of a single fraudulent scheme are grouped together even if the mailings and telephone call occurred on different days; one count of auto theft and one count of altering the vehicle identification number of the stolen car. An example of where the counts would not be grouped is where the defendant is convicted of two counts of rape or raping the same person on different days. *See* *U.S. v. Rugh*, 968 F.2d 750 (8th Cir. 1992) (two child pornography charges involving separate pictures and separate mailings should not have been grouped).

(3) counts that embody conduct treated as a specific offense characteristic in or adjustment to the guideline applicable to another count;

The Commentary states that this category applies when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count (an example might be bank robbery resulting in bodily injury, a specific offense characteristic that could increase the offense level from two to six points). In such situations, the count that is also the specific offense characteristic or other adjustment factor is grouped with the count that it otherwise aggravates. An example provided in the Commentary is the use of a firearm in a bank robbery and unlawful possession of that firearm. A second example given in the Commentary is where the defendant is convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together. However, if the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and result in a two-level adjustment to the offense level for the fraud. In such a circumstance, the two counts would be grouped together.

Where there are several counts which could be treated as aggravating factors to another more serious count, the count representing the most serious aggravating factor is to be grouped with the other count. For example, if a defendant is convicted of robbery of a credit union and assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count (increasing the robbery offense level by four) and the remaining assault conviction would be treated separately.

(4) counts involving the same general type of offense and the guidelines for the offense level rely primarily on the total amount of harm or loss, the quantity of the substance involved or some other measure of aggregate harm.

The guidelines list the offenses specifically included and excluded by this grouping rule. However, exclusion under this subsection does not necessarily preclude grouping under another subsection. The
The guideline also specifies that this rule applies in regard to offenses that are continuing and gives as examples: (1) engaging in a pattern of unlawful employment of aliens (§2L1.3); and (2) continuous mishandling of environmental pollutants (§2Q1.3).

The Commentary predicts that the fourth category will be used with the greatest frequency. It urges a broad construction of the language "the same general type of offense" and states that the list of instances listed with the Guideline itself is not exhaustive.

The Commission attempts in a detailed Commentary section to provide examples of application of these rules but there will inevitably be disputes over whether or not counts are closely related. It is conceivable that the government will be in a "Catch-22" position when an indictment is returned which joins certain counts and it argues the legitimacy of the joinder in opposing severance motions but then later argues for consecutive sentencing on the basis that the counts are unrelated.

Money laundering and underlying fraud or drug counts may or may not group depending on the circuit and the facts. See U.S. v. Jackson, 983 F.2d 757 (7th Cir. 1994) (issue left undecided); U.S. v. Rose, 20 F.3d 367 (9th Cir. 1994) (proper to group in this case); U.S. v. Lombardi, 5 F.3d 568 (1st Cir. 1993) (one who commits a fraud and launders the money is normally more culpable than one who merely launders the money, no grouping); U.S. v. Taylor, 984 F.2d 298 (9th Cir. 1993) (wire fraud count should not be grouped with monetary transaction count); U.S. v. Johnson, 971 F.2d 562 (10th Cir. 1992) (money laundering and fraud counts do not group); U.S. v. Harper, 972 F.2d 321 (11th Cir. 1992) (money laundering and drug trafficking counts not grouped in this case).

**Determining the Offense Level Applicable to Each Group of Closely Related Counts (§3D1.3)**

There are two basic rules to follow:

(1) Where counts are grouped together because they fit within one of the first three categories (same victim and same act or transaction, same victim and common scheme or plan, or conduct treated as a specific offense characteristic or other adjustment to a count), the offense level applicable to the group is that for the most serious of the counts in the group. Again, the offense level is determined in accordance with Chapter Two (Offense Level and Specific Offense Characteristics) and Parts A, B and C of Chapter Three (Adjustments for Victim, Role and Obstruction).

The Commentary notes that it will ordinarily be necessary to determine the offense level for each of the counts in a group in order to ensure that the highest is correctly identified.

(2) Where counts are grouped together in accordance with the fourth category (same general type of offense) the offense level applicable to a group is that corresponding to the aggregated quantity or the offense guideline that produces the highest offense level. Again, the offense level is calculated in accordance with Chapter Two and the adjustments for victim, role and obstruction as set forth in Chapter Three.
The Commentary recognizes that the rules regarding grouping of closely related counts "sometimes" may not result in incremental punishment for additional criminal acts. An example provided is where the defendant commits rape, aggravated assault and robbery all against the same victim on a single occasion. In such an instance, all of the counts would be grouped together under the second category (common scheme or plan or common criminal objective). The aggravated assault will increase the guideline range for the rape but the robbery will not. The Commentary suggests that the additional factor of property loss could be taken into account adequately within the guideline range for rape which is a fairly wide range. It suggests finally that an exceptionally large property loss in the course of the rape may provide grounds for a departure (see §5K2.5).

**Determining the Combined Offense Level (§3D1.4)**

The combined offense level is determined by calculating the number of units involved and applying a table provided in the Guidelines. Basically, the group with the highest offense level is increased depending upon the number of other groups of related counts involved (referred to as "units").

The group with the highest offense level is counted as one unit. Each other count group that is equally serious to the highest offense level group or that is from one to four levels less serious is counted as an additional unit. A count group that is five to eight levels less serious than the highest group is counted as one-half unit. Any group that is nine or more levels less serious than the highest group is disregarded from the mathematical calculation but may provide a reason for sentencing at the higher end of the sentencing range. Except when the total number of units is one and one-half, fractions are rounded up to the next largest whole number.

The table is as follows:

<table>
<thead>
<tr>
<th>Number of Units</th>
<th>Increase in Offense Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>None</td>
</tr>
<tr>
<td>1 and 1/2</td>
<td>Add one Level</td>
</tr>
<tr>
<td>2</td>
<td>Add two Levels</td>
</tr>
<tr>
<td>2 1/2 -- 3</td>
<td>Add three Levels</td>
</tr>
<tr>
<td>3 1/2 -- 5</td>
<td>Add four Levels</td>
</tr>
<tr>
<td>More than 5</td>
<td>Add five Levels</td>
</tr>
</tbody>
</table>

The Commentary recognizes that there will be situations in which there are counts of conviction which will not affect the offense level of the most serious counts (e.g., those nine levels or more less serious than the highest group) as well as situations where several minor offenses may not be grouped together and result in an excessive increase in the sentencing range. The Commentary suggests that these situations be handled through departures above or below the Guidelines. See, e.g., U.S. v. Chase, 894 F.2d 488 (1st Cir. 1990) (departure where additional offenses would have added significantly more than five units). According to the Commentary, the Commission is willing to rely on the infrequent occurrence of these situations and the ability of the courts to impose an adequate sentence through departing as opposed to creating "a more complicated mathematical formula."
14.04.05.05 Acceptance of Responsibility (§3E1.1)

The critical advantage most defendants seek by entering a guilty plea is the reduction for acceptance of responsibility. The guidelines provide for a two-level reduction in all cases and a possible three-level reduction in others.

If the defendant "clearly demonstrates" acceptance of responsibility for "his offense", the court is to decrease the offense level by two levels. §3E1.1(a).

A third level reduction applies where the defendant qualifies for a decrease under §3E1.1(a), the offense level determined before applying §3E is level 16 or greater and the defendant has assisted authorities in the prosecution of his own misconduct by:

1. timely providing complete information to the government concerning his own involvement in the offense; or
2. timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.

§3E1.1(b). This third level reduction was added November 1, 1992 and was not made retroactive. See U.S. v. Dullen, 15 F.3d 68 (6th Cir. 1994); U.S. v. Desouza, 995 F.2d 323 (1st Cir. 1993); U.S. v. Caceda, 990 F.2d 707 (2d Cir. 1993); U.S. v. Dowty, 996 F.2d 937 (8th Cir. 1993); U.S. v. Aldana-Ortiz, 6 F.3d 601 (9th Cir. 1993); U.S. v. Avila, 997 F.2d 767 (10th Cir. 1993). The level 16 threshold has survived a constitutional challenge. U.S. v. Wehr, 20 F.3d 1035 (9th Cir. 1994).

This guideline has changed a couple of times on the issue of what conduct must be the focus of the acceptance of responsibility. During the time that this guideline required acceptance of responsibility for a defendant's "criminal conduct", a split developed in the circuits over whether the guideline violated the Fifth Amendment. Compare U.S. v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989) (a court cannot predicate the reduction upon a defendant making self-incriminating statements); U.S. v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (same); U.S. v. Watt, 910 F.2d 587 (9th Cir. 1990) (same) with U.S. v. Frierson, 945 F.2d 650 (3d Cir. 1991) (no constitutional violation compelling a defendant to accept responsibility for additional criminal conduct); U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990) (same); U.S. v. Mourning, 914 F.2d 699 (5th Cir. 1990) (same) and U.S. v. Chambers, 944 F.2d 1253 (6th Cir. 1991) (same).

The November 1992 amendment has been interpreted as resolving the Fifth Amendment issue. See U.S. v. Hicks, 978 F.2d 722 (D.C. Cir. 1992). This does not mean that a defendant does not have to tell the "whole truth" about the crime charged. U.S. v. Reyes, 13 F.3d 638 (2d Cir. 1994); U.S. v. Pitz, 2 F.3d 723 (7th Cir. 1993) (refusal to admit extent of involvement in conspiracy was not acceptance of responsibility). With regard to uncharged, but relevant conduct, silence is the preferred course of action to a false denial. False denial of relevant conduct can preclude the adjustment. U.S. v. Price, 13 F.3d 711
A defendant may be given consideration for this adjustment without regard to whether there is a guilty plea, a finding of guilt by the court or a jury or the practical certainty of conviction at trial. See U.S. v. Moskowitz, 883 F.2d 1142 (2d Cir. 1989). A guilty plea does not automatically entitle a defendant to this adjustment. U.S. v. Hernandez, 967 F.2d 456 (10th Cir. 1992); U.S. v. Irabor, 894 F.2d 554 (2d Cir. 1990); U.S. v. Apple, 915 F.2d 899 (4th Cir. 1990); U.S. v. Evidente, 894 F.2d 1000 (8th Cir. 1990); U.S. v. Wright, 873 F.2d 437 (1st Cir. 1989); U.S. v. Ortiz, 878 F.2d 125 (3d Cir. 1989); U.S. v. White, 869 F.2d 822 (5th Cir. 1989); U.S. v. Wilson, 878 F.2d 921 (6th Cir. 1989); U.S. v. Spraggins, 868 F.2d 1541 (11th Cir. 1989). However, a sentencing court may find that a guilty plea is a sufficient basis for the reduction. U.S. v. Guarin, 898 F.2d 1120 (6th Cir. 1990).

Great deference is accorded the district court's determination of the acceptance of responsibility adjustment and the courts of appeal are generally reluctant to disturb the district court's finding unless it is "without foundation." See, e.g., U.S. v. Irabor, 894 F.2d 554 (2d Cir. 1990); U.S. v. Mueller, 902 F.2d 336 (5th Cir. 1990); U.S. v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990); U.S. v. Blanco, 888 F.2d 907 (1st Cir. 1989); U.S. v. Cianscewski, 894 F.2d 74 (3d Cir. 1990); U.S. v. White, 875 F.2d 427 (4th Cir. 1989); U.S. v. Wilson, 878 F.2d 921 (6th Cir. 1989); U.S. v. White, 888 F.2d 1252 (8th Cir. 1989); U.S. v. Davis, 878 F.2d 1299 (11th Cir. 1989). The Seventh Circuit once noted that it had never directed the district court to award an acceptance of responsibility reduction. U.S. v. Gomez, 24 F.3d 924 (7th Cir. 1994).


The courts have generally found that the acceptance of responsibility provision does not violate either the Fifth or Sixth Amendments. See, e.g., U.S. v. Parker, 903 F.2d 91 (2d Cir. 1990) (provision does not impermissibly prejudice a defendant's right to appeal the conviction); U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990) (the acceptance of responsibility provision is a mitigating factor available under certain circumstances and the defendant is not penalized for not speaking; the defendant argued the provision would render the appeal of a conviction of a hollow victory); U.S. v. Paz-Uribe, 891 F.2d 396 (1st Cir. 1989); U.S. v. White, 869 F.2d 822 (5th Cir. 1989) (does not violate Sixth Amendment); U.S. v. Chambers, 944 F.2d 1253 (6th Cir. 1991) (no Fifth Amendment violation); U.S. v. McNeal, 900 F.2d 119 (7th Cir. 1990); U.S. v. Davis, 960 F.2d 820 (9th Cir. 1992) (acceptance of responsibility reduction not unconstitutional Hobson's choice); U.S. v. Skillman, 922 F.2d 1370 (9th Cir. 1990) (reversed automatic grant of reduction given to protect exercise of Fifth Amendment). In general, the courts have found that the denial of a downward adjustment does not constitute a penalty or enhancement of a
sentence. *U.S. v. Rogers*, 899 F.2d 917 (10th Cir. 1990); *U.S. v. Henry*, 883 F.2d 1010 (11th Cir. 1989). The Ninth Circuit found that just because it may be more difficult for a defendant who has protested innocence through trial to convince the court of his or her acceptance of responsibility, such does not make the provision constitutionally infirm. *U.S. v. Davis*, 960 F.2d 820 (9th Cir. 1992); *U.S. v. Gonzalez*, 897 F.2d 1018 (9th Cir. 1990). The extra level reduction has also been upheld against a Fifth Amendment challenge. *U.S. v. McQuay*, 7 F.3d 800 (8th Cir. 1993).

A refusal to cooperate may be evidence of a failure to accept responsibility. *U.S. v. Frazier*, 971 F.2d 1076 (4th Cir. 1992); *U.S. v. Fabregat*, 902 F.2d 331 (5th Cir. 1990); *U.S. v. Cross*, 900 F.2d 66 (6th Cir. 1990) (the dissent expressed the concern that the majority would deny acceptance of responsibility based on the defendant's failure to reveal his drug suppliers finding that such might be a death sentence); *but see U.S. v. Guarin*, 898 F.2d 1120 (6th Cir. 1990) (noting potential problems with requiring defendant to reveal source). There is a distinction between §5K1.1 (substantial assistance) and §3E1.1. *U.S. v. Escobar-Mejia*, 915 F.2d 1152 (7th Cir. 1990). Cooperation can be a basis for the reduction even over the government's objection. *U.S. v. De La Rosa*, 922 F.2d 675 (11th Cir. 1991).

There is a split in the circuits over whether continuing to engage in criminal conduct or drug use while on bond is a lack of acceptance of responsibility. See *U.S. v. McDonald*, 22 F.3d 139 (7th Cir. 1994) (holding that defendant who engaged in unrelated criminal conduct after guilty plea could, but did not, accept responsibility and noting circuit split).

Statements to the probation officer preparing the presentence report can have an effect on the acceptance of responsibility reduction. See, e.g., *U.S. v. Beal*, 960 F.2d 629 (7th Cir. 1992) (various reasons including failure to cooperate with probation and statements to probation officer showed lack of acceptance of responsibility); *U.S. v. Martinez-Gonzalez*, 962 F.2d 874 (9th Cir. 1992) (proper to deny reduction where defendant's statements to probation were "truly incredible"); *U.S. v. Ibanez*, 924 F.2d 427 (2d Cir. 1991) (responsible behavior did not show acceptance in face of statements to probation); *U.S. v. Hardeman*, 933 F.2d 278 (5th Cir. 1991) (refusal to reduce properly based on defendant's lie to officers and statements to probation); *U.S. v. Chambers*, 944 F.2d 1253 (6th Cir. 1991) (statements to probation showed lack of acceptance of responsibility); *U.S. v. Hodges*, 935 F.2d 766 (6th Cir. 1991) (defendant's dealings with probation officer did not demonstrate acceptance of responsibility); *U.S. v. Pelayo-Munoz*, 905 F.2d 1429 (10th Cir. 1990) (denial of knowledge to probation officer precluded reduction); *U.S. v. Howard*, 923 F.2d 1500 (11th Cir. 1991) (initial acceptance of responsibility rendered ineffective by misrepresentations during probation interview); *U.S. v. Charria*, 919 F.2d 842 (2d Cir. 1990) (voluntary admissions to government agents did not overcome statements to probation officer). Although no circuit has found a Sixth Amendment right to have counsel present at the probation interview, see, e.g., *U.S. v. Hicks*, 948 F.2d 877 (4th Cir. 1991); *U.S. v. Simpson*, 904 F.2d 607 (11th Cir. 1990); *U.S. v. Jackson*, 886 F.2d 838 (7th Cir. 1989); *Brown v. Butler*, 811 F.2d 938 (5th Cir. 1987). There is no good reason to preclude counsel from being present at the interview. *U.S. v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990).
The timing of acceptance of responsibility is a consideration for the court. *U.S. v. Blair*, 958 F.2d 26 (2d Cir. 1992) (acceptance of responsibility one week before sentencing too late); *U.S. v. Cepeda*, 907 F.2d 11 (1st Cir. 1990) (proper to consider timing of defendant's confession in evaluating acceptance of responsibility); *U.S. v. Martinez*, 901 F.2d 374 (4th Cir. 1990) (delay in acceptance of responsibility supported denial); *U.S. v. Blas*, 947 F.2d 1320 (7th Cir. 1990) (denial of reduction justified where defendant failed to make a timely manifestation of acceptance of responsibility). However, a delay in accepting responsibility should not necessarily result in a denial of the reduction. See *U.S. v. Hill*, 953 F.2d 452 (9th Cir. 1992) (reduction upheld over government's argument defendant only made eleventh hour statement); *U.S. v. Johnson*, 956 F.2d 894 (9th Cir. 1992) (inappropriate to deny reduction based solely on timing).

The reduction is still available, but much more difficult to obtain when there has been an increase for obstruction of justice. *U.S. v. Hopper*, 27 F.3d 378 (9th Cir. 1994) (defining when both adjustments are available); *U.S. v. Irabor*, 894 F.2d 554 (2d Cir. 1990) (when a defendant obstructs justice, an adjustment under §3E1.1 is ordinarily not warranted); *U.S. v. Restrepo*, 936 F.2d 661 (2d Cir. 1991) (obstruction of justice does not act as a complete bar to acceptance of responsibility); *U.S. v. Alvarado-Avila*, 905 F.2d 295 (9th Cir. 1990) (a finding of both acceptance of responsibility and obstruction is allowable in extraordinary cases).

A defendant's extraordinary acceptance of responsibility can result in a further downward departure. *U.S. v. Brown*, 985 F.2d 478 (9th Cir. 1993); *U.S. v. Rogers*, 972 F.2d 489 (2d Cir. 1992); *U.S. v. Lieberman*, 971 F.2d 989 (3d Cir. 1992). However, it is improper for a court to grant a two-level reduction for the guilty plea and a two-level reduction for acceptance of responsibility unless it justifies a departure. *U.S. v. Wright*, 873 F.2d 437 (1st Cir. 1989); *U.S. v. Farrier*, 948 F.2d 1125 (9th Cir. 1991).

The third level reduction is not discretionary once the criteria are met. *U.S. v. Colussi*, 22 F.3d 218 (9th Cir. 1994). A defendant can qualify for the third level reduction if he or she timely provides complete information, whether or not he or she moves to suppress or timely notifies the government of the intent to plead guilty. *U.S. v. Stoops*, 25 F.3d 820 (9th Cir. 1994) (three day of arrest confessions qualified for extra level). Pretrial motions may, or may not, affect the extra level. See *U.S. v. Kimple*, 27 F.3d 1409 (9th Cir. 1994) (discussing impact). Trial preparation by the government will affect the ability to get the extra level reduction. *U.S. v. Gonzales*, 19 F.3d 982 (5th Cir. 1994) (offering conditional plea after suppression hearing that was equivalent to full trial not timely); *U.S. v. Robinson*, 14 F.3d 1200 (7th Cir. 1994); *U.S. v. Nomeland*, 7 F.3d 744 (8th Cir. 1993) (eve of trial plea did not merit extra level).

**Accepting Responsibility after Trial**

The Commentary suggests that "sincere contrition" is the linchpin and acknowledges (in spite of the examples given) that such may occur even if the defendant exercises his constitutional right to trial. The Commentary then attempts to restrict the plain language of the guideline by citing as an example a situation where the defendant goes to trial to assert and preserve issues not relating to factual guilt such as where the defendant makes a constitutional challenge to a statute or a challenge to the applicability of a statute to
the case. Defense counsel should argue the language of the Guideline as well as the Sixth Amendment jury trial right where there are other indications of “acceptance of responsibility” for the defendant who went to trial and was convicted. The reduction should not be denied simply because a defendant exercises the right to appeal and refuses to discuss the case with the probation officer. See U.S. v. Lapierre, 998 F.2d 1460 (9th Cir. 1993).

The assertion of an affirmative defense such as duress or entrapment should not automatically preclude the acceptance of responsibility reduction. See U.S. v. Hoenscheidt, 7 F.3d 1528 (10th Cir. 1993) (entrapment defense did not necessarily preclude reduction); U.S. v. Reno, 992 F.2d 739 (7th Cir. 1993) (insanity defense does not preclude reduction); U.S. v. Johnson, 956 F.2d 894 (9th Cir. 1992) (duress defense at trial not a barrier to reduction); U.S. v. Molina, 934 F.2d 1440 (9th Cir. 1991) (entrapment defense is not incompatible with reduction); but see U.S. v. Spedalieri, 910 F.2d 707 (10th Cir. 1990) (defendant’s insanity defense did not amount to acceptance of responsibility).

The difficulty in arguing for this adjustment in cases where the defendant goes to trial is the dilemma faced in preserving appellate issues and at the same time having the defendant express sincere contrition. See, e.g., U.S. v. Aichele, 941 F.2d 761 (9th Cir. 1991) (dissent recommends remand after appeal over to determine acceptance of responsibility); U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990). A similar problem is faced in such situations under the old sentencing scheme, however the old sentencing scheme did not involve the precision in impact that the guidelines do. Consequently, the defendant could infer contrition by recommending community service, saying that he or she will not come before the court again and by providing the court with letters of support from the defendant’s family, friends and employer. Under the guidelines, it appears more difficult to argue "sincere contrition" absent a full confession from the defendant, particularly where the acceptance of responsibility must be to the defendant’s "criminal conduct." An option, in cases where the defendant goes to trial and counsel would ordinarily advise silence regarding the offense, is to seek a judicial grant of immunity similar to that granted in Simmons v. U.S., 390 U.S. 377 (1968), on the rationale that the defendant would otherwise be forced to give up one right (preservation of appeal and Fifth Amendment on retrial) in order to be fairly sentenced. See U.S. v. Perry, 788 F.2d 100 (3d Cir. 1986) (application of Simmons to bail hearing).

A far more difficult, if not impossible situation, is faced by the testifying defendant who is convicted and later attempts to qualify for the "acceptance of responsibility" adjustment. The Commentary states that this adjustment is not warranted for a defendant who commits perjury, suborns perjury or "otherwise obstructs" the trial or administration of justice, regardless of other factors. Although not common, situations did occur under the old sentencing scheme where the testifying defendant later admitted his testimony was false and then confessed to the probation officer and later to the sentencing judge. While perjury prosecutions may have resulted, more often defense counsel could work with the prosecutor and agree that the defendant would not be prosecuted for the perjury at trial. The language of the Commentary would appear to preclude a testifying, convicted defendant from ever benefiting from a "change of heart" and may serve to lock the defendant into a false story. The defendant could also face a two-level increase for obstruction of justice, §3C1.1. This could have the effect of inhibiting the sentencing process and interfering with a court’s ability to determine certain sentencing considerations required by 18 U.S.C. §3553.
Application to Career Offenders

Effective November 1, 1989, the reduction applies to career offender cases. This amendment effectively overruled the law in most circuits. See, e.g., U.S. v. Alves, 873 F.2d 495 (1st Cir. 1989); U.S. v. Huff, 873 F.2d 709 (3d Cir. 1989); U.S. v. Cruz, 882 F.2d 922 (5th Cir. 1989); U.S. v. Rodriguez-Reyes, 881 F.2d 155 (5th Cir. 1989); U.S. v. Green, 902 F.2d 1311 (8th Cir. 1990); U.S. v. Summers, 895 F.2d 615 (9th Cir. 1990). In fact, the Ninth Circuit had indicated that having a career offender accept responsibility "borders on an oxymoron."

14.04.06 Chapter Four--Criminal History, Criminal Livelihood and Career Offender and Armed Career Criminal

Congress directed the Commission to consider the relevance of an offender's criminal record and degree of dependence upon crime for a livelihood in establishing the guidelines. 28 U.S.C. §994(d)(10), (11). Chapter Four of the guidelines contains the rules for scoring the criminal history category, (§4A1.1-1.3), career offender (§4B1.1-1.2) and criminal livelihood (§4B1.3) and Armed Career Criminal (§4B1.4).

14.04.06.01 Criminal History

Once the offense level is determined, it is necessary to calculate the defendant's criminal history score as such score impacts the guidelines applicable to each offense level. For example, a defendant with a criminal history Category I, offense level 10, faces six to 12 months. With the same offense level (10) but a criminal history category of VI, the defendant faces guidelines of 24 to 30 months. Use of prior sentences to enhance the sentence has been challenged and upheld. See U.S. v. Thomas, 895 F.2d 1198 (8th cir. 1990).

The criminal history category is determined by assigning points to prior sentences as follows:

1. prior sentences > one year and one month = 3 points
2. prior sentences ≥ 60 days and ≤ one year and one month = 2 points
3. all other prior sentences = 1 point (maximum 4 points)
4. for offenses committed while under any criminal just sentence, e.g., supervised release, work release, probation, imprisonment or on escape status = 2 points
5. commission of instant offense less than two years after release from 60-day-or greater sentence = 2 points (1 point if 2 points added for committing offense while on release, supervision or escape)
(6) prior sentences for crimes of violence that were not otherwise counted because they were considered related (unless occurred on same occasion) = 1 point (maximum of 3 points)

See §4A1.1.

A "prior sentence" is any sentence previously imposed upon adjudication of guilt (including nolo contendere) for conduct not part of the instant offense. The prior sentence need not be imposed before commission of the federal offense. *U.S. v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992); *U.S. v. Flowers*, 995 F.2d 315 (1st Cir. 1993) (prior sentence for subsequent crime counts).

Where a defendant has been convicted of an offense but not yet sentenced, one point is added if the sentence would otherwise be countable. §4A1.2(a).

"Sentence of imprisonment" refers only to the portion of the sentence that was not suspended. It is the length of the sentence imposed and not that actually served that counts. *U.S. v. Altman*, 901 F.2d 1161 (2d Cir. 1990); *U.S. v. Shinnors*, 892 F.2d 742 (8th Cir. 1989). To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment. *U.S. v. McCrary*, 887 F.2d 485 (4th Cir. 1989). Commitment to a juvenile facility may count. *U.S. v. Hanley*, 906 F.2d 1116 (6th Cir. 1990). Residence in a community treatment center may or may not be "imprisonment." *Compare U.S. v. Latimer*, 991 F.2d 1509 (9th Cir. 1993) (placement in community treatment facility following parole revocation is not "incarceration") with *U.S. v. Rasco*, 963 F.2d 132 (6th Cir. 1992) (detention in community treatment facility following revocation of parole is "incarceration").

A prior sentence pending appeal counts in most circumstances. See §4A1.2(1) (added November 1, 1991); *U.S. v. Mackbee*, 894 F.2d 1057 (9th Cir. 1990) (defendant can petition for resentencing if the prior is determined to be invalid).

The guidelines specifically exclude certain prior sentences. For example, sentences for misdemeanor and petty offenses are counted unless they fall in a category of offenses listed under §4A1.2(c)(1). The courts have grappled with whether particular misdemeanor offenses should be counted. See, e.g., *U.S. v. Kingston*, 922 F.2d 1234 (6th Cir. 1990) (reckless driving should be counted); *U.S. v. Aichele*, 912 F.2d 1170 (9th Cir. 1990) (same); *U.S. v. Ayala-Rivera*, 954 F.2d 1275 (7th Cir. 1992) (same); *U.S. v. Lewis*, 896 F.2d 246 (7th Cir. 1990) (DUI conviction without sentence imposed counted); *U.S. v. Russell*, 913 F.2d 1288 (8th Cir. 1990) (assault and criminal damage counts); *U.S. v. Ziglin*, 964 F.2d 758 (8th Cir. 1992) (exhibiting deadly weapon and petty theft counted); *U.S. v. Locke*, 918 F.2d 841 (9th Cir. 1990) (AWOL conviction counts); *U.S. v. Wilson*, 927 F.2d 1188 (11th Cir. 1991) (same); *U.S. v. Williams*, 919 F.2d 1451 (10th Cir. 1990) (domestic violence prior counts); *U.S. v. Martinez*, 905 F.2d 251 (9th Cir. 1990) (public indecency included).

A prior "deferred adjudication probation" should count as a prior sentence. *U.S. v. Hatchett*, 923 F.2d 369 (5th Cir. 1991); *U.S. v. Giraldo-Lara*, 919 F.2d 19 (5th Cir. 1990). A diversionary disposition should count under §4A1.2(f); *U.S. v. Frank*, 932 F.2d 700 (8th Cir. 1991). Although expunged convictions are not to be counted under §4A1.2(j), offenses that have not yet been expunged will probably
count. *U.S. v. Cox*, 934 F.2d 1114 (10th Cir. 1991). However, if a state law automatically expunges a conviction, it should not be counted. *U.S. v. Johnson*, 941 F.2d 1102 (10th Cir. 1991).

The Ninth Circuit has held that a conviction "set aside" under the Federal Youth Corrections Act should not count. See *U.S. v. Kammerdiener*, 945 F.2d 300 (9th Cir. 1991); *U.S. v. Hidalgo*, 932 F.2d 805 (9th Cir. 1991) (set aside in state court). The D.C. and Fifth Circuits disagree. *U.S. v. McDonald*, 991 F.2d 866 (D.C. Cir. 1993); *U.S. v. Ashburn*, 20 F.3d 1336 (5th Cir. 1994).

Prior conduct resulting in a conviction that is part of the federal offense of conviction should not count. See §4A1.2, Application Note 1; *U.S. v. Lohan*, 945 F.2d 1214 (2d Cir. 1991) (district court erred in finding conduct of prior conviction was part of offense of prior conviction); *U.S. v. Query*, 928 F.2d 383 (11th Cir. 1991) (acts underlying the state conviction should have been considered as relevant conduct rather than a prior sentence because the conduct was part of the offense of conviction in federal court).

Prior sentences imposed in related cases are to be treated as one for purposes of the criminal history score. Cases are considered related if they: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) were consolidated for trial or sentencing. A 1991 amendment provides that offenses separated by an intervening arrest are not "related." See Application Note 3, §4A1.2.

There has been substantial litigation over whether offenses are related. Many circuits have found that the simple fact of receiving concurrent sentences will not make offenses related. See, e.g., *U.S. v. Lopez*, 961 F.2d 384 (2d Cir. 1992) (cases not related even though sentence is concurrent unless close factual relationship); *U.S. v. Coleman*, 964 F.2d 564 (6th Cir. 1992) (cases not related even though sentenced on the same day concurrently); *U.S. v. Davis*, 929 F.2d 930 (3d Cir. 1991) (cases not related simply because concurrent sentences were imposed); *U.S. v. Ainsworth*, 932 F.2d 358 (5th Cir. 1991) (concurrent sentencing only one factor in determining whether priors were related); *U.S. v. Castro-Perpia*, 932 F.2d 364 (5th Cir. 1991) (prior convictions not related merely because of concurrent sentencing); *U.S. v. Watson*, 952 F.2d 982 (8th Cir. 1991) (prior convictions not related merely because the sentences were concurrent); *U.S. v. Veteto*, 920 F.2d 823 (11th Cir. 1991) (concurrent sentence does not mean crimes were related). The Ninth Circuit has a more liberal view of "related" cases. *U.S. v. Hummasti*, 986 F.2d 337 (9th Cir. 1993) (concurrent sentences in separate cases made cases related); *U.S. v. Bachiero*, 969 F.2d 733 (9th Cir. 1992) (related where cases were consolidated for sentencing). The 1991 amendment precluding cases separated by an intervening arrest from being deemed "related" was a substantive change in Ninth Circuit law. *U.S. v. Bishop*, 1 F.3d 910 (9th Cir. 1993) (under 1990 guidelines, cases separated by arrest but consolidated for sentencing were related). An argument can be made that if the priors were pre-1991, the 1990 guidelines apply. See *U.S. v. Lindholm*, 24 F.3d 1078 (9th Cir. 1994).

Whether offenses were part of a common scheme is for the district court to decide. *U.S. v. Garcia*, 962 F.2d 479 (5th Cir. 1992) (two heroin sales within nine days did not establish a common scheme or plan); *U.S. v. Ali*, 951 F.2d 827 (7th Cir. 1992) (robbery of supermarket and forgery a few days later of money order taken in robbery not related); *U.S. v. Rivers*, 929 F.2d 136 (4th Cir. 1991)
(two prior armed robberies not part of common scheme). Sentencing on the same date may or may not make cases related. Compare U.S. v. Connor, 950 F.2d 1267 (7th Cir. 1991) (arrest on same date meant offenses were related) with U.S. v. Jones, 898 F.2d 1461 (10th Cir. 1990) (sentencing on same date does not make cases related).

For offenses committed prior to age 18:

(1) conviction as an adult and > one year and one month sentence = 3 points

(2) adult or juvenile sentence ≥ 60 days = 2 points (if released from such confinement within five years of instant offense)

(3) other adult or juvenile sentences (1 point) if imposed within five years of the defendant's commencement of the instant offense.

See §4A1.2(d). The use of prior juvenile sentences has been challenged and upheld. U.S. v. Johnson, 12 F.3d 760 (8th Cir. 1993); U.S. v. Bucaro, 898 F.2d 368 (3d Cir. 1990) (not violation of due process); U.S. v. Kirby, 893 F.2d 867 (6th Cir. 1990) (federal law controls in determining whether juvenile prior counts); U.S. v. Mackbee, 894 F.2d 1057 (9th Cir. 1990); U.S. v. Williams, 891 F.2d 212 (9th Cir. 1989) (no due process violation).

Age of prior:

Prior sentences exceeding one year and one month which are more than 15 years old are not counted unless the defendant was incarcerated during any part of the 15-year period. Other prior sentences older than 10 years are not counted. See §4A1.2(e); U.S. v. Stephenson, 887 F.2d 57 (5th Cir. 1989) (date conspiracy began controlled time in institution).

Invalid Prior Convictions/Collateral Challenges

The current version of the guidelines stress that they do not confer upon the defendant any right to collaterally attack a prior conviction or sentence beyond any such right recognized in law. Note 6, §4A1.2. However, the application note does provide that convictions that have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant or have been ruled constitutionally invalid in a prior case are not to be counted. A split in the circuits developed over the right to collaterally attack priors at the federal sentencing hearing. Compare U.S. v. Vea-Gonzales, 999 F.2d 1326 (9th Cir. 1993) (constitutional right to collaterally attack priors) with U.S. v. Roman, 989 F.2d 1117 (11th Cir. 1993) (en banc) (attack only if presumptively void). The Ninth Circuit was joined by the Third Circuit. The Eleventh Circuit was joined by the First, Sixth, Seventh, and Eighth Circuits.

Then, the Supreme Court rendered its decision in U.S. v. Custis, 511 U.S. 485 (1994), severely limiting the ability to collaterally attack, at the federal sentencing hearing, priors used to enhance under the Armed Career Criminal Act (18 U.S.C. §924(e)). The case precludes collateral attacks, at least at an
ACCA sentencing hearing, unless the prior conviction was obtained without counsel (or a valid waiver). _Custis_ will probably apply to "regular" guideline sentencing and preclude all but the most limited of collateral attacks. _U.S. v. Davis_, 36 F.3d 1424 (9th Cir. 1994), _on reh'g_ (questioning the validity of _U.S. v. Vea-Gonzales_, 986 F.2d 321 (9th Cir. 1993) in light of _Custis_; _U.S. v. Fondren_, 32 F.3d 429 (9th Cir. 1994) (guidelines do not permit collateral attack at federal sentencing hearing); _U.S. v. Jones_, 27 F.3d 50 (2d Cir. 1994) (_Custis_ applies to career offender provisions).

However, the holding in _Custis_ does not end the issue. The majority opinion concludes with the following:

We recognize, however, as did the Court of Appeals, _see_ 988 F.2d at 1363, that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under §924(e), may attack his state sentences in Maryland or through federal habeas review. _See Maleng v. Cook_, 490 U.S. 488 (1989). If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

_Custis_, 511 U.S. at 498.

As a result of this language and based on due process considerations, several options remain available for attacks on prior convictions. Suggested below are challenges under Fed. R. Crim. P. 32 to the reliability of the prior conviction, collateral attack on the prior conviction in the state court and federal habeas review.

**Rule 32.** Fed. R. Crim. P. 32 is a potential avenue for attacking priors at sentencing. _Custis_ held only that there is neither a constitutional right nor a right under ACCA to attack a prior conviction at sentence. Under Rule 32 and case law, a sentencing court may use only reliable information in setting a sentence. _See Townsend v. Burke_, 334 U.S. 736 (1948). The court must consider matters related to an appropriate sentence and allow presentation of information in mitigation of the sentence. The fact that a state conviction was obtained in violation of constitutional or other rights is a mitigating factor that should be admitted at a sentencing hearing. An unconstitutional conviction is not reliable.

**Collateral Attack.** The above quoted language in _Custis_ permits an attack on prior state convictions in state court or through federal habeas proceedings. If successful, a defendant could reapply for reopening any federal sentence enhanced by the state convictions. _Custis_, 511 U.S. at 497. Several options with respect to the forum and procedure for a collateral attack may be available.

(1) Presumably the _Custis_ language opens the door to the filing of a challenge in the state court. There can be some procedural problems with state court challenges, including statutory time limitations. State law regarding post-conviction relief varies widely from state to state and the availability of a state court attack will need to be individually
assessed. The state court route may be cumbersome and ultimately procedurally barred, but should be considered.

(2) If the state court challenge were unsuccessful, there could be a 28 U.S.C. §2254 challenge in the federal court. A §2254 habeas action, in which a person may obtain federal relief from a state conviction, requires a person be in custody as a result of the conviction under attack. Custody does not require actual imprisonment. In addition, a person is "in custody" with respect to their state convictions for habeas purposes if they are on parole, supervised release, or under similar supervision. Other procedural barriers also often stand in the way of §2254 actions, but these too may be overcome.

In *Maleng v. Cook*, 490 U.S. 488 (1989), the petitioner filed a §2254 petition attempting to attack a 1958 state conviction that had been used to enhance a 1978 conviction. The Court held the petitioner was not in custody for his 1958 conviction so he was not entitled to habeas relief. The Court went on to say that it would interpret the petition as an attack on the 1978 sentence on which the petitioner was in custody. The attack on the 1978 sentence could include an attack on the 1958 conviction because the earlier conviction had been used to enhance the 1978 sentence.

Therefore, under *Maleng*, otherwise unassailable convictions which have been used to enhance a sentence for a conviction subject to habeas attack, may be indirectly attacked. If, as *Maleng* holds, a conviction can be indirectly attacked even though the defendant is no longer in custody, nothing should prevent an indirect attack even though an issue may have been defaulted or is otherwise immune from direct attack. If there is a time barrier under state law, federal habeas may be available.

(3) Another related avenue to explore is an immediate 28 U.S.C. §2255 attack on the federal sentence after it is imposed. Section 2255 is used to attack a federal sentence imposed in violation of the Constitution or federal law. The rationale of *Maleng* should permit an attack on any conviction, regardless of where obtained or how old, that was used to enhance the sentence. The appeal of this approach is that it permits attacks on several convictions in one proceeding and precludes the necessity of returning to the sentencing proceeding.

By its language, *Custis* does not preclude this procedure: "We therefore hold that §924(e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions. Congress did not prescribe and the Constitution does not require such delay and protraction of the federal sentencing process." *Custis*, 511 U.S. at 485 (emphasis added). A §2255 motion is not part of the "federal sentencing process" held in the "federal sentencing forum." Therefore, nothing in *Custis* or ACCA prevents using §2255. This should be quicker and more efficient than a §2254 approach.

Uncounseled misdemeanors. Finally, in *Nichols v. U.S.*, 511 U.S. 738 (1994), the Supreme Court held that an uncounseled misdemeanor with no prison term imposed "counts" for purposes of criminal history. This decision resolved a split in the circuits on the issue.
14.04.06.02 Career Offender Provision (§4B1.1-§4B1.2)

Career offenders are defined in §4B1.1 as those (1) at least 18 years old at the time of the instant offense; (2) committing a crime of violence or trafficking in a controlled substance; and (3) with at least two prior felony convictions of either a crime of violence or a controlled substance offense. The greater of the offense level applicable for the offense or the following table applies:

<table>
<thead>
<tr>
<th>Offense Statutory Maximum</th>
<th>Offense Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>37</td>
</tr>
<tr>
<td>25 years or more</td>
<td>34</td>
</tr>
<tr>
<td>≥ 20 years but &lt; 25 years</td>
<td>32</td>
</tr>
<tr>
<td>≥ 15 years but &lt; 20 years</td>
<td>29</td>
</tr>
<tr>
<td>≥ 10 years but &lt; 15 years</td>
<td>24</td>
</tr>
<tr>
<td>≥ five years but &lt; 10 years</td>
<td>17</td>
</tr>
<tr>
<td>≥ one year but &lt; five years</td>
<td>12</td>
</tr>
</tbody>
</table>

The criminal history category for all career offenders is Category VI (the most severe). The offense level may be decreased for acceptance of responsibility. A 1994 amendment to the guidelines provides that the offense statutory maximum is the unenhanced statutory maximum.

During the early days of litigation, the career offender guideline survived a variety of constitutional challenges. See U.S. v. Hayden, 898 F.2d 966 (5th Cir. 1990) (not a violation of due process or equal protection); U.S. v. Green, 902 F.2d 1311 (8th Cir. 1990) (not a due process violation); U.S. v. Hughes, 901 F.2d 830 (10th Cir. 1990) (not a violation of the Eighth Amendment). At least two circuits have found that the career offender guideline coupled with enhanced statutory sentencing provisions does not constitute impermissible double punishment. U.S. v. Lawrence, 889 F.2d 1187 (1st Cir. 1989); U.S. v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989) (not impermissible double enhancement for two prior drug felonies to enhance both the statutory minimum and the guideline range).

Guideline §4B1.2 defines the various terms used in §4B1.1. "Crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) 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.

Effective November 1, 1990, the Commission clarified that the offense of unlawful possession of a firearm by a felon was not a crime of violence. This clarification effectively overruled case law in many circuits.

The Circuits split over whether “Offense Statutory Maximum” meant enhanced maximums such as found in 21 U.S.C. §841. The Commission adopted Amendment 509 effective November 1, 1994, which amended the commentary to refer to the maximum without enhancement. The circuits then split over
whether, the Commission exceeded its authority. The Supreme Court resolved the issue by holding that the statutory maximum includes enhancements. *U.S. v. Labonte*, 520 U.S. 751 (1997).


There has also been substantial litigation over whether an offense is a crime of violence. Burglaries of dwellings are crimes of violence. *U.S. v. Fredette*, 15 F.3d 272 (2d Cir. 1994); *U.S. v. Ghent*, 29 F.3d 416 (8th Cir. 1994) (even an unoccupied house); *U.S. v. Jackson*, 986 F.2d 312 (9th Cir. 1993) (attempted first degree burglary). Bank robbery has been determined to be a crime of violence. See *U.S. v. McVicar*, 907 F.2d 1 (1st Cir. 1990); *U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989). Voluntary manslaughter will be deemed a crime of violence, *U.S. v. Gant*, 902 F.2d 570 (7th Cir. 1990). The mailing of threatening communications that convey a threat to injure will probably be a crime of violence, *U.S. v. Left Hand Bull*, 901 F.2d 647 (8th Cir. 1990), as well as threatening the President, see *U.S. v. McCaleb*, 908 F.2d 176 (7th Cir. 1990) (conduct did include the threatened use of physical force). Child stealing is probably a crime of violence under the "otherwise" prong. *U.S. v. Lonczak*, 993 F.2d 180 (9th Cir. 1993). Racketeering, travel in aid of racketeering and sports bribery were not considered crimes of violence. *U.S. v. Winter*, 22 F.3d 15 (1st Cir. 1994).

The "two prior felony convictions" must occur before the offense conduct giving rise to the offense of conviction. §4B1.2(3). The date a defendant sustained a conviction is the date the judgment of conviction was entered. *Id.* Further, the two prior felony convictions must be from unrelated cases and otherwise "countable" under §4A. See §4B1.2, Note 4.

The two prior violent or drug felonies need not be of the same category but rather the career offender guideline can be invoked where there is one prior violent crime and one prior drug felony. See *U.S. v. Green*, 902 F.2d 1311 (8th Cir. 1990); *U.S. v. Jones*, 898 F.2d 1461 (10th Cir. 1990). The argument that the two predicate offenses must be of the same category has been based on the language of 28 U.S.C. §994(b)(2) that requires the Commission to assure a sentence at or near the statutory maximum.
where there are two or more prior felony convictions "each of which" is a crime of violence or a controlled substance offense.

The guidelines define "prior felony conviction" as a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether the offense is specifically designated as a felony and regardless of the actual sentence imposed. See Application Note 3, §4B1.2. Consequently, a court should not rely on a state law definition in determining whether an offense is a felony. See U.S. v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991); U.S. v. Davis, 932 F.2d 752 (9th Cir. 1991); U.S. v. Brunson, 907 F.2d 117 (10th Cir. 1990); U.S. v. Thomas, 894 F.2d 996 (8th Cir. 1990) (a misdemeanor under state law may be a felony within the meaning of §4B1.2); but see U.S. v. Thompson, 891 F.2d 507 (4th Cir. 1989) (even though South Carolina was the only state in the Fourth Circuit to define "pointing a firearm at another" as a felony, the court could properly consider the state's policy and statement of morals in determining whether the offense was a felony).

Several circuits have held that a district court may depart downward from the career offender guideline. U.S. v. Shoupe, 35 F.3d 835 (3d Cir. 1994) (departure from career offender can be in both criminal history and offense level); U.S. v. Spencer, 25 F.3d 1105 (D.C. Cir. 1994) (minor priors can justify downward departure for career offender); U.S. v. Beckham, 968 F.2d 47 (D.C. Cir. 1992); U.S. v. Adkins, 937 F.2d 947 (4th Cir. 1991); U.S. v. Brown, 903 F.2d 540 (8th Cir. 1990); U.S. v. Lawrence, 916 F.2d 553 (9th Cir. 1990). The Ninth Circuit found it was proper to depart downward for a career offender based on the disproportionate treatment of drug offenders, U.S. v. Reyes, 8 F.3d 1379 (9th Cir. 1993) and based on the nature of priors and the age of the defendant, U.S. v. Brown, 985 F.2d 478 (9th Cir. 1993). It should be improper to depart upward by analogy to the career offender guidelines for a defendant who is not a career offender. See U.S. v. Faulkner, 934 F.2d 190 (9th Cir.), amended, 952 F.2d 810 (11th Cir. 1991).

There is also a dispute as to whether or not a "near miss" as a career offender should justify an upward departure without other grounds for departure. Compare U.S. v. Campbell, 888 F.2d 76 (11th Cir. 1989) (upward departure justified where defendant was close to being a career offender); U.S. v. Dorsey, 888 F.2d 79 (11th Cir. 1989) (appropriate to depart upward to career offender guideline given severity of defendant's past record and the fact that he avoided career offender status by Rule 20 dispositions) and U.S. v. Armstrong, 901 F.2d 988 (11th Cir. 1990) (same) with U.S. v. Robison, 904 F.2d 365 (6th Cir. 1990) (cannot arbitrarily change requirement for career offender because the defendant "got a break" in an earlier offense) and U.S. v. Hawkins, 901 F.2d 863 (10th Cir. 1990) (the fact the defendant narrowly missed being a career offender is not a basis for departure).

Most of the circuits have held that the notice required under 21 U.S.C. §851 for doubling the minimum statutory penalty does not appear to apply to the career offender guideline. U.S. v. Meyers, 952 F.2d 914 (6th Cir. 1992); U.S. v. Sanchez, 917 F.2d 607 (1st Cir. 1991); U.S. v. Whitaker, 938 F.2d 1551 (2d Cir. 1991); U.S. v. Adams, 938 F.2d 96 (8th Cir. 1991); U.S. v. McDoogherty, 920 F.2d 569 (9th Cir. 1990); U.S. v. Novey, 922 F.2d 624 (10th Cir. 1991); Young v. U.S., 936 F.2d 533 (11th Cir. 1991); U.S. v. Marshall, 910 F.2d 1241 (5th Cir. 1990).
14.04.06.03 Criminal Livelihood Provisions

If the offense was committed as a pattern of criminal conduct engaged in as a livelihood, the offense level must be not less than 13. If the "acceptance of responsibility" adjustment applies, the offense level is to be no less than 11.


There should be a link between the offense of conviction and the prior activity in order to apply §4B1.3. See U.S. v. Oliver, 908 F.2d 260 (8th Cir. 1990). A "pattern of criminal conduct" may involve only a single course of conduct extending over a period of time. U.S. v. Cryer, 925 F.2d 828 (5th Cir. 1991) (spree need not last 12 months); U.S. v. Reed, 951 F.2d 97 (6th Cir. 1991) (seven month spree sufficient); U.S. v. Hearrin, 892 F.2d 756 (8th Cir. 1990); U.S. v. Irvin, 906 F.2d 1424 (10th Cir. 1990). The totality of the circumstances can be considered. U.S. v. Quertermous, 946 F.2d 375 (5th Cir. 1991). Gambling proceeds qualify under §4B1.3. U.S. v. Rosengard, 949 F.2d 905 (7th Cir. 1991). The criminal livelihood determination is not limited to a calendar year. U.S. v. Kellams, 26 F.3d 646 (6th Cir. 1994).

Failure of counsel to present evidence of legitimate income may be ineffective assistance. Lee v. U.S., 939 F.2d 503 (7th Cir. 1991).

14.04.06.04 Adequacy of Criminal History

The court may depart from the guidelines (above or below) if "reliable information" indicates that the criminal history category does not adequately reflect the seriousness of the record (or over-represents the severity). See §4A1.3. Suggested areas to consider are:

1. prior sentence(s) not used in computing the criminal history category (e.g., foreign offenses);
2. prior sentence(s) substantially greater than one year;
3. prior similar misconduct established by civil adjudication or failure to comply with an administrative order;
4. whether the defendant was pending trial, sentencing or appeal at the time of the offense;
5. prior similar adult conduct not resulting in a conviction.

According to §4A1.3, a departure is warranted when the criminal history category "significantly underrepresents" or "significantly overrepresents" the seriousness of the defendant's criminal history or the
likelihood the defendant will commit future crimes. See, e.g., U.S. v. Beckham, 968 F.2d 47 (D.C. Cir. 1989) (career offender overrepresents defendant's criminal history); U.S. v. Sturgis, 869 F.2d 54 (2d Cir. 1989) (proper to consider two pending felony convictions and three misdemeanor arrests within two months of the offense of conviction as indicators of the likelihood of future crimes); U.S. v. Fisher, 868 F.2d 128 (5th Cir. 1989) (defendant's only lapse in criminal activity was while he was in prison, departure proper); U.S. v. Joan, 883 F.2d 491 (6th Cir. 1989) (defendant's record of violating probationary requirements and continuing violent behavior indicated a failure of prior punitive and rehabilitative measures, upward departure justified). See U.S. v. Brady, 928 F.2d 844 (9th Cir. 1991) (prior tribal convictions not "significant").

The fact that certain prior convictions did not count in the criminal history score because they were "related cases" may give rise to departure. U.S. v. Jackson, 883 F.2d 1007 (11th Cir. 1989) (departure appropriate because the defendant had two prior armed robberies that counted only three points because they were "related cases"); U.S. v. Elwell, 984 F.2d 1289 (1st Cir. 1993) (avoidance of career offender status because of related cases may justify departure).

There is a dispute over whether it is legitimate to consider the fact that the defendant's criminal history category is less because of Rule 20 dispositions. Compare U.S. v. Dorsey, 888 F.2d 79 (11th Cir. 1989) (appropriate to depart upward because the defendant avoided career offender status by disposing of cases pursuant to Rule 20) with U.S. v. Miller, 903 F.2d 341 (7th Cir. 1990) (the fact the defendant could have received a greater punishment had he been sentenced separately in each jurisdiction where he committed a bank robbery cannot be a basis for departure).

A court will be justified in departing where the defendant continues to commit crimes while on release. See U.S. v. Berkowitz, 927 F.2d 1376 (7th Cir. 1991); U.S. v. Franklin, 902 F.2d 501 (7th Cir. 1990) (cocaine incident while defendant on bond for cocaine charges formed proper basis for departure); U.S. v. Hernandez, 896 F.2d 642 (1st Cir. 1990) (departure because defendant on bail for state drug offense when he committed the federal offense). A court should consider limiting the departure on these grounds to the two points as provided in §4A1.2(d). U.S. v. Ferra, 900 F.2d 1057 (7th Cir. 1990) (crime while on release should not be treated more severely than two points provided in §4A1.2(d)).

The central consideration in a criminal history departure is the reliability of the indicators of inadequacy. For example, an acquittal by reason of insanity may be reliable information about a defendant's criminal past and the basis for departure. U.S. v. McKenley, 895 F.2d 184 (4th Cir. 1990). A foreign conviction can also be considered where reliable. U.S. v. Soliman, 889 F.2d 441 (2d Cir. 1989). A conviction that has been reversed on appeal may likewise be considered. U.S. v. Cota-Guerrero, 907 F.2d 87 (9th Cir. 1990) (can consider a reversed conviction if it is reliable evidence of past criminal activity).

The court may also consider convictions that are outside the time limits or where the defendant received extremely lenient treatment in the past. See U.S. v. Jackson, 903 F.2d 1313 (10th Cir. 1990); U.S. v. Lopez, 871 F.2d 513 (5th Cir. 1989). Before a November 1992, amendment, departure was probably limited to those remote convictions that were similar to the offense of conviction. U.S. v.
Smallwood, 19 F.3d 1317 (9th Cir. 1994) (pre-1992 guidelines precluded consideration of remote dissimilar conduct in departing); but see Williams v. U.S., 503 U.S. 193 (1992) (noting split in circuits over use of non-similar priors to depart).

The extent of a criminal history departure should be guided by reference to higher or lower criminal history categories, as applicable. §4A1.3. Failure to consider the next applicable categories and state reasons for the particular category selected should result in a reversal and remand for resentencing. See, e.g., U.S. v. Allen, 898 F.2d 203 (D.C. Cir. 1990) (remanded for district court to identify correct category, consider adequacy of category and, if inadequate, state why a sentence longer than one allowed at the top of the criminal history category is in order); U.S. v. Summers, 893 F.2d 63 (4th Cir. 1990) (court should have considered the defendant's criminal history category without the driving offenses it believed caused the category to overstate the defendant's criminal history); U.S. v. Kennedy, 893 F.2d 825 (6th Cir. 1990) (court must consider next higher criminal history category as a reference before departing from the range); U.S. v. Chavez-Botello, 905 F.2d 279 (9th Cir. 1990) (court must use reference to next available criminal history categories); U.S. v. Gayou, 901 F.2d 746 (9th Cir. 1990) (same); U.S. v. Richison, 901 F.2d 778 (9th Cir. 1990) (same); U.S. v. Coe, 891 F.2d 405 (2d Cir. 1989) (if the defendant's criminal history category is inadequate, the next higher category will usually be sufficient; it must at least be considered and a sequential approach is required where the court is considering past or future crimes); U.S. v. Sappe, 898 F.2d 878 (2d Cir. 1989) (court contemplating upward departure because of a under-representative criminal history category must refer to a guideline range for a defendant having a more appropriate criminal history category; remanded because court did not consider higher categories or use as a guide in determining the sentence); U.S. v. Lopez, 871 F.2d 513 (5th Cir. 1989) (while departure was appropriate, remanded because the court did not consider other criminal history categories); U.S. v. Miller, 874 F.2d 466 (7th Cir. 1989) (departure must be made by reference to higher criminal history categories and their intended applicability; reversed and remanded because the district court did not articulate appropriate reasons); U.S. v. Anderson, 886 F.2d 215 (8th Cir. 1989) (reversed and remanded because the district court failed to compare the defendant's criminal history to most defendants in the higher criminal history categories as required); U.S. v. Wells, 878 F.2d 1232 (9th Cir. 1989) (reversed and remanded because the district court did not specify events in the defendant's criminal history category that it found were inadequately represented by the applicable category or why it selected two categories higher); U.S. v. Cervantes-Lucatero, 889 F.2d 916 (9th Cir. 1989) (on remand, court should consider next applicable criminal history categories).

Courts have also departed above Criminal History Category VI where the points are significantly above 13. See U.S. v. Brown, 899 F.2d 94 (1st Cir. 1990) (substantial difference between 20 points and Category VI's cap of 13 can be basis for departure); U.S. v. Rivera, 879 F.2d 1247 (5th Cir. 1989) (defendant's criminal history category totaled 18 points and court was justified in departing upward); U.S. v. Belanger, 892 F.2d 473 (6th Cir. 1989) (24 points, a long list of convictions and pending charges and current detainers indicated the defendant was "out of control" and a departure was justified); U.S. v. Carey, 898 F.2d 642 (8th Cir. 1990) (21 points). The Second Circuit has indicated that a departure above Category VI would be appropriate only in the most compelling circumstances, e.g., wanton cruelty. See U.S. v. Coe, 891 F.2d 405 (2d Cir. 1989).
A November 1992 amendment recommends guiding a departure above Category VI by moving incrementally down the sentencing table to the next higher offense level in Category VI until an appropriate range is found.

The guidelines specify that a departure below the lower limit for Category I is not appropriate as it is already viewed as the lowest range for a first offender with the lowest risk of recidivism. §4A1.3; U.S. v. Miller, 991 F.2d 552 (9th Cir. 1993) (clean record adequately considered by Category I).

14.04.06.05 Armed Career Criminal (§4B1.4)

In November 1990, the Sentencing Commission added a new guideline to Chapter Four specifically to cover the sentencing of "armed career criminals" under 18 U.S.C. §924(e). See §4B1.4. This guideline provides that a defendant who is subject to an enhanced sentence under 18 U.S.C. §924(e) is an armed career criminal. See §4B1.4.(a).

The offense level for an armed career criminal is the greatest of:

1. the offense level applicable from Chapters Two and Three of the guidelines; or
2. the offense level from §4B1.1 (career offender), if applicable; or
3. Level 34, if the defendant used or possessed a firearm or ammunition in connection with a crime of violence or controlled substance offense, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a); or
4. Level 33 otherwise.

The acceptance of responsibility provisions found in §3E1.1, as amended November 1992, apply.

The criminal history category for an armed career criminal is the greatest of:

1. the criminal history category from §4A1.1 or §4B1.1, if applicable; or
2. Category VI if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a); or
3. Category IV.

For a more detailed discussion of the armed career criminal provisions, see supra Chapter 13.

14.04.07 Chapter Five--Determining the Sentence
Chapter Five of the guidelines is divided into eleven parts, A-K. Part A is the sentencing table which is included as 14.12, infra. The Sentencing Table was amended November 1, 1992 to provide for 0-6 month ranges at offense levels seven and eight in criminal history category I. Parts B through G address various sentencing options. Part J is a policy statement regarding relief from disability under 29 U.S.C. §§504 and 1111. This section will address the remaining parts of Chapter Five--Part H (Specific Offender Characteristics) and Part K (Departures).

The issue of departures is discussed more fully in section 14.09 infra. Downward Departures After Koon--A Fact-Based Inquiry.

In addition, a "blue sheet" by Attorney General Reno setting forth the Department of Justice's revised view of departures is included at section 14.15, infra.

14.04.07.01 Specific Offender Characteristics

The Commission has considered whether certain specific characteristics have any relevance to the sentencing process. With certain specified exceptions, the following characteristics are not ordinarily relevant in determining whether a sentence should be outside the guidelines: age, education and vocational skills, mental and emotional conditions, physical condition (including drug dependence and alcohol abuse), previous employment record, family ties and responsibilities, community ties, military, civic, charitable, public service and prior good works. A defendant's role in the offense, criminal history and dependence upon criminal activity for a livelihood are all relevant in determining the appropriate sentence. Race, sex, national origin, creed, religion and socioeconomic status are not relevant in the determination of the sentence. As of November 1992, lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for sentencing outside the guidelines (overruling U.S. v. Floyd, 945 F.2d 1096 (9th Cir. 1991). See §§5H1.1-1.12.

A 1994 amendment to §5H clarifies that extraordinary offender characteristics and a combination of factors may give rise to downward departure. The "combination of factors" departure has been recognized in several circuits. U.S. v. Fletcher, 15 F.3d 553 (6th Cir. 1994); U.S. v. Parham, 16 F.3d 844 (8th Cir. 1994); U.S. v. Tsosie, 14 F.3d 1438 (10th Cir. 1994); U.S. v. Cook, 938 F.2d 149 (9th Cir. 1991); U.S. v. Takai, 941 F.2d 738 (9th Cir. 1991).

Defense counsel should continue to rely on the traditional offender characteristics in arguing for downward departures. The real challenge in advocacy is to convince the court why the defendant's particular characteristics are relevant and should be considered.

Showing uniqueness in the situation or unusual circumstances in a particular case appears to be the key. See U.S. v. Higgins, 967 F.2d 841 (3d Cir. 1992); U.S. v. Johnson, 964 F.2d 124 (2d Cir. 1992) (gainful employment for nine years since entering the country coupled with the circumstances of the offense

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14 The Fifth Circuit reversed a downward departure finding it was error to depart because "there is something good in the defendant." U.S. v. Reed, 882 F.2d 147 (5th Cir. 1989).
justified downward departure); *U.S. v. Lauzon*, 938 F.2d 326 (1st Cir. 1991) (borderline intelligence not extraordinary enough to justify departure); *U.S. v. Alba*, 933 F.2d 1117 (3d Cir. 1991) (extraordinary family circumstances basis for downward departure); *U.S. v. Shoupe*, 929 F.2d 116 (3d Cir. 1991) (defendant's youthfulness, immaturity and responsibility to child not extraordinary); *U.S. v. Headley*, 923 F.2d 1079 (3d Cir. 1991) (same as *Lara*); *U.S. v. Lara*, 905 F.2d 599 (2d Cir. 1990) (the potential for victimization of this "delicate looking young man" in prison justified downward departure);\(^ {15} \) *U.S. v. Whitehorse*, 909 F.2d 316 (8th Cir. 1990) (ill-advised furlough of alcoholic defendant leading to escape conviction and compelling need for effective treatment of the defendant's alcoholism justified downward departure); *U.S. v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990) (same); *U.S. v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990) (excellent employment and consistent efforts to overcome adverse environment of the reservation justified downward departure).

The circuits have shown little reluctance in reversing downward departures where the circumstances were not unusual or extraordinary. See *U.S. v. Mogel*, 956 F.2d 1555 (11th Cir. 1992); *U.S. v. Williams*, 891 F.2d 962 (1st Cir. 1989); *U.S. v. Brewer*, 899 F.2d 503 (6th Cir. 1990); *U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990).


Alcohol abuse is not a proper ground for departure. *U.S. v. Lowden*, 905 F.2d 1448 (10th Cir. 1990); *U.S. v. Creed*, 897 F.2d 963 (8th Cir. 1990); *U.S. v. Williams*, 891 F.2d 962 (1st Cir. 1989). The Ninth Circuit has found that §5H1.4 suggests that the Commission foreclosed consideration of drug and alcohol abuse as a basis for downward departure leaving open the possibility of consideration within the range or as an aggravating upward departure. *U.S. v. Richison*, 901 F.2d 778 (9th Cir. 1990). However, the court did find that drug and/or alcohol abuse would not be an aggravating factor in the usual case. *Id.* The court found that the Sentencing Commission did not consider the likelihood of successful treatment for addiction. See *U.S. v. Whitehorse*, 909 F.2d 316 (8th Cir. 1990) (departure because of desire to see defendant successfully treated in substance abuse program proper; departure was not based on the fact the defendant was an alcoholic or intoxicated during the furlough). Severe medical or physical problems can be a basis for departure. *U.S. v. Greenwood*, 928 F.2d 645 (4th Cir. 1991) (loss of both legs in war was extraordinary medical problem). However, one court found that a 55-year-old defendant with cancer did not qualify for a downward departure. *U.S. v. Guajardo*, 950 F.2d 203 (5th Cir. 1991).

Attempts at post-arrest rehabilitation will probably not justify a downward departure, *U.S. v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991); *U.S. v. Sklar*, 920 F.2d 107 (1st Cir. 1990); *U.S. v. Martin*, 938 F.2d 162 (9th Cir. 1991); unless, perhaps, truly extraordinary. *U.S. v. Williams*, 948 F.2d 706 (11th Cir. 1991). In response to a growing number of departures based on post-sentence rehabilitation when a defendant was resentenced, the Commission amended the guidelines to include

\(^ {15} \) Effectively overruled by 1991 Amendment ordinarily precluding consideration of physique.
§5K2.19, which precludes post-sentence rehabilitation as a ground for departure. A justification for the ban was that it unfairly rewarded only those who are resentenced for some reason.


Promises of restitution may not be sufficient to warrant a downward departure. See U.S. v. Brewer, 899 F.2d 503 (6th Cir. 1990); U.S. v. Carey, 895 F.2d 318 (7th Cir. 1990); U.S. v. Bolden, 889 F.2d 1336 (4th Cir. 1989). Charitable contributions will not justify departure. U.S. v. McHan, 920 F.2d 244 (4th Cir. 1990).

A defendant's age is not ordinarily relevant. U.S. v. White, 945 F.2d 100 (5th Cir. 1991); U.S. v. Summers, 893 F.2d 63 (4th Cir. 1990); U.S. v. Daiagi, 892 F.2d 31 (4th Cir. 1989). To depart based upon age, the court must find the defendant was elderly and infirm and that an alternative form of confinement would be equally efficient and less costly than imprisonment. See U.S. v. Carey, 895 F.2d 318 (7th Cir. 1990).

The refusal to consider a defendant's military history will not violate due process. U.S. v. Chiarelli, 898 F.2d 373 (3d Cir. 1990). However, at least one district court has considered a defendant's military record as a basis for a downward departure. U.S. v. Pipich, 688 F. Supp. 191 (D. Md. 1988). This basis for departure was effectively overruled by the addition of §5H1.11 in 1991.

Several opinions have upheld a downward departure on the basis of "aberrant behavior." See, e.g., U.S. v. Fairless, 975 F.2d 664 (9th Cir. 1992) (aberrant behavior finding based on convergence of factors justified departure to lower term of imprisonment); U.S. v. Morales, 961 F.2d 1428 (9th Cir. 1992) (court may depart below Category I for first offender whose conduct is a single act of aberrant behavior); U.S. v. Takai, 941 F.2d 738 (9th Cir.), amending, 930 F.2d 1427 (9th Cir. 1991) (defendant's single act of aberrant behavior justified departure); U.S. v. Pena, 930 F.2d 1486 (10th Cir. 1991) (aberrational character of conduct may be combined with family responsibilities to justify departure); but see U.S. v. Glick, 946 F.2d 335 (4th Cir. 1991) (first offense does not per se constitute aberrant behavior); U.S. v.
Unsuccessful arguments have been made that the “sufficient, but not greater than necessary” language in 18 U.S.C. §3553(a) should also be a basis for departure. See U.S. v. Davern, 970 F.2d 1490 (6th Cir. 1992) (en banc).

Carey, 895 F.2d 318 (7th Cir. 1990) (aberrant behavior must be more than merely something out of character or the defendant's first offense).

The Commission addressed the issue of aberrant behavior with Amendment 603 effective November 1, 2000. The amendment added §5K2.20 which precludes departure for aberrant behavior if the offense involved serious bodily injury or death, the defendant discharged a firearm, the offense is a serious drug trafficking offense, the defendant has more than one criminal history point, or the defendant has a prior felony conviction regardless of whether it is counted under criminal history calculations. The guideline also restrictively defines “aberrant behavior.”

Counsel should be careful to tie offender characteristic departures to the specific defendant and avoid the creation of "boutique" offender characteristic departures. The danger with these boutique phrases is that the Sentencing Commission may ultimately overrule certain departures. See, e.g., U.S. v. Floyd, 945 F.2d 1096 (9th Cir. 1991) (departure based on youthful lack of guidance), effectively overruled by November 1992 amendment; U.S. v. Lara, 905 F.2d 599 (2d Cir. 1990) (delicate looking physique justified downward departure), effectively overruled by November 1991 amendment.

14.04.07.02 Other Departures

Unlike adjustments, which result in specific increases or decreases in the offense level, departures are those factors which allow the court to sentence outside the guidelines. The statutory authority for departures is found at 18 U.S.C. §3553(b). Several departure factors have been considered by the Commission but the list is not all-inclusive. §§5K1.1, 5K2.0. Presence of factors not considered by the Commission may also warrant departure from the guidelines and the court may depart from the guidelines even though the reason for the departure has been considered if the court determines the guideline level attached to that factor is inadequate. See 18 U.S.C. §3553(b). See also U.S. v. Van Dyke, 895 F.2d 984 (4th Cir. 1990) (post offense rehabilitative conduct adequately considered by acceptance of responsibility adjustment); U.S. v. Hays, 899 F.2d 515 (6th Cir. 1990) (improper to consider amount of drugs as mitigating factor; absence of violence also not proper departure factor); U.S. v. Coe, 891 F.2d 405 (2d Cir. 1989) (short time span for bank robberies not sufficiently unusual); U.S. v. Sanchez-Solis, 882 F.2d 693 (2d Cir. 1989); U.S. v. Palta, 880 F.2d 636 (2d Cir. 1989) (attempt to conceal identity not sufficiently unusual; covered by obstruction adjustment); U.S. v. Uca, 867 F.2d 783 (3d Cir. 1988) (guidelines already adequately considered the number of guns involved in the offense); U.S. v. Smith, 888 F.2d 720 (10th Cir. 1989) (court did not enumerate the factors it believed the guidelines did not adequately consider; departure based on force and violence in bank robbery).

The departure factors must arise from conduct related to the offense of conviction. See U.S. v. Kim, 896 F.2d 678 (2d Cir. 1990); U.S. v. Ferra, 900 F.2d 1057 (7th Cir. 1990); U.S. v. Missick, 875 F.2d 1294 (7th Cir. 1989).

16 Unsuccessful arguments have been made that the "sufficient, but not greater than necessary" language in 18 U.S.C. §3553(a) should also be a basis for departure. See U.S. v. Davern, 970 F.2d 1490 (6th Cir. 1992) (en banc).
The grounds for departure should be derived from the circumstances attendant to a particular defendant's commission of a particular crime and not from the offense itself. U.S. v. Aguilar-Pena, 887 F.2d 347 (1st Cir. 1989). Local or popular sentiment against the crime involved cannot be the basis for departure. Id. A convergence of factors may give rise to departures where each single factor would not alone justify departure. U.S. v. Fairless, 975 F.2d. 664 (9th Cir. 1992); U.S. v. Takai, 941 F.2d 738 (9th Cir.), amending, 930 F.2d 1427 (9th Cir. 1991); U.S. v. Cook, 938 F.2d 149 (9th Cir. 1991).

Those 17 factors which have been specifically considered by the Commission in Chapter Five are as follows:17

Cooperation (§5K1.1)

(1) Substantial Assistance to Authorities. This departure factor is to be considered "upon motion of the government" and requires the court to evaluate the significance and usefulness of the assistance, the truthfulness and reliability of the information, the nature and extent of the assistance, the danger or risk of injury to the defendant or family members and the timeliness of the assistance. §5K1.1. Refusal to assist in the investigation of others is not to be considered as an aggravating sentencing factor. §5K1.2; see U.S. v. Griess, 971 F.2d 1368 (9th Cir. 1992) (refusal to cooperate did not justify departure).

The government motion requirement has been upheld. U.S. v. Wade, 504 U.S. 181 (1992). A defendant has a limited ability to challenge the failure of the government to file a motion. The defendant must show the government's failure was based on an unconstitutional motive or not rationally related to any legitimate government interest. Id.

Once the motion for departure based upon cooperation is made, it remains within the discretion of the district court to determine the extent of the departure. See U.S. v. Keene, 933 F.2d 711 (9th Cir. 1991); U.S. v. Wilson, 896 F.2d 856 (4th Cir. 1990); U.S. v. Damer, 910 F.2d 1239 (5th Cir. 1990); U.S. v. Pippin, 903 F.2d 1478 (11th Cir. 1990). In fact, the district court would have the authority to impose probation even if it were otherwise statutorily prohibited if the government made a motion based upon substantial assistance of the defendant to sentence below a statutory minimum (pursuant to §3553(e)). See U.S. v. Dalagi, 892 F.2d 31 (4th Cir. 1989); but see U.S. v. Thomas, 930 F.2d 526 (7th Cir. 1991) (cannot ignore probation ban). Even with a government motion, the district court retains the discretion to refuse to depart based upon cooperation. U.S. v. Castellanos, 904 F.2d 1490 (11th Cir. 1990). A cooperation based departure may be restricted to that factor alone and a further reduction based on other factors may not be permitted. See U.S. v. Chestna, 962 F.2d 103 (1st Cir. 1992) (extent of cooperation departure cannot be based on usual family responsibilities); U.S. v. Valente, 961 F.2d 133 (9th Cir. 1992) (§5K1.1 motion justifies departure only for substantial assistance and not also for aberrant behavior).

17 Several of the Offense Conduct sections in Chapter Two also contain specific suggestions for departure, e.g., §2B1.3, Application Note 4 (upward departure for destruction of a telephone line if interruption in service to thousands of people for several hours); §2B2.1, Background Note (upward departure for weapon used in a burglary); §2L.1.1, Application Note 8 (upward departure for offenses involving large numbers of aliens or dangerous or inhumane treatment); §2P1.1, Application Note 4 (upward departure if death or bodily injury resulted from escape).
The circuits have split over whether a government motion under §5K1.1 also "lifts" the mandatory minimum. Compare U.S. v. Ah-kai, 951 F.2d 490 (2d Cir. 1991) (§5K1.1 motion also lifts mandatory minimum) and U.S. v. Keene, 933 F.2d 711 (9th Cir. 1991) (same) with U.S. v. Dumas, 921 F.2d 650 (6th Cir.), modified, 934 F.2d 1387 (6th Cir. 1990) (separate motions required), U.S. v. Durham, 963 F.2d 185 (8th Cir. 1992) (same) and U.S. v. Rodriguez-Morales, 958 F.2d 1441 (8th Cir 1992) (same).

If a departure motion is made part of a plea agreement, the court also has the authority to enforce the agreement. See, e.g., U.S. v. Huerta, 878 F.2d 89 (2d Cir. 1989).

Even in the absence of a government motion, the court can consider cooperation as a mitigating factor in deciding what sentence within the range to impose, whether or not the government agrees. See U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990); U.S. v. Huerta, 878 F.2d 89 (2d Cir. 1989).

The district court may also have the power to prohibit a defendant from cooperating with the government by making controlled purchases of drugs while on bail pending sentencing. See U.S. v. French, 900 F.2d 1300 (8th Cir. 1990).

**Aggravating Departure Factors**

(2) **Death** (§5K2.1). The court may increase the sentence above the authorized guideline range if death results. The extent of the increase should depend upon the dangerousness of the conduct, the extent to which death was intended or risked and the extent to which the offense level already reflects the risk of personal injury. See U.S. v. Rivalta, 892 F.2d 223 (2d Cir. 1989); U.S. v. Melton, 883 F.2d 336 (5th Cir. 1989); U.S. v. Roberson, 872 F.2d 597 (5th Cir. 1989).

(3) **Physical Injury** (similar to above) (§5K2.2).

(4) **Extreme Psychological Injury** (§5K2.3). The court may increase the sentence above the authorized guideline range if the victim suffered psychological injury "much more" serious than that normally resulting from the offense. See U.S. v. Lucas, 889 F.2d 697 (6th Cir. 1989).

(5) **Abduction or Unlawful Restraint** (§5K2.4).

(6) **Property Damage or Loss** (§5K2.5). The sentence may be increased above the guideline range if the offense caused property damage or loss not taken into account within the guidelines. See U.S. v. Garcia, 900 F.2d 45 (5th Cir. 1990).

(7) **Weapons and Dangerous Instrumentalities** (§5K2.6). The extent of the increase should depend on the dangerousness of the weapon, the manner in which it was used and the extent to which its use endangered others. According to the Commission, "the discharge of a firearm might warrant a substantial sentence increase." There should be some

(8) Disruption of Governmental Function (§5K2.7). This departure factor would not ordinarily be justified when the conviction is for bribery or obstruction of justice because interference with governmental function is inherent in such offenses. It should be applied where the circumstances are unusual in such cases or where the conduct resulted in a "significant" disruption of a governmental function otherwise unrelated to the offense. See U.S. v. Murillo, 902 F.2d 1169 (5th Cir. 1990); U.S. v. Garcia, 900 F.2d 45 (5th Cir. 1990).

(9) Extreme Conduct (§5K2.8). Examples include torture, gratuitous infliction of injury or prolonging of pain or humiliation. See U.S. v. Roberson, 872 F.2d 597 (5th Cir. 1990).

(10) Criminal Purpose (§5K2.9). This factor relates to offenses committed to conceal another offense.

(11) Public Welfare (§5K2.14). Sentences above the guidelines are permitted where the public welfare is "significantly" endangered. See U.S. v. Chiarelli, 898 F.2d 373 (3d Cir. 1990); U.S. v. Uca, 867 F.2d 783 (3d Cir. 1988). The danger presented by the presence of "crack houses" is probably not the type of special danger envisioned by this section. See U.S. v. McDowell, 902 F.2d 451 (6th Cir. 1990).

(12) Terrorism (§5K2.15). If the defendant committed the act in furtherance of a terroristic action, an upward departure may be warranted.
Mitigating Departure Factors

(13) **Victim's Conduct** (§5K2.10). The court may reduce the sentence below the guidelines if the victim's wrongful conduct contributed "significantly" to the offense behavior (e.g., self-defense). See *U.S. v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989).

(14) **Lesser Harms** (§5K2.11). This applies where the defendant commits a crime in order to avoid a perceived greater harm provided that the circumstances diminish society's interest in punishing the conduct. For example, the Commission suggests application of this departure where a schoolteacher possesses controlled substances for display in a drug education program.

(15) **Coercion and Duress** (§5K2.12). This factor arises where the offense is committed because of "serious" coercion, blackmail or duress under circumstances not amounting to a complete defense. The fact that a jury rejects the defense does not preclude the court from considering coercion and duress as a basis for a downward departure. *U.S. v. Cheape*, 889 F.2d 477 (3d Cir. 1989). "Serious" coercion is that involving a threat of physical injury or substantial damage to property. Economic hardship and personal financial difficulties or economic pressures upon a trade or business do not warrant a decrease.

(16) **Diminished Capacity** (§5K2.13). This departure factor appears to be restricted to a nonviolent offense committed while suffering from "significantly" reduced mental capacity which did not result from voluntary use of drugs. See *U.S. v. Rosen*, 896 F.2d 789 (3d Cir. 1990). The offense of conviction must be non-violent, *Id; U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989). A lower sentence may be warranted provided that the defendant's criminal history does not indicate that incarceration is needed to protect the public. The court should link the mental capacity problem to the offense. *U.S. v. Adonis*, 891 F.2d 300 (D.C. Cir. 1989).

(17) **Voluntary Disclosure of Offense** (§5K2.16) Voluntary disclosure of the offense prior to discovery where the offense is unlikely to be discovered can justify a downward departure.

Other Factors

Justifiable Reasons

The sentencing guidelines recognize the continued viability of the Fed. R. Crim. P. 11(e) procedures. §6B1.1-1.4. Plea agreements may be accepted where the recommended or agreed sentence is within the applicable guideline range or where the recommended or agreed sentence departs from the applicable guideline range "for justifiable reasons."
There is no definition within the existing guidelines of "justifiable reasons." The government may argue that "justifiable reasons" must be based on the Chapter Five departure factors or those factors which the Commission failed to adequately consider or consider at all. However, the guidelines do not place these limitations on "justifiable reasons."

14.04.08 Sentencing Procedures

14.04.08.01 The Presentence Report

Procedures regarding presentence reports are governed by 18 U.S.C. §3552, Rule 32\textsuperscript{18} of the Federal Rules of Criminal Procedure and guidelines §6A1.1-1.3. Rule 32 requires a presentence report be prepared unless the court finds there is sufficient information in the record to enable the meaningful exercise of sentencing authority under §3553 and explains such finding on the record. The court can waive the presentence report over objection of the defendant. \textit{U.S. v. Whitworth}, 856 F.2d 1268 (9th Cir. 1988). However, the court must make specific findings that there is information in the record sufficient to enable the meaningful exercise of sentencing authority. \textit{U.S. v. Turner}, 905 F.2d 300 (9th Cir. 1990).

The guidelines recommend the development of local rules to provide for timely disclosure of the report, the narrowing and resolution of issues in dispute and the identification for the court of issues remaining in dispute. §6A1.2. Most of the district courts have adopted local rules that counsel should consult in order to make timely objections to the presentence report.

Content of the Report

Rule 32 requires the presentence report to contain: (1) information about the history and characteristics of the defendant, including prior criminal record, financial condition, and any circumstance affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant; (2) the classification of the offense and the defendant under the guidelines, the kinds of sentence and range suggested for the case and an explanation of any factors that may indicate a departure from the guidelines; (3) any pertinent policy statement of the Sentencing Commission; (4) verified information in a non-argumentative style containing an assessment of the financial, social, psychological and medical impact and cost to any victim of the offense; (5) information concerning the nature and extent of non-prison programs and resources available to the defendant (unless the court orders otherwise); and (6) any other information required by the court.

The statute allows the court to also order a more specific study to obtain more information than is otherwise available. The study is to be conducted in the local community unless the court finds a compelling reason for the study to be done by the Bureau of Prisons. 18 U.S.C. §3552(b). The court may also order a psychiatric or psychological examination. 18 U.S.C. §3552(d).

Disclosure

\textsuperscript{18} A copy of the amended version of Rule 32 is included at section 14.11, \textit{infra}. 
The statute requires that the report be disclosed to the defendant, counsel for the defendant and the attorney for the government at least 10 days before the date set for sentencing unless the time period is waived by the defendant. 18 U.S.C. §3552(d). Rule 32 requires disclosure "at a reasonable time before imposing sentence." Rule 32 does not require disclosure of the final recommendation or any information that in the opinion of the court contains diagnostic opinions which might seriously disrupt a program of rehabilitation. It also does not require disclosure of information obtained upon a promise of confidentiality or any other information which might result in physical or other harm to the defendant or others. For a discussion of disclosure issues, see U.S. v. Schlette, 842 F.2d 1574 (9th Cir. 1988), second amended opinion, 854 F.2d 359 (9th Cir. 1988). Information that is not disclosed is to be provided to the defendant in summary form. The defendant should be entitled to obtain an actual copy of the presentence report. U.S. Department of Justice v. Julian, 486 U.S. 1 (1988).

Factual Inaccuracies

Counsel and the defendant are to be given the opportunity to comment on the report and, in the discretion of the court, introduce testimony or other information relating to any alleged factual inaccuracy. Old Rule 32(c)(3)(A); see U.S. v. Otero, 868 F.2d 1412 (5th Cir. 1989) (reversed because defendant not given notice purity of cocaine an issue and defendant was not allowed to challenge the evidentiary basis for the court’s departure); U.S. v. Monaco, 852 F.2d 1143 (9th Cir. 1988); U.S. v. Donn, 661 F.2d 820 (9th Cir. 1981); U.S. v. Weston, 448 F.2d 626 (9th Cir. 1971). It is important to correct the presentence report because the Bureau of Prisons will use the report to determine the security classification and institutional designation for the defendant. The corrective action must be requested at the time of sentencing. See U.S. v. Jones, 899 F.2d 1097 (11th Cir. 1990); U.S. v. Catabran, 884 F.2d 1288 (9th Cir. 1988). If possible, counsel should obtain a corrected, retyped, or "sanitized" presentence report when false or unreliable information has been discovered. The federal courts have equitable power to order expungement of inaccurate information in the presentence report where necessary to vindicate rights secured by the constitution or by statute. Fendler v. U.S. Bureau of Prisons, 846 F.2d 550 (9th Cir. 1988); U.S. v. Wilson, 896 F.2d 856 (4th Cir. 1990).

If factual inaccuracies are alleged the court is required to make a finding as to the allegation or a determination that no such finding is necessary because the matter controverted is not to be considered in the sentencing. A written record of such findings and determinations is to be appended to an accompany the presentence report to the Bureau of Prisons. Rule 32(c) (3)(D); U.S. v. Gerante, 891 F.2d 364 (1st Cir. 1989); U.S. v. Rosa, 891 F.2d 1063 (3d Cir. 1989); U.S. v. Forbes, 888 F.2d 752 (11th Cir. 1989); U.S. v. Hamm, 786 F.2d 804 (7th Cir. 1986); U.S. v. Gonzales, 765 F.2d 1393 (9th Cir. 1985); U.S. v. Ibarra, 737 F.2d 825 (9th Cir. 1984). Failure to comply could result in a remand for resentencing. U.S. v. Fernandez-Angulo, 897 F.2d 1514 (9th Cir. 1988) (en banc); U.S. v. Baron, 860 F.2d 911 (9th Cir. 1988); U.S. v. Messer, 785 F.2d 832 (9th Cir. 1986); U.S. v. Castillo-Roman, 774 F.2d 1280 (5th Cir. 1985).

The failure of the defendant to object to disputed facts may preclude review. U.S. v. Ebertowski, 896 F.2d 906 (5th Cir. 1990) (not clear error); U.S. v. Tibesar, 894 F.2d 317 (8th Cir. 1990); U.S. v.
Fox, 889 F.2d 357 (1st Cir. 1989); U.S. v. Soliman, 889 F.2d 441 (2d Cir. 1989); but see U.S. v. Frederick, 897 F.2d 490 (10th Cir. 1990) (reviewed issue because determinative of defendant's liberty).
Defendant's Statements to the Court and Probation

Defense counsel must exercise caution in advising the defendant about the extent of statements to the court during the guilty plea and to the probation officer during the presentence investigation. See, e.g., *U.S. v. Colon*, 905 F.2d 580 (2d Cir. 1990) (admitted additional drug sales); *U.S. v. Talbott*, 902 F.2d 1129 (4th Cir. 1990) (used statements to prove valid prior convictions); *U.S. v. Rogers*, 899 F.2d 917 (10th Cir. 1990) (admitted to addiction and drug sales); *but see U.S. v. Trujillo*, 906 F.2d 1456 (10th Cir. 1990) (refusal to provide information could be considered a lack of acceptance of responsibility). While a certain amount of "groveling" still exists under guideline sentencing, e.g., the court must determine where within the range a sentence must fall, whether to grant the reduction for acceptance of responsibility, and determine departures above and below the guidelines, factual determinations can have a dramatic impact on the sentence. Consequently, a defendant may want to refrain from making certain admissions during the guilty plea that are not relevant to the elements of the offense and certainly may want to refrain from making statements to the probation officer that could result in increasing the applicable offense level or criminal history category. Counsel will have to be alert at the time of the taking of the plea and also be present during the entire presentence interview with the probation officer. There may be instances in which the defendant should not subject himself or herself to an interview at all and other situations in which only certain questions should be answered. The legal basis for refusing to respond to certain questions is the Fifth Amendment.

Defendants who do not subject themselves to a presentence interview may confront sentencing courts that refuse to consider the acceptance of responsibility reduction. There should be other ways to accept responsibility for criminal conduct other than a conversation with the probation officer, e.g., a written statement or declaration provided to the court, participation in community service, the voluntary making of restitution.

### 14.04.08.02 Resolving Disputed Issues

The guidelines do not set forth the manner in which disputes must be resolved other than to state that they must be resolved in accordance with Fed. R. Crim. P. 32. Reliability is the key; *U.S. v. Bernaugh*, 969 F.2d 858 (10th Cir. 1992); *U.S. v. Burns*, 894 F.2d 334 (9th Cir. 1990); *U.S. v. Miller*, 891 F.2d 1265 (7th Cir. 1989). See *U.S. v. Ramirez*, 963 F.2d 693 (5th Cir. 1992) (reliable hearsay can be considered); *U.S. v. Bowman*, 926 F.2d 380 (4th Cir. 1991) (same); *U.S. v. Rodriguez*, 897 F.2d 1324 (5th Cir. 1990) (proper to use hearsay to determine amount of drugs involved); *U.S. v. Robinson*, 898 F.2d 1111 (6th Cir. 1990) (same); *U.S. v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990) (same); *U.S. v. Fox*, 889 F.2d 357 (1st Cir. 1989) (hearsay is admissible at a sentencing hearing as long as it is reliable); *U.S. v. Sciarra*, 884 F.2d 95 (3d Cir. 1989) (proper to use hearsay to determine amount of drugs involved); *U.S. v. Agyemang*, 876 F.2d 1264 (7th Cir. 1989) (reliable hearsay admissible). The Confrontation Clause probably does not apply. *U.S. v. Silverman*, 976 F.2d 1502 (6th Cir. 1992) (en banc); *U.S. v. Wise*, 976 F.2d 393 (8th Cir. 1992) (en banc) (*but see strong dissent*).

The court is required to notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence. §6A1.3(b).

**Burden of Proof**

The guidelines recommend that standard of proof that the judge must apply in making factual determinations at the sentencing be a preponderance of the evidence. Further, the guidelines do not state which party has the burden of going forward, which party bears the burden of persuasion, or the weight of the burden. The Supplementary Report at p.47, n.79, acknowledged that these issues were left to be resolved by the courts.

The old sentencing scheme required that information presented to the court be accurate and reliable, *Townsend v. Burke*, 334 U.S. 736 (1948), and allowed federal judges to have discretion to consider a wide variety of information from a wide variety of sources in order to tailor punishment to the individual rather the crime. *U.S. v. Grayson*, 438 U.S. 41 (1978); *Williams v. New York*, 337 U.S. 241 (1949). The courts were permitted to conduct inquiries broad in scope, "largely unlimited either as to the kind of information [that may be considered] or the source from which it may come." *U.S. v. Glassey*, 715 F.2d 352 (7th Cir. 1983); *U.S. v. Stevenson*, 573 F.2d 1105, 1108 (9th Cir. 1978); *U.S. v. Tucker*, 404 U.S. 443, 446 (1972).

Every circuit has adopted the preponderance standard. *U.S. v. Morrison*, 946 F.2d 484 (7th Cir. 1991); *U.S. v. Frederick*, 897 F.2d 490 (10th Cir. 1990); *U.S. v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990) (court did not foreclose possibility that in future time and other context, it might require a higher standard of proof as a matter of policy); *U.S. v. Burke*, 888 F.2d 862 (D.C. Cir. 1989); *U.S. v. Wright*, 873 F.2d 437 (1st Cir. 1989); *U.S. v. Guerra*, 888 F.2d 247 (2d Cir. 1989); *U.S. v. McDowell*, 888 F.2d 285 (3d Cir. 1989); *U.S. v. Urreaga-Linares*, 879 F.2d 1234 (4th Cir. 1989); *U.S. v. Casto*, 889 F.2d 562 (5th Cir. 1989); *U.S. v. Silverman*, 889 F.2d 1531 (6th Cir. 1989); *U.S. v. Gooden*, 892 F.2d 725 (8th Cir. 1989). However, a drastic increase in sentence that results from a factual finding may require a higher standard of proof. See *U.S. v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990) (clear and convincing standard required for increase from 27-33 months to 30 years); see also *U.S. v. Galloway*, 976 F.2d 414 (8th Cir. 1992) (en banc) (dissenting opinion); *U.S. v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (en banc).

Evidence that is speculative, unsupported or unreliable should not meet the preponderance standard. *U.S. v. Rivalta*, 892 F.2d 223 (2d Cir. 1989); see *U.S. v. Robison*, 904 F.2d 365 (6th Cir. 1990) (district court's reliance on certain witness regarding amount of cocaine was clear error).

In upholding the preponderance standard, the courts have relied on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, the United States Supreme Court found a preponderance of the evidence standard provided for by a state statute governing sentencing for possession of a firearm during the commission of certain felonies met due process standards. Although the circuits have fairly quickly adopted the *McMillan* analysis, this burden of proof issue is a critical one which should always be considered in light of the quantified impact of various sentencing factors under the guidelines. Some courts
have discussed the difficulty in burden of proof issues and the use of acquittals. See, e.g., U.S. v. White, 888 F.2d 490 (7th Cir. 1990); U.S. v. Scroggins, 880 F.2d 1204 (11th Cir. 1989). But see U.S. v. Talbott, 902 F.2d 1129 (4th Cir. 1990) (acquittal can be considered); U.S. v. Dawn, 897 F.2d 1444 (8th Cir. 1990) (same).

In Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348 (2000), the Supreme Court held that any factor which increases the maximum potential sentence is an element of the offense and must be charged and submitted to the jury. The case has had substantial impact on mandatory sentences. As of this writing, no court has applied Apprendi to guideline calculations, but the arguments have been made. Apprendi has come into play mostly in drug cases where the quantity of drug has not been pled nor stipulated to. In light of its earlier ruling in Almendarez-Torres v. U.S., 523 U.S. 224, 118 S.Ct. 1219 (1998), the Court found that increases based on criminal history have historically been sentencing issues and thus are not elements. Without further rulings by the court, armed career criminals, illegal immigrants with prior aggravated felonies, and similar defendants are still subject to increased maximum penalties without the need for the jury to find the criminal history.

The burden of proof is on the party seeking to adjust the sentence. See U.S. v. Howard, 894 F.2d 1085 (9th Cir. 1990); U.S. v. Kirk, 894 F.2d 1162 (10th Cir. 1990); U.S. v. McDowell, 888 F.2d 285 (3d Cir. 1989); U.S. v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989); U.S. v. Barrett, 890 F.2d 855 (6th Cir. 1989); U.S. v. Wilson, 884 F.2d 1355 (11th Cir. 1989). The government should bear the burden of proving the base offense level as well as any aggravating specific offense characteristics. Howard, 894 F.2d at 1085.

Allocution at the Hearing (but see Defendant's Statements, supra). Rule 32 requires the court to address the defendant personally and ask if the defendant wishes to make a statement and present any information in mitigation of sentence. The rule is not complied with when the court affords only counsel the opportunity to speak. U.S. v. Turner, 741 F.2d 696 (5th Cir. 1984); U.S. v. Sparrow, 673 F.2d 862, 865 (5th Cir. 1982). Failure to comply could result in a remand for resentencing before another judge. U.S. v. Navarro-Flores, 628 F.2d 1178 (9th Cir. 1980); see U.S. v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973); Mawson v. U.S., 463 F.2d 29, 31 (1st Cir. 1972). The Supreme Court has recognized the value of allocution: "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. U.S., 365 U.S. 301, 304 (1961); see also 3 C. Wright, Federal Practice and Procedure, 542 (1982).

Impact of Plea Agreements

Policy statements covering plea agreements are set forth in Chapter Six, part B and allow the court to accept plea agreements involving dismissed counts if the court determines 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. §6B1.2(a); see U.S. v. Citro, 938 F.2d 1431 (1st Cir. 1991). This obligation may be construed to require the court to state reasons for departing from a plea agreement. U.S. v. Plaza-Garcia, 914 F.2d 345 (1st Cir. 1990). These provisions place severe limitations on a defendant's ability to get out from under consideration of dismissed counts. See U.S. v.
Salmon, 948 F.2d 776 (D.C. Cir. 1991) (plea agreements calling for dismissed counts will not necessarily result in reduced sentence); U.S. v. Friers, 945 F.2d 650 (3d Cir. 1991) (consider dropped counts in sentencing); U.S. v. Rutter, 897 F.2d 1558 (10th Cir. 1990); U.S. v. Ykema, 887 F.2d 697 (6th Cir. 1989); U.S. v. Scroggins, 880 F.2d 1204 (11th Cir. 1989). Indeed, a November 1992 amendment to §6B1.2 specifically provided that a plea agreement that includes dismissal of a charge or an agreement not to pursue a potential charge shall not preclude the underlying conduct from being considered under §1B1.3.

Courts will not generally be bound by factual stipulations, but instead must determine the relevant facts at sentencing. §6B1.4(d); see also U.S. v. Telesco, 962 F.2d 165 (2d Cir. 1992) (defendant gained nothing in stipulation); U.S. v. Singh, 923 F.2d 1039 (3d Cir. 1991) (stipulation that defendant accepted responsibility cannot bar judge from making independent determination); U.S. v. Hibbert, 929 F.2d 434 (8th Cir. 1991) (court not bound by stipulated offense level); U.S. v. Jimenez-Otero, 898 F.2d 813 (1st Cir. 1990) (stipulation regarding dangerous weapon not binding); U.S. v. Garcia, 902 F.2d 324 (5th Cir. 1990) (stipulation lowering amount of drugs not binding); U.S. v. Cardenas, 896 F.2d 317 (8th Cir. 1990) (stipulation regarding acceptance of responsibility not binding); U.S. v. Howard, 894 F.2d 1085 (9th Cir. 1990) (stipulation regarding mitigating role not binding); U.S. v. Richardson, 901 F.2d 867 (10th Cir. 1990) (stipulation not binding because it failed to contain all relevant conduct); U.S. v. Rutter, 897 F.2d 1558 (10th Cir. 1990) (stipulated conduct not binding because it did not cover all relevant conduct); U.S. v. Barreto, 871 F.2d 511 (5th Cir. 1989) (stipulation that defendant accepted responsibility not binding); U.S. v. Forbes, 888 F.2d 752 (11th Cir. 1989) (district court not bound by stipulations of fact but must determine the facts relevant to sentencing; stipulations are encouraged but do not supplant the court's fact finding responsibility).


The court may accept a non-binding or binding recommendation (Fed. R. Crim. P. 11(e)(1)(B) or (C)) if the court is satisfied the recommended or agreed to sentence is within the applicable guideline range or the recommended sentence departs for "justifiable reasons." §6B1.2(b) and (c). The court may also depart from the guidelines to follow a plea agreement on the basis that the Commission did not fully consider plea bargaining in shaping the guideline. U.S. v. Fernandez, 877 F.2d 1138 (2d Cir. 1989).

The government may be able to "defend" on appeal a district court's refusal to comply with a plea agreement unless the government agrees not to as part of the bargain. U.S. v. Howard, 894 F.2d 1085 (9th Cir. 1990). Counsel should make this as well as other issues, e.g., departure authority, clear in the plea agreement.

14.05 ORGANIZATIONAL SANCTIONS

14.05.01 Four General Principles in Sentencing Organizations

According to the Introductory Commentary to Chapter Eight, the Sentencing Commission followed four general principles in arriving at the corporate guidelines.

First, "whenever practicable," the organization must remedy any harm caused by the offense. As a result, resources expended to remedy the harm are to be viewed as a means of making victims whole for the harm caused and not as punishment.

Second, if the organization operated primarily for a criminal purpose, the fine should be high enough to divest the organization of all of its assets.

Third, fines for other organizations should be based on the seriousness of the offense and the culpability of the organization. Culpability generally should be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in the offense by certain personnel and the organization's post offense activity.

Fourth, probation is an appropriate sentence when needed to ensure that another sanction will be fully implemented or to ensure no future criminal conduct.

14.05.02 Definitions and Basic Application Instructions

An "organization" is defined under 18 U.S.C. §18 as a person other than an individual and includes corporations, partnerships, associations, joint stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions, and non-profit organizations. See also §8A1.1 Application Note 1.

According to the Application Instructions set forth in §8A1.2, note 2, certain provisions in the guidelines applicable to individuals also apply in the sentencing of organizations. For example, the Commentary to §1B1.1 and the application instructions and definitions set forth in Chapter One (see §§1B1.2-1B1.8) apply to the organizational guidelines. Chapter Six regarding sentencing procedures and plea agreements also apply to proceedings in which the defendant is an organization. However, Chapter Three regarding victim, role, obstruction and acceptance of responsibility adjustments do not apply.

Most of the definitions important to applying the organizational sanction guidelines are set forth in the Application Notes to §8A1.2. For example, "high-level personnel" are distinguished from "substantial authority personnel" in Note 3(b) and (c); pecuniary gain and pecuniary loss are defined in Note 3(h) and (l); an "effective program to prevent and detect violations of law" is defined in Note 3(k).

14.05.03 Restitution

In accordance with the first goal of sentencing organizations, that the court should require that the organization take all appropriate steps to provide compensation to victims and remedy the harm caused
or threatened by its offense, §8B1.1 requires the court to enter an order of restitution, unless restitution has already been made or the court determines that the complication and prolongation of the sentencing process which would result from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.
14.05.04 Remedial Orders

A remedial order may be imposed as a condition of probation requiring the organization to remedy the harm caused by the offense and eliminate or reduce the risk that the offense will cause future harm. If the magnitude of expected future harm can be estimated, the court may require the organization to create a trust fund sufficient to address the anticipated harm. See §8B1.2.

14.05.05 Community Service

Community service may be ordered as a condition of probation if reasonably designed to repair the harm caused by the offense. §8B1.3. However, an order that an organization perform community service is essentially an indirect monetary sanction and therefore generally less desirable than a direct monetary sanction. The background note to §8B1.3 recognizes that community service may be appropriate where the organization is uniquely qualified to repair damage caused by the offense. The note also recognizes that community service orders imposed on organizations in the past have not been related to the purposes of sentencing. For example, requiring a defendant to endow a chair at a university or contribute to a local charity would not be consistent with the new guidelines unless the community service provides a means for preventative or corrective action directly related to the offense. See Background, §8B1.3.

14.05.06 Order of Notice to Victims

The court is to apply the provisions of §5F1.4 which implements 18 U.S.C. §3555. Under §3555, where the defendant has been convicted of fraud or "other intentionally deceptive practices," the court may order the defendant to give reasonable notice and explanation of the conviction to the victims of the offense. The cost of this notice may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive. See §5F1.4.

The Sentencing Reform Act provides for an order of notice to victims in cases involving fraud or other intentionally deceptive practices. 18 U.S.C. §3555. This section provides the court can order the defendant to give reasonable notice and explanation of the conviction to the victims of the offense. The maximum cost of the notice to the defendant cannot exceed $20,000. Before imposing such an order, the court shall give the parties notice of its consideration of such an order and allow a hearing. 18 U.S.C. §3553(d).

14.05.07 Fines

Criminal Organizations

Where the organization operated primarily for criminal purposes or for primarily for criminal means, the fine must be high enough to divest the organization of its assets. See §8C1.1. In other instances, organizational fines are determined under new provisions in Chapter Eight.

Non-Criminal Organizations
For certain specified offenses (e.g., theft, fraud, money laundering, tax offenses), the Commission has developed detailed fine determination procedures.

Guidelines covering §2E1.1 (RICO), §2X1.1 (conspiracy and attempt), §2X2.1 (aiding and abetting), §2X3.1 (accessory after the fact), §2X4.1 (misprision of felony) are also covered if the underlying offense is determined from one of the listed guidelines.

For offenses not listed in §8C2.1, the Commission has not yet promulgated detailed fine guidelines and has directed that the court should determine an appropriate fine by applying the statute, 18 U.S.C. §§3553 and 3572. See §8C2.10. A major unspecified area is environmental crimes.

**Inability to Pay Fine**

Where it is "readily ascertainable" that an organization cannot and is not likely to become able, even on an installment schedule, to pay restitution, a determination of the guideline fine range is not necessary. See §8C2.2, §8C3.3(a). Where it is "readily ascertainable" that the organization cannot and is not likely to become able, even on an installment schedule, to pay the minimum guideline fine, the court may reduce the fine to that necessary to avoid substantially jeopardizing the continued viability of the organization. See §8C2.2, §8C3.3.

**Base Fines**

For those offenses for which the Commission has determined fine ranges, the basic procedure is to determine the "base fine" by applying §8C2.4. In general, the base fine is the greatest of

1. an amount from a table which corresponds to the offense levels determined by Chapter Two of the guidelines (for the specified offenses); or

2. the pecuniary gain of the organization from the offense; or

3. the pecuniary loss from the offense caused by the organization to the extent it was caused intentionally, knowingly or recklessly.

Pecuniary gain or loss is not used if calculation would unduly complicate or prolong the sentencing process. As the guidelines note in the Commentary to §8C2.4, the base fine measures the seriousness of the offense.

"Pecuniary gain" and "pecuniary loss" are defined in the Commentary to §8A1.2. "Pecuniary Gain" means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenue or cost savings. "Pecuniary Loss" can be the value of property taken, damaged or destroyed (§2B1.1), intended or actual loss (§2F1.1) or the amount of tax evaded (§2T1.1). Loss is determined by considering the Commentary to §§2B1.1, 2F1.1, or 2T.
Culpability Score

Once the base fine is determined, a "culpability score" must be determined under §8C2.5. The culpability score starts with the base level of five points and increases based upon the size of the organization and the involvement of high level or substantial authority personnel. For example, an organization of 5,000 or more employees and the involvement of high level personnel in the offense will result in the addition of five points to the culpability score. On the other hand, if the organization had 10 or more employees and an individual within substantial authority personnel participated in the offense, one point is added to the culpability score. See §8C2.5. The "prior history" of the organization is also considered in determining the culpability score as well as whether or not the corporation has violated a judicial order or injunction, has obstructed justice, had in place an effective program to prevent and detect violations of law and whether or not the organization self-reported, cooperated and accepted responsibility.

According to the Background notes to §8C2.5, the increased culpability scores are based on three interrelated principles:

1. an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for their organization participate in, condone, or remain willfully ignorant of criminal conduct;

2. as organizations become larger, participation in criminal conduct by management is increasingly a breach of trust or abuse of position;

3. as organizations increase in size, the risk of criminal conduct beyond that reflected in the offense increases whenever management's tolerance of the offense is pervasive.

Multipliers

The "culpability score" is then applied to a table set forth in §8C2.6 and results in minimum and maximum "multipliers." The minimum and maximum multipliers increase with the increase in the culpability score. The minimum of the guideline fine range is determined by multiplying the base fine by the applicable minimum multiplier. The maximum of the guideline fine range is determined by multiplying the base fine by the applicable maximum multiplier. See §8C2.7.

Determination of the Actual Fine

The court then determines the fine within the minimum and maximum range by considering a policy statement set forth in §8C2.8 which provides guidance in determining where within the range, the fine should fall.
In addition to the fine determined by the above procedures, any gain to the organization from the offense that has not and will not be paid as restitution or other remedial measures is to be added to the fine. See §8C2.9.

14.05.08 Sample Application Procedures

An example of the fine application procedures follows:

The organization is convicted of one count of mail fraud involving a "loss" of $400,000 under 18 U.S.C. §1341. The maximum fine permitted by statute for a felony conviction for organizations is $500,000, 18 U.S.C. §3571(c)(3) or twice the gross gain or loss, here $800,000, 18 U.S.C. §3571(d). The organization had 65 employees and an individual within "substantial authority personnel" was involved in the fraud.

Determining the Offense Level

The guideline for mail fraud is §2F1.1 and because §2F1.1 is a guideline specified in §8C2.1, the offense level is determined under §2F1.1. Under §2F1.1, the base offense level is Level 6. The loss of $400,000 adds nine levels. Assume the court finds the offense involved "more than minimal planning" and add two levels. The adjusted offense level is then Level 17.

Determining the Base Fine

The Base Fine is the greatest of the amount set forth in the fine table for Level 17 offenses ($250,000), the pecuniary gain to the organization or the pecuniary loss from the offense. Assume for the hypothetical that the loss of $400,000 is the greater amount.

Determining the Culpability Score

Under §8C2.5, start with five points. Because the organization had 50 or more employees and the offense involved "substantial authority personnel", add two points. Assume no prior history, no violation of an order, no obstruction of justice, no preventive program in place. See §8C2.5(c-f). Also assume that the corporation fully cooperated in the investigation and "accepted responsibility" and subtract two points for the cooperation and acceptance of responsibility. See §8C2.5(g) (2-3). The "culpability score" then equals four points (5 + 2 - 2 = 5).

Determining the Multipliers

Under §8C2.6, with a culpability score of 4, the minimum multiplier is 1.80 and the maximum multiplier is 2.00.

Determining the Fine Range
Under §8C2.7, the minimum fine in the range would be $400,000 (1.00 x $400,000) and the maximum fine would be $800,000 (2.00 x $400,000).

14.05.09 Implementing the Fine Sentence

If the minimum guideline fine is greater than the maximum fine authorized by statute, the maximum fine authorized by statute is to be the guideline fine. Where the maximum guideline fine is less than a minimum fine required by statute, the minimum fine required by the statute is to be the guideline fine. See §8C3.1.

If the defendant operated primarily for a criminal purpose, immediate payment of the fine is to be required. In other cases, immediate payment is to be required unless the court finds that the organization is financially unable to make immediate payment or that such would pose an undue burden on the organization. If delayed payment is permitted, the court is to require full payment at the earliest possible date either by requiring payment on a date certain or by establishing an installment schedule. See §8C3.2. The court has the authority to reduce the fine below that required by the guidelines to the extent that imposition of such a fine would impair the corporation's ability to make restitution to victims. See §8C3.3.

The court may offset the fine imposed upon a closely held organization when one or more of the individuals who owns at least 5% each in the organization has been fined in a federal criminal proceeding for the same offense conduct. §8C3.4.

14.05.10 Departures

The organizational sanctions also provide for departures from the guideline fine range. Several policy statements are set forth in §§8C4.1-8C4.11. Just as the court may depart from the applicable guidelines for individual defendants, departures from the organizational sanction guidelines may be warranted 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." See 18 U.S.C. §3553(b).

Upward departures are recommended if the offense involved:

--risk of death or bodily injury (§8C4.2)
--threat to national security (§8C4.3)
--threat to the environment (§8C4.4)
--threat to a market (§8C4.5)
--official corruption (§8C4.6).

Upward departure is also recommended if:

--the organization's culpability score is reduced by the existence of effective programs to prevent and detect violations of law which were implemented in response to a court order (§8C4.10), or
--if there was exceptional organizational culpability (§8C4.11).
Downward departures are recommended if:

--the organization provides substantial assistance to authorities (§8C4.1)
--the members or beneficiaries, other than shareholders of the organization are direct victims of the offense, meaning that a fine on the organization may increase the burden upon the victims (§8C4.8)
--remedial costs greatly exceed the gain (§8C4.9).

The substantial assistance departure is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense which the organization is being sentenced. See §8C4.1, Application Note 1.

14.05.11 Probation

In certain instances, the organizational guidelines require that the court order a term of probation. See §8D1.1. For example, probation should be ordered if it is necessary to:

--secure payment of restitution;
--enforce a remedial order; or
--ensure completion of community service or if the organization is sentenced to pay a monetary penalty which is not paid in full at the time of sentencing.

Probation will also be required if:

--the organization has more than fifty employees and no effective program to prevent and detect violations of law;
--if the organization, within five years prior to sentencing, engaged in similar misconduct; or,
--if probation is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.

Probation will be required if the sentence imposed does not include a fine.

In felony cases, the term of probation is to be at least one year but not more than five years and in any other case, not more than five years. See §8D1.2.

The guidelines also provide for conditions of probation, some of which are mandatory and some of which are recommended. Section 8D1.3 sets forth the mandatory conditions of probation which include no further violations of law and if the offense is a felony, at least a fine, restitution or community service unless such conditions would be plainly unreasonable. Optional conditions of probation are to publicize the nature of the offense committed and the steps that will be taken to prevent the recurrence of similar offenses, making periodic submissions to the court or probation officer reporting on the organization's financial condition and results of business operations, unannounced examinations of books and records, reporting to the court or probation officer any material adverse change in the organization's business or
financial condition. See §8D1.4(a)(b). The organization may also be ordered to submit a program to prevent and detect violations of law, notify employees and shareholders of its criminal behavior and the program to prevent and detect violations of law as well as reporting to the court or probation officer on the progress of implementing the programs. See §8D1.4(c).

14.05.12 Miscellaneous Provisions

The guidelines reinforce the mandatory statutory special assessment found in 18 U.S.C. §3013. If the organization is convicted of Class B misdemeanor, the special assessment is $50; a Class A misdemeanor, $125; and a felony conviction, $200. See §8E1.1 and 18 U.S.C. §3013.

The organization may also be subject to forfeiture as well as the assessment of the cost of prosecution. See §§8E1.2 and 8E1.3.

14.06 SENTENCING APPEALS

The Sentencing Reform Act provides statutory authority to appeal sentences. Under 18 U.S.C. §3742, a sentence can now be appealed on numerous grounds. In the past, sentences were rarely appealed because they were subject to review under the abuse of discretion standard, see Dorszynski v. U.S., 418 U.S. 424 (1974). The general rule was that a sentence within the statutorily prescribed limits was unreviewable. U.S. v. Tucker, 404 U.S. 443, 447 (1972). There were some constitutional limitations such as proportionality, Solem v. Helm, 463 U.S. 277, 290 (1983) and a requirement the sentence not be based on false or unreliable information, U.S. ex rel. Welch v. Lane, 738 F.2d 863 (7th Cir. 1984); U.S. v. Lee, 648 F.2d 667 (9th Cir. 1981). Limited review was also available when discretion was not exercised, U.S. v. Barker, 771 F.2d 1362 (9th Cir. 1985); U.S. v. Ely, 719 F.2d 902, 906 (7th Cir. 1983) or there was a gross abuse of discretion, U.S. v. Roper, 681 F.2d 1354 (11th Cir. 1982); U.S. v. Latimer, 415 F.2d 1288 (6th Cir. 1969).

Counsel with a case or sentencing that occurred between November 1, 1987 and November 18, 1988 should review the statute in existence before the amendments occasioned by Pub.L. 100-690, §7103.

14.06.01 Grounds for Appeal

Section 3742(a) allows for appeal by a defendant if his or her sentence was imposed in violation of the law or as a result of an incorrect application of the guidelines. If the sentence was greater than the guideline range, that is, if the term of imprisonment, supervised release, or fine is higher than the guideline maximum it can also be appealed. 18 U.S.C. §3742(a)(3). A sentence greater than that specified in a plea agreement per Fed. R. Crim. P. 11(e)(1)(C) (stipulated sentence) may be appealed. 18 U.S.C. §3742(c). Until November 18, 1988, the defendant could appeal a sentence greater than that specified in a plea agreement pursuant to Rule 11(e)(1)(B). Finally, where there is no guideline but the sentence is "plainly unreasonable" or greater than that specified in the plea agreement, it may also be appealed. 18 U.S.C. §3742(a)(4). A defendant should be able to appeal a failure to depart on the basis the sentence was "greater than necessary." See 18 U.S.C. §3553(a). The case law is to the contrary.

A sentence imposed by a magistrate can be appealed to the district court and will be treated "as though the appeal were to a court of appeals from a sentence imposed by a district court." 18 U.S.C. §3742(g).

The government can likewise appeal a sentence that is in violation of law, lower than the guideline range and/or Rule 11(e)(1)(C) plea agreement, or is "plainly unreasonable" in the absence of a guideline. 18 U.S.C. §3742(b). The government's authority to appeal a sentence lower than that specified in a Rule 11(e)(1)(B) agreement was also deleted by Pub.L. 100-690, §7103. The Attorney General or Solicitor General, however, must personally approve the filing of the notice of the appeal by the prosecutor.

The circuits have generally agreed that the district court's discretionary refusal to depart downward is reviewable only if the district court committed error in construing its authority to depart. See U.S. v.
The Ninth Circuit requires counsel to forward four copies of the presentence report with all addenda under seal to the Court of Appeals. Ortez, 902 F.2d 61 (D.C. Cir. 1990); U.S. v. Pighetti, 898 F.2d 3 (1st Cir. 1990); U.S. v. Tucker, 892 F.2d 8 (1st Cir. 1989); U.S. v. Romero, 897 F.2d 47 (2d Cir. 1990); U.S. v. Denardi, 892 F.2d 269 (3d Cir. 1989) (strong dissent would find that discretionary refusals to depart are appealable); see also U.S. v. Bayerle, 898 F.2d 28 (4th Cir. 1990); U.S. v. Pierce, 893 F.2d 669 (5th Cir. 1990); U.S. v. Gant, 902 F.2d 570 (7th Cir. 1990); U.S. v. Evidente, 894 F.2d 1000 (8th Cir. 1990); U.S. v. Morales, 898 F.2d 99 (9th Cir. 1990); U.S. v. Richardson, 901 F.2d 867 (10th Cir. 1990); U.S. v. Wright, 895 F.2d 718 (11th Cir. 1990). But see U.S. v. Williams, 503 U.S. 193 (1992) (departure decision may be incorrect application of the guidelines). However, a failure to exercise discretion can be reviewed.

In U.S. v. Koon, 518 U.S. 81 (1996), the Supreme Court held that an appellate court should give substantial deference to a sentencing court’s departure decisions and reverse only for abuse of discretion. See infra, section 14.09.

14.06.02 Record on Review

Until now, the presentence report (PSR) was not included in the record on appeal. For sentencing appeals, the PSR will be certified by the district court clerk to the court of appeals. 18 U.S.C. §3742(c). The PSR should be sent to the court of appeals under seal. That portion of the record which is deemed "pertinent" by either party will also be designated as well as "information submitted during the sentencing proceeding."

14.06.03 Standard of Review/Relief

The court of appeals must now determine whether the sentence was imposed in violation of the law or as result of an incorrect application of the guidelines. 18 U.S.C. §3742(e). If the sentence is either of these, the court of appeals "shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U.S.C. §3742(f)(1). If the sentence is outside the guideline range and is "unreasonable" -- having in mind the factors set out in 18 U.S.C. §3553(a) and the reasons stated on the record by the district court per section 3553(c) -- the court of appeals must state "specific reasons for its conclusions." 18 U.S.C. §3742(f)(2). A sentence that is too high or too low will then be set aside and remanded with appropriate instructions.

If the court of appeals finds that the sentence was not imposed in violation of the law, did not result from an incorrect application of the guidelines, and was not "unreasonable" it shall affirm the sentence. If there is no guideline and the sentence is not "plainly unreasonable" it too shall be affirmed. 18 U.S.C. §3742(f)(3). Further, under 28 U.S.C. §2106 the court of appeals can always fashion an appropriate remedy. Id.

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19 The Ninth Circuit requires counsel to forward four copies of the presentence report with all addenda under seal to the Court of Appeals.
The court of appeals must give "due regard" to the district court's judgment of the credibility of a witness; findings of fact will be accepted unless "clearly erroneous." 18 U.S.C. §3742(e). The court of appeals must give "due deference" to the district court's application of the Guidelines to the facts. *Id.*

The district court's factual findings are probably subject to clearly erroneous review, while application of the guidelines should be considered under a *de novo* standard. *See U.S. v. Stroud*, 893 F.2d 504 (2d Cir. 1990); *U.S. v. Roberts*, 898 F.2d 1465 (10th Cir. 1990).

A dispute as to which of two guideline ranges may be left unresolved where the sentence imposed falls within both the guideline range deemed applicable by the government and a lower guideline range deemed applicable by the defendant. *U.S. v. Munster-Ramirez*, 888 F.2d 1267 (9th Cir. 1989); *U.S. v. Bermingham*, 855 F.2d 925 (2d Cir. 1988). If the court's intention is not clear, the Court of Appeals should probably remand for clarification of the district court's intention under the appropriate guideline range. *U.S. v. McCrary*, 887 F.2d 485 (4th Cir. 1989); *U.S. v. Vasquez*, 874 F.2d 250 (5th Cir. 1989).

**14.06.04 Mootness Problems**

Because a normal appeal takes an average of one year to eighteen months to be decided, many challenged sentences could be served before the appeal is heard. *See, e.g.*, *U.S. v. Farmer*, 923 F.2d 1557 (11th Cir. 1991) (sentence appeal moot on completion of sentence). *But see U.S. v. Gallo*, 20 F.3d 7 (1st Cir. 1994) (presence of supervised release kept appeal from being moot); *U.S. v. Jackson*, 32 F.3d 1101 (7th Cir. 1994) (same); *U.S. v. Smith*, 991 F.2d 1468 (9th Cir. 1993).

Defense counsel should consider several alternatives: request a stay in the execution of the sentence, Fed. R. Crim. P. 38; seek bail pending appeal of the sentence, 18 U.S.C. §3143, Rule 9(b), Fed. R. App. P.; and/or file a motion to expedite the appeal, Rule 27, Fed. R. App. P., in order to allow the defendant to benefit from any relief that may be granted. For a sample motion to expedite, see infra section 14.17. The Ninth Circuit has granted emergency motions to expedite sentencing appeals when relief would otherwise be virtually meaningless and has ordered a defendant released on his own recognizance pending resentencing, *see, e.g.*, *U.S. v. King*, 849 F.2d 1259 (9th Cir. 1988).

For information regarding provisions for handling expedited appeals in the various circuits see infra section 14.16.

**14.07 DESIGNATION TO AN INSTITUTION**

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20 In *U.S. v. Montenegro-Rojo*, 908 F.2d 425, 431 (9th Cir. 1990), the court noted that the fact the defendant had already served the full amount of his prison term did not render its remand for resentencing moot. The court noted that the defendant's sentence "may still have collateral consequences" such as his possible future criminal history category as well as the length of supervised release. *Id.* at Note 8.

21 For information regarding the federal institutions, see infra section 14.14.
Authority to determine the place of confinement resides with the executive branch of government and has been delegated to the Bureau of Prisons. 18 U.S.C. §§3621, 4082. Under Bureau of Prisons regulations, assignment to a particular federal institution is governed primarily by the defendant's security classification. The security level of the defendant is determined under guidelines on the basis of the type of sentence, medical or psychiatric limitations, the existence of detainers, the severity of the offense, the types of prior commitments, the expected length of incarceration, history of escapes (or attempts), history of violence, and the defendant's precommitment status.

Each federal institution is also classified by security levels and can accept defendants with that particular security level or below.

Other variables are also considered in the designation process, including racial balance, legal residence, sentence limitations and any special handling requirements. Another factor considered is the court's recommendation. While the court has no jurisdiction to select the place where the sentence will be served, U.S. v. Dragna, 746 F.2d 457 (9th Cir. 1984), its recommendation is generally honored by the Bureau of Prisons unless completely inappropriate. When rejecting the court's recommendation, the Bureau of Prisons will set forth in writing the reasons for rejection. Closeness to home and family ties are additional considerations which will not override a security classification, but efforts will be made to designate to the closest appropriate security level institution.

14.08 PRISONER TRANSFER

The United States has entered into treaties with a variety of countries to permit the transfer of offenders to and from the United States and those foreign countries. The statutory provisions governing transfers are found at 18 U.S.C. §4100 et seq. Generally, an offender may be transferred from the United States pursuant to these provisions only to a country of which the offender is a citizen or national, if the offender consents and if the offense for which the offender was sentenced satisfies the requirement of "double criminality" as defined in the statute. 18 U.S.C. §4100(b).

The prisoner transfer treaties are managed by the Office of Enforcement Operations of the Criminal Division of the Department of Justice. The United States has bilateral transfer agreements with Bolivia, Canada, France, Mexico, Panama, Peru, Thailand and Turkey. Transfer is also available under the Council of Europe Convention on the Transfer of Sentenced Persons with Austria, Cyprus, Denmark, Finland, Greece, Hong Kong, Italy, Luxembourg, Netherlands, Spain, Switzerland, United Kingdom and some United Kingdom territories.

Forms to initiate the transfer process can be obtained from the defendant's case manager in both state and federal prisons.

14.09 DOWNWARD DEPARTURES AFTER Koon -- A FACT-BASED INQUIRY

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22 Article by Carmen D. Hernandez of the Sentencing Guidelines Group of the Federal Defenders in Washington, D.C. We thank Ms. Hernandez for her permission to reprint the article in its entirety.
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, 207 F.3d 46 (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);

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 Ninth 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)

4. Reasonableness of Departure

In United States v. Sablan, 114 F.3d 913 (9th Cir. 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.
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:

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;


(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


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.


(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**, 518 U.S. 120 (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**


D. **District Court Must Exercise Independent Discretion**

<**United States v. Campo**, 140 F.3d 415 (2d Cir. 1998). Vacates and remands for resentencing 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.

### 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.”
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 . . . .

**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. 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 have been 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


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. 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. 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. 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. Racial Disparities in State Sentencing Schemes Ground For Downward Departure
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.

§ 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. Alfaro-Zayas>, 196 F.3d1338 (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, 522 U.S. 1065 (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.


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); 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.

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.

“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.

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.”

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. 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 (2d Cir.), reh’g en 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. 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. 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. Rudolph>, 190 F.3d 720 (6th Cir. 1999). 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, 516 U.S. 137 (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

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 . . . .

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. 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 heir 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. 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, 97 F. Supp. 2d 74 (D. Mass. 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.

“No-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."

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 will serve to limit the discretion that courts had enjoyed in applying the “totality of circumstances” test in the 1st, 2nd, 9th and 10th Circuits.

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. Del Valle>, 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. 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

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. 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. Charry-Cubillos>, 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).


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.


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. Armenta-Castro, 227 F.3d 1255 (10th Cir. 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, 519 U.S. 990 (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*, 516 U.S. 137 (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 over deployment 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, 180 F.3d 1091 (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. 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.


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.


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.

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. Staufer*, 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)

14.10 CONCLUSION/SUGGESTED READING

This article gives a broad overview and very basic look at federal sentencing under the guidelines and Sentencing Reform Act of 1984. As such it is hoped the chapter will give counsel some ideas and some working knowledge of the Federal Sentencing Guidelines. For some other references, see:


**Federal Sentencing & Forfeiture Guide**, James Publishing Co. (digest) (This is a hardbound book, with softbound bi-weekly supplements, summarizing published guideline opinions from all circuits. Order through James Publishing, (714) 755-5450, P.O. Box 25202, Santa Ana, California, 92799; ($295/year).


McFadden, Clarke & Staniels, *Federal Sentencing Manual*, Matthew Bender (treatise)

*Federal Sentencing Reporter*, U.C. Press Journals, (Freed, D.J. and Miller M. eds) (This publication contains an excellent analysis of guideline issues as they develop nationwide, reprints of significant cases and updates on amendments as well as publications from the Sentencing Commission. Order through Federal Sentencing Reporter, 2120 Berkeley Way, Berkeley, California, 94720; (415) 642-4191; ($100/year).


**RULE 32. Sentence and Judgment**

(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, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. §3553; and

(B) the court explains this finding on the record.

(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.

(3) **Nondisclosure.** The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(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;

(B) The classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. §994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. §994(a); and the probation officer's explanation of any factors that may suggest a different sentence -- within or without the applicable guideline -- that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. §994(a); and

(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:

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 28 U.S.C. §3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must include:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation.

(B) sources of information obtained upon a promise of confidentiality;

or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing -- unless the defendant waives this minimum period -- the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at any hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(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 or 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.

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court -- in lieu of making that information available -- must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford the defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(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.

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the
defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(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.

(2) **Criminal Forfeiture.** If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

(e) **Plea withdrawal.** If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255.

(f) **Definitions.** For purposes of this rule- "(1) 'victim' means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by- "(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or "(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated; if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and "(2) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, U.S. Code."
### SENTENCING TABLE

*(in months of imprisonment)*

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14.14 FACILITIES

INSTITUTIONS IN THE NORTH CENTRAL REGION*
Gateway complex Tower II, 8th Floor
400 State Avenue
Kansas City, MO 66101-2492
(913) 621-3939
Fax: 913-551-1175

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<td>Chicago MCC**</td>
<td>M &amp; F</td>
<td>Administrative</td>
<td>Adult Basic Education (ABE), high school equivalency (GED) ESL; social education, shorthand, Spanish, accounting, art, typing and music; recreation. Staff complement: 234.</td>
<td>411 R 602 A</td>
<td>Pretrial and immigration detainees; inmates in community based programs; work cadre (of sentenced prisoners).</td>
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<td>Duluth, MN 55814</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, college courses through Arrowhead Community College, vocational pre-industrial technical and clerical training; UNICOR panels systems and stainless steel factory employs more than half the inmate population; recreation. Staff complement: 114.</td>
<td>885 R 448 A</td>
<td>Inmates primarily from North Central state districts.</td>
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<td>Florencia FCI</td>
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<td>Medium</td>
<td>The Federal Correctional Institute, Florence, and an adjacent satellite camp are the first of several institutions to be built utilizing a common site and core facilities. The FCI opened in 1993 and it operates a UNICOR upholstery factory, V.T. carpentry program, and a 500 hour drug treatment program. Staff complement: 373.</td>
<td>744 R 1156 A</td>
<td>Inmates primarily from North Central United States.</td>
</tr>
<tr>
<td>P.O. Box 6500</td>
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<tr>
<td>Florence FCI</td>
<td>M</td>
<td>Minimum</td>
<td>The satellite camp opened in July 1992. The FPC offers basic programs and is primarily a work cadre facility.</td>
<td>512 R 337 A</td>
<td>Camp.</td>
</tr>
<tr>
<td>P.O. Box 7500</td>
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<tr>
<td>Florence USP</td>
<td>M</td>
<td>High</td>
<td>This facility was activated in February 1994. Staff complement: 295.</td>
<td>640 R 976 A</td>
<td>Most inmates have extensive criminal histories, often involving escape and violence. Average inmate sentence is 25 years.</td>
</tr>
<tr>
<td>P.O. Box 7500</td>
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</tbody>
</table>

*Many of the institutions listed in this chart may have changed designation levels as well as programs. Information regarding the institutions may be obtained from the Bureau of Prisons.

**Accreditation status indicates whether the institution is accredited by the Commission of Accreditations for Corrections which provides an additional level of assurance that Federal prisons offer decent living conditions, provide adequate programs and services, and safeguard inmate rights by ensuring compliance with the more than 400 standards developed by the Commission. Currently there are 45 accredited institutions.
R = rated population  A = average daily population for 1997
<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greenville FCI</td>
<td>M</td>
<td>Medium</td>
<td>GED, GSL, Correspondence courses. Staff complement: 299.</td>
<td>752 R 1016 A</td>
<td>Inmates primarily from North Central United States.</td>
</tr>
<tr>
<td>P.O. Box 4000</td>
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<tr>
<td>100 U.S. Route 40</td>
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<tr>
<td>Greenville, IL 62246</td>
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<tr>
<td>(618) 664-6200</td>
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<tr>
<td>Fx: (719) 664-6372</td>
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<tr>
<td>Leavenworth USP</td>
<td>M</td>
<td>High</td>
<td>Cellblocks, ABE, GED, ESL; degree programs through local college; vocational training in building maintenance, graphic arts design, engraving and painting. Pre-industrial textile and printing. UNICOR include print, furniture, textile and mattress factories. UNICOR employs 703 inmates. Staff complement: 543.</td>
<td>1197 R 1038 A</td>
<td>Inmates are primarily from Midwestern and Western states and Cuban detainees.</td>
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<tr>
<td>1300 Metropolitan</td>
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<tr>
<td>Leavenworth, KS 66048</td>
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<tr>
<td>(913) 682-8700</td>
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<tr>
<td>FTS 758-1000</td>
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<tr>
<td>Fx: (913) 682-0041</td>
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<tr>
<td>Leavenworth FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Educational, counseling, recreational and industrial programs. UNICOR mattress and textile factory.</td>
<td>396 R 392 A</td>
<td>Short sentenced prisoners and inmates placed in camp from main facility after showing of compliance w/prison rules.</td>
</tr>
<tr>
<td>1300 Metropolitan</td>
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<td>Leavenworth, KS 66048</td>
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<tr>
<td>Fx: (913) 682-3617</td>
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<tr>
<td>Marion USP</td>
<td>M</td>
<td>High</td>
<td>ABE, adult secondary education (via cable TV), correspondence courses, and individualized instruction. UNICOR cable factory employs 62 inmates. Marion is the only security level 6 institution within the U.S. Bureau of Prisons system. Staff complement: 361.</td>
<td>482 R 353 A</td>
<td>Offenders from all parts of U.S., demonstrating &quot;need for high security confinement.&quot; Inmates have serious records of violence, escape and therefore require unusually high level of security.</td>
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<tr>
<td>4500 Prison Camp Rd.</td>
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<td>P.O. Box 2000</td>
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<tr>
<td>Marion, IL 62959</td>
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<tr>
<td>(618) 964-1441</td>
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<tr>
<td>FTS 277-5400</td>
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<tr>
<td>Fx: (618) 964-1695</td>
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<tr>
<td>Marion FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Maintenance work outside the main institution and for selected departmental functions within penitentiary. Range of educational courses (varies). Staff complement 361.</td>
<td>310 R 266 A</td>
<td>Short term offenders; offenders nearing completion of sentence.</td>
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<tr>
<td>Marion, IL 62959</td>
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<tr>
<td>(618) 964-1441</td>
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<tr>
<td>FTS 27-0306</td>
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<tr>
<td>Fx: (618) 964-1695</td>
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<tr>
<td>Oxford FCI**</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, Associate and Bachelors degree program in business through University of Wisconsin; vocational training A.A. degree in hotel-restaurant cookery offered through Fox Valley Technical College. UNICOR cable assembly factory employs 40 percent of inmate population. Staff complement: 346.</td>
<td>586 R 1032 A</td>
<td>Primarily long-term from North Central State Districts.</td>
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<td>P.O. Box 500</td>
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<tr>
<td>Oxford, WI 53952-0500</td>
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<tr>
<td>(608) 584-5511</td>
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<tr>
<td>FTS 364-2000</td>
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<tr>
<td>Fx: (608) 584-6371</td>
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<tr>
<td>Oxford FPC**</td>
<td>M</td>
<td>Adjacent/Minimum</td>
<td>Educational and vocational training opportunities available. UNICOR warehouse operation employs approximately 20 inmates.</td>
<td>156 R 162 A</td>
<td>Short term/minimal level security offenders not requiring ongoing care, drug/alcohol treatment.</td>
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<tr>
<td>P.O. Box 500</td>
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<td>Oxford, WI 53952-0500</td>
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<tr>
<td>Rochester FMC</td>
<td>M &amp; F</td>
<td>Medium</td>
<td>Serves as a major psychiatric and medical referral center for federal prison system. ABE, GED, ESL, limited college courses through Rochester Community College; UNISAT a small &quot;sheltered workshop&quot; operates in the mental health unit as a satellite unit of the Oxford UNICOR factory. Staff complement 469.</td>
<td>677 R 661 A</td>
<td>Small general population/work force; mostly medical cases returned to inst. after treatment.</td>
</tr>
<tr>
<td>P.O. Box 4600</td>
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<tr>
<td>Rochester, MN 55903-4600</td>
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<tr>
<td>(507) 287-0674</td>
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<tr>
<td>FTS 787-1110</td>
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<tr>
<td>Fx: (507) 282-9601</td>
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<tr>
<td>Name/Location of Institution</td>
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<td>Overview</td>
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<tr>
<td>Sandstone FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, college courses available through Anoka-Ramsey Community College; vocational training in welding and auto shop; pre-industrial training in printing and glove manufacturing. UNICOR employs 2442 inmates in glove factory and print plant. Staff complement: 253.</td>
<td>375 R 711 A</td>
<td>36.7 years; average age 36.7 years.</td>
</tr>
<tr>
<td>Springfield MCFP**</td>
<td>M</td>
<td>Administrative</td>
<td>Specializing in intensive surgical, medical and psychiatric treatment; ABE, GED, ESL, pre-release program, adult continuing education, college correspondence courses. 1 work cadre unit. Staff complement: 676.</td>
<td>912 R 1005 A</td>
<td>Patients transferred from other inst. for diagnosis/treatment</td>
</tr>
<tr>
<td>Terre Haute USP**</td>
<td>M</td>
<td>High</td>
<td>ABE, GED, ESL, Associate degree in general studies from Vincennes University; and B.A. degree in English from Indiana University. Vocational training. UNICOR employs more than 50 percent of employable population in textile and canvas mill. Staff complement: 513.</td>
<td>766 R 1215 A</td>
<td>Offenders with extensive criminal history, as well as those considered to be sophisticated offenders.</td>
</tr>
<tr>
<td>Terre Haute FPC**</td>
<td>M</td>
<td>Minimum</td>
<td>Wide Range of educational opportunities available, including vocational training in electrical and diesel mechanics. UNICOR sewing operation employs 40 percent of the inmates.</td>
<td>284 R 409 A</td>
<td>Adjacent camp.</td>
</tr>
<tr>
<td>Yankton FPC</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, college courses; vocational training in horticulture, landscape management; houses inmates who do not have records of violence, escape, sexual offenses, or major medical or psychiatric problems. Staff complement 116.</td>
<td>605 R 470 A</td>
<td>Average age is 36; average sentence of 52 months for drug offenses.</td>
</tr>
</tbody>
</table>

**INSTITUTIONS IN THE NORTHEAST REGION**

Northeast Regional Office
U.S. Customs House, 7th Floor
2d and Chestnut Streets
Philadelphia, PA 19106
(215) 597-6317
FTS 597-6317

<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allenwood FPC**</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, ESL, adult continuing education, pre-release college program offered through correspondence courses. Vocational training in small engine repair, barbering, and exploratory masonry. UNICOR industrial furniture factory employs more than half the inmate population. Staff complement: 360.</td>
<td>457 R 838 A</td>
<td>Houses inmates who have no record of violent crimes or sexual offenses. Primarily first offenders, average age of 40.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>P.O. Box 999 Sandstone, MN 55072 (320) 245-2262 FTS 782-0011 Fx: (320) 245-0345</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, college courses available through Anoka-Ramsey Community College; vocational training in welding and auto shop; pre-industrial training in printing and glove manufacturing. UNICOR employs 2442 inmates in glove factory and print plant. Staff complement: 253.</td>
<td>375 R 711 A</td>
<td>Average age 7.1 years; average age 36.7 years.</td>
</tr>
<tr>
<td>P.O. Box 4000 Springfield, MO 65808 (417) 862-7041 FTS 271-8000 Fx: (417) 837-1711</td>
<td>M</td>
<td>Administrative</td>
<td>Specializing in intensive surgical, medical and psychiatric treatment; ABE, GED, ESL, pre-release program, adult continuing education, college correspondence courses. 1 work cadre unit. Staff complement: 676.</td>
<td>912 R 1005 A</td>
<td>Patients transferred from other inst. for diagnosis/treatment</td>
</tr>
<tr>
<td>Highway 63 South 47808 (812) 238-1531 FTS 335-0531 Fx: (812) 238-9873</td>
<td>M</td>
<td>High</td>
<td>ABE, GED, ESL, Associate degree in general studies from Vincennes University; and B.A. degree in English from Indiana University. Vocational training. UNICOR employs more than 50 percent of employable population in textile and canvas mill. Staff complement: 513.</td>
<td>766 R 1215 A</td>
<td>Offenders with extensive criminal history, as well as those considered to be sophisticated offenders.</td>
</tr>
<tr>
<td>Highway 63 South 47808 (812) 238-1531 FTS 335-0531 Fx: (812) 238-1531</td>
<td>M</td>
<td>Minimum</td>
<td>Wide Range of educational opportunities available, including vocational training in electrical and diesel mechanics. UNICOR sewing operation employs 40 percent of the inmates.</td>
<td>284 R 409 A</td>
<td>Adjacent camp.</td>
</tr>
<tr>
<td>Box 680 Yankton, SD 57078 (605) 665-3262 FTS 782-1400 Fx: (605) 665-4703</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, college courses; vocational training in horticulture, landscape management; houses inmates who do not have records of violence, escape, sexual offenses, or major medical or psychiatric problems. Staff complement 116.</td>
<td>605 R 470 A</td>
<td>Average age is 36; average sentence of 52 months for drug offenses.</td>
</tr>
</tbody>
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INSTITUTIONS IN THE NORTHEAST REGION

Northeast Regional Office
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(215) 597-6317
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<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
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<tbody>
<tr>
<td>Allenwood FPC**</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, ESL, adult continuing education, pre-release college program offered through correspondence courses. Vocational training in small engine repair, barbering, and exploratory masonry. UNICOR industrial furniture factory employs more than half the inmate population. Staff complement: 360.</td>
<td>457 R 838 A</td>
<td>Houses inmates who have no record of violent crimes or sexual offenses. Primarily first offenders, average age of 40.</td>
</tr>
</tbody>
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<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
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<tr>
<td>P.O. Box 1000 Montgomery, PA 17752 (570) 547-1641 Fx: (717) 547-1504</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, ESL, adult continuing education, pre-release college program offered through correspondence courses. Vocational training in small engine repair, barbering, and exploratory masonry. UNICOR industrial furniture factory employs more than half the inmate population. Staff complement: 360.</td>
<td>457 R 838 A</td>
<td>Houses inmates who have no record of violent crimes or sexual offenses. Primarily first offenders, average age of 40.</td>
</tr>
<tr>
<td>Name/Location of Institution</td>
<td>Sexes</td>
<td>Security Level</td>
<td>Overview</td>
<td>R/A Capacity</td>
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<tr>
<td>Allenwood FCI</td>
<td>M</td>
<td>Low</td>
<td>Received its first inmates in August 1993. Staff complement: 309.</td>
<td>992 R</td>
<td>1270 A</td>
</tr>
<tr>
<td>P.O. Box 2500</td>
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<td>Inmates age range from 19-78.</td>
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<tr>
<td>White Deer, PA 17887</td>
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<tr>
<td>(570) 547-7950 Fx:(717) 547-7751</td>
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</tr>
<tr>
<td>Allenwood USP**</td>
<td>M</td>
<td>High</td>
<td>This facility is one of four correctional facilities located at the Federal Correctional Complex in Allenwood, Pennsylvania. This facility was activated in November 1993. Staff complement: 378.</td>
<td>2183 R</td>
<td>1429 A</td>
</tr>
<tr>
<td>P.O. Box 3500</td>
<td></td>
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<td>Houses serious offenders.</td>
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<tr>
<td>White Deer, PA 17887</td>
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<tr>
<td>(570) 547-0963 Fx: (717) 547-6124</td>
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<tr>
<td>Brooklyn MDC</td>
<td>M &amp; F</td>
<td>Administrative</td>
<td>Designed to house pretrial and unsentenced detainees appearing in Federal courts. A permanent facility will be opened in 1995.</td>
<td>564 R</td>
<td>64 A</td>
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<tr>
<td>100 29th St. Brooklyn, NY 11232</td>
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<td>Pretrial inmates.</td>
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<tr>
<td>(718) 832-1039 Fx: (718) 882-4225</td>
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<tr>
<td>Danbury FCI</td>
<td>F</td>
<td>Low</td>
<td>ABE, GED, ESL, adult continuing education; college degree program through Marist College; training in 10 vocational programs, 6 apprenticeships, and 4 multi-industrial occupational programs conducted in cooperation with UNICOR (machine shop). UNICOR electronic cable factory, business office, molding and potting department employs 35 percent of the male population. Staff complement: 304.</td>
<td>508 R</td>
<td>981 A</td>
</tr>
<tr>
<td>33 1/2 Pembroke Rd. Danbury, CT 06810</td>
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<td></td>
<td>Adult male offenders convicted of nonviolent crimes. Average age is 36.</td>
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<tr>
<td>(203) 743-6471 FTS 642-9071 Fx: (203) 746-7393</td>
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<tr>
<td>Danbury FPC</td>
<td>F</td>
<td>Minimum</td>
<td>ABE, GED, and Marist College courses are available. Approximately 50 inmates are employed in warehousing, packaging, quality control sections and procurement for the main institution's UNICOR cable factory.</td>
<td>178 R</td>
<td>169 A</td>
</tr>
<tr>
<td>Danbury, CT 06810</td>
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<td>Short-term low security females. Average sentence is 8 and 10 months.</td>
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<tr>
<td>(203) 743-6471 FTS 642-9071 Fx: (203) 746-7393</td>
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<tr>
<td>Fairton FCI</td>
<td>M</td>
<td>Medium</td>
<td>GED, GSL, Adult education, correspondence. Staff complement: 362.</td>
<td>751 R</td>
<td>1068 A</td>
</tr>
<tr>
<td>P.O. Box 280</td>
<td></td>
<td></td>
<td>Only maximum security inst. on East Coast.</td>
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<tr>
<td>Fairton, NJ 08320</td>
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<tr>
<td>(609) 453-1177 Fx: (609) 453-4015</td>
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<tr>
<td>Lewisburg USP**</td>
<td>M</td>
<td>High</td>
<td>ABE, GED, ESL, college courses offered through Park College, Parkville, MO; correspondence courses in vocational training, certification programs in dental technology heating/air conditioning and pest control managing; apprenticeship training available in 24 trades. UNICOR employs 450 inmates for metal factory.</td>
<td>857 R</td>
<td>1129 A</td>
</tr>
<tr>
<td>R.D. #5 Lewisburg, PA 17837</td>
<td></td>
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<td>Only maximum security inst. on East Coast.</td>
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<tr>
<td>(570) 523-1251 FTS 591-3800 Fx: (717) 523-5805</td>
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<tr>
<td>Lewisburg FPC</td>
<td>M</td>
<td>Adjacent/Minimum Camp</td>
<td>Serves as satellite to main facility.</td>
<td>352 R</td>
<td>275 A</td>
</tr>
<tr>
<td>R.D. #5 Lewisburg, PA 17837</td>
<td></td>
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<td>Camp.</td>
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<tr>
<td>(717) 523-1251 FTS 591-3800 Fx: (717) 523-1251</td>
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<tr>
<td>Name/Location of Institution</td>
<td>Sexes</td>
<td>Security Level</td>
<td>Overview</td>
<td>R/A Capacity</td>
<td>Population</td>
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<tr>
<td>Lewisburg ICC</td>
<td>M</td>
<td>Minimum</td>
<td>This 192 bed facility opened in 1991. It has a highly structured program of work, education, physical training and life skill development.</td>
<td>180 R</td>
<td>191 A</td>
</tr>
<tr>
<td>Lewisburg, PA</td>
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<td></td>
<td>Minimum security offenders.</td>
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<tr>
<td>17837</td>
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<td>(717) 523-1251</td>
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<td>Fx: (717) 523-1251</td>
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<tr>
<td>Loretto FCI</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, ESL, adult continuing education; correspondence courses and college classes; vocational training for food service specialist, information processing, blueprint reading, and self-study electronics.  UNICOR employs 200 inmates in electronics cable factory.  Staff complement: 227.</td>
<td>473 R</td>
<td>749 A</td>
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<tr>
<td>P.O. Box 1000</td>
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<td>First offenders; 2.5 and 5 years.  Majority of offenders convicted drug related and &quot;white collar&quot; crimes.</td>
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<tr>
<td>Loretto, PA 15940</td>
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<tr>
<td>(814) 472-4140</td>
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<td>FTS 592-0000</td>
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<tr>
<td>Fx: (814) 472-6046</td>
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<tr>
<td>McKean FCI</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL, ALE, college courses available through University of Pittsburgh/Bradford; correspondence courses; vocational training in business education, bakery, horticulture, masonry and carpentry programs.  UNICOR employs more than 200 inmates in furniture factory producing laminated components.  Staff complement: 316.</td>
<td>784 R</td>
<td>986 A</td>
</tr>
<tr>
<td>P.O. Box 5000</td>
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<td></td>
<td>Inmates primarily from Northeastern U.S.; average age is 30; average sentence is 8 years.</td>
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<tr>
<td>(McKean County)</td>
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<tr>
<td>Bradford, PA 16701</td>
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<tr>
<td>(814) 362-8900</td>
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<tr>
<td>FTS 923-1900</td>
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<tr>
<td>Fx: (814) 362-3287</td>
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<tr>
<td>McKean FPC</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, ESL and continuing education classes available. U.S. Forest Service &amp; Bradford Regional Airport employ inmates.</td>
<td>292 R</td>
<td>258 A</td>
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<tr>
<td>P.O. Box 5000</td>
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<td>Average stay is 24 months; average age is 30.</td>
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<tr>
<td>Bradford, PA 16701</td>
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<td>Fx: (814) 362-3287</td>
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<tr>
<td>New York MCC**</td>
<td>M &amp; F</td>
<td>Administrative</td>
<td>Pretrial inmates only allowed to participate in GED &amp; ESL.  Designated inmates participate in pre-release programming.  UNICOR: none.  Staff complement: 289.</td>
<td>507 R</td>
<td>843 A</td>
</tr>
<tr>
<td>150 Park Row</td>
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<td>90 day average stay mostly pre-trial pre-sentence detainees.</td>
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<tr>
<td>New York, NY 10007</td>
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<tr>
<td>(212) 240-9656</td>
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<tr>
<td>FTS 662-9130</td>
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<tr>
<td>Fx: (212) 417-7673</td>
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<tr>
<td>Otisville FCI**</td>
<td>M</td>
<td>Administrative</td>
<td>ABE, GED, social education, adult continuing education; college courses and independent studies; vocation training in sanitation maintenance and computer literacy.  UNICOR glove operation employs approximately 30 inmates.  Staff complement: 329.</td>
<td>665 R</td>
<td>988 A</td>
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<tr>
<td>P.O. Box 600</td>
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<td>Houses overflow of pre-trial and holdover inmates from NY NCC.</td>
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<tr>
<td>Otisville, NY 10963</td>
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<tr>
<td>(914) 386-5855</td>
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<tr>
<td>FTS 887-1055</td>
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<tr>
<td>Fx: (914) 386-9455</td>
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<tr>
<td>Petersburg FCI</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, social ed, health courses, pre-release classes, college courses.  Vocational; welding, machine shop, auto body repair, masonry, and auto mechanics.  Apprenticeship programs in several trades including soldering and quality control.  Staff complement: 375.</td>
<td>734 R</td>
<td>1178A</td>
</tr>
<tr>
<td>P.O. Box 1000</td>
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<td></td>
<td>Houses offenders primarily from the Eastern U.S.</td>
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<tr>
<td>Petersburg, VA 23804-1000</td>
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<tr>
<td>(804) 733-7881</td>
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<tr>
<td>FTS 920-3230</td>
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<tr>
<td>Fx: (804) 733-7881</td>
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<tr>
<td>Name/Location of Institution</td>
<td>Sexes</td>
<td>Security Level</td>
<td>Overview</td>
<td>R/A Capacity</td>
<td>Population</td>
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<tr>
<td>Petersburg FPC**</td>
<td>M</td>
<td>Adjacent/Minimum Camp</td>
<td>Education, vocational training. UNICOR refinishing and cable packaging factories employs approximately half the camp inmates.</td>
<td>100 R</td>
<td>107 A</td>
</tr>
<tr>
<td>P.O. Box 1000 Petersburg, VA 23804-1000 (804) 733-7881 FTS 920-3230 Fx: (804) 733-3728</td>
<td></td>
<td></td>
<td></td>
<td>Camp.</td>
<td></td>
</tr>
<tr>
<td>Ray Brook FCI**</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL, college courses; off site college-level courses through the Career Learning Program; vocational training in mechanical drawing and architectural drafting, business computer applications, and horticulture/landscaping. Apprenticeship training for barbering, lithographic stripper, press operator, bookbinder, and quality assurance. UNICOR print plant, drapery and textile factories employ 375 inmates. Staff complement: 279.</td>
<td>780 R</td>
<td>1015 A Male offenders from Northeastern U.S.</td>
</tr>
<tr>
<td>P.O. Box 300 Ray Brook, NY 12977-0300 (518) 891-5400 FTS 561-3075 Fx: (518) 891-0011</td>
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<tr>
<td>P.O. Box 700 Minersville, PA 17954 (717) 544-7100 Fx: (717) 544-7225</td>
<td></td>
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<td>Staff complement: 348</td>
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</tbody>
</table>

INSTITUTIONS IN THE SOUTH CENTRAL REGION
South Central Regional Office
4211 Cedar Springs Road, Suite 300
Dallas, TX 75219
(214) 224-3389
Fax: (214) 224-3420
FTS 729-9700

<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bastrop FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, ESL, computer learning center; A.A. degree available through Blinn College; vocational programs include small engine repair, commercial arts, air conditioning, computer applications building trades and horticulture; UNICOR employs 225 inmates in helmet and broom manufacturing factory. Chemical abuse/holistic health unit. Staff complement: 251.</td>
<td>793 R</td>
<td>1037A Average length of sentence is eight years average age is 37.</td>
</tr>
<tr>
<td>P.O. Box 730 Bastrop, TX 78602 (512) 321-3903 FTS 521-3050 Fx: (512) 321-0117</td>
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<tr>
<td>Bastrop FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Camp adjacent to FCI with same programs.</td>
<td>122 R</td>
<td>120 A</td>
</tr>
<tr>
<td>P.O. Box 730 Bastrop, TX 78602 (512) 321-3903 FTS 521-3050 Fx: (512) 321-3903</td>
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<tr>
<td>Institution</td>
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<td>Security Level</td>
<td>Overview</td>
<td>Capacity</td>
<td>Population</td>
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<tr>
<td>Big Spring FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, ESL, college correspondence courses, adult continuing education (including auctioneering, Spanish, and securities investments), college correspondence courses, A.A. degree programs in petroleum technology and business administration available. Inmates must be capable of performing work in the camp's industrial operations and maintenance assignments. Vocational training available in heating/air conditioning, masonry, building trades, electronics, landscape horticulture, plumbing and business education. UNICOR employs 225 inmates in electronic factory. Staff complement: 252.</td>
<td>104 R</td>
<td>887 A</td>
</tr>
<tr>
<td>Big Spring FPC</td>
<td>M</td>
<td>Minimal</td>
<td>Camp provides labor force in support of main institution as well as several local federal agencies.</td>
<td>144 R</td>
<td>146 A</td>
</tr>
<tr>
<td>Bryan FPC</td>
<td>F</td>
<td>Minimum</td>
<td>ABE, GED, ESL, vocational training in horticulture and computer technology. Open dormitories with 4-10 inmates per room. Staff complement: 193.</td>
<td>720 R</td>
<td>664 A</td>
</tr>
<tr>
<td>Bryan ICC</td>
<td>F</td>
<td>Minimum</td>
<td>Houses inmates in two open-boy areas and involves them in highly structured program of work, education, physical training and life skills development.</td>
<td>82 R</td>
<td>106 A</td>
</tr>
<tr>
<td>Carswell FMC</td>
<td>F</td>
<td>Minimum/Administration/Low</td>
<td>The Federal Medical Center opened its 300 bed facility in July 1994. The former Air Force hospital facility is the major medical referral center for female inmates. Staff complement: 446.</td>
<td>550 R</td>
<td>532 A</td>
</tr>
<tr>
<td>El Paso, FPC</td>
<td>M</td>
<td>Minimum Camp</td>
<td>Education on contract basis. No vocational training available. UNICOR employs all inmates for Fort Bliss Army Post laundry facility. Houses inmates without record of escape, violence, sexual offenses or major medical/psychiatric problems. Staff complement: 103.</td>
<td>308 R</td>
<td>213 A</td>
</tr>
<tr>
<td>El Reno FCI**</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, adult continuing education, social/pre-release programs, college courses; vocational training in welding, building maintenance, auto mechanics, meat cutting, building construction and business and dental lab. UNICOR metal factory employs 450 inmates for production of bed frames, shelves and catwalks. Chemical abuse unit and a holdover unit. Staff complement: 441.</td>
<td>820 R</td>
<td>1090 A</td>
</tr>
</tbody>
</table>

Most inmates from Texas.

Houses female offenders primarily from Texas and surrounding states.

Inmates in need of physical or psychiatric treatment.

Most inmates from Southwestern U.S.

Serves as a hub of inmate movement for federal prison system.
<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>El Reno FPC**</td>
<td>M</td>
<td>Minimum Camp</td>
<td>Houses minimum security inmates who are employed on its 3,000 acre farm providing beef and milk for El Reno and eight other federal institutions.</td>
<td>216 R 242 A</td>
<td>Inmates from Texas.</td>
</tr>
<tr>
<td>El Reno, OK</td>
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<tr>
<td>P.O. Box 1000</td>
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<td>(405) 262-4875</td>
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<td>FTS 743-1011</td>
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<tr>
<td>Fx: (405) 262-6266</td>
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<tr>
<td>Fort Worth FMC</td>
<td>M</td>
<td>Low/Administrative</td>
<td>ABE, GED, computer programming; vocational training in graphics, printing, and bookbinding; business education; UNICOR sign factory provides 526 inmates. UNICOR also provides staff to extensive health units serving seriously disabled inmates. Staff complement: 395.</td>
<td>1132 R 1444 A</td>
<td>Inmates population inmates and inmates requiring special medical and drug/alcohol abuse treatment.</td>
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<tr>
<td>3150 Horton Road</td>
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<tr>
<td>Fort Worth, TX</td>
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<td>76119-5996</td>
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<td>(817) 534-8400</td>
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<td>FTS 738-4011</td>
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<tr>
<td>Fx: (817) 413-3350</td>
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<tr>
<td>La Tuna FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, ESL, adult continuing education, computer programming, Spanish, and college correspondence courses available. Vocational training in auto mechanics, radio/TV repair, building trades and air conditioning/refrigeration. UNICOR brush factory and business office employ up to 400 inmates. Staff complement: 315.</td>
<td>556 R 1090 A</td>
<td>Inmates 40% are Mexican, or South and Central American nationals.</td>
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<td>La Tuna, TX 88021</td>
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<tr>
<td>(915) 886-3422</td>
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<tr>
<td>Fx: (915) 886-4977</td>
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<tr>
<td>La Tuna FPC**</td>
<td>M</td>
<td>Minimum Camp</td>
<td>Camp, educational programs similar to those above. UNICOR operates a furniture refinishing factory, a warehouse, and a plastic operation.</td>
<td>324 R 314 A</td>
<td>Inmates Camp.</td>
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<tr>
<td>P.O. Box 1000</td>
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<td>La Tuna, TX 88021</td>
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<tr>
<td>(915) 886-3422</td>
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<tr>
<td>Fx: (915) 886-4977</td>
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<tr>
<td>Millington FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Opened in 1990, Millington is located on the largest inland naval base in the world. FPC provides 175 inmates daily to the Naval Air Station for janitorial and maintenance services. ABE, GED. Staff complement: 83.</td>
<td>403 R 507 A</td>
<td>Inmates Short term offenders from Tennessee, Arkansas and Mississippi.</td>
</tr>
<tr>
<td>6696 Navy Road</td>
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<tr>
<td>Millington, TN</td>
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<td>38053</td>
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<tr>
<td>(901) 872-2277</td>
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<td>FTS 493-8299</td>
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<tr>
<td>Fx: (901) 873-8202</td>
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<tr>
<td>Oakdale FCI</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL, life skills education. Vocational training in horticulture, building trades, building maintenance, heating/air conditioning. UNICOR textile factory employs 250-300 inmates. Staff complement: 299.</td>
<td>826 R 1135 A</td>
<td>Inmates Houses sentenced aliens and regularly sentenced federal inmates.</td>
</tr>
<tr>
<td>P.O. Box 5050</td>
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<tr>
<td>Oakdale, LA 71463</td>
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<tr>
<td>(318) 335-4070</td>
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<td>FTS 687-9000</td>
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<td>Fx: (318) 335-3936</td>
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<td>P.O. Box 5060</td>
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<td>(318) 335-4466</td>
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<td>FTS 490-8100</td>
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<tr>
<td>Fx: (318) 335-4476</td>
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<tr>
<td>Seagoville FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, ESL; college correspondence, vocational training courses in automotive, upholstery, computers, food management/restaurant and industrial training in textiles. UNICOR upholstery and textile factories employ 135 inmates. Staff complement: 277.</td>
<td>866 R 1181 A</td>
<td>Inmates Average length of sentence nine years. Inmates primarily from South Central U.S.</td>
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<td>2113 N. Highway 175</td>
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<td>Seagoville, TX</td>
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<td>75159</td>
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<tr>
<td>(972) 287-2911</td>
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<td>FTS 729-8471</td>
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<td>Fx: (972) 287-5466</td>
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<td>Name/Location of Institution</td>
<td>Sexes</td>
<td>Security Level</td>
<td>Overview</td>
<td>R/A Capacity</td>
<td>Population</td>
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<tr>
<td>Texarkana FCI**</td>
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<td>Texarkana, TX 75501</td>
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<tr>
<td>(903) 838-4587</td>
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<td>FTS 731-3190</td>
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<td>Fx: (903) 223-4424</td>
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<tr>
<td></td>
<td>M</td>
<td>Minimum</td>
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<td>1190 A</td>
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<td>transferred here to serve remainder of sentences.</td>
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<tr>
<td></td>
<td>M</td>
<td>Minimum</td>
<td></td>
<td>220 R</td>
<td>336 A</td>
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<td></td>
<td>Primarily houses inmates from South Central and Southeastern U.S. and inmates finishing longer terms.</td>
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<td></td>
<td>M</td>
<td>Minimum</td>
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<td>784 R</td>
<td>1098 A</td>
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<td></td>
<td>Primarily houses inmates from Southwestern U.S.</td>
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<tr>
<td>Three Rivers FPC** P.O. Box 4000</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL, ACE, social/pre-release programs, and junior college courses; vocational training programs, building trades, business education, waste water treatment, horticulture/landscape. UNICOR shoe factory expects to employ approximately 250 inmates. Staff complement: 316.</td>
<td>256 R</td>
<td>307 A</td>
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<tr>
<td>Three Rivers, TX 78071</td>
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<td>Camp.</td>
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<tr>
<td>(512) 786-3576</td>
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<tr>
<td>FTS 477-0000</td>
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<tr>
<td>Fx: (512) 786-4909</td>
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<td></td>
<td>M</td>
<td>Minimum</td>
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<td>1429 R</td>
<td>2183 A</td>
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<td>ABE, French, Spanish and computer; college correspondence courses through Mercer and Ohio University; vocational training, bartering, heating and air conditioning. UNICOR employs 275 in mail bag repair, weather parachute production, mattresses and battle dress uniform production. Staff complement: 751.</td>
<td>Currently houses medium security inmates, holdovers and pretrial inmates.</td>
<td></td>
</tr>
</tbody>
</table>

INSTITUTIONS IN THE SOUTHEAST REGION
Southeast Regional Office
3800 Camp Creek Parkway, S.W.
Atlanta, GA 30331-6226
(678) 686-1200
Fax: (678) 686-1229
Minimum Camp

ABE: Inmates are employed in camp maintenance and in UNICOR factory manufacturing mattresses, mailbags, survival backpacks, and weather balloon parachutes.

Houses nonviolent offenders.
<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eglin FPC**</td>
<td>M</td>
<td>Minimum</td>
<td>Labor crews to Air Force Base; ABE, GED, ESL and some college classes in English and Spanish; vocational programs in diesel and marine small engine mechanics. Staff complement: 134.</td>
<td>800 R 863 A</td>
<td>Houses inmates who do not have violent records or major medical/physical problems.</td>
</tr>
<tr>
<td>Eglin Air Force Base P.O. Box 600</td>
<td></td>
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<tr>
<td>Eglin, FL 32542 (850) 882-8522 FTS 534-9100 Fx: (904) 729-8261</td>
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</tr>
<tr>
<td>Guaynabo MDC P.O. Box 2146</td>
<td>M &amp; F</td>
<td>Administrative</td>
<td>First facility activated outside continental U.S.. Staff complement: 208.</td>
<td>932 R 855 A</td>
<td>Pretrial and immigration detainees and work cadre inmates.</td>
</tr>
<tr>
<td>San Juan Puerto Rico 00922 (787) 749-4480 FTS 782-3488 Fx: (787) 749-4363</td>
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<tr>
<td>Jesup FCI 2600 Hwy 301 S. Jesup, GA 31545 (912) 427-0870 FTS 230-0111 Fx: (912) 427-1125</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ACE, ESL, post-secondary education; vocational training in principles of technology, building/trade maintenance, pre-industrial sewing, computer assisted drafting; UNICOR employs 300 inmates in textile facilities. Staff complement: 323.</td>
<td>744 R 921 A</td>
<td>Opened in 1990, houses offenders primarily from Southeastern U.S.</td>
</tr>
<tr>
<td>Marianna FCI 3625 FCI Road Marianna, FL 32446 (850) 526-2313 FTS 848-0514 Fx: (850) 482-6837</td>
<td>M &amp; F</td>
<td>Medium/Male High/Female</td>
<td>ABE, GED, ESL, college courses; vocational training in business education; UNICOR furniture factory, upholstery factory, ground cloth factory and data processing operation employs 20% of the inmate population. Staff complement: 363.</td>
<td>805 R 1091 A</td>
<td>Houses male and female inmates in separate areas.</td>
</tr>
<tr>
<td>Marianna FPC 3625 FCI Road Marianna, FL 32446 (904) 526-1313 FTS 848-0514 Fx: (904) 482-6837</td>
<td>F</td>
<td>Minimum</td>
<td>Opened in 1988, houses female offenders in 2 living units of double cubicles. ABE, GED, and college courses available; UNICOR operates an automated data processing factory.</td>
<td>296 R 204 A</td>
<td>Camp.</td>
</tr>
<tr>
<td>Miami FCI** 15801 S.W. 137th Avenue Miami, FL 33177 (305) 259-2100 FTS 822-1100 Fx: (305) 255-2160</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL, computer education, pre-release program available; social education, ceramics, leathcraft, music, electronics, pottery and arts; vocational training in culinary arts; UNICOR employs 190 inmates in textile factory. Staff complement: 313.</td>
<td>581 R 790 A</td>
<td>Pre-trial and pre-sentence detainees.</td>
</tr>
<tr>
<td>Miami FPC** 15801 S.W. 137th Miami, FL 33177 (305) 253-4400 FTS 822-1100 Fx: (305) 253-4400</td>
<td>M</td>
<td>Minimum</td>
<td>Adjacent camp.</td>
<td>280 R 294 A</td>
<td>Camp.</td>
</tr>
</tbody>
</table>
Opened in 1988, FPC houses offenders who do not have records of escape, violence, or major medical or emotional problems. Inmates serve as auxiliary work force in maintenance for Naval Air Station. ABE, GED, ESL and college courses available. Staff complement: 100.
<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A</th>
<th>Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Talladega FCI**</td>
<td>M</td>
<td>Medium</td>
<td>ABE and post-secondary education; vocational programs include drafting, woodworking, heating and air conditioning, welding and masonry; extensive recreation program; UNICOR employs 200 inmates in furniture factory. Staff complement: 339.</td>
<td>699 R</td>
<td>1068 A</td>
<td>Southeastern U.S.</td>
</tr>
<tr>
<td>Talladega FPC**</td>
<td>M</td>
<td>Minimum</td>
<td>Satellite facility to main institution.</td>
<td>296 R</td>
<td>379 A</td>
<td>Camp.</td>
</tr>
<tr>
<td>Tallahassee FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, ESL, Spanish and college education classes; wide-range of educational programs include auto repair, barbering, masonry, air conditioning/refrigeration, drafting, electronics and horticulture. UNICOR furniture factory employs 10 inmates. Staff complement: 346.</td>
<td>645 R</td>
<td>1286 A</td>
<td>Adult males primarily from Southeastern U.S.</td>
</tr>
</tbody>
</table>

**INSTITUTIONS IN THE MID-ATLANTIC REGION**
10010 Junction Drive, Suite 100-N
Annapolis Junction, MD 20701
301-317-3100
Fax: 301-317-3115

<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A</th>
<th>Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alderson FPC**</td>
<td>F</td>
<td>Minimum</td>
<td>Largest all-female facility. Cottages and small dormitories; ABE, GED, ESL; adult continuing education; college courses through Concord College and Bluefield State College. A specially funded parenting skills program consists of a children's center, social services, and educational courses. UNICOR garment and data graphics factories employ 300-325 inmates. Vocational training includes computerized education, business education, pre-industrial decal screen printing. Apprenticeship programs in 20 skilled trade areas to qualifying inmates. Staff complement: 208.</td>
<td>688 R</td>
<td>700 A</td>
<td>Inmate population from all states and several foreign countries.</td>
</tr>
<tr>
<td>Ashland FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED; vocational training in auto body, auto mechanics, bookkeeping, welding, printing and photography. Apprenticeship training includes cabinet making, steamfitting, drafting, dental hygiene, baking and cooking, auto mechanic/body, brick layer, machinist, carpenter, electrician, heating/air-conditioning, quality assurance, painter, plumber and powerhouse. UNICOR employs 400 inmates in its furniture factory. Staff complement: 331.</td>
<td>662 R</td>
<td>943 A</td>
<td>Average inmate is 35 years old serving a 12 year sentence.</td>
</tr>
</tbody>
</table>
Minimum inmates who are employed in maintenance positions in support of the main institution.
<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Butner FCI**</td>
<td>M</td>
<td>Low/Medium</td>
<td>GED, ESL, Adult education, AA program in business management, 4 year B.S. program by Shaw University.</td>
<td>513 R</td>
<td>788 A</td>
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<tr>
<td>P.O. Box 1000</td>
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<td>R/A</td>
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<tr>
<td>Butner, NC 27509</td>
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<tr>
<td>(919) 575-4541</td>
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<tr>
<td>FTS 629-8011</td>
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<tr>
<td>Fx: (919) 575-6341</td>
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<tr>
<td>Fort Dix FCI</td>
<td>M</td>
<td>Low</td>
<td>The Federal Correctional Institution at Fort Dix is one of the newest correctional facilities and it will soon be the largest. Staff complement: 370</td>
<td>R</td>
<td>987 A</td>
</tr>
<tr>
<td>P.O. Box 38</td>
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<td>Non-violent offenders.</td>
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<tr>
<td>Fort Dix, NJ 08640</td>
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<tr>
<td>(609) 723-1100</td>
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<tr>
<td>Fx: (609) 724-0779</td>
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<tr>
<td>Lexington FCI**</td>
<td>F</td>
<td>Administrative/</td>
<td>7 female units; 3 health care units; and 1 mental health unit; ABE, GED, Parents and Children Together (PACT), college courses; vocational training in business, horticulture, and data processing. Cosmetology and building maintenance and culinary arts are scheduled to begin during fiscal year 1990. UNICOR employs 500 inmates in its print plant, automated data processing, electronic cable factory, and sign factory. Staff complement: 510.</td>
<td>765 R</td>
<td>905 A</td>
</tr>
<tr>
<td>3301 Leestown Rd.</td>
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<td>Adjacent camp</td>
<td></td>
<td>Non-medical inmates average length of sentence is seven years. 85 bed hospital unit accepts referrals from throughout the U.S.</td>
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<tr>
<td>Lexington, KY 40511</td>
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<tr>
<td>(606) 255-6812</td>
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<td>FTS 355-7000</td>
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<tr>
<td>Fx: (606) 253-8821</td>
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<tr>
<td>Manchester FCI</td>
<td>M</td>
<td>Medium</td>
<td>The facility opened in 1992. FCI Manchester houses medium security inmates. Staff complement: 337.</td>
<td>756 R</td>
<td>905 A</td>
</tr>
<tr>
<td>P.O. Box 3000</td>
<td></td>
<td></td>
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<td>Inmates primarily from Mid-Atlantic region.</td>
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<tr>
<td>Manchester, KY 40962</td>
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<tr>
<td>(606) 598-1900</td>
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<tr>
<td>FTS 598-1497</td>
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<tr>
<td>Fx: (606) 599-4115</td>
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<tr>
<td>Manchester FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Inmates from camp provide services to main institution.</td>
<td>512 R</td>
<td>359 A</td>
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<tr>
<td>Route 8</td>
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<td>P.O. Box 7</td>
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<tr>
<td>Suite 207</td>
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<td>Manchester, KY 40962</td>
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<tr>
<td>(606) 598-1413</td>
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<tr>
<td>FTS 598-1497</td>
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<tr>
<td>Fx: (606) 598-1413</td>
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<tr>
<td>Milan FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, adult continuing education, high school through Milan area schools; college courses through Cleary College; vocational training in automotive services and building trade. Apprenticeships offered in air conditioning/refrigeration; stationary engineer, plumbing/pipelfitting/steamfitting; welding; electrical, and tool and die. UNICOR employs 550-600 inmates. Staff complement: 420.</td>
<td>1054 R</td>
<td>1405 A</td>
</tr>
<tr>
<td>P.O. Box 9999</td>
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<td>Male offenders ages 20 to 71; average sentence 10.7 years; pre-trial detainees from Detroit.</td>
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<tr>
<td>Arkona Road</td>
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<td>Milan, MI 48160</td>
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<td>(734) 439-1511</td>
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<td>FTS 378-0011</td>
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<td>Fx: (734) 439-0949</td>
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<tr>
<td>Morgantown FCI**</td>
<td>M</td>
<td>Minimum</td>
<td>Chemical abuse treatment; counseling; ABE, GED, social/adult continuing education, college courses; vocational training in graphic arts, drafting, microcomputers, and welding. UNICOR furniture factory employs approximately 130 inmates. Staff complement: 210.</td>
<td>902 R</td>
<td>814 A</td>
</tr>
<tr>
<td>Greenbag Rd.</td>
<td></td>
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<td>Male offenders with substantial program needs, i.e., chemical substance abuse.</td>
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<tr>
<td>P.O. Box 1000</td>
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<tr>
<td>Morgantown, WV 26505</td>
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<tr>
<td>(304) 296-4416</td>
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<td>FTS 923-4556</td>
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<tr>
<td>Fx: (304) 284-3613</td>
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</table>
Petersburg FCI**
P.O. Box 1000
Petersburg, VA 23804-1000
(804) 733-7881
FTS 920-3230
Fx: (804) 458-7295

ABE, GED, social education, health courses, and pre-release classes; college courses available; vocational training in welding, machine shop, auto body repair, masonry, auto mechanics; apprenticeship programs in several trades including soldering and quality control. UNICOR employs more than 300 inmates in electronic cable factory, furniture refinishing, and print plant. Staff complement: 363.

Inmates primarily from Eastern U.S.
<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A</th>
<th>Capacity</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petersburg FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Houses offenders who will be released to the Mid-Atlantic region of the U.S.</td>
<td>230 R</td>
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<td>308 A</td>
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<td>P.O. Box 1000</td>
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<td>(804) 733-7881</td>
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<tr>
<td>Fx: (804) 458-7295</td>
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</tr>
<tr>
<td>Seymour-Johnson FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Opened in 1989, FPC houses inmates who do not have records of escape, violence, sexual offenses, or major medical/psychiatric problems. Inmates serve as auxiliary work force for Air Force Base. ABE, GED, and college programs. Staff complement: 103</td>
<td>576 R</td>
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<td>482 A</td>
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<tr>
<td>Caller Box 8004</td>
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<td>Goldsboro, NC</td>
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<tr>
<td>(919) 735-9711</td>
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<td>FTS none</td>
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<tr>
<td>Fx: (919) 735-0169</td>
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</tbody>
</table>

**INSTITUTIONS IN THE WESTERN REGION**

Western Regional Office
7950 Dublin Boulevard, 3rd Floor
Dublin, CA 94568
(925) 803-4700
Fax: (925) 803-4802
FTS 468-1700

<table>
<thead>
<tr>
<th>Name/Location of Institution</th>
<th>Sexes</th>
<th>Security Level</th>
<th>Overview</th>
<th>R/A</th>
<th>Capacity</th>
<th>Population</th>
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</thead>
<tbody>
<tr>
<td>Boron FPC**</td>
<td>M</td>
<td>Minimum</td>
<td>ABE, GED, ESL, and some college courses; vocational training in electrical and pre-industrial training. UNICOR operates a vehicular components factory which employs 90 inmates. Staff complement: 108.</td>
<td>429 R</td>
<td>411 A</td>
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<td>P.O. Box 500</td>
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<tr>
<td>Boron, CA 93516</td>
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<tr>
<td>(760) 762-5161</td>
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<tr>
<td>Fx: (619) 762-5719</td>
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</tr>
<tr>
<td>Dublin FCI**</td>
<td>F</td>
<td>Low</td>
<td>ABE, ESL, continuing adult and social education; vocational training in business education; UNICOR factories include cut and sewing factory, automated data processing, furniture factory and employ 45 of the inmate population. Staff complement: 286.</td>
<td>810 R</td>
<td>1081 A</td>
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<tr>
<td>8th St. Camp Parks</td>
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<tr>
<td>(925) 833-7500</td>
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<tr>
<td>Fx: (925) 833-7599</td>
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<tr>
<td>Dublin FPC**</td>
<td>M</td>
<td>Minimal</td>
<td>Opened in 1990, the facility is located on camp parks military bases. Inmates provide labor to the base, FCI, FPC and other government agencies.</td>
<td>178 R</td>
<td>169 A</td>
<td>Camp.</td>
</tr>
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<td>8th St. Camp Parks</td>
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<tr>
<td>Name/Location of Institution</td>
<td>Sexes</td>
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<td>Overview</td>
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<td>Capacity</td>
<td>Population</td>
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<tr>
<td><strong>Englewood FCI/FDC</strong>**</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL, adult continuing education, college courses, post secondary vocational training in welding, business and auto body. Pre-industrial training. Numerous apprenticeships such as painter, dental assistance, and electrician. UNICOR employs 225 inmates in electronics and textile factories. Staff complement: 329.</td>
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<tr>
<td>Littleton, CO 80123</td>
<td></td>
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<td>Houses both sentenced and unsentenced inmates. Separate detention center, houses Cuban detainees.</td>
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<tr>
<td>Lompoc USP**</td>
<td>M</td>
<td>High</td>
<td>ABE, GED, ESL, continuing adult education, A.A. and B.A. through Chapman College; vocational training in barbering, building maintenance, computer technology and soldering; apprenticeships offered in printing and dental technology. Pre-industrial training for UNICOR factory positions. UNICOR print plant, cable and sign factory, business office and quality control department employs 400 inmates. Staff complement: 519.</td>
<td>1035</td>
<td>R 1533 A</td>
<td>472 R 876 A</td>
</tr>
<tr>
<td>Lompoc, CA 93436</td>
<td></td>
<td></td>
<td>Inmates are serving long sentences for sophisticated offenses. Residents are primarily from California and other western states.</td>
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<tr>
<td>Lompoc FCI**</td>
<td>M</td>
<td>Low</td>
<td>ABE, GED, ESL, and adult continuing education; A.A. and B.A. college education available; vocational training in business computers and meat processing; UNICOR operates furniture, electronic cable shop, and warehouse employ more than 230 inmates. Staff complement: 224.</td>
<td>472</td>
<td>R 1061 A</td>
<td>371 R  371 A</td>
</tr>
<tr>
<td>Lompoc, CA 93436</td>
<td></td>
<td></td>
<td>Houses offenders primarily from California, Arizona and Nevada many of whom are serving first period of confinement.</td>
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</tr>
<tr>
<td>Los Angeles MDC</td>
<td>M &amp; F</td>
<td>Administrative</td>
<td>GED, ESL, adult education. Staff complement: 267.</td>
<td>728</td>
<td>R 998 A</td>
<td>415 R  371 A</td>
</tr>
<tr>
<td>Los Angeles, CA 90053-1500</td>
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<td>Houses pretrial and pre-sentence detainees.</td>
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<tr>
<td>Nellis FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Houses offenders without records of escape, violence, sexual offenses or major medical/psychiatric problems. ABE, GED, and adult continuing education courses, college courses. Staff complement: 69.</td>
<td>415</td>
<td>R 998 A</td>
<td>371 R  371 A</td>
</tr>
<tr>
<td>C.S. 4500</td>
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<td>Inmates serve as auxiliary work force for Nellis AFB.</td>
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<tr>
<td>North Las Vegas, NV 89036-4500</td>
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<td></td>
<td>Residents primarily from Southwestern U.S. Special unit for administrative detention and disciplinary segregation.</td>
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<tr>
<td>Phoenix FCI**</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, ESL and collegiate education; vocational programs in air conditioning/refrigeration; pre-industrial training in electronics; UNICOR operates electronic harness manufacturing/connector assembly factory and electronics factory which employs 325 inmates. Staff complement: 355.</td>
<td>740</td>
<td>R 1061 A</td>
<td>272 R  371 A</td>
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<tr>
<td>Phoenix, AZ 85027</td>
<td></td>
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<td>Camp.</td>
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<tr>
<td>Dept. 1680</td>
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<tr>
<td>Phoenix FPC**</td>
<td>F</td>
<td>Minimum/ Camp</td>
<td>Opened in 1989, houses female offenders with no significant history of violence or escape. Offers wide-range of educational opportunities; UNICOR packaging and warehouse facility employs 40% of inmate population.</td>
<td>272</td>
<td>R 1061 A</td>
<td>272 R  328 A</td>
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<tr>
<td>Phoenix, AZ 85027</td>
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</table>
Safford FCI
P.O. Box 820
Safford, AZ 85548
(520) 428-6600
FTS 261-1000
Fx: (520) 348-1331

San Diego MCC**
808 Union Street
San Diego, CA 92101-6078
(619) 232-4311
FTS 890-0000
Fx: (619) 595-0390

<table>
<thead>
<tr>
<th>Institution</th>
<th>Type</th>
<th>Level</th>
<th>Description</th>
<th>Complement</th>
<th>Notes</th>
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<tr>
<td>Safford FCI</td>
<td>M</td>
<td>Low</td>
<td>ABE, ESL, college correspondence courses; vocational training in building trades; UNICOR cut and sew textile factory manufacturing towels and gloves employs 120 inmates. Staff complement: 184.</td>
<td>421 R</td>
<td>Inmates mainly from Southwestern U.S.</td>
</tr>
<tr>
<td>San Diego MCC**</td>
<td>M &amp; F</td>
<td>Administrative</td>
<td>ABE, GED, ESL, Spanish and art; vocational training in computer literacy, word processing and typing. Staff complement: 266.</td>
<td>612 R</td>
<td>Houses detainees held for immigration violations, probation and parole violations, drug offenses and bank robbery. Less than 6 months mainly pre-trial.</td>
</tr>
<tr>
<td>Name/Location of Institution</td>
<td>Sexes</td>
<td>Security Level</td>
<td>Overview</td>
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<tr>
<td>Sheridan FCI</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, college courses; vocational training in physical fitness, building trades, pre-industrial program; UNICOR furniture factory employs 35% of the inmates. Staff complement: 387.</td>
<td>923</td>
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<tr>
<td>27072 Ballston Rd</td>
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<td>1279 A</td>
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<td>Sheridan, OR 97378-9601</td>
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<td>Houses offenders from Western U.S.</td>
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<tr>
<td>(503) 843-4442</td>
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<tr>
<td>Fx: (503) 843-3408</td>
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<tr>
<td>Sheridan FPC</td>
<td>M</td>
<td>Minimum</td>
<td>Opened in 1989, serves as satellite facility to main institution. Wide-range of educational opportunities available. UNICOR employs 5% of inmate population.</td>
<td>512</td>
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<td>27072 Ballston Rd</td>
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<td>Sheridan, OR 97378-9601</td>
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<tr>
<td>(503) 843-4442</td>
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<td>Camp.</td>
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<tr>
<td>Fx: (503) 843-3408</td>
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<tr>
<td>Terminal Island FCI**</td>
<td>M</td>
<td>Medium</td>
<td>ABE, GED, adult continuing and social education, computer, college courses; vocational training in pre-industrial metal; UNICOR metal factory produces shelves, lockers and metal frame tables and employs 300 inmates. Staff complement: 320.</td>
<td>478</td>
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<td>1299 Seaside Ave.</td>
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<td>Reservation Point</td>
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<tr>
<td>Terminal Island, CA 90731-0207</td>
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<td></td>
<td>Serves as medical referral facility for Western Region providing short-term medical care.</td>
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<tr>
<td>(310) 831-8961</td>
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<tr>
<td>FTS 793-1160</td>
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<tr>
<td>Fx: (310) 732-5335</td>
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<tr>
<td>Tucson FCI**</td>
<td>M &amp; F</td>
<td>Medium/</td>
<td>ABE, GED, ESL, vocational training in wastewater treatment; UNICOR textile factory producing mailbags, helmet bags employs 165 inmates. Staff complement: 231.</td>
<td>392</td>
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<tr>
<td>8901 S. Wilmot Rd.</td>
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<td>Tucson, AZ 85706</td>
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<tr>
<td>(520) 574-7100</td>
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<td>Houses pre-trial offenders and those awaiting transfer.</td>
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<tr>
<td>FTS 762-6921</td>
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<tr>
<td>Fx: (520) 670-5674</td>
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<td>Victorville FCI</td>
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<tr>
<td>Victorville, CA 92394</td>
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</tr>
<tr>
<td>(760) 246-2400</td>
<td></td>
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<td></td>
<td>Serves as medical referral facility for Western Region providing short-term medical care.</td>
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<tr>
<td>Fx (760) 246-2621</td>
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</tbody>
</table>
MEMORANDUM

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: Office of the Attorney General

RE: Principles of Federal Prosecution

NOTE: 1. This is issued pursuant to USAM 1-1.550
2. Distribute to Holders of Title 9
3. Insert in front of affected section

AFFECTS: 9-27.000

PURPOSE: The purpose of this bluesheet is to clarify the Department's policy concerning the principles that should guide federal prosecutors in their charging decisions and plea negotiations.

As first stated in the preface to the original 1988 edition of the Principles of Federal Prosecution, "they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility."

It should be emphasized that charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines. However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, and consistent with the purposes of the federal criminal code.
and maximize the impact of federal resources on crime. Thus, for example, in determining “the most serious offense that is consistent with the nature of the defendant’s conduct, that is likely to result in a sustainable conviction, “[as set forth in 9-27-310.], it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range. (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence; and rehabilitation. Note that these factors may also be considered by the attorney for the government when entering into plea agreements [9-27.400].

To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied.

This bluesheet is intended to provide interpretative guidance with respect to 9-27.130; 9-27.140; 9-27.300; and 9-27.400. Principles of Federal Prosecution, dated January 14, 1993, in your United States Attorneys’ Manual.
14.16 Sample Motion and Declaration of Counsel in Support of Motion for Expedited Appeal

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICAN, ) U.S.C.A. No.
 )
Plaintiff-Appellee, ) U.S.D.C. No.
 )
 v. ) EMERGENCY MOTION FOR
 ) EXPEDITED APPEAL UNDER
 ) CIRCUIT RULE 27-3

Defendant-Appellant, )
___________________________
 )
PLEASE TAKE NOTICE that Defendant-Appellant ________________, by and through his/her counsel, _________________ and pursuant to Circuit Rule 27-3, hereby moves this Court to hear the appeal of his/her sentence on an expedited basis. The grounds for this motion are that unless the appeal is briefed, submitted and decided on an expedited basis, the appeallant will serve a sentence in excess of that which he/she argues would be appropriate under the sentencing guidelines as applied to his/her case.

This motion is based upon the instant motion, the files and records of this case, the attached Circuit Rule 27-3 Certificate and declaration of counsel, and all other applicable constitutional, statutory and case authority.

Respectfully submitted,

Date: __________________ ___________________________

Attorney’s Name
Address
Telephone Number

Attorneys for the Defendant-Appellant
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) U.S.C.A. No.
                      )
               Plaintiff-Appellee, ) U.S.D.C. No.
) v. 
) CIRCUIT RULE 27-3
) CERTIFICATE AND
) DECLARATION OF
) COUNSEL
)
Defendant-Appellant,

I, _______________________________, hereby declare and say:

1. I am an attorney licensed to practice in the State of __________________________ and represent ______________, the appellant herein;

2. My office address and telephone number are ________________________________;

3. On ________________________ 20__, I contacted Assistant United States Attorney ____________________, United States Attorney’s Office, (address and telephone number), to inform him/her of this motion for expedited appeal. A copy of this motion was hand delivered to his/her office on this same date;

4. On ________________________ 20__, appellant was arrested for transportation of illegal aliens in violation of ____ U.S.C. §________ and has remained in continuous custody since that time;

5. On ________________________ 20__, judgment was entered in United States District Court in the __________ District of __________ and the defendant-appellant was sentenced to ________ month imprisonment with ________ years of supervised release and credit given for time served. Appellant filed a timely notice of appeal on ____________ 20__;

6. By this appeal, appellant will argue that the sentencing judge misinterpreted and misapplied the sentencing guidelines of the Sentencing Reform Act of 1984 as they pertain to his/her case. Under the district court’s interpretation of those guidelines, a substantial upward departure from appellant’s offense level of __________ was justified by application of U.S.S.G. §_________, with a result that a ________ month imprisonment was imposed. Under the interpretation argued by the appellant, his/her offense level is ________ and the applicable Sentencing Guidelines are ____ to ____ months imprisonment;
7. The briefing schedule established for this case sets ____________ 20__ as the due date for appellant’s opening brief, ____________ 20__ for the government’s response brief, and ____________ 20__ for appellant’s optional reply brief. Under this schedule, appellant will have already served over ____ months in custody before the briefing of the appeal is even completed. Because the maximum sentence within the guideline range is ____ months, it is essential that the appeal be briefed, submitted and decided on an expedited bases. Specifically, appellant requests that a new briefing schedule be ordered by this Court such that the appeal can be decided by the end of ____________, 20__, or as soon thereafter as possible.

I declare under penalty of perjury that that the foregoing is true and correct to the best of my knowledge and belief.

Executed this ___ day of _____, 20__ at _____________________.

__________________________________
Declarant
CHAPTER 15

FEDERAL CRIMINAL APPEALS

by

Terri L. Goodman

15.01 SOURCE OF THE RIGHT TO APPEAL

In this day of the virtually automatic direct appeal in criminal cases, it may seem to defendants and practitioners alike that there is, in fact, a constitutional right to appeal a criminal conviction. Not so, said a unanimous Supreme Court in 1894 in McKane v. Durston, 153 U.S. 684 (1894). No matter how grave the offense, a criminal defendant has no constitutional right to appeal a criminal conviction. Id. at 687. Justice Harlan, writing for the Court, declared that “a citation of authorities upon the point [was] unnecessary” because a criminal appeal “was not at common law, and is not now, a necessary element of due process of law.”

More than a century later, in the first days of the new millennium, the Supreme Court of the United States affirmed that there is no constitutional right to appeal. In Martinez v. Court of Appeal of California, ___ U. S. ___, 120 S. Ct. 684 (2000), Justice Stevens explained that “[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute.” Id. at 690 (quoting Abney v. U.S., 431 U.S. 651, 656 (1977)). “[I]n order to exercise that statutory right of appeal one must come within the terms of the applicable statute.” Abney, 431 U.S. at 656. While Article III, §1 of the United States Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” this language simply does not confer a constitutional right to an appeal.

15.02 THE RULES OF APPELLATE PROCEDURE

1 McKane and other cases asserting that there is no constitutional right to an appeal, have done so only in dicta, because there has never been a case which purported to dispense entirely with the right to appeal in a criminal case. Justice Brennan opined that “[o]f course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.” Jones v. Barnes, 463 U.S. 745, 757 n. 1 (1983) (Brennan, J., dissenting).
There are two sets of rules that govern appeals in any given circuit, the Federal Rules of Appellate Procedure and the local circuit rules. The Federal Rules of Appellate Procedure (Fed. R. App. P.) were initially adopted December 4, 1967 and have been amended frequently, with a substantial set of amendments taking effect in December 1998. Federal Rule of Appellate Procedure 47 permits an individual circuit to adopt additional rules governing its practice. This chapter incorporates relevant portions of the rules for the U.S. Court of Appeals for the Ninth Circuit.

15.03 FEDERAL APPELLATE JURISDICTION

Congress has provided by statute that a defendant has the right to appeal only a final decision. 28 U.S.C. §1291 “grants the federal courts of appeals jurisdiction to review ‘all final decisions of the district courts,’ both civil and criminal.” Id. at 657. A criminal sentence may be appealed pursuant to 18 U.S.C. §3742. The Supreme Court in Abney articulated strong policy against interlocutory or “piecemeal” appeals in criminal cases. Id. at 656. “A final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” Catlin v. U.S., 324 U.S. 229, 233 (1945) (citation omitted). Generally, a final decision in a criminal case is the sentence. Berman v. U.S., 302 U.S. 211, 212 (1937).

15.03.01 The Collateral Order Doctrine

In spite of strong policy against expanding the category of appealable issues in criminal cases based on a belief that “encouragement of delay is fatal to the vindication of the criminal law,” U.S. v. MacDonald, 435 U.S. 850, 854 (1977) (internal quotation marks and citation omitted), there is a mechanism known as the “collateral order doctrine,” which expands the category of “final judgments” within the meaning of §1291 to permit some pretrial or interlocutory appeals. The collateral order doctrine, first announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), may be satisfied if: (1) the appealed order is a final rejection of the appellant’s claim; (2) the appealed issue is collateral to and separate from the principal issue; and (3) the order would effectively be unreviewable on appeal from a final judgment. Abney, 431 U.S. at 656-62.

Pursuant to the collateral order doctrine, the Supreme Court in Abney permitted the immediate appeal of the denial of a motion to dismiss for a violation of double jeopardy. However, in MacDonald it found that the denial of a motion for a violation of the right to a speedy trial did not satisfy the collateral order doctrine. The Abney Court reasoned that double jeopardy involves the right not to be tried at all for a second time and thus, the constitutional privilege would be irretrievably lost if the decision was not heard prior to a judgment on the merits. Abney, 431 U.S. at 661-62. Whereas, the MacDonald Court held that the right to speedy trial does not encompass the right not to be tried. The Court reasoned, in part, that because a violation of speedy trial requires analysis of the prejudice resulting from the delay, the determination could best be made following trial and is thus, not sufficiently separate from the outcome of the trial. MacDonald, 435 U.S. at 859. Further, prejudice to the defense would be remedied by an acquittal at trial. Id. 2

2 See Anderson, Lloyd C., The Collateral Order Doctrine: A New “Serbian Bog” and Four Proposals For Reform, 46 Drake L. Rev. 539, 559-61 (1998), for a persuasive argument that the Supreme Court’s attempt to distinguish the holding of MacDonald with that of Abney was unsatisfactory.
The collateral order doctrine has been applied to an order denying a motion to reduce bail, *Stack v. Boyle*, 342 U.S. 1 (1951), and an order holding a recalcitrant witness in contempt and imposing confinement under 28 U.S.C. §1826. The Supreme Court has also permitted immediate appeal of the denial of a Congressman’s motion to dismiss an indictment for violation of the speech and debate clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979). However, the Supreme Court has refused to apply the doctrine to the denial of a motion to dismiss the indictment for alleged prosecutorial abuses of the grand jury process, reasoning that any error in the grand jury process was rendered harmless by a subsequent conviction at trial. *U.S. v. Mechanik*, 475 U.S. 66, 70 (1986). Similarly, the denial of a motion to dismiss the indictment for prosecutorial vindictiveness did not satisfy the collateral order doctrine. *U.S. v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam).

The broad application of the collateral order doctrine appears to be dwindling in scope. In a recent decision, the Ninth Circuit held that the collateral order doctrine did not permit review of an order disqualifying an attorney from representing witnesses and targets of a grand jury investigation. The government moved to disqualify the attorney because of a potential conflict of interest in his representation of multiple defendants. *In re Grand Jury Investigation*, 182 F.3d 668 (9th Cir. 1999). The opinion indicated that the scope of the collateral order doctrine may be narrowing. The Ninth Circuit referred to several cases from the 1970s which permitted the immediate appeal of disqualification and similar orders. The Court then stated, “h[owever, all of these cases come from an era when disqualification orders were widely presumed to be immediately appealable.” *Id.* at 670 (collecting cases). The Court further noted that “since then, the Supreme Court has refused to allow interlocutory appeals in every disqualification case that has come before it.” *Id.* (collecting cases). The Court concluded that “if disqualification orders are generally unappealable in either civil or criminal proceedings, they should [not] be appealable in the grand jury context.” *Id.* (following *In re Schmidt*, 775 F.2d 822 (7th Cir. 1985)).

### 15.03.02 Post-Sentencing Judgments

The circuit courts of appeal also have jurisdiction over post sentencing proceedings, such as an order denying a motion to withdraw a guilty plea or *nolo contendere* plea under Rule 32(e) of the Federal Rules of Criminal Procedure, or denying a motion for new trial based on newly discovered evidence under Rule 33. *See U.S. v. Green*, 89 F.3d 657 (9th Cir. 1996).


However, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. §2253 to require a certificate of appealability from a final order in §§2254 and 2255 proceedings. Under AEDPA, an appeal may not be taken to the court of appeals from the §2254 final order or the §2255 final order, unless a “circuit justice or judge issues a certificate of appealability.” *See 28 U.S.C. §2253(c)(1)(A & B).* Nevertheless, Fed. R. App. P. 22 recognizes that these certificates may issue from
the district court judge under 28 U.S.C. §2253(c)(1). See U.S. v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir. 1997). The certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c)(2). The certificate of appealability “shall indicate which specific issue or issues satisfy the showing required by paragraph (2).” 28 U.S.C. §2253(c)(3).
15.04 RIGHT TO COUNSEL ON APPEAL

Although the Constitution does not require provisions for appeal in criminal cases, if an appellate system is created the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that trial transcripts must be provided to indigent appellant to assure an adequate and effective appeal). In 1958, the Court relied on equal protection concerns to strike down a state law that permitted a trial court to deny free transcripts to indigent appellants if it determined that no reversible error occurred in trial. *Eskridge v. Washington State Board*, 357 U.S. 214 (1958). By 1963, the Supreme Court recognized that when an appellate system has been instituted, the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal. *Douglas v. California*, 372 U.S. 353 (1963). In 1985, the Court opined that “the promise of *Douglas*, that a criminal defendant has a right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel.” *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

However, the right to counsel on appeal has been limited. In *Ross v. Moffit*, 417 U.S. 600 (1974), the Supreme Court held that the right to counsel is limited to the first appeal as of right, and in *Jones v. Barnes*, 463 U.S. 745 (1983), the Court further held that the attorney need not advance every argument, regardless of merit, urged by the appellant. The attorney merely must be available to assist in the preparation of the appellate brief, *Swensen v. Bosler*, 386 U.S. 258 (1967) (per curiam), and “must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant’s claim.” *Evitts*, 469 U.S. at 394 (citing *Anders v. California*, 386 U.S. 738 (1967)). Recently, the Supreme Court held that a criminal defendant has no right of self-representation on appeal. *Martinez*, ___ U.S. ___, 120 S.Ct. at 687.

The Ninth Circuit Rules provide for continuity of representation on appeal. Ninth Circuit Rule 4-1 provides that both retained and appointed counsel shall continue to represent the defendant on appeal until counsel is relieved by replacement counsel or it is determined that the defendant may proceed pro se. If the defendant either appeared pro se or with retained counsel in the district court and believes that the appointment of counsel is appropriate on appeal, the defendant may petition the district court for appointment. If that request is denied, the court of appeals may also appoint appellate counsel. The Criminal Justice Act provides that appointed counsel shall be compensated for services and reimbursed for reasonable expenses.

It is presumed that counsel will continue to represent the defendant in filing a petition for a writ of certiorari to the United States Supreme Court. Rule 4-1 further instructs that upon an adverse ruling by the Ninth Circuit, counsel must, within 14 days after entry of judgment of denial of a petition for rehearing, advise the client of the right to file for a petition for a writ of certiorari to the United States Supreme Court. If, in counsel’s judgment, there are no non-frivolous grounds for filing a petition, then counsel must notify the client of the intention to seek leave to withdraw as counsel if the client insists on filing the petition in violation of Supreme Court Rule 10. Any motion to withdraw as counsel must be made within 21 days of judgment or the denial of a petition for rehearing and must articulate the efforts made to notify the client. The Supreme Court held in *Austin v. U.S.*, 513 U.S. 5 (1994) (per curiam), that a cursory statement of frivolity is not a sufficient basis for withdrawal.
15.05 NON-MERITORIOUS APPEALS

When appointed counsel determines that although a client wants to appeal his conviction or sentence, there are no meritorious issues to be raised in an appeal and an appeal would be wholly frivolous, counsel may file a brief pursuant to Anders v. California, 386 U.S. 738, reh’g denied, 388 U.S. 924 (1967). Counsel for Anders determined that there were no meritorious issues to present in an appeal. He sent a letter to the court briefly stating his conclusion and notifying that Anders wanted to file his own brief. Id. at 739-40. The Court permitted counsel to withdraw and Anders filed opening and reply briefs pro se. His conviction was unanimously affirmed. Following Gideon v. Wainwright, 372 U.S. 335 (1963) (applying accused’s Sixth Amendment right to trial counsel to the States), the Supreme Court held that a cursory no-merit letter from counsel is constitutionally insufficient to require an indigent defendant to proceed on direct appeal without counsel. Anders, 386 U.S. at 742. The Court then set forth procedures to follow in the event that counsel determines an appeal to be wholly frivolous. First, counsel must notify the court and request to withdraw as counsel. However, that request must “be accompanied by a brief referring to anything in the record that might arguably support the appeal.” Id. at 744. The court then must conduct an investigation to determine if the appeal is truly frivolous.

In Penson v. Ohio, 488 U.S. 75 (1988), the Supreme Court found that petitioner was denied his constitutional right to representation when his counsel was allowed to withdraw from representation without filing an Anders brief. Counsel filed a “Certificate of Meritless Appeal and Motion,” but no brief accompanied the request. The court of appeals permitted trial counsel to withdraw and gave appellant 30 days to file a brief pro se. Id. at 78. Upon its investigation, the court found several arguable claims, including one which constituted plain error, requiring reversal. Id. at 79. The court reversed that conviction and affirmed the remainder, finding no prejudice from counsel’s failure to prepare a brief. The appellate court violated Penson’s Sixth Amendment right to counsel when it failed to require counsel to file a no-merit brief, dismissed counsel prior to reviewing the record, and failed to appoint counsel to prepare an appeal once it determined that the case contained meritorious issues. Id. at 80-81. Finally, the complete deprivation of counsel required a presumption of prejudice. Id. at 88. The Court found that under such circumstances, it was “inappropriate to apply either the prejudice requirement of Strickland or the harmless-error analysis of Chapman.” Id. at 88-89.

The states then began to develop various procedures to address, and in some cases avoid, the issues raised by Anders and Penson. In Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746 (2000), the

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3 The Court distinguished between appeals that are merely meritless and those that are wholly frivolous. A Florida Fourth District Court of Appeals judge pointed out this apparent anomaly: “[u]nder Anders, so interpreted, the constitutional guarantee of effective assistance of counsel assures representation to criminal appellants for meritless, but not for frivolous appeals.” Warner, Martha C., Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others', 23 Fla. St. U. L. Rev. 625, 632 (1996).


5 For a compilation of state cases adopting procedures to address Anders and commentary, see, Warner, supra n. 3. at 643-56.
Supreme Court recently decided that California’s procedure set forth in People v. Wende, 25 Cal. 3d 436 (1979), was sufficient to protect Robbin’s Fourteenth Amendment rights even though it differed from the procedure set forth in Anders. Id. at 753. Wende provides that although counsel may not withdraw from the case, counsel may remain silent on the merits without explicitly stating that the appeal is frivolous. Counsel filing a Wende brief provides a summary of the case’s procedural and factual history with record citations and then offers to brief the case upon the direction of the court. Id. This procedure satisfies the Fourteenth Amendment’s requirement that states afford adequate and effective appellate review to indigent defendants, while assuring that public moneys will not be spent to subsidize frivolous appeals. Wende is not unconstitutional because it is a two-tiered system, requiring both counsel and the court to find the appeal to be frivolous and it does not permit counsel to withdraw prior to the determination that the appeal is frivolous. The Anders opinion established a constitutionally sound procedure, but not the only constitutionally sound procedure. Id. at 758.

On the other hand, the Fifth Circuit held that Mississippi’s attempt to comply with Anders set forth in Killingsworth v. State, 490 So.2d 849 (Miss. 1986), ”fail[ed] to erect sufficient safeguards to protect a defendant’s right to appellate counsel.” Hughes v. Booker, 220 F.3d 346, 352 (5th Cir. 2000). Killingsworth provide that, in the clearest cases of meritless appeals, counsel could simply file a brief indicating the lack of meritorious issues, inform the client, and withdraw as counsel. Id. at 350-51. This procedure was unconstitutional because it provided only for one tier of review, did not require briefing of potential issues or an outline of the record, and was the “functional equivalent of withdrawing from representation without complying with the requirements of Anders.” Id. at 349. Limiting Killingsworth's application to only the “clearest cases” was simply insufficient to preserve constitutional rights; the Court presumed prejudice. Id. at 353.

In the recent case of U.S. v. Gomez-Perez, 215 F.3d 315, 316 (2d Cir. 2000), the Second Circuit required counsel to file an Anders brief in response to the Government’s motion to dismiss an appeal. The Government argued that Gomez-Perez had waived his right to appeal in a plea agreement. Id. Counsel notified the Court that she “took no position with respect to the Government’s motion.” Id. The Second Circuit held that in order to comply with the Constitution counsel for Gomez-Perez had to file an Anders brief setting forth only the limited issues of “whether defendant’s plea and waiver of appellate rights were knowing, voluntary, and competent[,] . . . whether it would be against the defendant’s interest to contest his plea . . . and [] any issues implicating a defendant’s constitutional or statutory rights that either cannot be waived, or cannot be considered waived by the defendant.” Id. at 319 (citations omitted).

15.06 RIGHT TO A SPEEDY APPEAL

The Supreme Court has not recognized that there is a right to a speedy appeal that parallels that of a speedy trial. However, several circuits have recognized situations where a delay in the appellate process, usually caused by a delay in the production of transcripts, might result in a due process violation. See U.S. v. Tucker, 8 F.3d 673, 676 (9th Cir. 1993) (en banc). Court reporters are required under 28...
U.S.C. § 753(b), to deliver verbatim transcripts in a timely fashion. However, the failure to do so will only require reversal or a new trial if the defendant can make a showing of prejudice -- a due process violation. *U.S. v. Antoine*, 906 F.2d 1379 (9th Cir. 1990).

The *Antoine* Court recognized that while an extreme delay in processing an appeal might amount to a due process violation, the Due Process Clause cannot be used to create specific requirements for a speedy appeal, similar to those adopted in the realm of speedy trial. *Id.* at 1382. Following the Fifth Circuit case of *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), the *Antoine* Court adopted the four-part test initially set forth in the pre-trial delay case of *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Antoine*, 906 F.2d at 1382. The four factors to be considered in determining if there was a due process violation are the length of delay, the reason for delay, the defendant’s assertion of his right, and the prejudice to the defendant. *Id.*

The prejudice inquiry is most important and may be established by showing the following: “(1) oppressive incarceration pending appeal; (2) anxiety and concern of the convicted party awaiting the outcome of the appeal; and (3) impairment of the convicted person’s grounds for appeal or of the viability of his defense in case of retrial.” *U.S. v. Mohawk*, 20 F.3d 1480, 1485-86 (9th Cir. 1994) (citation omitted). Even when a defendant has been able to make quite a showing in the area of prejudice, courts have not been quick to reverse convictions for delayed transcript production. For instance, the Court would not find prejudicial delay in *Mohawk* where the appeal was finally decided more than 10 years after filing the notice, the transcripts were never properly reproduced, and the defendant had represented himself at trial. *Id.* at 1483-84. *See also U.S. v. Chavez*, 979 F.2d 1350 (9th Cir. 1992) (finding no prejudice from 16-month delay in filing transcripts).

When the delay is caused by counsel, courts seem more willing to find prejudice. “[D]elays caused by court-appointed counsel and by court reporters [will be] attributable to the government for purposes of determining whether a defendant has been deprived of due process on appeal.” *U.S. v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994)(citing *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990)). The Third Circuit discharged the petitioner in *Burkett* due to a five and a half year delay in the sentencing and appeal process. *Burkett v. Cunningham*, 826 F.2d 1208, 1224 (3d Cir. 1987). In the case of *Simmons v. Beyer*, 44 F.3d 1160, 1169-71 (3d Cir. 1995), the Third Circuit reversed petitioner's conviction and remanded for retrial because of a thirteen year delay between petitioner's sentencing and appeal due to his having “slipped through the cracks.” The court refused to place responsibility for the delay on Simmons when the blame lie with Simmons’ ineffective lawyer. *Id.* at 1170. In both cases, the Third Circuit still required a showing of prejudice, but relied upon the recognition by the Supreme Court in *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), that nominal representation on appeal violates due process.

**15.07 RELEASE PENDING APPEAL**

Once a defendant has been convicted and sentenced to a term of imprisonment, it is presumed that the defendant will remain detained unless it can be shown by clear and convincing evidence that, (1) the person is not likely to flee or pose a danger to the community; (2) that the appeal is not for the purpose of delay; and (3) that the appeal raises a substantial question of law or fact which is likely to result in a
reversal, an order for a new trial, a sentence which does not include a term of imprisonment, or a reduced sentence which will total less than the amount of time already served. 18 U.S.C. §3143.

A defendant who is released from custody at the time of sentencing is entitled to an automatic stay of surrender upon filing a motion in the court of appeals for bail pending appeal. U.S. v. Fuentes, 946 F.2d 621 (9th Cir. 1991). In some cases, potential economic or pecuniary harm may suffice as a danger to the community to justify the denial of bail pending appeal. U.S. v. Reynolds, 956 F.2d 192 (9th Cir. 1992). A motion for bail pending appeal must set forth with specificity the merits of the arguments to be made on appeal to demonstrate that the issues are “fairly debatable.” U.S. v. Montoya, 908 F.2d 450 (9th Cir. 1990). If the government is the appellant, then §3143(c) provides that the considerations set forth in §3142, which apply to the release of the defendant pending trial, shall be applied.

Federal Rule of Appellate Procedure 9 provides that the district court must state in writing, or orally on the record, the reasons for an order of release or detention of the defendant. When appealing the order, the party must file a copy of the district court’s order and statement of reasons with the court of appeals, and if there is a question of fact, a transcript also must be filed. Rule 9-1 further requires that counsel file a memorandum of law and facts in support of the appeal to be considered when the appeal is from a release or detention order.

15.08 NOTICE OF APPEAL

15.08.01 Criminal Cases

The right to a federal criminal appeal commences with the filing of the Notice of Appeal. A sample form of the Notice of Appeal provided by the United States District Court for the Southern District of California is found at page 812. The clerk of the district court supplies the form for the filing of the Notice of Appeal. Counsel provides the information required under Fed. R. App. P. 3(c) by merely filling in the appropriate blank spaces and identifying the type of appeal by placing a check mark or an "X" at ( ) final judgment; ( ) sentence only; or ( ) order. If the appeal is from an order, the order must be identified with specificity. The district court clerk is then responsible for serving the notice of appeal on the parties. Fed. R. App. P. 3(d).

Federal Rule of Appellate Procedure 4(b) requires that a Notice of Appeal be filed within 10 days after entry of the judgment on the criminal docket, and applies not only to an appeal from a final judgment or sentence, but also applies to orders denying the following motions:

* Judgment of acquittal;
* Arrest of judgment;
* A new trial on any ground other than newly discovered evidence;
* To withdraw a guilty or nolo contendere plea;
* To dismiss the indictment predicated on double jeopardy;
* For bail pending trial or appeal;
* A petition for writ of error corum nobis under 28 U.S.C. §1651 (see Yasui v. U.S., 772 F.2d 1496 (9th Cir. 1985)).
Once the Notice of Appeal is filed, the district court is generally divested of jurisdiction over the aspects of the case relevant to the appeal. *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993). Thus, compliance with the 10-day requirement is jurisdictional and appeals cannot be decided that do not comply with Rule 4(b). *U.S. v. Barragan-Mendoza*, 174 F.3d 1024, 1026 (9th Cir. 1999) (holding that the 10-day period within which to file a Notice of Appeal does not begin until the expiration of the seven day period to correct sentence under Fed. R. Crim. P. 35(c)). Federal Rule of Appellate Procedure 4(b) provides that the filing of a Notice of Appeal does not divest the district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c).

However, Fed. R. App. P. 4(b)(4) provides that upon a showing of excusable neglect or good cause, the court may extend the time for filing a Notice of Appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed. The Supreme Court recently held in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029 (2000), that the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), should be applied to determine whether counsel’s failure to consult with a defendant regarding appeal options *per se* constituted ineffective assistance of counsel. The Supreme Court declined to hold that as a constitutional matter, in every case, counsel’s failure to consult with the defendant is necessarily deficient. *Flores-Ortega*, 120 S. Ct. at 1035. Rather, the Supreme Court held that counsel has a constitutionally imposed duty to consult with a defendant when there is reason to think either that a rational defendant would want to appeal or that this particular defendant reasonably demonstrated his desire to appeal. *Id.* at 1035-36. A presumption of prejudice will lie if a defendant can show that but for counsel’s deficient performance in failing to file a notice of appeal, he would have appealed the case. *Id.* at 1038.

**15.08.02 Civil Cases**

Criminal practitioners need to be aware of civil rules regarding the Notice of Appeal because a habeas corpus proceeding is civil in nature. *Browder v. Dept. of Corrections of Illinois*, 434 U.S. 257, 269 (1978). Federal Rule of Appellate Procedure 4(a) requires that a Notice of Appeal be filed within 30 days after entry of the judgment or order, except where the United States or an officer or agency of the United States is a party, when the time for filing the Notice of Appeal is 60 days. The 30-day filing requirement applies to an order denying a petition for writ of habeas corpus to a petitioner whose liberty is restrained by a state. The 60-day filing period applies both to a federal prisoner in custody under service of sentence who moves pursuant to 28 U.S.C. §2255 (see Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts) and a habeas corpus petition predicated upon execution of the federal sentence. As in the criminal context, the time limit is mandatory and jurisdictional in nature.

Title 28 U.S.C. §1826(b) provides that a recalcitrant witness summarily ordered confined pursuant to 28 U.S.C. §1826(a) shall have his or her appeal disposed of "not later than thirty days from the filing of such appeal." Ninth Circuit Rule 3-5 requires that the appeal be labeled “RECALCITRANT WITNESS APPEAL” and that counsel notify the criminal motions unit of the court of appeals both telephonically and in writing within 24 hours or face sanctions.

**15.09 TIME SCHEDULE ON APPEAL**
15.09.01 Order for Time Schedule

The clerk of the district court enters the Order for Time Schedule pursuant to the directions of the Ninth Circuit Court of Appeals. That order sets the time for the court reporter to file the reporter's transcript with the district court and the appellant and appellee to file their briefs in the Ninth Circuit. A sample form of the Order for Time Schedule is found at page 813.

Federal Rule of Appellate Procedure 31 provides that:

* The appellant must serve and file a brief within 40 days after the record is filed.
* The appellee must serve and file a brief within 30 days after the appellant’s brief is served.

* The appellant may file an optional reply brief within 14 days after service of appellee’s brief, but it must be filed at least three days before argument.

Ninth Circuit Rule 31-2.1(a) provides that the early filing of an appellant’s brief does not advance the date for filing the appellee’s brief. Further, the appellant bears ultimate responsibility for determining the date on which the certificate of record is filed with the court of appeals and for computing the due date for the opening brief.

15.09.02 Extensions of Time

Any extension of time for the filing of the briefs must come from the Ninth Circuit Court of Appeals. Ninth Circuit Rule 31-2.2(a) provides that a 14-day extension may be granted upon oral request. Counsel must first notify opposing counsel and then follow up with written notice to the opposing party. A copy of such written notice shall be attached to any brief filed pursuant to the extension of time. An oral grant of extension of time will bar any further motion to extend the brief’s due date, unless there is a written request showing extraordinary and compelling circumstances.

When an extension of time is granted to file a petition for rehearing and suggestion for rehearing en banc, it is important to note that the petition must be received in the Ninth Circuit by the due date. Even though a post-mark alone is sufficient when extensions of time are granted for other briefs, a post-mark alone is insufficient for a petition for rehearing and suggestion for rehearing en banc.

If an extension of more than 14 days is necessary, or future extensions may be necessary, a written motion is required. According to 9th Cir. R. 31-2.2(b), the motion must be filed seven days prior to the due date and must include a declaration stating:

* When the brief is due;
* When the brief was first due;
* The length of the requested extension;
* The reason an extension is necessary;
* A representation that movant has exercised diligence and that the brief will be filed within the time requested; and
* Whether any other party objects to the request, or why the moving party has been unable
to determine the other parties’ position.

The rule specifically provides that merely citing to the press of business alone is insufficient to show
diligence. Thus, it is advisable to provide a detailed explanation of the reasons for the request; and if the
reason is the press of business, provide a detailed explanation of the pressing business. If counsel for
appellant fails to file a brief within the time allotted, or to notify the court of the intent not to file a brief,
counsel will be subjected to sanctions.

15.09.03 Time for Filing

Federal Rule of Appellate Procedure 25(a) provides that filing may be accomplished by mail
addressed to the district court. Generally, a filing is not timely unless the clerk receives the papers within
the time set for filing. However, a brief or appendix is deemed to be filed upon mailing if it is mailed by
First-Class Mail, postage prepaid, or by a third-party commercial carrier for delivery to the clerk within
three calendar days. Federal Rule of Appellate Procedure 26(a) details how to compute the time for filing.
Generally, the day of the act is excluded. Saturdays, Sundays and legal holidays are excluded when the
total period is less than seven days. If service is achieved by mail, then the due date may be extended by
three days. The rule also provides a list of recognized holidays.

15.09.04 Motions

Federal Rule of Appellate Procedure 27 provides that any application for relief (including requests
for extensions of time) must be made by motion. Any affidavit in support of a motion must be filed at the
same time as the motion and cannot contain legal argument. Parties may not file a separate brief supporting
or responding to a motion.

A motion is limited to twenty pages and a notice of motion and proposed order are not required.
If a response is filed, it must be within 10 days of service of the motion and cannot exceed 10 pages. An
original and three copies must be submitted and there is no oral argument.

15.10 THE RECORD ON APPEAL AND ORDERING TRANSCRIPTS

In Griffin v. Illinois, 351 U.S. 12, 19-20 (1956), the Supreme Court held that due process and
equal protection require that a transcript of proceedings be provided to indigent defendants for their direct
appeal as of right. Nonetheless, assembling the record for appeal can be a logistical nightmare requiring
the assignment of duties.

15.10.01 Distribution of Duties

Generally, it is the duty of the appellant to notify the appellee of the sections of the transcripts and
proceedings to be ordered, and to determine if the appellee requires the ordering of additional sections.
It is also the duty of the appellant to order the transcripts from the court reporter and file a transcript
designating form in the district court. Finally, it is the appellant’s duty to notify the Ninth Circuit if the court reporter fails to comply with the time schedules.

It is the duty of the court reporter to prepare a verbatim transcript in a timely manner or file a motion with the circuit clerk for additional time. The court reporter must file the transcript with the district clerk and notify the circuit clerk of the filing.

It is the duty of the district court clerk to complete and number the record and forward it to the circuit court clerk. The circuit clerk then docket the appeal and files it.

15.10.02 Ordering Transcripts

Federal Rule of Appellate Procedure 10(a) states that the record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the district clerk.

Rule Federal Rule of Appellate Procedure 10(b)(1) requires the appellant, within 10 days of filing the Notice of Appeal, either to order in writing the parts of the transcript necessary for the appeal or file a certificate indicating that transcripts will not be necessary. If the costs are to be paid by the Criminal Justice Act, the order must so state. If only a portion of the transcript is ordered, notice must be given to the appellee, who may then order additional portions within 10 days. Fed. R. App. P. 10(b)(3).

The Ninth Circuit Rules differ from the Federal Rules of Appellate Procedure regarding the process for ordering transcripts. Ninth Circuit Rule 10-3.2 requires that when an appellant intends only to order partial transcripts, or no transcripts at all, the appellant must provide notice of the chosen portions or the intent not to order transcripts to the appellee within seven days of filing the notice of appeal. Then, the appellee has seven additional days to respond and indicate which additional portions of the transcript are necessary to the appeal. Finally, appellant’s counsel must file a Transcript Designation and Ordering Form in the district court within 21 days after the filing of the Notice of Appeal, indicating the transcripts requested by both appellant and appellee. An appeal will not be processed without the filing of this form.

If there is no recording or transcription of the evidence available, Fed. R. App. P. 10(c) permits the appellant to prepare a statement of the evidence from the best available means. Of course, the appellee may object and propose amendments. As an alternative, Rule 10(d) provides that an agreed statement of the record may be certified as the record on appeal.

Rule 10(e) of the Federal Rules of Appellate Procedure permits correction or modification of the record on appeal. This Rule can be used to augment the record in the event that something material to either party is omitted or misstated.

15.10.03 Paying for Transcripts
Ninth Circuit Rule 10-3.2(e) requires that suitable arrangements be made by appellant’s counsel for payment to the court reporter for the transcript. The failure to do so may result in sanctions pursuant to Rule 46(c) of the Federal Rules of Appellate Procedure.

In appointed cases, counsel uses the **Authorization and Voucher for Payment of Transcript (CJA 24)**. Retained counsel must make suitable arrangements with the court reporter for payment of the cost of the transcript on or before the date the **Transcript Designation and Ordering Form (CA9-039)** is filed with the district court.

Under Rule 10-3.2(f) of the Ninth Circuit Rules, when an appellee gives an appellant notice that additional portions of the transcript are required, the appellant remains responsible for payment. However, if the appellant believes the requested portions to be unnecessary, the court will determine the allocation of costs after the certificate is served and filed in that court and copies are furnished to the court of appeals and the court reporter.

**15.10.04 Delivery of Transcripts**

Federal Rule of Appellate Procedure 11 and 9th Cir. R. 11-1.2 set forth the procedures for when the court reporter fails to prepare the transcripts in accordance with the scheduling order issued by the court. Ninth Circuit Rule 11-1.1 requires that the transcript be filed in the district court within 30 days from the date the transcript designation form is filed in the district court. If the court reporter fails to comply with the scheduling order, the appellant shall notify the circuit court to request modification of the briefing schedule. 9th Cir. R. 11-1.2. This notice must be filed within 14 days of the transcript due date. *Id.* The appellant need not file this notice if the court reporter has motioned for an extension of time. However, the grant of an extension will not waive the mandatory fee reduction for the late delivery of transcripts unless so stated in the order. 9th Cir. R. 11-1.1.

After completion of the clerk’s record in the district court, Fed. R. App. P. 11(c) and 9th Cir. R. 11-3 permit the record to be housed temporarily in the district court during the time of preparation of briefs by the parties. Finally, 9th Cir. R. 11-5 indicates that the record will be transmitted to the court of appeals within seven days after the filing of the appellee’s brief.

**15.11 EXCERPTS OF RECORD**

**15.11.01 Federal Rules - Appendix**

Federal Rule of Appellate Procedure 30, labeled “Appendix to the Briefs,” requires the appellant to attach to the brief: (1) the docket entries from the proceedings below; (2) the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question. The Rule permits the addition of any other portions of the record that the parties wish to bring to the court’s attention.

The Appendix must begin with a table of contents and all other documents must follow chronologically. Federal Rule of Appellate Procedure 30(a)(3) requires 10 copies of the Appendix to be served with the brief, with another copy to opposing counsel. If the parties cannot agree on the contents
of the record, then the appellee may, within 10 days of receiving the designation, serve a designation of additional parts. Fed. R. App. P. 30(b)(1). The appellant bears the cost of the Appendix. Fed. R. App. P. 30(b)(2). However, if the parts of the record designated by the appellee are unnecessary, the cost for those portions will lie on the appellee. *Id.* The entire record will be available to the court of appeals and thus, excluded sections may be relied upon.

15.11.02 Ninth Circuit Rules - Excerpt of Record

The Ninth Circuit does not require the Appendix described above, but instead Rule 30-1 requires an Excerpt of Record. This is a more thorough compilation than the Appendix. Generally, all members of the panel assigned to hear a case will rely solely upon it and will thus not have the entire record before them. Excerpts of Record must be filed in all cases and there are sanctions for failure to follow this rule. *Dela Rosa v. Scottsdale Memorial Health Systems, Inc.*, 136 F.3d 1241 (9th Cir. 1998).

15.11.02.01 Form

Ninth Circuit Rule 30-1.2 provides that five copies of the excerpt must be filed with the opening brief and one copy must be served on each of the other parties. Each excerpt must be printed on white paper, bound separately, paginated, and tabbed. 9th Cir. R. 30-1.5. If the number of pages exceeds 300, then the excerpt must be filed in multiple volumes, each containing 300 or fewer pages. *Id.* The cover must be tan, styled like a brief cover, except that it should be labeled “Excerpt of Record,” rather than “Brief of Appellant.” *Id.* The documents should appear in chronological order, beginning with an index and ending with the docket sheet. *Id.* The document with the earliest file date stamp should be on top.

15.11.02.02 Content

Ninth Circuit Rule 30-1.3 requires an Excerpt of Record to contain:

* The final indictment;
* Relevant portions of documents or transcripts necessary to determine issues presented in the appeal and those cited in the briefs;
* The judgment or interlocutory order appealed from;
* The notice of appeal; and
* The trial court docket sheet.

Ninth Circuit Rule 30-1.8 requires that if a Presentence Report is referenced in any brief, four copies must be forwarded to the clerk of the court of appeals in a sealed, marked envelope, along with the opening brief and Excerpt of Record.

Ninth Circuit Rule 30-1.4 prohibits the inclusion of pages of transcript, briefs, or other memoranda of law filed in the district court which are unnecessary to resolution of the issue. If necessary, 9th Cir. R. 30-1.6 and 1.7 permit Supplemental and Further Excerpts of Record.

15.12 BRIEFS
Ninth Circuit Rule 31-1 provides that in lieu of the 25 copies of the brief required by Rule 31(b) of the Federal Rules of Appellate Procedure, an **original** and **15 copies** of each brief shall be filed. Ninth Circuit Rule 32 details the form of the brief.

**15.12.01 Form of Brief**

**Covers.** The covers must appear in the following colors:

- Opening Brief for Appellant: Blue.
- Opening Brief for Appellee: Red.
- Reply Brief: Gray.

The **front** cover of a brief must contain: (1) the number of the case centered at the top; (2) the name of the court; (3) the title of the case; (4) the nature of the proceeding and the name of the court, agency, or board below; (5) the title of the brief identifying the party or parties for whom the brief is filed; and (6) the name, office, address, and telephone number of counsel representing the party for whom the brief is filed. 9th Cir. R. 32(a)(2).

**Binding.** Briefs may employ any type of binding which does not obscure the text and allows the brief to lie reasonably flat when open. 9th Cir. R. 32(a)(3).

**Font.** Briefs must be printed in a plain black image, on laser-quality paper, and on one side of an unglazed, opaque page. The font must be plain, roman style, but italics and bold may be used for emphasis. Photographs, illustrations, and tables may be reproduced by any method and on glossy paper so long as the original is glossy.

The brief must be double-spaced, on 8½ by 11 inch paper. Quotations of more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may appear in the margins, but no text. 9th Cir. R. 32(a)(4).

The typeface may be either proportionately spaced or monospaced. If it is proportionately spaced, then it must include serifs, but sans-serif type may be used in headings and captions; and it must be 14-point or larger. If a monospaced face is used, it may not contain more than 10½ characters per inch. 9th Cir. R. (a)(5).

**Length of Briefs.** The headings, footnotes, and quotations count toward the word and line limitations. 9th Cir. R. 32(a)(7). All other required sections do not. The following restrictions apply:

- Appellant/Appellee’s opening brief:
  -- May not exceed 30 pages; or
  -- May contain no more than 14,000 words; or
  -- If using monospaced face may not contain more than 1,300 lines of text.

- Reply brief:
-- May not exceed 15 pages; or
-- May contain no more than half of the type volume specified for the principle brief.

Certificate of Compliance. Federal Rule of Appellate Procedure 32(a)(7)(C) requires the submission of a Certificate of Compliance. Ninth Circuit Rule 32-1 requires that the language be identical to and in substantially the same format as the Form 8 (example provided at page 827).

Motion to Exceed Length Limitations. Ninth Circuit Rule 32-2 indicates that the Court will entertain motions to exceed the page limitation. Such motions are looked upon with disfavor. The request must be filed on or before the brief’s due date and must be accompanied by a declaration detailing the reasons in support of the request. When making such a request, the appellant is to submit only one (1) copy of the brief and a Form 8 certification. The cost of preparation and revision will not be considered.

15.12.02 Contents of Brief

Federal Rule of Appellate Procedure 28 dictates the contents of the opening and reply briefs and the proper order of the subsections. Where indicated, the Ninth Circuit imposes additional requirements.

15.12.02.01 Opening Brief

* Table of Contents (with page numbers).
* Table of Cases (alphabetically).
* Nature of the case.
* Statement of Jurisdiction (explanation below).
* Bail status (required by 9th Cir. R. 28-2.4).
* Statement of the issues presented for review.
* Statement of the Case.
* Statement of facts relevant to the issues with references to the record.
* Summary of the argument.
* Argument.
* Conclusion stating precise relief sought.
* Statement of Related Cases (required by 9th Cir. R. 28-2.6).
* Proof of Service.

Jurisdiction. The Statement of Jurisdiction must include the basis for subject matter jurisdiction in both the district court and the court of appeals, as well as evidence that the Notice of Appeal was timely filed. In criminal cases, the district court usually derives jurisdiction from 18 U.S.C. §3231. The appellate court has jurisdiction over appeals from final judgments under 28 U.S.C. §1291. The court of appeals has jurisdiction to review a criminal sentence pursuant to 18 U.S.C. §3742(a). Finally, an appellant must show that the Notice of Appeal was filed in a timely fashion as required by Fed. R. App. P. 4(b). The Rules require a statement of the date that the district court entered the Judgment and Commitment and the date appellant filed the Notice of Appeal.
Nature of the Case. The Nature of the Case requires a statement of what is being appealed from, be it a judgment of conviction, a sentence, or an order which may be heard as an interlocutory appeal. An appellant might state, “[t]his appeal is taken from the sentence imposed on John Smith, on January 1, 2000, by the Honorable Jane Doe, District Judge for the United States District Court for the Southern District of California. [CR 25; ER 13].”

Statement of the Case. The Statement of the Case section includes an explanation of the course of the proceedings below, as well as the disposition below. It is not necessary to include every procedural aspect of the case below. For instance, if the case ultimately resulted in a plea and the sentence is the only subject for appeal, then it may be unnecessary to explain in detail the proceedings which preceded entrance of the plea, including bail review and motion hearings. This section should be limited to proceedings which are useful to understand the case and necessary to its disposition.

Summary of the Argument. The Summary of the Argument should not be a mere recitation of the headings.

Argument. The standard of review may appear under a separate heading or within the discussion of each issue. Even if it appear under its own heading, it is often advisable to refer to the standard of review throughout the argument.

Also, recent case law has made clear that there are few issues which are too frivolous to be raised and arguably, all issues should be raised unless they have been squarely rejected by the United States Supreme Court. In Bousley v. U.S., 523 U.S. 614 (1998), the Supreme Court held that an issue had been procedurally defaulted because it was not raised on direct appeal, even though at the time of the direct appeal, no court had ever accepted the argument. Bousley pleaded guilty to a gun use charge prior to the Supreme Court’s decision in Bailey v. U.S., 516 U.S. 137 (1995) (holding that a defendant must actively employ a firearm to “use” it within the meaning of 18 U.S.C. § 924(c)(1)). The trial court rejected his 28 U.S.C. §2255 habeas petition. Then Bailey was decided, but the Eighth Circuit affirmed the dismissal of the petition, finding that it had been procedurally barred because he failed to raise the issue on direct appeal, even though no court had accepted the argument prior to Bailey. Thus, appellate practitioners are left in the untenable position of being torn between raising every issue for purposes of preservation, while seeking to strategically limit the number of issues for emphasis.

Statement of Related Cases. The Statement of Related Cases must appear on the last page of the brief. It must include the name and court of appeals docket number of any known related case pending in the Ninth Circuit. It must state its relationship to the case being briefed. If there are no related cases, a statement shall be made to that effect.

15.12.02.02 Appellee Brief

The Appellee Brief need not restate the jurisdiction, issues, case, or the standard of review unless the appellee disagrees with the appellant’s statements regarding these issues. The remaining sections of the Appellee’s Brief should be identical to those in the Opening Brief.
15.12.02.03 Reply Brief

This brief is optional and the form is flexible. However, reply briefs must contain a Table of Contents and a Table of Cases. The appellee may not file an additional brief in response to a Reply Brief without leave of court.

15.13 ORAL ARGUMENT

Federal Rule of Appellate Procedure 34 requires oral argument to be available in all cases unless a panel of three judges unanimously believes that oral argument is not necessary. The court must give notice to the parties of the intent to decide the matter without oral argument, and the parties must have an opportunity to give reasons why oral argument should be heard.

Oral argument should be permitted unless: (1) the appeal is frivolous; (2) the dispositive issue has been authoritatively decided; or (3) the facts and legal arguments are adequately set forth in the briefs.

The appellant opens and concludes the argument, but cannot read at length from briefs or authorities. Exhibits may be used, but must be removed by the parties or they will be destroyed. If one party fails to appear, the court may hear argument from the other party. If both fail to appear for oral argument, the merits may be decided on the briefs.

15.14 PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

In a Petition for Rehearing, a party requests that the same three judge panel reconsider their decision, while in a Suggestion for Rehearing En Banc, the request is that an 11 judge panel of the entire active panel consider the case. The filing of either petition is not a prerequisite to filing a petition for writ of certiorari to the United States Supreme Court. If both a Suggestion for Rehearing En Banc and a Petition for Rehearing are filed, then they are filed together and an answer brief will not be received unless requested. Generally, oral argument will not be heard. However, if either petition is granted, oral argument may or may not be granted. Once either petition has been granted and the opinion withdrawn, the opinion may not be cited in either briefs or during oral argument.

Both a Petition for Rehearing and a Suggestion for Rehearing En Banc should be filed within 14 days after entry of judgment. Fed. R. App. P. 35, 40. The cover must be blue in color. If only a Petition for Rehearing is filed, appellant need only file an original and three copies. 9th Cir. R. 40-1. However, an original and 50 copies must be filed if a Suggestion for Rehearing En Banc is also filed. Id. The form of the petition is the same as the form set forth for the opening briefs in Fed. R. App. P. 32.

Federal Rule of Appellate Procedure 35 and 9th Cir. R. 35-1 provide that an en banc determination will only be ordered if: (1) consideration of the full court is necessary to secure or maintain uniformity of its decisions (within the Ninth Circuit or among the circuits) or (2) the proceeding involves a question of exceptional importance. A matter may be accepted to be heard en banc if requested by a majority of the circuit judges in active service.
15.15 ENTRY OF JUDGMENT

Entry of judgment occurs upon its notation on the docket sheet. The clerk is responsible for notifying the parties if no opinion is issued or, if an opinion should issue, mailing a copy of the opinion to each party. Ninth Circuit Rule 36-1 provides that the Ninth Circuit may issue Opinions, Memoranda or Orders. Memorandum opinions are not intended for publication and have no precedential value.

It is presumed that an opinion will not be published unless it: (1) establishes, alters, modifies or clarifies a rule of law; (2) calls attention to a rule of law which appears to have been generally overlooked; (3) criticizes existing law; (4) involves a legal or factual issue of unique interest or substantial public importance; (5) is a disposition of a case in which there is a published opinion by a lower court or administrative agency; (6) is a disposition of a case following a reversal or remand by the United States Supreme Court; or (7) is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition for the court. 9th Cir. R. 36-2.

15.16 PETITION FOR WRIT OF CERTIORARI

The Supreme Court has original jurisdiction over few issues and therefore, uses the extraordinary writ of certiorari to hear most of its cases. Literally, *certiorari* means to direct “a lower court to deliver the record in the case for review.” Black’s Law Dictionary 220 (7th Ed.). The United States Supreme Court grants few petitions for writ of certiorari, particularly where the issue is one of disputed fact or the misapplication of a properly stated rule.

Supreme Court Rule 10 indicates that the Court will consider granting the writ when there is a conflict between: (1) two or more circuits, (2) a state court of last resort and a federal circuit, (3) between two state courts of last resort, on an important federal question, or (4) a state court of last resort or a circuit court and the Supreme Court. The Court also may exercise its supervisory powers to act when a court has departed from the accepted and usual course of judicial proceedings.

15.16.01 Form of Petition

A petition for writ of certiorari must be filed within 90 days from entry of the decision in the court of appeals or the denial of a petition for rehearing. Supreme Court Rule 12 requires the submission of 40 copies and the docketing fee, unless the petitioner qualifies to proceed *in forma pauperis*. An *in forma pauperis* petitioner need only submit an original and 10 copies of a typewritten petition and 10 copies of the motion to proceed *in forma pauperis*. The cover must be white in color and the document may not exceed 30 pages.

15.16.02 Content of Petition

The petition for writ of certiorari must contain the following:

* Question Presented for Review;
* List of all parties to the proceeding in the court whose judgment is sought to be reviewed;
* Table of Contents and Table of Cited Authorities (if exceeds five pages);
* Citations of the official and unofficial reports of opinions and orders in the case;
* Statement of the basis for jurisdiction, including the date of the judgment below;
* Verbatim recitation of constitutional provisions, treaties, and statutes relied upon;
* Statement of the case and relevant facts; and
* Argument.

The general concept here is brevity. The petition must set out the questions presented for review on the first page following the cover, and no other information may appear on that page. They must be stated concisely, but not argumentatively, and be related to the circumstances of the case, without unnecessary detail. If the document is more than five pages, there must be table of contents. Similarly, if the constitutional or statutory provisions are lengthy, they should be set out in an Appendix, rather than the text. Again, with brevity in mind, the statement of the case should set forth only the facts material to the consideration of the questions presented, including a summary of the relevant proceedings and quotation of the relevant parts of the record.

15.17 PROOF OF SERVICE

A Proof of Service (or Certificate of Service) must accompany any brief that is filed with the court of appeals and any petition for writ of certiorari filed in the United States Supreme Court. See Fed. R. App. P. 25(d) and Sup. Ct. R. 29(5). The Proof of Service must be separate from the document(s) submitted to the clerk. A proof of service must identify the document delivered, the address and parties to whom it was delivered, and the method of delivery. A Supreme Court Proof of Service must also be signed by a member of the Bar of the Supreme Court who represents the party on whose behalf service is made.

15.18 STANDARDS OF REVIEW

Federal Rule of Appellate Procedure 28(a)(6) and 9th Cir. R. 28-2.5 require an appellant to set forth where in the record an issue "was raised and ruled on" in the lower court and to "identify" the applicable standard of review. The standard of review dictates the degree of deference that an appellate court will give to the findings of fact and conclusions of law made by a trial court. The standard of review is often determinative of the outcome of the case and too often overlooked by appellate writers. For errors that were properly preserved and objected to in the district court, the appellate court reviews either de novo, for clear error, or for an abuse of discretion.

15.18.01 De Novo

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7 It is appropriate for an appellate brief to cite to a case which has applied a particular standard to a particular issue. For a thorough listing of issues and appellate standards of review in the Ninth Circuit, see Tom Carter's, Ninth Circuit Court of Appeals Standards of Review, Outline (September 1999).
This is the least deferential standard of review and is applied primarily to issues of law. The reviewing court reviews the findings from the same position as the trial court. By way of example, the *de novo* standard is applied to pure questions of law like the district court’s determinations of its jurisdiction, violation of the right to speedy trial, and its interpretation of a statute. However, an appellate court will also review *de novo* mixed questions of law and fact, such as the lawfulness of a search.

**15.18.02 Clearly Erroneous**

This deferential standard is used to review the trial court’s findings of fact. It requires a definite and firm conviction that a mistake has been committed. If the finding of the district court is plausible in light of the record viewed in its entirety, a finding may not be reversed simply because the appellate court would have weighed evidence differently. The trial court’s determinations of fact are given deference because it is the trial court which is presumably in the best position to evaluate the evidence and judge the credibility of the witnesses. The trial court’s determination of a witness’s credibility is given special deference. *U.S. v. Nelson*, 137 F.3d 1094, 1110 (9th Cir.) (citation omitted), *cert. denied*, 525 U.S. 901 (1998).

**15.18.03 Abuse of Discretion**

This very deferential standard is used to review judicial exercises of discretion. A trial court abuses its discretion when it bases its decision on an erroneous view of the law. For example, the abuse of discretion standard is generally applied to the district court’s decision to admit or exclude evidence, including whether witnesses will be permitted to testify, as well as to decisions to grant or deny continuances and to discovery requests.

**15.18.04 Choosing the Proper Standard**

Often, the applicable standard of review is subject to debate and in these instances defense counsel should be arguing for a less deferential standard of review. It is particularly important to argue for a better standard of review when a district court’s discretionary ruling effects a defendant’s constitutional rights. Imagine, for instance, a situation where the defense requested a continuance for a couple of hours to procure the presence of an exculpatory witness and the district court denied the request. The decision might be reviewed only for an abuse of discretion. However, the defense could argue that the denial of the continuance request should be reviewed *de novo* and the trial court should be given no deference because the denial of the continuance resulted in the denial of the defendant’s Sixth Amendment right to put on a defense.

The standard of review may also be debated if the issue is reasonable suspicion for a stop. While the inquiry is necessarily fact intensive, the determination of whether there is reasonable suspicion nonetheless has been found to be a mixed question of fact and law to be reviewed *de novo*. See *U.S. v. Michael R.*, 90 F.3d 340, 345 (9th Cir. 1996).

Within one issue, multiple standards of review will often apply. For instance, the legality of a sentence pursuant to the United States Sentencing Guidelines is reviewed *de novo*, as is the district court’s interpretation of the Guidelines. *U.S. v. Jackson*, 176 F.3d 1175, 1176 (9th Cir. 1999) (per curiam)
Sometimes it is not so easy to distinguish questions of fact from questions of law. For example, the definition of a waiver is an “intentional relinquishment or abandonment of a known right or privilege.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Whether a waiver is voluntary is a question of law to be reviewed de novo. U.S. v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998) (citations omitted). However, the determination of whether a waiver is knowing and intelligent is a question of fact to be reviewed for clear error. U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc) (citation omitted). Thus, the determination of whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact to be reviewed de novo. U.S. v. Springer, 51 F.3d 861, 864 (9th Cir. 1995) (citation omitted). In short, it is often the case that an appellate practitioner is in a position to characterize the issue differently so that the trial court may be given less deference, and the appellate court a wider discretion within which to decide the appeal favorably.

15.18.05 Harmless Error

Once an appellate court has found an error by reviewing under one of the above standards, the question becomes whether the error warrants a reversal of the conviction or sentence. Acknowledging that all fifty states had adopted some sort of harmless error rule, the Supreme Court held in Chapman v. California, 386 U.S. 18, 22 (1967), that a federal constitutional error could be harmless. Rule 52(a) of the Federal Rules of Criminal Procedure provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” Similarly, Fed. R. Crim. P. 11(h) specifically provides for application of the harmless error rule to uphold guilty pleas where there has been a technical violation.

When the harmless error rule applies, it is the government who bears the burden to prove the federal constitutional error to be harmless beyond a reasonable doubt. Neder v. U.S., 527 U.S. 1, 7 119 S.Ct. 1827, 1833 (1999). If the error is not constitutional, the government must prove only that the prejudice resulting from the error was more likely than not harmless. U.S. v. Mett, 178 F.3d 1058, 1066 (9th Cir. 1999).

Although the harmless error rule is not limited by its terms and applies to all errors where a proper objection is made, the Supreme Court has recognized a limited class of fundamental constitutional errors that “defy analysis” by harmless error standards. Arizona v. Fulminante, 499 U.S. 279, 309 (1991). These are “structural” errors which require automatic reversal. Neder, 527 U.S. at 8 (citing Johnson v. U.S., 520 U.S. 461, 468 (1997) (citation omitted) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in selection

15.18.06 Plain Error

The general rule is that errors must be preserved for appeal, meaning that the error must have been objected to in the trial court. Traditionally, if an issue was not preserved in the trial court, it was deemed to be waived and the appellate court would not review the issue at all. Nonetheless, a finding of waiver did not, and does not, create a jurisdictional bar to review, and an appellate court can exercise its jurisdiction to review even a waived issue. More recent case law requires the record to reflect the intentional abandonment of a known right in order to effect a valid waiver. *U.S. v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997). If the record does not reflect such an intentional abandonment, then the appellate court will deem the error to be merely forfeited and review for plain error. Thus, a forfeiture is a mere failure to act at trial, rather than an intentional relinquishment of the right to challenge an error. Federal Rule of Criminal Procedure 52(b) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

Plain error is: (1) error, (2) that is plain, clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *U.S. v. Olano*, 507 U.S. 725, 732-35 (1993) (explaining the requirements for plain error under Rule 52(b)). Plain error is intended only to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Id.* at 736. The error must be such that is so clear-cut and so obvious that a competent district judge should be able to avoid it without the benefit of objection. If the state of the law is unclear at trial and only becomes clear as a result of later authority, the error is perforce not plain. *U.S. v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). However, where the state of the law below was clear, but was clearly contrary to the law at the time of the appeal and the appellant failed to object, the review will be only for plain error if the law later changes. See *U.S. v. Johnson*, 520 U.S. 461, 468 (1997); *U.S. v. Keys*, 133 F.3d 1282 (9th Cir. 1998) (en banc). This somewhat ironic situation arises because the presence of error is to be determined at the time of appeal rather than at trial or sentencing. This is because “defendants may take advantage of new rules announced while their appeals are pending.” *U.S. v. Castillo-Casiano*, 198 F.3d 787, 789 (9th Cir. 1999), modified by 204 F.3d 1257 (9th Cir. 2000).

In *Castillo-Casiano*, the defendant, convicted of unlawfully reentering the United States after being deported following conviction for an aggravated felony, did not request a departure based on the nature of his aggravated felony because *U.S. v. Rios-Favela*, 118 F.3d 653 (9th Cir. 1997), specifically precluded such a departure at the time of sentencing. While *Castillo-Casiano*’s appeal was pending, the Ninth Circuit Court of Appeals sitting en banc overturned *Rios-Favela*, holding that departure could be based upon the nature of the aggravated felony. The Ninth Circuit found plain error and remanded for resentencing. Thus, although the law was settled contrary to appellant’s position at the time of sentencing, the appellate court found plain error following a change in the law.
The third prong of the plain error analysis requires that the error “affect substantial rights” and has been interpreted to be identical to the harmless error analysis under Rule 52(a) except that it is the defendant, rather than the government, who bears the burden of persuasion with respect to prejudice. *U.S. v. Castillo-Casiano*, 204 F.3d 1257 (9th Cir. 2000). This burden shifting “does not affect the subjective standard governing what renders an error prejudicial.” *Id.* (citing *Olano*, 567 U.S. at 734). Whatever standard be applied, the court of appeals cannot correct the forfeited error unless it was prejudicial.

Once the three prongs of the plain error test are satisfied, a court of appeals will only reverse if the plain error “seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings.” *Johnson*, 520 U.S. at 469-70 (internal quotation marks and citations omitted). Sometimes a court may choose not to notice a prejudicial error in the trial context, particularly where there is overwhelming evidence of guilt. It may be very expensive to undo or redo a jury trial or one party may have already performed a condition of a plea bargain which may not readily be rescinded.

However, in the sentencing context, an appellate court may be more inclined to find that a prejudicial error affects the fairness, integrity and public reputation of judicial proceedings because such errors needlessly impose longer sentences which directly result in greater public expense and a host of other due process problems recognized to be abhorrent to society. *See Castillo-Casiano*, 198 F.3d at 792. Similarly, the cost to fix the error is minimal. Unlike the trial situation, the error may be corrected by a single appearance in court or possibly even an amended judgment and commitment document.
15.19 NOTICE OF APPEAL

NAME AND ADDRESS OF ATTORNEY
_____________________________________
_____________________________________
_____________________________________

Phone: ________________________________
______Retained ________Appointed

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRIAL JUDGE____________________________ Court Reporter__________________________

UNITED STATES OF AMERICA, ) No.________________________ Criminal
) NOTICE OF APPEAL (CRIMINAL)
) NOTICE OF APPEAL (CRIMINAL)
) (Appellant/Appellee) Plaintiff
) )
) vs. ) NOTICE OF APPEAL (CRIMINAL)
) )
) (Appellant/Appellee) Defendant
) Notice is hereby given that______________________________________________,
defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from
the (check one)
(  ) final judgment (Fed. R. Crim. P. 32(d))
(  ) sentence only (18 U.S.C. §3742) Sentence imposed________________________
(  ) order (describe) _____________________________________________________________
entered in this proceeding on the ____________ day of ___________________________ 19__.
If government appeal:  Was the filing of this appeal approved in accordance with 18 U.S.C. §3742(b)(4)?
_____Yes ______No
Dated: ______________________________________________________

*Pursuant to Fed.R.Crim.P.32(a)(2) the defendant may request the clerk to prepare and file the Notice
of Appeal.
**If transcript required, transcript order form (CA9-039) must be completed and court reporter contacted to make arrangements for transcription.
15.20 ORDER FOR TIME SCHEDULE AND TIME LINE FOR CRIMINAL APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) ORDER FOR TIME SCHEDULE
Plaintiff ) CA NO. ______________________
) )
) )
) DC NO. ______________________
) )
) District_______________________
) Notice of Appeal filed__________
) 
) Defendant(s) ) ( ) CJA or F.P. ( ) Paid Appeal
) ) ( ) Apptd Couns ( ) Fed Defender
) ) ( ) Retained Counsel
) ) ( ) Advisory Counsel Only
) ) ( ) On Bail ( ) In Custody
) )
) _______________________________
) 

The parties, counsel and court personnel, in the processing of this appeal, will comply with the following time schedule:

1. If not exempt, the docket fee will be transmitted to the Clerk of the District Court ............................................... IMMEDIATELY
2. Date transcript will be ordered from the Court reporter. (If this case is under CJA, give the date that the order is to be given to the court reporter.) ............................................... _________
3. The court reporter's transcript will be filed in the District Court .............................................................. _________
   (Certificate of record will be submitted to the Court of Appeals by the Clerk of the District Court immediately upon the filing of the transcript. The Certificate of Record indicates that the complete trial court record including designated transcripts is available for use by the parties.)
4. Appellant's opening brief and excerpts of record will be served and filed .............................................. _________
5. The brief of appellee will be served and filed ............................................................................................... _________
6. The (optional) reply brief of appellant will be served and filed ................................................................. _________

By direction of the Judicial Conference of the United States, this Court must expedite criminal appeals. This time schedule must be adhered to without exception. This appeal will be deemed ready for calendaring, on the first available calendar, after the appellee's brief is filed.

For the Court:

NOTE Cathy A. Catterson
9th Cir. Rule 42-1 Clerk, U.S. Court of Appeals
requires that this appeal be dismissed if appellant's brief is not timely filed.

By: ____________________________
   Deputy Clerk
   U.S. District Court
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Transcript Designation and Ordering Form

U.S. Court of Appeals Case No __________________________ US District Court Case No __________________________

Short Case Title (Include Name of Specific Defendants in Criminal Cases)

Date Notice of Appeal Filed by Clerk of District Court __________________________

SECTION A — To be completed by party ordering transcript

HEARING DATE COURT REPORTER

PROCEEDINGS (Mark those not desired)

Verbal Opening Statements

Settlement Instructions

Closing Arguments

Jury Instructions

Pre-Trial Proceedings

Other (please specify)

(Attach additional page for designations if necessary)

( ) I do not intend to designate any portion of the transcript and will notify all counsel of this intention.

( ) As retained counsel (or litigant proceeding in pro per), I request a copy of the transcript and guarantee payment to the reporter of the cost thereof upon demand. I further agree to pay for work done prior to cancellation of this order.

( ) As appointed counsel I certify that an appropriate order authorizing preparation of the transcript at the expense of the United States has been, or within 5 days thereof will be, obtained and delivered to the reporter. I agree to recommend payment for work done prior to cancellation of this order.

Date transcript ordered __________________________

Type or Print Name __________________________

Signature of Attorney __________________________ Phone Number __________________________

Address: __________________________

This form is divided into five parts. It should be used to comply with the Federal Rules of Appellate Procedure and the Local Rules of the U.S. Court of Appeals for the Ninth Circuit regarding the designation and ordering of court reporters' transcripts.

Please note the specific instructions below. If there are further questions, contact the Clerk's Office, U.S. District Court at (619) 557-6368.

SPECIFIC INSTRUCTIONS FOR ATTORNEYS

(1) Pick up form from district court clerk's office when filing the notice of appeal.

(2) Complete Section A, place additional designations on blank paper if necessary.

(3) Send Copy 1 to District Court.

(4) Send Copy 4 to opposing counsel. Make additional photocopies if necessary.

(5) Send Copies 2 and 3 to court reporter. Contact court reporter to make further arrangements for payment.

(6) Continue to monitor progress of transcript preparation.
## 15.22 CJA 24 -- AUTHORIZATION AND VOUCHER OF PAYMENT

### CJA 24 AUTHORIZATION AND VOUCHER FOR PAYMENT OF TRANSCRIPT (25-M)

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### SPECIAL AUTHORIZATIONS

- Appointed Cost: % of transcript with [Give one name and defendent]

### JUDICIAL INITIALS

A. [ ] Expenditure [ ] Daily [ ] Hourly Transcription [ ] Realtime Transcription

B. [ ] Prosecution Opening Statement [ ] Prosecution Argument [ ] Defense Opening Statement [ ] Defense Argument

C. [ ] Prosecution Rebuttal [ ] Defense Rebuttal [ ] Jury Instructions

D. [ ] Individually

E. In this multi-defendant case, all essential information and expenditures will be made as necessary under the Criminal Justice Act.

### ATTORNEY’S STATEMENT

As the authorized for the person represented who is named above, I hereby affirm that the transcript requested is necessary for the appropriate representation of the defendant. The fees are in compliance with the Criminal Justice Act.

(Blank)

(Blank)

### COURT ORDER

[Blank]

### COURT REPORTER/TRANSCRIBER STATUS

- [ ] Official
- [ ] Transcript
- [ ] Other

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### TRANSCRIPT

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### TOTAL AMOUNT CLAIMED:

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### CERTIFICATION OF SERVICE PROVIDER

[Signature] [Date]

### CERTIFICATION OF ATTORNEY OR CLEERE

I hereby certify that the services were rendered and that the transcript was received.

(Blank)

### APPROVED FOR PAYMENT

(Blank)

### AMOUNT APPROVED

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15.23 NOTICE OF ENTRY OF JUDGMENT AND INSTRUCTIONS

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file date on the attached decision of the Court.

MANDATE (FRAP 41)

The mandate will issue seven (7) days after the expiration of the time for filing a petition for rehearing or seven (7) days from the denial of a petition for rehearing, unless the Court directs otherwise. If a stay of mandate is sought, an original and three (3) copies of the motion must be filed.

PETITION FOR REHEARING (FRAP 40)

Filing Time: A petition for rehearing may be filed within fourteen (14) days from entry of judgment. If the United States or an agency or officer thereof is a party in a civil appeal, the time for filing a petition for rehearing is 45 days from entry of judgment.

An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency, or officer thereof is a party, 45 days after the date of the order of publication. If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.

Purpose: A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material point of fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel.
3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

Petitions which merely reargue the case should not be filed.

Statement of Counsel: A petition which contains an introduction stating that, in counsel's judgment, one or more of the situations described above (in Purpose Section) exist. The points to be raised must be clearly stated. Lacking such a statement, the petition will not be filed.

Form: Use fifteen (15) 8½ x 11 inch, vertically oriented, single - spaced, typewritten pages allowed by FRAP 41. No other format is acceptable. The petition must always comply in form with FRAP 32. Three (3) copies of the petition and the original are required unless the petition includes a suggestion for rehearing en banc. If it does, fifty (50) copies and the original must be filed.

The petition must be directed to the Clerk of Court, contain an original signature of the counsel, pro per litigant, submitting the petition and indicate complete proof of service to all parties.
PETITION FOR REHEARING EN BANC
(FRAP 35, CIRCUIT RULE 35)

Grounds: Parties should seek en banc consideration only if one or more of the following grounds exist: (1) When consideration by the full court is necessary to secure or maintain uniformity of its decisions; or (2) when the proceeding involves a question of exceptional importance; or (3) when the opinion directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

BILL OF COSTS (FRAP 39, CIRCUIT RULE 39-1)

If a party is allowed costs, the bill of costs must be filed within fourteen (14) days of entry of judgment. (See attached form for additional information.)

ATTORNEYS' FEES

If a party is entitled to attorneys' fees and expenses under the Equal Access to Justice Act, such request must be accompanied by a completed Form AO 291. Ninth Circuit Rule 39-2. Contact the Clerk's Office at (415) 356-9800 for a copy of Form AO 291.

A completed Form CA9-001/86 must accompany all other requests for attorneys fees which are filed pursuant to Ninth Circuit Rule 39-1.6. A copy of Form CA9-001/86 may be obtained by telephoning the Clerk's Office at (415) 356-9800.

PETITION FOR WRIT OF CERTIORARI

For information concerning the filing of this petition, please refer to the rules of the Supreme Court of the United States.

COUNSEL LISTING IN PUBLISHED OPINIONS ONLY

If the disposition in your case is published, please check counsel listing on the attached decision. If there are any errors, please notify West Publishing Company and this office, in writing, within ten (10) days. The address is: West Publishing Company: 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526 (Attn.: Manuscript Dept., Kathy Blissner). Counsel listed on the opinions are those attorneys who argued and signed the brief. You list the attorney's name, law firm, city and state.
15.24 PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) U.S.C.A. No. 00-####
) )
Plaintiff-Appellee, ) U.S.D.C. No. CR. 00-####-ABC
) )

v. )

JUAN DOE, )

) )

Defendant-Appellant. )

) )

____________________________________)

Appeal from the United States District Court
for the Southern District of California
Honorable A. B. Cee, District Judge

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

ATTORNEY
Office
Address
City, State Zip
Telephone
Attorneys for Defendant-Appellant
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) U.S.C.A. No. 00-###
 )
 Plaintiff-Appellee, ) U.S.D.C. No. 00-####-ABC
 )
 v. )
 )
 JUAN DOE., )
 )
 Defendant-Appellant. )
 )
______________________________)

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

A. Introduction

Short statement as to why opinion should be withdrawn and rehearing granted.

B. Statement of Facts Relevant to the Petition for Rehearing and Suggestion for Rehearing En Banc

(1) facts relevant to petition for rehearing.

C. Argument -- Argue point[s] why petition should be granted.

CONCLUSION

For the foregoing reasons, defendant-appellant respectfully submits that the # Month 199# opinion should be withdrawn and that a rehearing or a rehearing en banc be granted.

Respectfully submitted,

DATED:

ATTORNEY
Office
Address
City, State Zip
Telephone
Attorneys for Defendant-Appellant
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ) U.S.C.A. No.
) )
Plaintiff-Appellee, ) U.S.D.C. No.
) )
v. ) NOTICE TO DEFENSE COUNSEL
) )
JUAN DOE, ) )
) )
Defendant-Appellant. ) )

I, , after having been advised by my attorney of my right to petition
the United States Supreme Court for a writ of certiorari to review the decision of the Ninth Circuit rendered
on in No. , do hereby notify my attorney that: (Indicate your choice by checking one
of below).

_____ I wish to petition the United States Supreme Court.

_____ I do not wish to petition the United States Supreme Court.

DATED: (Signature of Defendant-Appellant)

DATED: (Attorney for Defendant-Appellant)
15.26 PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

DOE,

PETITIONER,

- VS. -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATTORNEY
Office
Address
City, State Zip
Telephone
Attorneys for Petitioner
QUESTION PRESENTED FOR REVIEW

Whether . . . .
IN THE SUPREME COURT OF THE UNITED STATES

DOE,

PETITIONER,

- VS -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, DOE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on ## Month 200#.

OPINION BELOW

On _____ entered it opinion affirming the conviction of petitioner for . . . A copy of the opinion is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Self-explanatory.

STATEMENT OF THE CASE

Concise statement of relevant facts.
REASONS FOR GRANTING THE WRIT

1.

2.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

DATED:

ATTORNEY
Office
Address
City, State  Zip
Telephone
Attorneys for Petitioner
15.27 PROOF OF SERVICE

IN THE SUPREME

COURT OF THE UNITED STATES

No.______________
_____________________
_____________________

DOE,

PETITIONER,

- VS -

UNITED STATES OF AMERICA,

RESPONDENT.

_____________________
_____________________

PROOF OF SERVICE

State of __________, )
) ss.
County of ________, )

DEPOSITOR, being first duly sworn, deposes and says:

That on ## Month 199#, the petition for writ of certiorari in the above-entitled case was deposited in a United States Post Office mail box located in City, State, with first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States and within the time allowed for filing said petition for writ of certiorari;

That an additional copy of the petition and motion to proceed in forma pauperis were served on counsel for respondent:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Dated at City, State, this ___ Day of Month, 200#.

Subscribed and Sworn to Before Me
This ___ Day of Month 199#

DEPOSITOR, Affiant
Office

Notary Public in and for said
County and State
15.28 MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

IN THE SUPREME
COURT OF THE UNITED STATES

No.______________
_____________________
_____________________

DOE,
PETITIONER,

- VS -

UNITED STATES OF AMERICA,
RESPONDENT.

_____________________

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Title 18, United States Code §3006A(d)(7) and Rule 39 of this Court, Petitioner, Doe, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code §3006(a) in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

_____________________________

Dated:     ATTORNEY
Office
Address
City, State  Zip
Phone
Attorneys for Petitioner
CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER ________________

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is
   Proportionately spaced, has a typeface of 14 points or more and contains __________ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),
   or is
   Monospaced, has 10.5 or fewer characters per inch and contains __________ words or __________ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

2. The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because
   This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages:
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Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7000 words of less,

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Date __________________________ Signature of Attorney or Unrepresented litigant
CHAPTER 16

THE FEDERAL PETITION FOR WRIT OF HABEAS CORPUS
AND
THE 28 U.S.C. §2255 MOTION

by

Benjamin F. Rayborn

16.01 INTRODUCTION

During the 10-year period preceding passage of the Anti-Terrorism And Effective Death Penalty Act of 1996 [hereinafter AEDPA] more than 80 bills proposing statutes of limitations for filing of the habeas petition had been introduced in Congress. See Appendix to Lonchar v. Thomas, 517 U.S. 314, 333-34 (1996). The crusade to accelerate and limit the filing of the petition for writ of habeas corpus prevailed when President Clinton signed AEDPA on 24 April 1996.

AEDPA extirpated the "at any time" provision for filing a §2255 motion and replaced it with a 1-year limitation period paralleling the one-year limitation period for filing the §2254 habeas petition. However, AEDPA limitation periods for filing are not the only procedural barriers which confront those relying on federal habeas corpus or §2255 as a panacea for enforcement of federal constitutional rights. AEDPA also amended and rewrote habeas law to alter the criteria for granting the writ and appealing from its denial.

16.02 LIMITATION PERIOD FOR FILING HABEAS PETITION

AEDPA provides a one-year limitation period with four potential commencing points for filing a habeas petition by one in custody pursuant to the judgment of a State court [codified as Title 28, United States Code, §2244(d)(1)]. The one-year period runs from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(2) prohibits counting the time toward the one-year period set forth under §2244(d)(1) during which a:

properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.

16.02.01 Conclusion of Direct Review of State Judgment

Under §2244(d)(1)(A) the 1-year limitation period for the person in state custody to file the §2254 habeas petition runs from the date: on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

In *Smith v. Bowersox*, 159 F.3d 345 (8th Cir. 1998), the State of Missouri contended that "final by the conclusion of direct review" meant "conclusion of state review" of the conviction and death sentence of Smith. The Smith Court rejected the contention. Eighth Circuit Judge Bright relied upon federal case law reflecting that the opportunity to seek certiorari was a part of the direct review process. Consequently, the one-year limitation period for Smith to file his federal habeas petition did not commence until the Supreme Court of the United States denied the petition for writ of certiorari in *Smith v. Missouri*, 522 U.S. 954 (1997).

In *Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999), no petition for writ of certiorari was filed in the United States Supreme Court seeking review of the California drug convictions and concurrent 25 years to life terms of imprisonment. Thirteen months after the California Supreme Court denied review Bowen filed a petition for writ of habeas corpus in the United States District Court. The district court dismissed the habeas petition as untimely under §2244(d)(1)(A).

Ninth Circuit Judge Hall, writing for the unanimous Bowen Court, referred to the §2244(d)(1)(A) definition of finality that included the period a person could seek direct review of the state conviction, namely: "expiration of the time for seeking such review." Judge Hall cited *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), for enunciating the proposition that direct review of a state conviction encompasses the right to seek certiorari. Therefore, the one-year limitation period did not commence until expiration of the 90-day period that Bowen had for filing a petition for writ of certiorari in the United States Supreme Court.

Twenty-five years prior to the *Bowen* decision the Supreme Court said that a State was not required to appoint counsel to file a petition for writ of certiorari in that Court. *Ross v. Moffitt*, 417 U.S.
California is one of those states that do not appoint counsel for indigents like Bowen to exercise their right to seek direct review of their state convictions as recognized in *Barefoot v. Estelle*.

### 16.02.02 Impediment to Filing Habeas Petition

Under §2244(d)(1)(B) the 1-year limitation period for filing a §2254 habeas petition commences on the date:

on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed if the applicant was prevented from filing by such State action.

The Ninth Circuit, sitting en banc, reversed and remanded the district court’s ruling in *Whalem/Hunt v. Early*, 99-55627 (9th Cir. Dec. 7, 2000) finding inadequacy of the prison library was an impediment to the filing of a timely petition. Petitioner also deemed tolling of the 1-year limitation period appropriate for the failure of prison officials to make available AEDPA provisions.

### 16.02.03 Retroactive Constitutional Right

Under §2244(d)(1)(C) the one-year limitation period for filing a §2254 habeas petition commences on the date:

on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

In *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), the Supreme Court held that it was unconstitutional for the legislature to remove from the jury the assessment of facts that increased prescribed range of penalties to which defendant is exposed and that such facts must be established by proof beyond a reasonable doubt.

On 7 November 2000 the Ninth Circuit entered its opinion in *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000), where it applied the non-retroactivity principle set forth in *Teague v. Lane*, 489 U.S. 288 (1989). While acknowledging that the California treatment of premeditation as a sentencing factor was open to question after *Apprendi*, Jones was not entitled to relief on his habeas petition.

In *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000), the court denied habeas relief. The Seventh Circuit referred to the narrow exceptions outlined by the Court in *Teague v. Lane*, 489 U.S. 288 (1989), as to enunciation of a new rule of law by the Supreme Court. In the *Teague* opinion the Court said that once the conviction of the petitioner had become final the new rule of law may not be the basis for vacating the conviction through habeas corpus unless:

(1) the new rule places certain kinds of primary conduct beyond the power of the criminal lawmaking authority to proscribe, or
(2) the rule requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.
16.02.04 Claim(s) Discovered Through Due Diligence

The one-year limitation period runs from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. §2244 (d)(1)(D).

In Easterwood v. Champion, 213 F.3d 1321 (10th Cir. 2000), Circuit Judge Kelly, writing for the unanimous court, held that the one-year limitation period did not commence to run until the prison library had a copy of the April 10, 1997 opinion of the court in Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997). At the state trial of the petitioner he had presented an insanity defense to the charge-of murder. Oklahoma presented the testimony of Dr. Garcia who offered his opinion that petitioner was not insane. The Williamson v. Ward opinion reflected the fact that Dr. Garcia himself was suffering "from severe untreated bipolar disorder" which was possibly severe enough "to impair and distort his diagnostic judgment.” Judge Kelly said: “Holding that a prisoner could with 'due diligence' discover information related in a case before the prison law library has access to a copy of the opinion simply ignores the reality of the prison system.”

16.03 TIME NOT COUNTED TOWARD ONE-YEAR LIMITATION PERIOD

Section 2244 (d) (2) provides that:

the time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The question of what constituted "properly filed" divided the circuit courts until 7 November 2000. On that date Associate Justice Scalia, writing for the unanimous Court in Artuz v. Bennett, ___ U.S. ___, 121 S. Ct. 361(2000), held, inter alia, in ascertaining whether the habeas petition was "properly filed, the court will not determine whether the claim was procedurally barred in the state court.” The term "properly filed" simply means the application for state post-conviction relief is recognized as such under governing state procedures.

On 13 November 2000 the Supreme Court granted certiorari to resolve another §2244(d) (2) issue upon which the lower courts do not agree. In that case, Duncan v. Walker, ___ U.S. ___, 121 S. Ct. 480 (Mem) (2000), the question is whether the "other collateral review" provision of §2244(d)(2) tolls the one-year limitation period when a federal petition for writ of habeas corpus is pending. The Second Circuit had held in Walker v. Artuz, 208 F.3d 357 (2d Cir. 2000), that the limitation period was tolled while the federal habeas petition was pending.

Ninth Circuit Judge Beezer, writing for a unanimous court in Jiminez v. Rice, 222 F.3d 1210 (9th Cir. 2000), agreed with those circuits holding that the one-year limitation period was not tolled while a federal habeas petition was pending. Judge Beezer stated:
Section 2244 (d) (2) makes no mention of federal relief. This omission is in stark contrast to other sections of AEDPA in which Congress explicitly described both state and federal collateral relief . . . .

16.04 EQUITABLE TOLLING UNDER AEDPA

The federal courts agree that equitable tolling is proper under AEDPA where the circumstances are either extraordinary or exceptional. Disagreements occur in weighing which circumstances rise to the level of extraordinary or exceptional. Examples are:

Alleged confiscation of legal papers deemed sufficient to establish potential basis for tolling if petitioner exercised due diligence and was prevented from filing his habeas application because of the confiscation of his legal papers. Valverde v. Stinson, 224 F.3d 129 (2d Cir. 2000).

Tolling rejected where petitioner claimed: (1) he was litigating pro se; (2) he was unaware of AEDPA requirements as they had been interpreted judicially; and (3) he lacked access to the law text during the one-year limitation period. Felder v. Johnson, 204 F.3d 168 (5th Cir. 2000).

Counsel wrote petitioner that he had one-year from the date that the Maryland Appellate Court entered its denial of post-conviction review. Petitioner actually had one-year less that time consumed in preparation and-filing of his State post-conviction actions. The one-year limitation period for filing his habeas petition was tolled only while his actions were pending in the Maryland Courts. However, the mistake of counsel in reading the AEDPA statutory provision did not constitute an extraordinary circumstance beyond the control of petitioner under Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000).

AEDPA [codified as 28 U.S.C. § 2254 (i) ] provides:

The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

16.05 LIMITATION PERIOD FOR FILING §2255 MOTION

AEDPA [codified as 28 U.S.C. §2255] provides one-year limitation periods for filing a §2255 motion. The limitation periods parallel the one-year limitation periods for filing the habeas petition under §2254.

16.05.01 Judgment of Conviction Becomes Final

Congress made it crystal clear that the one-year limitation period for filing a §2255 motion begins to run on the date that "the judgment of conviction becomes final." When does the judgment become final?? Decisions of the federal courts reflect that the answer to this question is contingent upon the location of the federal criminal conviction.
Within the jurisdiction of the Seventh Circuit the answer provided in *Gendron v. U.S.*, 154 F.3d 672 (7th Cir. 1998) is the date that the Seventh Circuit enters its mandate if no petition for writ of certiorari is filed. Consequently, the one-year period for filing a §2255 motion runs from the date the mandate is issue by the Seventh Circuit if no certiorari petition is filed.


However, on 2 May 2000, Ninth Circuit Judge O'Scannlain, joined by Circuit Judges Leavy and Rymer, concurred with those Circuits holding that the 1-year limitation period for filing the §2255 motion begins to run on the date that the time for filing a petition for writ of certiorari has expired. *U.S. v. Garcia*, 210 F.3d 1058 (9th Cir. 2000). At footnote 2, page 1059, of its opinion the Garcia Court stated:

The parties are in agreement in this appeal although the government had argued differently in earlier cases before other circuit courts, it is now the position of the Solicitor General that the limitation period begins to run only after the time for filing a petition for a writ of certiorari has expired.

Other circuit courts which had held the 1-year limitation period for filing a §2255 motion begins to run on the date that the time for filing a petition for writ of certiorari has expired are:

*U.S. v. Kapral*, 166 F.3d 565 (3rd Cir. 1999);
*U.S. v. Burch*, 202 F.3d 1274 (10th Cir. 2000);
*U.S. v. Gamble*, 208 F.3d 536 (5th Cir. 2000).

16.05.02 Impediment and its Removal

The one-year limitation period for filing a §2255 motion begins to run from the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action. *See supra* 16.02.02, Impediment to Filing Habeas Petition.

In *Akins v. U.S.*, 204 F.3d 1086 (11th Cir. 2000), the alleged impediment was the prison lockdown with the inability of the movant to access the law library. In its rejection of this claimed impediment, the Eleventh Circuit referred to the failure of the prisoner to show that inability to access the law library unconstitutionally prevented him from exercising his fundamental right of access to courts and that the lockdown was not reasonably related to legitimate penological interests in order for the lockdown to be considered an unconstitutional impediment.

The dismissal of a §2255 motion which had arrived at the office of the district court clerk one day after the expiration of the one-year limitation period for filing the motion was upheld in *Sandvik v. U.S.*, 177 F.3d 1269 (11th Cir. 1999). The attorney for Sandvik mailed the §2255 motion by regular mail from
Atlanta, Georgia to the federal court in Miami, Florida. In its sustaining the dismissal of the §2255 motion the Eleventh Circuit said:

Sandvik's motion was late because his lawyer sent it by ordinary mail from Atlanta less than a week before it was due in Miami. While the inefficiencies of the United States Postal Service may be a circumstance beyond Sandvik's control, the problem
was one that Sandvik's counsel could have avoided by mailing the motion earlier or by using a private delivery service or even a private courier.

_id. at 1272.

16.06 SECOND OR SUCCESSIVE HABEAS PETITION

AEDPA [codified as 28 U.S.C. §2244(b)(1)] provides that a petition for habeas corpus shall be dismissed where it is a second or successive application presenting a claim presented in a prior habeas petition.

Under §2244(b)(2) a claim presented in a second or successive §2254 habeas application that was not presented in the prior habeas application shall be dismissed unless:

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or

(B) the factual predicate for the claim could not have been discovered through the exercise of due diligence; and

(C) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

One who believes that the claim to be presented in a second or successive §2254 habeas petition is within the ambit of "A, B, or C" of §2244(b)(2) must move the appropriate court of appeals under §2244(b)(3)(A) for "an order authorizing the district court to consider the application."

AEDPA [codified as 28 U.S.C. §2244(b)(3)(B-E)] provides for a three-judge panel to decide the motion seeking the authorization for the district court to consider the second or successive habeas petition with the decision to be made within 30 days of filing the motion with the court of appeals. The order of the appellate court denying or granting the motion "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." §2244(b)(3)(E).

16.07 SECOND OR SUCCESSIVE §2255 MOTION

AEDPA, as codified under paragraph 8 of §2255, states:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain
(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, could be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense, or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Alleged newly discovered evidence deemed insufficient to show that no reasonable factfinder would have found movant guilty where the record contained substantial evidence that defendant associated with and participated in the distribution of 100 kilograms of cocaine. *U.S. v. Villa-Gonzalez*, 208 F.3d 1160, (9th Cir. 2000).

In *Bennett v. U.S.*, 119 F.3d 470 (7th Cir. 1997), where the §2255 motion was predicated upon the "new rule of constitutional law" codified under paragraph 8(2) of §2255, the Seventh Circuit held that the Supreme Court must declare any retroactive application.

However, in *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000), the Ninth Circuit relied upon the narrow exceptions outlined in *Teague v. Lane*, 489 U.S. 288 (1989), as to the retroactive application of *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000).

### 16.08 CERTIFICATE OF APPEALABILITY

AEDPA [codified as 28 U.S.C. §2253(a)] provides for appealing the final order in both a habeas proceeding and a §2255 motion action. However, AEDPA [§2253(c)], unequivocally states that an appeal "may not be taken" from the final order unless a circuit judge or judge issues a certificate of appealability.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Section 2253(c)(3) requires that the certificate of appealability sets forth which specific issue or issues satisfy the showing required under paragraph 2 of §2253(c).

Rule 22(b)(1) refers to §2253(c), as requiring a certificate of appealability before an appeal can be taken. The rule provides: "If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate" or "state why a certificate should not issue." If the district judge denies the applicant a certificate, the applicant may seek issuance from a circuit judge.

Under Rule 22(b)(2) the filing of the notice of appeal is deemed a request for a certificate when no express request for the certificate is filed.

The circuits promulgated rules for implementing Rule22(b) of the Federal Rules of Appellate Procedure. For example, Ninth Circuit Rule 22-1(a) sets forth that issuance of the certificate of appealability must first be considered by the district judge. If the district court grants a certificate, it shall state which issue or issues satisfy the 28 U.S.C. §2253(c) standard.
Ninth Circuit Rule 22-1(c) provides 35 days for the filing of a motion seeking a certificate of appealability where the certificate was denied by the district court judge. If no motion is filed within the 35 days, the Ninth Circuit will deem the notice of appeal to constitute a request for the certificate.

Rule 22-1 (d) permits the filing of a motion within the 35 day period where the district court has denied a certificate of appealability in part. Under this Rule the Ninth Circuit will not consider the issue or issues denied certification by the district court unless the appellate court grants a request to broaden what was certified by the district court. In *U.S. v. Zuno-Arce*, 209 F.3d 1095, 1102 (9th Cir. 2000), where the motion to broaden the issue certified by the district court was not filed within the 35 days, the court said:

As noted, Rule 22-1(d) states that a motion to broaden a COA [certificate of appealability] must be filed within 35 days. Here, even accepting any of Defendant's suggestions as to when that 35-day period began to run, the motion is untimely. Because Defendant has failed to comply with the express terms of Rule 22-1(d) or to provide a compelling reason for his noncompliance, we decline to address his motion to broaden the COA. As a consequence, we decline to address the issues in Defendant's brief that fall outside the limited COA that the district court granted; appeal from the denial of a §2255 motion is strictly limited to the issues specified in the COA.

In *Nevius v. McDaniel*, 218 F.3d 940 (9th Cir. 2000), the Ninth Circuit denied a certificate of appealability predicated upon the failure of the petitioner to make a substantial showing of the denial of a constitutional right.

**16.09 STATE COURT ADJUDICATION ON MERITS**

AEDPA [codified as 28 U.S.C. §2254 (d)] provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law, as determined by the Supreme Court of the United States, or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1495 (2000), Justice O’Connor, writing for a 5-4 Court, held that the two clauses under §2252(d) are separate and usually applicable to different circumstances, stating:
Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

Id. at 1523.

Applying the enunciation in William v. Taylor, the Sixth Circuit held in Machacek v. Hofbauer, 213 F.3d 947, 953 (6th Cir. 2000), the Court said:

Thus, even if we believe that a state court incorrectly applied federal law, we must refuse to issue the writ of habeas corpus if we find that the state court’s decision was a reasonable one. Given the facts of this case, we have little trouble deciding that the Michigan court’s decision was ‘objectively reasonable’ in light of clearly established federal law.

Id. at 953.

The Ninth Circuit said in Van Tran v. Lindsey, 212 F.3d 1143, 1152 (9th Cir. 2000), that the Court’s opinion in Williams v. Taylor makes clear that:

in some circumstances, erroneous interpretations can be upheld on habeas corpus because they are ‘reasonable’... in determining what constitutes an ‘unreasonable application’ of federal law, we look to the doctrine of ‘clear error’ as the source for the most helpful body of precedent.

AEDPA fortifies the instruction of the Supreme Court eighteen years ago in Ross v. Lundy, 455 U.S. 509, 519 (1982), that before you bring “claims in federal court, be sure that you first have taken each one to state court.” The procedural default doctrine is not strengthened under the requirement of AEDPA.
CHAPTER 17

SPECIAL CONSIDERATIONS IN REPRESENTING NON-CITIZEN DEFENDANTS

updated by
Federal Defenders of San Diego, Inc.

17.01 INTRODUCTION

The complexity of the immigration code, always daunting, grew immensely with the passage in September 1996 of the Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA]. Criminal defense practitioners are understandably leery of venturing into this morass. And most courts have refused to impose this obligation upon defense attorneys. The federal circuit courts have consistently held that vulnerability to deportation is a “collateral” rather than “direct” consequence of a guilty plea, and therefore neither trial courts nor defense counsel have a legal duty to inform non-citizen defendants of the possibility of deportation, either on Constitutional grounds or under Fed. R. Crim. P. 11. See Varela v. Kaiser, 976 F.2d 1357 (9th Cir. 1992) (holding failure to advise of possible deportation did not constitute ineffective assistance; collecting and citing similar cases from the Second, Fourth, Fifth, Seventh and Eleventh Circuits); accord Nunez-Cordero v. U.S., 533 F.2d 723 (1st Cir. 1976); Kandiel v. U. S., 964 F.2d 794 (8th Cir. 1992); Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976) and U.S. v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990). In a few states, including California, Illinois, and Colorado, defense counsel’s failure to advise a non-citizen client of potentially adverse immigration consequences has been ruled ineffective assistance of counsel. See, e.g., People v. Soriano, 194 Cal. App. 3d 1470, 240 Cal. Rptr. 328 (1987). But the contrary rule has been espoused in the vast majority of state appellate courts, including Arizona, New York, Ohio, Alaska, Iowa, Wisconsin, Idaho, Utah, Washington, Oregon, Delaware, and Wisconsin. In some states, including Hawaii, Texas, Ohio, and California, a statutory obligation has been imposed upon judges and/or defense attorneys to advise non-citizen defendants of potential immigration consequences. See, e.g., Cal. Penal Code §1016.5.

Despite the historical reluctance of courts to require that a non-citizen defendant be advised of immigration risks, the simple fact is that dire potential immigration consequences can and routinely do fall upon a non-citizen who suffers a criminal conviction. This is true whether the non-citizen is a long-term resident alien, a visa holder, or undocumented. Further, most felony convictions, whether suffered in state or federal court, now fall under the immigration code’s greatly expanded definition of “aggravated” felonies. An alien who: (1) suffers such a conviction; (2) is removed, deported or excluded from the United States;
and (3) is then apprehended while or after a new illegal entry, will be prosecuted under Title 8 U.S.C. §1326, and can receive a federal prison sentence of up to 20 years. Accordingly, even if there is no legal duty to do so, the defense bar has a moral responsibility to acquire at least a passing familiarity with potential immigration consequences, and to impart this knowledge to his/her non-citizen clients. This article explains the current law concerning the grounds for which a non-citizen may be removed, deported, or excluded. It also provides an overview of the remedies potentially available to such persons.

17.02 IS THE CLIENT A NON-CITIZEN WHO MAY BE AT RISK FOR IMMIGRATION CONSEQUENCES?

In some instances, a client may reasonably but erroneously believe himself to be a non-citizen or “alien.” Birth abroad does not automatically foreclose United States citizenship since a person may “acquire” or “derive” United States citizenship from one or both parents. See 8 U.S.C. §1401 et seq. The immigration code sections setting forth the rules on acquisition and derivation of citizenship are among the most difficult to untangle, and Congress has muddled affairs by constantly tinkering with the relevant statutes. Whether or not an individual born abroad acquired United States citizenship turns on the confluence of several factors: the year of the client’s birth, whether both parents were U.S. citizens, or, if not, which parent was a citizen, the marital status of the parents and/or legitimation of the client, the length of time the parent citizen(s) resided in the United States prior to the client’s birth abroad, and in a few instances, whether and how long the client has resided in the United States. This inquiry, though difficult, is critically important, since only aliens can suffer immigration consequences as a result of criminal conduct. Defense counsel should always find out whether the suspected non-citizen client’s parents or grandparents (in some instances citizenship can be passed from grandparent to parent, then to the client) were born in the United States or ever became naturalized U.S. citizens. If the answer is “yes,” defense counsel should research the relevant citizenship statutes, consult an immigration attorney concerning possible U.S. citizenship, or advise the client that he may have a claim to United States citizenship and recommend that the client consult qualified counsel.

17.03 WILL THE PENDING CRIMINAL CHARGES PLACE THE CLIENT AT RISK FOR REMOVAL, DEPORTATION OR INADMISSIBILITY?

Authority to admit aliens to the United States and to eject aliens who have entered with or without permission rests squarely with the legislative branch. See, e.g., Kleindienst v. Mandel, 408 U.S. 753 (1972) (conditions of entry); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (grounds for expulsion). Congress has availed itself of these broad powers, delineating extensive requirements for entry and categories of applicable applicants (see 8 U.S.C. §1151 et seq.), as well as providing multiple grounds for termination of an alien’s right to remain in the United States and procedures for removal (see 8 U.S.C. §1227). While the bases for removal of aliens are many, the grounds which will be of primary concern to the defense bar are those which predicate removal upon conviction of crime.

The immigration code previously divided proceedings to expel an alien into “deportation” or “exclusion” categories, depending upon whether the alien in question was seeking to enter the United States (exclusion) or already present (deportation). The 1996 IIRIRA merged the two concepts, creating a
representing non-citizen defendants 17-849

unitary proceeding entitled a “removal” hearing. However, differences remain between aliens seeking “admission” to the United States and those already “admitted.” Title 8 U.S.C. §1227 sets out the categories of “deportable aliens” who may be removed from the United States, while Title 8 U.S.C. §1182 describes the categories of aliens who are barred from securing admission to the United States. These provisions overlap, since §1227(a)(1)(A) specifically incorporates the §1182 grounds by providing that any alien who was inadmissible (under §1182) at the time of admission is a deportable alien, and may therefore be removed from the country. Five categories of deportability will be examined in this article: (1) convictions for crimes of moral turpitude; (2) narcotics offenses; (3) weapons offenses; (4) alien smuggling offenses; and (5) aggravated felony convictions. These categories are not mutually exclusive — in some instances a single offense may fall under multiple categories. Also, counsel should keep in mind that criminal offenses may serve two negative purposes initially rendering the alien removable from the United States, then precluding a grant of discretionary relief from removal.

17.03.01 Crimes of Moral Turpitude (“CMT”)  
17.03.01.01 Statutory Provisions

Title 8 U.S.C. §1227(a)(2)(A) provides for deportability based on CMT under either of two circumstances:

- one conviction of a CMT which occurs within 5 years of admission and for which the maximum authorized (not imposed) sentence is one year or more; or

- two convictions of a CMT at any time following admission and without regard to the sentence authorized by statute or actually imposed, so long as the two convictions did not arise from a single scheme of criminal misconduct.

These two bases for deportability contain various elements and terms of art which will be examined in turn: (1) conviction; (2) crime involving moral turpitude; (3) admission; (4) authorized sentence; and (5) single scheme of criminal misconduct.

On the other hand, the admission statute, U.S.C. §1182, also addresses CMT:

- any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of --

  (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is excludable.


Admission is not precluded if the alien committed only one crime of moral turpitude and:
the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).


Lastly, §1182 provides that an alien may be inadmissible based on convictions which are not even morally turpitudinous:

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more . . . .


17.03.01.02 Conviction

Deportability under the CMT statute requires proof of at least one “conviction.” Before passage of IIRIRA, the term “conviction” was defined by case law. See Matter of Ozkok, Int. Dec. 3022 (BIA1988). IIRIRA supplanted the Ozkok definition, creating a statutory definition of “conviction” broader than that previously adopted by the BIA. Under Title 8 U.S.C. §1101(a)(48)(A), a “conviction” requires (1) a finding of guilt by judge/jury, a guilty plea by the alien, or an admission by the alien of facts sufficient to support a finding of guilt; coupled with (2) an order by the judge imposing any sort of punishment, penalty, or restraint on the alien’s liberty.

Criminal proceedings which are not considered “convictions” include dispositions in juvenile proceedings (see, e.g., Matter of Ramirez-Rivero, 18 I&N 135 (BIA 1985)), certain diversionary proceedings or deferred prosecutions (such as under 18 U.S.C. §3607, and convictions which are on direct appeal (see, e.g., In re Thomas, Int. Dec. 3245 (BIA 1995)). Convictions which are final except for a pending discretionary writ, such as writ of error coram nobis or habeas corpus, are considered “convictions” for deportation purposes. Morales-Alvarado v. INS, 655 F.2d 172 (9th Cir. 1981).
17.03.01.03 Moral Turpitude

According to Black’s Law Dictionary, crimes of moral turpitude are those which embody “act[s] or behavior that gravely violate moral sentiment or accepted moral standards of [the] community” - these offenses are *malum in se* rather than *malum prohibita*. Dozens of cases have applied this esoteric definition to a wide variety of criminal offenses. The outcome of those cases is collected in the publication *Immigration Law and Crimes*, National Lawyer’s Guild, Clark Boardman, 1991. The Fifth Circuit summed up much of the definitional precedent in *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996), noting that moral turpitude refers generally to conduct that shocks the conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. *Id.* When analyzing a particular crime, it is the statutory elements which inform the determination of whether the offense is morally turpitudinous, not the actual conduct leading to the conviction. *See Gonzalez-Alvarado v. INS*, 39 F.3d 245 (9th Cir. 1994).

Offenses held to be morally turpitudinous include murder, mayhem, voluntary manslaughter, kidnaping, aggravated assault, rape, lewd conduct, robbery, mail fraud, tax evasion, arson, blackmail, extortion, embezzlement, larceny, receiving stolen property, burglary, counterfeiting, bribery, forgery and false statements. Among those offenses held not to be crimes of moral turpitude are involuntary manslaughter, simple assault, battery, carrying a concealed weapon, joy riding, escape, and illegal entry.

17.03.01.04 Admission

Until 1996, the definition of “admission” turned on the date of the alien’s last “entry” to the United States. The legal concept of “entry” did not include every physical departure and reentry by an alien, but rather only those entries which followed a “meaningfully interruptive” absence from the United States, rather than those which followed “brief, casual, and innocent departures.” *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963) and Title 8 U.S.C. §1254(b)(2) (superseded). IIRIRA changed this, replacing “entry” with the legal concept of “admission.” “Admission” takes place when an immigration officer has inspected the alien and authorized the alien’s physical entry to the United States. *See* Title 8 U.S.C. §1101(a)(13).

17.03.01.05 Authorized Sentence

Previous law qualified the CMT ground for deportability upon the length of sentence actually imposed, but under IIRIRA, the relevant inquiry is as to the maximum sentence authorized by the statute, regardless of what sentence was actually imposed. Thus any felony qualifies, as do misdemeanors which carry a one year lid, and so-called “wobblers” - offenses which may be punishable as either a felony or a misdemeanor; so long as the offense is one of “moral turpitude.”

17.03.01.06 Single Scheme of Criminal Misconduct

For the “multiple conviction” CMT ground of deportability to apply, the law provides that the two CMT convictions must not arise out of a “single scheme of criminal misconduct.” *See* Title 8 U.S.C. §1227(a)(2)(A)(ii). In interpreting this section of the code, courts have keyed in on whether or not the two
crimes in question were a “temporally integrated episode of continuous activity” or not. See Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), cert. denied, 430 U.S. 985 (1977). The government bears the burden of establishing that the two crimes were not part of a single scheme, and doubt as to this issue is to be resolved in the alien’s favor. See, e.g., Gonzalez-Sandoval v. INS, 910 F.2d 614 (9th Cir. 1990); Costello v. INS, 376 U.S. 120, 128 (1964).
17.03.01.07 Narcotics Offenses

Other than an aggravated felony conviction, no offenses are more damning to an alien’s immigration status in the United States than narcotics offenses. The narcotics offense ground of deportability, set forth at Title 8 U.S.C. §1227(a)(2)(B), is not limited by any restrictions on the age of the conviction or the length of the sentence authorized or imposed. The statute provides that:

Any alien who at any time after admission has been convicted of a violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.

The statute goes on to provide that a person is deportable, whether or not the person has suffered a conviction, if shown to be a drug abuser or addict. While the deportation statute does not include “drug trafficking” as a ground of deportability (unless a conviction is suffered), drug trafficking is a bar to an alien’s admission into the United States. As noted previously, where an alien is shown to have been inadmissible at the time of admission, this alone will constitute a basis for deportability. Thus, if the government can demonstrate that the person was a “drug trafficker,” whether or not a conviction was suffered, before the alien’s admission, this showing will render the alien removable. See Matter of Rocha, Int. Dec. 3239 (BIA 1995). As an example, if a permanent resident alien is arrested for a “drug trafficking” offense following his admission and the trafficking charges are dismissed or an acquittal is secured, the alien is immune from removal, unless the alien leaves the United States and then again seeks admission. But should the alien leave, then seek admission anew, INS could deny admission or secure removal based on the facts underlying the original charge, even though no conviction resulted and the outcome of the criminal proceedings was favorable to the alien. Clients facing these circumstances must be warned of this risk, since the result is counter-intuitive.

In addition to the “drug trafficking” provisions of the admission statute, that statute precludes the admission of an alien who is convicted, admits committing, or admits committing acts which constitute the essential elements of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance. The same exceptions to this ground of inadmissibility apply as to the one-conviction CMT ground of inadmissibility (see supra).

The federal crime of “misprision” of a drug felony (as where one harbors or fails to report a principal actor to law enforcement authorities) does not constitute a deportable offense under Title 8 U.S.C. §1227(a)(2)(B). See Castaneda de Esper v. INS, 557 F.2d 79 (6th Cir. 1977); Matter of Velasco, 16 I&N 281 (BIA 1977). In contrast, a conviction for “aiding and abetting” a narcotics offense will render an alien deportable. See Londono-Gomez v. INS, 699 F.2d 475 (9th Cir. 1982). But a conviction for possessing a firearm during the course of a drug offense, as under Title 8 U.S.C. §924(c), will not render the alien deportable under this section of the immigration code. See Matter of Carrillo, 16 I&N 625, 626 (BIA 1978).
The defense practitioner should always keep in mind that except for the drug abuser/addict provisions identified above, this ground of deportability, like that for CMT, requires proof of a “conviction,” as that term is defined in Title 8 U.S.C. §1101(a)(48)(A). Thus, juveniles will not be subject to removal by virtue solely of an adjudication of delinquency on a narcotics offense, and drug convictions which are on direct appeal will not subject an alien to removal. As with CMT, deferred prosecutions or drug “diversion” may or may not protect the alien from removal, depending on whether or not the proceedings included an admission of guilt by the alien or an admission of facts sufficient for a finding of guilt.

An expungement may also prevent INS from deporting an alien for conviction of a narcotics offense. INS cannot deport a person whose federal conviction for simple possession of narcotics has been expunged under the Federal First Offender Act, Title 18 U.S.C. §3607. See Matter of Seda, 17 I&N Dec. 550 (BIA 1980). And the INS must honor an expungement received by an alien in state proceedings, if the alien would have been eligible for an expungement under federal proceedings, even if the state expungement statute does not mirror the federal statute. See In re Manrique, Int. Dec. 3250 (BIA1995); accord Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994). However, if the expunged conviction qualifies as an “aggravated felony,” the alien can still be removed under the aggravated felony provision, notwithstanding the expungement.

17.03.01.08 Weapons Offenses

Although there are no specific references in the admission statute to weapons offenses, Title 8 U.S.C. §1227(a)(2)(C) mandates that certain weapons offenses will render an alien deportable:

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

This broad provision includes state as well as federal firearm violations, so long as the definition of “firearm or destructive device” in the questioned state statute is similar to the federal definition. See Alleyne v. INS, 879 F.2d 1177 (3d Cir. 1989). A firearms enhancement to another, underlying conviction does not qualify as a firearm conviction for purposes of deportability under this code section, nor does conviction of an offense that does not specifically involve a firearm -- even where the record makes clear that the alien used a firearm. See, e.g., Matter of Rodriguez-Cortez, Int. Dec. 3189 (BIA 1992) and Matter of Perez-Contreras, Int. Dec. 3194 (BIA 1992). On the other hand, where the statute of conviction includes multiple types of weapons, some qualifying as “firearms” and others not, the BIA will look beyond the judgment of conviction to the “record of conviction” to determine whether or not the “weapon” in question was a “firearm.” See, e.g., In re Madrigal-Calvo, Int. Dec. 3274 (BIA 1996) and Vue v. INS, 92 F.3d 696 (8th Cir. 1996). The “record of conviction” includes the charging document (indictment, complaint or information), transcript of the guilty plea, the verdict or judgment form, and the sentencing report and transcript. See In re Pichardo, Int. Dec. 3275 (BIA 1996).
The weapons offense ground of deportability requires proof of a “conviction” – all the same definitional issues concerning that term of art apply equally here as in CMT and narcotics offenses, discussed above. As to the effect of expungement of a weapons offense, the BIA has held that California Penal Code §1203.4 will prevent deportation under the firearms code section. See In re Luviano, Int. Dec. 3267 (BIA 1996). This decision superseded previous BIA authority to the contrary. This earlier, contrary authority had been upheld in Carr v. INS, 86 F.3d 949 (9th Cir. 1996).

An alien deportable due to a weapons offense conviction may seek relief from under 8 U.S.C. §1229b - cancellation of removal (discussed infra), unless the weapons offense also qualifies as an “aggravated felony,” in which case no relief from removal would be available.

17.03.01.09 Alien Smuggling

Under Title 8 U.S.C. §1227(a)(1)(E)(I), any alien who:

prior to the date of admission, at the time of admission, or within 5 years of the date of any admission knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

Title 8 U.S.C. §1182(a)(6)(E)(I) sets forth the alien smuggling bases for inadmissibility:

Any alien who at any time knowingly has encouraged, induced, assisted, aided or abetted any other alien to enter or to try to enter the United States in violation of law is inadmissible.

Each of these code sections is followed by an exemption where the prohibited acts related to the alien’s spouse, parent, son or daughter. Also of note is that the deportation ground includes temporal restrictions, whereas the admission ground contains none.

This code section, unlike many of the removal statutes, does not require that the alien suffer a “conviction” in order for the removal grounds to apply, although if the alien has suffered such a conviction and the offense was a felony, the conviction will likely qualify as an “aggravated felony” see infra. The code sections quoted above only penalize an alien for assisting another to either enter or attempt to enter the United States unlawfully. Thus, if the conviction is for transportation or harboring or other conduct involving aliens who already entered the United States, the alien will not be subject to removal under these particular code sections. However, as noted earlier, such a conviction may well meet the “aggravated felony” definition and may render the alien removable under those harsher provisions.

17.03.01.10 Aggravated Felony Convictions

No event is as ruinous to an alien’s immigration status as is a conviction of an “aggravated felony.” While under previous law at least some forms of immigration relief remained open to an alien convicted of an aggravated felony (depending on the length of the sentence, IIRIRA eliminated all forms of immigration relief for aliens who suffer aggravated felony convictions, without regard to the age of the conviction, the equities weighing in the alien’s favor, the length of the alien’s residence in the United States, or the length
of sentence authorized, imposed, or served for the conviction (although some types of “aggravated felonies” themselves contain length of sentence limitations).

The term “aggravated felony” is statutorily created and defined, and the many categories of felonies deemed by Congress to be “aggravated” are set forth at 8 U.S.C. §1101(a)(43). IIRIRA significantly broadened the number and type of felonies considered “aggravated” and, in a marked departure from previous incarnations of the definitional statute, made these and all other definitional expansions expressly retroactive. Though 8 U.S.C. §1101(a)(43) is too lengthy to set forth in toto here, the criminal defense practitioner should always have a copy readily available for reference when representing a non-citizen defendant, since the definition is wide-ranging and relatively precise.

The following is a non-exclusive list of some of the more notable and commonly encountered inclusions to the “aggravated felony” definition:

- any illicit trafficking in controlled substances (which may even include simple possessions)
- any illicit trafficking in firearms, destructive devices, or explosives
- crimes of violence for which a sentence of at least one year is imposed
- murder, rape or sexual abuse of a minor
- theft and burglary offenses for which a sentence of at least one year is imposed
- money laundering offenses involving funds over $10,000
- fraud or deceit offenses involving funds over $10,000
- certain alien smuggling offenses
- obstruction of justice, perjury, subornation or bribery of a witness, if a sentence of at least one year is imposed
- failure to appear in court on a felony charge carrying a statutory maximum of at least two years
- failure to appear for service of sentence after conviction of a crime carrying a statutory maximum of at least five years
- conspiracy or attempt to commit any of the above offenses or other §1101(a)(43) offenses.

Aliens convicted of aggravated felonies are also subject to special, expedited removal proceedings with virtually no due process protections, cannot receive bail or bond when arrested by immigration
officials, have almost no available avenues for appeal, and are barred for life from applying for admission to the United States.
17.04 CAN THE CLIENT QUALIFY FOR ANY TYPE OF RELIEF FROM REMOVAL/DEPORTATION/INADMISSIBILITY?

Most aliens who suffer criminal convictions will be unable to prevent their removal from the United States. However, there are some measures by which an alien who is otherwise removable or inadmissible may be able to stay in the United States. Only one statutory remedy serves as an outright and absolute protection -- an executive pardon. However, some aliens convicted of crime may be able to apply for relief under §212(h) of the immigration code, while others may qualify for “cancellation of removal” under §240A(a) of the code. Each will be discussed in turn.

17.04.01 Executive Pardon

Title 8 U.S.C. §1227(a)(2)(A)(v) provides that an alien otherwise removable by virtue of CMT conviction(s) or aggravated felony conviction(s) (but not narcotics offenses or firearm offenses) shall not be deported:

if the alien subsequent to the criminal conviction has been granted full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

17.04.02 Cancellation of Removal

IIRIRA annulled two earlier forms of immigration relief, suspension of deportation and the §212(c) waiver, and replaced each with a form of relief entitled “cancellation of removal.” Cancellation of removal is codified at 8 U.S.C. §1229b (the parallel INA cite is §240A). As noted previously, the primary and critically important restriction to keep in mind is that cancellation of removal is unavailable for any person convicted of an aggravated felony, without regard to the length of sentence imposed, the age of the conviction, or the alien’s equities and ties to the United States.

Cancellation of removal is a discretionary waiver which may be granted to allow an otherwise removable alien to remain in the United States. This form of relief will allow an alien to evade removal under either the admissibility provisions of 8 U.S.C. §1182, or the deportability provisions of U.S.C. §1227. Cancellation relief is available for both permanent residents (“LPR”) and non-LPRs, but the standards and requirements are different for each.

For an LPR, removal may be canceled if the alien -

1. has been lawfully admitted for not less than 5 years,
2. has resided in the United States continuously for 7 years after having been admitted in any status, and
3. has not been convicted of any aggravated felony.
A non-LPR may receive cancellation of removal relief if the alien has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the application for cancellation, has been a person of good moral character during such period and has not been convicted of certain offenses, and establishes that removal would result in “exceptional and extremely unusual hardship” to the alien’s U.S. citizen or LPR spouse, parent or child. See 8 U.S.C. §1229b(b)(1). Further, persons who have previously received a §212(c) waiver, suspension of deportation, or cancellation of removal are ineligible to receive cancellation of removal.

Before IIRIRA, §212(c) required seven years of continuous residence, and this time period could continue to accumulate until such time as the §212(c) waiver was adjudicated. This was a distinct advantage, since §212(c) adjudication would often take place long after the deportable or excludable act, such as a criminal conviction, took place. But under cancellation of removal, accrual of the required seven year period of residency is terminated either upon issuance of a Notice to Appear (the INS “charging” document) or upon the commission of an act which renders the alien removable, whichever first occurs.

17.04.03 §212(h) Relief

A §212(h) waiver will excuse an alien’s inadmissibility due to CMT, conviction of two offenses with a cumulative five year sentence, prostitution, or simple possession convictions up to 30 grams of marijuana. In addition, the statute permits waiver of any of the above convictions even if the offense might also match the “aggravated felony” definition (such as a burglary conviction, a CMT, with a two year jail sentence).

Unless the alien is an immediate relative of a qualifying U.S. citizen or LPR (see below), §212(h) requires a showing that:

- the offense for which the alien seeks waiver falls within one of the categories enumerated above;
- the offense conduct underlying the conviction occurred fifteen years previous to the application for relief;
- the alien’s admission would not be contrary to the national welfare, safety or security; and the alien has been rehabilitated.

Where the alien is the spouse, parent or child of an LPR, the sole requirements for §212(h) relief are that:

- the offense for which the alien seeks waiver falls within one of the categories enumerated above;
- denial of admission would result in extreme hardship to the alien’s qualifying relative(s); and
the Attorney General has consented to the application or re-application of the alien for admission or adjustment of status.

However, a §212(h) waiver is not available for any alien convicted of murder or criminal acts involving torture. In addition and most importantly, an LPR who applies for §212(h) relief is at a disadvantage -- the statute provides that §212(h) relief is unavailable to an LPR who, after admission, has either: (1) been convicted of an aggravated felony or (2) has resided in the U.S. for less than seven continuous years preceding the initiation of deportation proceedings.
CHAPTER 18

JUVENILE CASES IN FEDERAL COURT

by

Knut S. Johnson

18.01  INTRODUCTION


Although the Act is written to encourage state, rather than federal, prosecution of juveniles, interest in the federal prosecution of juveniles has exploded. State court juvenile justice systems typically have prosecutors, appointed counsel, judges, and probation officers who are all specialists in the particular needs of juvenile offenders. The federal justice system has no specialized juvenile court, no judges who routinely hear and are aware of the special problems of juvenile offenders, nor any probation officers who are likewise trained. In fact, the Bureau of Prisons has closed its only juvenile care facility. What has evolved is a federal system where juvenile offenders are being more frequently prosecuted by a huge bureaucracy that neither knows of, nor is designed to deal with, the unique problems presenting young people who have committed an offense that would be criminal if they were older than 18.

The purpose of the juvenile justice system is to determine "the needs of the child in society rather than adjudicating criminal conduct." Kent v. U.S., 383 U.S. 541, 554 (1966). Guidance and rehabilitation, not responsibility, guilt, or punishment, are the objectives of the juvenile process. Kent, 383 U.S. at 554. To further those goals, Congress established the Office of Juvenile Justice Delinquency Prevention within the Department of Justice, under the general authority of the Attorney General. 42 U.S.C. §5611. ("The Office"). The Office was established as part of a comprehensive statutory scheme that noted: "[s]tates and local communities which experience directly the devastating failures of the juvenile justice system do not presently have sufficient technical expertise or adequate resources to deal
comprehensively with the problems of juvenile delinquency." 42 U.S.C. §5601(8). Congress also noted that: "existing federal programs have not provided the direction, coordination, resources, and leadership required to meet the crisis of delinquency." 42 U.S.C. §5601(9).

The Congressional Declaration of Purpose and Policy, enacted as part of Chapter 72 to Title 42, is entitled "Juvenile Justice and Delinquency Prevention," and its expressed purpose is to help state and local governments improve their administration of the juvenile justice system. 42 U.S.C. §5602. Chapter 72 establishes a comprehensive system of assisting state authorities in the rehabilitation and prevention of delinquency. As recently as 1992, Congress reaffirmed its goal of supplementing and enhancing state programs aimed at rehabilitation and prevention of delinquency. 1

In contrast to the rehabilitative goal for juveniles, the goals of the Federal Criminal Justice System for adults do not include rehabilitation. The current federal criminal justice system for adults encourages cooperation by offenders against others (see, e.g., U.S.S.G. §5K1.1, 18 U.S.C. §3553(e), 28 U.S.C. §3944); and rigid sentences, with an expressed disregard for offender's important personal characteristics. See also U.S.S.G. §§5H1.1 (age); §5H1.2 (education); §5H1.3 (mental and emotional conditions); §5H1.4 (physical conditions); §5H1.6 (family ties); and §5H1.12 (lack of guidance as a youth). Often, a juvenile being prosecuted by the federal government will be encouraged to act as an "informant" in exchange for an agreement that the government will not move to transfer the juvenile to "adult" jurisdiction. The probability of actually being transferred out of the rehabilitative world of juvenile court is high. See infra section 18.04.04. Indeed, despite the obvious intent of Congress to fund and encourage state rehabilitative prosecution of juveniles (see 42 U.S.C. §5601, et seq.) and to discourage federal jurisdiction of juveniles (see 18 U.S.C. §5032 and §18.4.4); legislators try to outdo each other in their "toughness on crime" by introducing new statutes that may be used to prosecute juveniles and, more chillingly, more frequently transfer juveniles to adult court. Currently, both Houses of Congress are considering legislation that would, among other things, amend the Act to reduce the minimum age for mandatory transfers to adult Court for certain types of crimes to 14 and expand the federal government’s jurisdiction to give it, rather than the states, the discretion to decide whether to proceed against alleged juvenile offenders. See, Juvenile Crime Control Act of 1997, H.R. 3, 105th Congress, §§10(a)-(b); Violent and Repeat Juvenile Offender Act of 1997, S.3, 105th Congress §112.

A federal prosecutors' goal of turning a criminal defendant into a "law enforcement officer" rewarded by a lesser sentence only obstructs the goal of rehabilitating children who have been accused of a crime. Providing information to the government in exchange for a lenient sentence produces many adult perjurers. See U.S. v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993); but, it is unclear what the effect of such a tempting offer may have on the delicate psyche of a child who is in custody and in trouble. A child's view of the world and of the truth is a malleable thing. Urging a child to become a government witness can only further entrench a child into the criminal justice system, make the child a target for possible retribution,

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1 There are no real federal "juvenile practitioners." Juvenile cases are filed sporadically throughout the country, without enough consistency to create any specialized courts, probation officers, or practitioners. Lacking anyone with any expertise in the criminal justice system's most important mission, preventing future crime, Congress, nonetheless, keeps encouraging federal prosecution of juveniles.
and teach the child that lying is rewarded by the government. Such lessons neither prevent future crime nor rehabilitate the child.

A young person who violates the law is thus thrust into a power struggle between a state system that is encouraged to rehabilitate and a federal system that is increasingly eager to punish children in adult court and which has no facilities for the treatment of juveniles. Peopling that system are participants who are usually uneducated, inexperienced, and untrained in the needs of juveniles and the procedures used in federal juvenile cases. The stakes in federal court could not be higher: if the juvenile remains in juvenile jurisdiction, that youth has some hope for rehabilitation; if transferred to "adult" jurisdictions, that same youth may face 10, 20, or 30 years under the guidelines and mandatory minimum sentences. Facing such oppressive sentences, the child’s only hope for turning his or her life around he may be cooperation, and the temptation to lie in order to gain leniency. In most cases, then, federal court is the last place a juvenile should to be.

18.02 BEGINNING THE PROSECUTION

Once the juvenile is in federal court, the statutory procedures that must be followed to give the federal court jurisdiction over a juvenile are always the first line of attack, prior to defending against the actual charges of delinquency. Section 5032 is specific in what it requires before a federal juvenile prosecution may begin, and counsel should move to dismiss if any of the procedures under §5032 are not properly followed by the court or the government. These procedures include the certification requirements and transfer proceedings. All of those procedures, and how to defend against them, are discussed in this article.

A juvenile accused of an act of juvenile delinquency will usually be charged in an information under the Act with a violation of 18 U.S.C. §5032. "Juvenile delinquency" is defined under §5031 as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." A document charging an act of juvenile delinquency will, therefore, include an allegation that the "juvenile" is a "juvenile delinquent" because the youth committed an act that would have been a crime if done by an adult. For example, an information may allege that Johnny Teenager is a juvenile delinquent under §5032 because he is 17 years old and robbed a bank, which is a violation of 18 U.S.C. §2113(a). At times federal juvenile prosecutions will be initiated by the filing of a complaint.

Nothing in the Act explains exactly which procedures are to be followed in initiating prosecution against a juvenile. As discussed above, most prosecutions are begun either by an information or a complaint. As discussed below, however, the Fourth Amendment requires a probable cause finding of some sort prior to holding a juvenile. See section 18.05.05.01. It has become the practice of some United States magistrate judges to require the filing of an affidavit establishing probable cause to begin a juvenile prosecution.

18.03 EFFECT OF JUVENILE ADJUDICATION
18.04 JUVENILE JURISDICTION

18.04.01 Who is a Juvenile?

Under the Act, "a juvenile' is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under [the Act], for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday . . . ." An act of "juvenile delinquency" is a "violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." 18 U.S.C. §5031. In other words, a person not yet 21 may be proceeded against as a juvenile for committing an act he or she committed prior to turning 18. Once the government begins proceedings under §5032, it must continue proceeding under the Act, even if the case continues into the juvenile's majority. U.S. v. Smith, 851 F.2d 706 (4th Cir.), reh'g denied, 859 F.2d 1200 (4th Cir. 1988).

18.04.01.01 Proceedings Filed After the Eighteenth or Twenty-first Birthday

If the information alleging an act of juvenile delinquency is filed prior to the defendant's twenty-first birthday, the district court has jurisdiction to proceed against the individual as a juvenile. In re Martin, 788 F.2d 696, 697-98 (11th Cir. 1986); U.S. v. Doe, 631 F.2d 110, 113 (9th Cir. 1980).

A criminal proceeding begun after a person's twenty-first birthday may not be prosecuted under §5032. U.S. v. Hoo, 825 F.2d 667, 680 (2d Cir. 1987). If a person commits an act of juvenile delinquency and then remains a fugitive until after turning 21, a motion to transfer under 18 U.S.C. §5032 is not necessary before proceeding against that person as an adult. U.S. v. Araiza-Valdez, 713 F.2d 430, 431-32 (9th Cir. 1980). A defendant who commits a crime before turning 18 but who is not indicted until after turning 21 is not entitled to protection under the Act, even if the defendant is faultless for the delay. Hoo, 825 F.2d at 670. There may be a different result if the delay causes "substantial prejudice" to the defendant and is an "intentional device to gain tactical advantage over the accused." Id. at 671 (citing U.S. v. Marion, 404 U.S. 307, 324 (1971)).

A person may first become involved in a conspiracy while a minor, and his or her participation in that conspiracy may continue until the juvenile turns eighteen. In such an instance, the district court has adult jurisdiction over the case. U.S. v. Thomas, 114 F.3d 228 (D.C. Cir. 1997); U.S. v. Welch, 15 F.3d 1202, 1207 (1st Cir. 1993); U.S. v. Harris, 944 F.2d 784, 785 (10th Cir. 1991); U.S. v. Gjonaj, 861 F.2d 143, 144 (6th Cir. 1988); U.S. v. Cruz, 805 F.2d 1464, 1475 (11th Cir. 1986); U.S. v. Spoone, 741 F.2d 680, 687 (4th Cir. 1984). In such a case, conduct before the age of 18 may be introduced as evidence of knowledge or intent, but not as substantive evidence of guilt. Thomas, 114 F.3d at 265. If a juvenile performs his or her overt acts in a conspiracy prior to turning 18, then the prosecution must be under the Act. U.S. v. Chambers, 944 F.2d 1253, 1257 (6th Cir. 1991).

In Welch, 15 F.3d 1202, the First Circuit considered whether a defendant who was accused of participating in a conspiracy that began prior to, and continued past, his 18th birthday, was entitled to a pretrial hearing on jurisdiction where the government would have to show that the defendant's participation
in the conspiracy continued into his majority. The First Circuit held that such an evidentiary hearing was not required, and noted that defendants could only be convicted as adults if they "participated" in, or "ratified" the conspiracy after age 18. Id. at 1209 (citing U.S. v. Maddox, 944 F.2d 1223, 1233 (6th Cir. 1991)). Those questions, the First Circuit held, are best left to jurors. Welch at 1209. The First Circuit held that although evidence of majority conduct is fully admissible in a conspiracy that spans the defendant's age of majority, the "jury nonetheless must be instructed to acquit a defendant who withdrew from the conspiracy before the bar date." Id. at 1211 (citation omitted).

18.04.02 Federal Jurisdiction and Certification

Under §5032 the government must meet two different certification requirements before proceeding under the Act: (1) a "need certification," which "requires certification by the Attorney General that there is a need for proceedings to take place in federal rather than state court" (U.S. v. Doe, 13 F.3d 302, 303 (9th Cir. 1993)); (2) a "record certification," which requires delivery to the federal court of any prior juvenile court record certification if there were no such records. Id. Before 1994, certification was "a jurisdictional requirement." Doe, 13 F.3d at 304; U.S. v. Baker, 10 F.3d 1374 (9th Cir. 1993); U.S. v. Juvenile Male, 864 F.2d 641, 643 (9th Cir. 1988). Nonetheless, the Act was amended in 1994, and the record certificate is no longer a jurisdictional requirement. U.S. v. Lyndell N., 124 F.3d 1170 (9th Cir. 1997). Now, the record certificate is necessary only before transfer or sentencing.

18.04.02.01 Need Certification

The Act revoked "the district courts' preexisting, largely unrestricted subject matter jurisdiction over a criminal prosecution against juveniles." U.S. v. Chambers, 944 F.2d 1253, 1258 (6th Cir. 1991). Under §5032 a juvenile alleged to have committed an act of juvenile delinquency may be prosecuted in federal court only if the government clears an important hurdle.\(^2\) That hurdle, usually called the "need certification," is to certify either that: (1) the state authority\(^3\) will not or cannot prosecute the juvenile; or (2) the state does not have programs or facilities for juveniles; or (3) the charged offense is a violent felony or enumerated drug or firearms offense.\(^4\) In some instances discussed below, the certificate must show a "substantial federal interest" in the prosecution.

\(^2\) An exception to this general rule occurs when the act is a violation of law committed within the special maritime and territorial jurisdiction of the United States and has an authorized term of imprisonment not exceeding six months. In such a case, the federal court has juvenile jurisdiction. 18 U.S.C. §5032.

\(^3\) If the jurisdiction over the juvenile is tribal instead of state, the certificate need not allege that the tribe refused to prosecute. U.S. v. Juvenile Male, 864 F.2d 641, 646 (9th Cir. 1988).

\(^4\) Although importing a controlled substance is an enumerated offense (21 U.S.C. §952(a)), importing a non-narcotic controlled substance is not (21 U.S.C. §952(b)). Possessing any controlled substance aboard a vessel or aircraft arriving at or departing from the United States is enumerated. 21 U.S.C. §955. Manufacturing or distributing a Schedule I or II controlled substance with the intent to import it into the United States is an enumerated offense (21 U.S.C. §959), but manufacturing substances such as amphetamine, methamphetamine and lysergic acid outside the United States, with the intent to import the substance, is not because such substances are Schedule III substances. Finally, importing less than 50 kilograms of marijuana, 10 kilograms of hashish, less than one kilogram of hashish oil or any Schedule III, IV, or V controlled substance, are not enumerated offenses because §5032 does not enumerate §960(b)(4).
Absent a timely tender of the required need certificate, the district court lacks subject matter jurisdiction. *U.S. v. Baker*, 10 F.3d 1374 (9th Cir. 1993); *Chambers*, 944 F.2d at 1260. Because §5032 does not state when the certificate must be filed, it is unclear when a certificate is considered "timely" filed. The certificate is timely if filed before arraignment. *U.S. v. Cuomo*, 525 F.2d 1285, 1289 (5th Cir. 1978). The Ninth Circuit has stated, *in dicta*, that §5032 does not require a certificate before the prosecution begins. *U.S. v. Gonzalez-Cervantes*, 668 F.2d 1073, 1077 n.6 (9th Cir. 1981). A district court has likewise held that a §5032 need certificate need not be filed before an underage defendant has been "proceeded against." *U.S. v. Ramapuram*, 432 F. Supp. 140, 143 (D. Md. 1977). The Sixth Circuit in *U.S. v. Chambers*, 944 F.2d 1253 (6th Cir. 1991), held that a need certificate filed at the close of the government's evidence in an adult prosecution of a 17-year-old, after a defense motion for an acquittal based on the lack of subject matter jurisdiction due to the government's failure to file a §5032 certificate, was timely filed. *Id.* at 1260-61. Nonetheless, counsel should always consider a motion to dismiss for lack of jurisdiction if there is any question regarding the timeliness of filing the certificate.

Although §5032 requires a need certification, several Circuits have refused to “allow jurisdiction to be defeated by a . . . ministerial act related to the certification requirement of §5032.” *U.S. v. White*, 139 F.3d 998, 1001 (4th Cir. 1998). In *White*, the Fourth Circuit held that the information within a transfer motion is satisfactory to meet the need certification requirement without filing a separate need certificate. *Id.* Although the court emphasized that “the filing of a separate document providing the need certification required by §5032 is preferable,” a timely filing of a transfer motion containing the need certificate information may satisfy the statute. *Id.* See also *U.S. v. Doe*, 871 F.2d 1248, 1257 (5th Cir. 1989), which noted that a “technical failure in filing is not fatal to jurisdiction.”

Section 5032 also requires that in certain cases the certification state that "there is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction.” Many certifications do not so state, and counsel should move to dismiss for lack of jurisdiction absent such a certification. In *U.S. v. Juvenile Male*, 923 F.2d 614 (8th Cir. 1991), the Eighth Circuit held that in a case alleging only a crime of violence, there was no federal jurisdiction over the juvenile without a certificate of the "Federal Interest." *Id.* at 620. In *Juvenile Male*, 864 F.2d 641 (9th Cir. 1988), the Ninth Circuit distinguished a need certificate based on a crime of violence from a need certification based on a state not having adequate programs. The Ninth Circuit held that a need certificate need not allege substantial federal interest if it was based on §5032(1), a state refusing or not having jurisdiction. The need certificate must only allege the substantial federal interest under §5032(3), where the offense charged is a crime of violence. See also *U.S. v. Juvenile No. 1*, 118 F.3d 298, 303 n. 6 (5th Cir. 1997); *Impounded (Juvenile R.G.*), 117 F.3d 730, 731 n. 1 (3d Cir. 1997); *U.S. v. Baker*, 10 F.3d 1374, 1394 (9th Cir. 1993).

The federal Courts of Appeal are split on the issue of the extent to which the government’s need certification is subject to judicial review. In the absence of allegations of bad faith, the government’s assertion of a “substantial federal interest” has been compared to prosecutorial discretion and held not subject to judicial review by the Fifth, Third and Eleventh Circuits. *U.S. v. Juvenile No. 1*, 118 F.3d 298 (5th Cir. 1997); *Impounded (Juvenile R.G.*), 117 F.3d 730 (3d Cir. 1997); *U.S. v. Wellington*, 102
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F.3d 499, 503 (11th Cir. 1996); *U.S. v. I.D.P.*, 102 F.3d 507, 515 (11th Cir. 1996); *C.G.*, 736 F.2d at 1478. By contrast, the Fourth Circuit has held that the district court must satisfy itself that there is a substantial federal interest before it assumes jurisdiction over a juvenile. *U.S. v. N.J.B.*, 104 F.3d 630, 632 (4th Cir. 1997); *U.S. v. Juvenile Male No. 1*, 86 F.3d 1314, 1319 (4th Cir. 1996). In *U.S. v. Juvenile Male*, 923 F.2d 614 (8th Cir. 1991), the court held that filing a certificate in compliance with §5032 is a jurisdictional requirement and therefore can be reviewed. *Id.* at 617.

The extent to which other aspects of the certificate are subject to review is also an unresolved question among the circuits. Before federal jurisdiction extended to violent crimes where the federal government expressed a substantial federal interest, the Second Circuit has held that the correctness of the facts recited in a §5032 certificate must be accepted as final and may not be reviewed by the district court. *U.S. v. Vancier*, 515 F.2d 1378, 1380-81 (2d Cir. 1975); see also, *I.D.P.*, 102 F.3d at 507. In *Impounded (Juvenile R.G.)*, the Third Circuit held that it could be reviewed for technical defects, for whether a crime is one of violence and bad faith, but not whether a state court would assume jurisdiction or whether the state had adequate programs for juveniles. 117 F.3d at 736. The Eleventh Circuit has suggested that so long as the government recites the statutory language in the certificate, it will look no further, in the absence of allegations of bad faith. *Wellington*, 102 F.3d at 505. The Fifth Circuit expressly declined to reach the issue of whether a determination of a “crime of violence” or the availability of state programs was subject to review. 118 F.3d at 302 n.3, 304 n.10. In *U.S. v. Gonzalez-Cervantes*, 668 F.2d 1073, 1077-78 (9th Cir. 1988), the Ninth Circuit held that an inaccurate need certificate does not divest the court of jurisdiction.

Section 5032 requires the Attorney General to prepare the need certificate. The power of certification was delegated to, "[t]he Assistant Attorney General in charge of the Criminal Division and his Deputy Assistant Attorney General . . . ." 28 C.F.R. §0.57. The Assistant Attorney General, under 28 C.F.R. §0.57 may re-delegate "any function delegated to him" to a "United States Attorney . . . ." In *U.S. v. Doe*, 98 F.3d 459, 451 (9th Cir. 1996) the Ninth Circuit observed that, “Although the regulations authorize United States Attorneys to file certificates of need, Assistant United States Attorneys are not specifically authorized to do so.” Unwilling to say that signature by an AUSA was only “a technical or ministerial error,” it remanded the case to the district court to dismiss the information with prejudice. *Id.* C.f. *U.S. v. Angelo D.*, 88 F.3d 856 (10th Cir. 1996) (signature of an Assistant United States attorney designated to carry out the U.S. Attorney’s functions in his absence was sufficient where it was shown the U.S. Attorney was away from the office when the certificate was signed).

In some districts there may be circumstances in which the state authority has a policy of not prosecuting, and therefore there is a "state" certification. For instance, in the Southern District of California, there exists a blanket certificate for cases involving illegal alien smuggling.

Despite the fact that the statute and the regulations both specify exactly how the certificate should be handled, as long as the decision to certify was made by an authorized delegate, the federal court may still have jurisdiction, even if the certification is not signed by an authorized delegate. See *U.S. v. Parker*, 622 F.2d 298, 306-07 (8th Cir. 1980). If the certificate is not signed by an authorized delegate, the defense should request a hearing to determine whether any qualified delegate chose to certify the case. The
certificate may be rejected if the certifying person is not a proper delegate of the Attorney General or if it is not timely filed. *U.S. v. C.G.*, 736 F.2d 1474, 1477 (11th Cir. 1984).

### 18.04.02.02 Record Certification

Before 1994, under §5032, "[A]ny proceedings against a juvenile under [the Act] or as an adult shall not be commenced until any prior juvenile records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable." That requirement was typically called the "records certification." Now however, the record certificate is not a jurisdictional prerequisite. Rather, the record certificate need merely be filed before a transfer hearing or sentencing. *See U.S. v. Lyndell N.*, 124 F.3d 1170 (9th Cir. 1997).

Despite the changes in the necessity of the records certificate, prior law concerning its form is probably still good law. For instance, the Ninth Circuit has held that where the record certificate is signed by an Assistant United States Attorney rather than the Clerk of the Court, there is no jurisdiction. *U.S. v. Doe*, 13 F.3d 302, 308 (9th Cir. 1993). *But see U.S. v. Parker*, 956 F.2d 169, 171 (8th Cir. 1992) (record certificate signed by judge and prosecution sufficient). Cases after the amendments to §5032 restate the need for strict compliance with the form of the record certificate. For instance, a “good faith” effort or “substantial compliance” by the government with the records certification requirement is insufficient; “strict literal compliance is required.” *Impounded (Juvenile I I. H., Jr.)*, 120 F.3d 457 (3d Cir. 1997) (vacating order transferring juvenile to adult status for failure to comply with records certification requirement).

If the record is not forwarded to the district court, or if there is no good faith proffer of the juvenile's records or a certificate as to their absence or unavailability, no proceedings may begin against the juvenile. If the case is commenced, the remedy is dismissal without prejudice. *U.S. v. M.I.M.*, 932 F.2d 1016, 1019 (1st Cir. 1991); *U.S. v. Juvenile Male*, 923 F.2d 614, 620 (8th Cir. 1991); *U.S. v. Brian N.*, 900 F.2d 218 (10th Cir. 1990).

### 18.04.03 Parental Notification

Under §5033, whenever a juvenile is taken into custody, the arresting officer shall immediately notify the juvenile's parents. Failure to do so violates the Due Process Clause as well as the statute. *Application of Gault*, 387 U.S. 1, 31, 34 (1967); *see also McKeiver v. Pennsylvania*, 403 U.S. 528, 532 (1971). As noted below in section 18.4.9, failure to notify parents may also affect the admissibility of any subsequent statements. The Ninth Circuit has held that failure to notify parents, where the failure to notify has no adverse affect on the fundamental fairness of the proceedings, does not violate due process. *U.S. v. Doe*, 701 F.2d 819, 822 (9th Cir. 1983). Other circuits have likewise held that the notice requirement in §5033 is merely a "safeguard." *U.S. v. White Bear*, 668 F.2d 409, 412 (8th Cir. 1982); *U.S. v. Watts*, 513 F.2d 5 (10th Cir. 1975).
In *U.S. v. Doe*, 155 F.3d 1070, 1077 (9th Cir. 1998) (en banc), an en banc panel of the Ninth Circuit held that a juvenile is not “in custody” under §5033 when he has been arrested on tribal charges and is not yet facing federal charges.

If the juvenile is an alien, illegal or otherwise, the government must take reasonable steps to notify the parents. If actual notification of the parents of an alien juvenile is not feasible, the government may notify the foreign consulate. The government has the burden of showing its efforts to so notify. *U.S. v. Doe*, 862 F.2d 776 (9th Cir. 1988). The government’s obligation to notify the consulate if it cannot successfully locate the parents does not apply in the case of a juvenile who is foreign national with legal resident status in the United States. *U.S. v. Juvenile Male*, 74 F.3d 526, 530 n.10 (4th Cir. 1996).

See infra section 18.04.10 (Suppression of Statements).

**18.04.04 Transfer to Adult Status**

The transfer proceeding is critically important, because of the extreme differences in possible penalties and consequences between adult and juvenile court. Therefore, the code requires reasons for the transfer, and the child is entitled to counsel at the transfer proceeding. *Kent v. U.S.*, 383 U.S. 541, 560-61 (1966); see also *People of Territory of Guam v. Kingsbury*, 649 F.2d 740, 743 (9th Cir. 1981) ("[D]ue process requires the right to counsel, to adequate notice, and to a statement of reasons at a hearing to determine whether a juvenile is to be tried as an adult."). Section 5032 lists all of the circumstances in which a juvenile may be transferred to adult status. Currently §5032 does not contain a provision to transfer to adult status a juvenile who is alleged to have committed an act prior to his thirteenth birthday. However, both houses of Congress are currently considering legislation that would mandate transfer to adult status for certain 14-year-olds. Additionally, that proposed legislation would allow the transfer of certain juveniles, regardless of age.

Transfer of a juvenile is discretionary if such a juvenile is alleged to have committed an act after turning 15 and: (1) the act is a felony if committed by an adult; and (2) it is a crime of violence or an enumerated narcotics crime. Such discretionary transfer may also be applied to certain thirteen year olds. In such situations, criminal prosecution as an adult may be begun after motion to transfer by the Attorney General, if the "transfer would be in the interest of justice." Transfer is mandatory for a juvenile charged with committing an act after turning 16 and that act: (1) is a felony offense if committed by an adult; (2) involves substantial risk of physical force against another, destruction of property, or explosives or drugs; and (3) the juvenile has "previously been found guilty" of a similar prior offense.

Much litigation has discussed the third element of mandatory transfer, the prior similar offense. For instance, even though an adjudication of juvenile delinquency is not a conviction of a crime, it may satisfy the third element. *U.S. v. N.J.B.*, 104 F.3d at 636-37 (citing *U.S. v. David H.*, 29 F.3d 489, 492 (9th Cir. 1994)). Also, a prior for possession of a dangerous weapon may be an act involving “substantial risk of physical force” if it includes an element of “intent to use.” *Impounded (Juvenile R.G.)*, 117 F.3d at 738. Furthermore, the District of Columbia Circuit Court of Appeals, in *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363 (D.C. Cir. 1990), held that because conspiracy to distribute drugs is not one of
the transferable offenses set forth in §5032, it was error to transfer a juvenile conspiracy case. *Id.* at 368-69. The Eighth Circuit, in *U.S. v. Juvenile Male*, 923 F.2d 614 (8th Cir. 1991), distinguished the *Sealed Case*, and held that a conspiracy to commit a crime of violence, i.e., traveling in interstate commerce for the purpose of committing murder, is a transferable offense under §5032. *Sealed Case*, 893 F.2d at 620.
18.04.04.01 Discretionary Transfer

Discretionary transfer under §5032 is permissible only if the alleged act of juvenile delinquency is a crime of violence or an enumerated narcotics crime. The definition of "crime of violence" in 18 U.S.C. §16 has been used for analyzing transfers under §5032. In *U.S. v. Baker*, 10 F.3d 1374 (9th Cir. 1993) the Ninth Circuit considered the definition of "crime of violence" under §5032. In *Baker*, a juvenile, was charged with violating 21 U.S.C. §846 by conspiring to manufacture, distribute, and possess with intent to distribute marijuana. The district court transferred the juvenile in *Baker*, finding that the charge of conspiracy was a "crime of violence" because the charged overt acts included attempting to kill a United States Forest Service employee, shooting a police helicopter, and planning the murders of state and federal drug agents and government witnesses. *Id.* at 1386. The Ninth Circuit reversed the district court, holding that despite alleged overt acts involving violence, a conspiracy to distribute narcotics is not a "crime of violence," "[b]ecause not every §846 conspiracy involves a substantial risk of physical force . . . ." *Id.* at 1394.

In other words, without citing *Taylor v. U.S.*, 495 U.S. 575 (1990), the Ninth Circuit used the "categorical approach" set out in *Taylor*, whereby the court looks only to the violated statute, rather than at the conduct itself.

By contrast, more recently in *U.S. v. Juvenile Male*, 118 F.3d 1344, 1350 (9th Cir. 1997), the Ninth Circuit focused on the objective of a conspiracy rather than the statute when reviewing the transfer of a juvenile. In that case, the court held that a RICO conspiracy to commit Hobbs Act robberies, which, by their nature, “involve[] a substantial risk that physical force . . . may be used,” constituted a crime of violence.

Before transferring a juvenile to adult status, the district court must first make a prediction at the transfer hearing of the possibility of rehabilitation of the juvenile. *U.S. v. Alexander*, 695 F.2d 398, 401 (9th Cir. 1982).

The Fifth Circuit in *U.S. v. Doe*, 871 F.2d 1248 (5th Cir. 1989), considered the transfer of a juvenile to adult proceedings and concluded:

while rehabilitation is a priority, courts are not required to apply the juvenile justice system to a juvenile's diagnosed intellectual or behavioral problems when it would likely prove to be nothing more than a futile gesture. The finding of rehabilitative potential is a test which is within the sound discretion of the trial court; the court may want more than a `glimmer of hope' that rehabilitation will be efficacious.

*Id.* at 1253 (citations omitted).

Section 5032 sets out the factors the district court must consider before deciding whether to transfer the juvenile. These factors include:

(1) the age and social background of the juvenile;
(2) the nature of the alleged offense;
(3) the extent and nature of the juvenile’s prior delinquency record;
(4) the juvenile’s present intellectual development and psychological maturity;
(5) the nature of past treatment and the juvenile’s response to such efforts; and
(6) the availability of programs designed to treat the juvenile’s behavioral problems.

After the 1994 amendments, in considering the nature of the offense for transfer, "[T]he court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms." If the court finds such a factor exists, that factor “shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.” These factors must be balanced by the district court in an effort to predict "the possibility of rehabilitation if in fact the juvenile is found guilty of the crime charged." U.S. v. Gerald N., 900 F.2d 189 (9th Cir. 1990); U.S. v. Alexander, 695 F.2d at 401. Before the juvenile offender may be transferred to adult status, the government must enter findings on each of the factors listed in §5032. Wellington, 102 F.3d at 505. The record must set forth these factors with sufficient specificity to permit meaningful review. U.S. v. Romulus, 949 F.2d 713 (4th Cir. 1991); U.S. v. C.G., 736 F.2d 1474 (11th Cir. 1984). Neither due process nor equal protection is violated if the court bases the decision to transfer a pregnant juvenile to adult status on the fact that the juvenile is pregnant. Toomey v. Clark, 876 F.2d 1433 (9th Cir. 1989).

According to the Senate Report on §5032, the juvenile should be proceeded against as a juvenile unless, after motion of the Attorney General, “in which the juvenile is accorded all due process rights, [the juvenile] is found by the court to have no reasonable prospects for rehabilitation before his or her twenty-first birthday.” 1974 U.S.C.C.A.N. 5320. However, in U.S. v. Nelson, 90 F.3d 636, 639 (2d Cir. 1996), the Second Circuit held the proper standard to determine whether a juvenile should be tried as an adult was whether “rehabilitation was likely,” rather than whether there was “reasonable probability” of rehabilitation. Id. (emphasis added). Thus, the Court affirmed the district court’s decision to transfer the juvenile, even though the district court found that all factors except the seriousness of the offense favored continued juvenile treatment.

Counsel should press for findings on all factors listed in §5032 and should be prepared to compare the case at issue with other district court cases in which a transfer has been denied or granted. E.g., U.S. v. M.L., 811 F. Supp. 491 (C.D. Cal. 1992); In re T.W., 652 F. Supp. 1440 (E.D. Wis. 1987); U.S. v. Dennison, 652 F. Supp. 211 (D.N.M. 1986); U.S. v. E.K., 471 F. Supp. 924, 932 (D. Or. 1979). Failure to do so could cause an appeal to fail. As discussed below, counsel should also be prepared to discuss any past treatment efforts and any locally available juvenile programs.

18.04.04.02 Opposing Transfer at the Transfer Hearing

The transfer hearing is the most critical point in any juvenile adjudication. The transfer to prosecution as an adult may ultimately result in a longer sentence under harsher conditions. In addition, a juvenile conviction is neither a felony nor a misdemeanor; U.S. v. Gonzalez-Cervantes, 668 F.2d 1073 (9th Cir. 1981), and may therefore have no effect on job applications and further sentence enhancements.
Unlike a felony conviction. Counsel for a juvenile should prepare the case from the very beginning to fight the transfer hearing.

Because of the Speedy Trial issue in juvenile cases, see infra section 18.05.06, the transfer hearing will occur very shortly after counsel receives the case. Counsel should be prepared to present evidence on each of the factors listed under §5032 and discussed above at section 18.04.04.01. Experts, including psychological experts, representatives of the local or state juvenile detention facilities, and substance abuse counselors can all be extremely useful in addressing the factors listed in §5032. Because the emphasis is on the juvenile's prospect for rehabilitation, see U.S. v. Bilbo, 19 F.3d 912 (5th Cir. 1994); U.S. v. Elwood, 993 F.2d 1146, 1149 (5th Cir. 1993); U.S. v. T.W., 992 F.2d 198, 199 (8th Cir. 1993) (Heaney, J., dissenting); U.S. v. Doe, 871 F.2d 1248 (5th Cir. 1989); U.S. v. Alexander, 695 F.2d 398 (9th Cir.), cert. denied, 462 U.S. 1108 (1983), counsel may choose to focus on the juvenile's prospects for rehabilitation through a mental health expert. For the court to make an informed finding, counsel may also want to present information on available juvenile programs and facilities to educate the court about those programs.

As discussed in the introduction to this chapter, the district court deciding the transfer will probably be uninformed about different juvenile programs. Counsel should begin by contacting some of the programs listed in 18.06.06. If a representative of a program is not available to testify some programs have videotaped programs that explain their particular program. The more the district court is educated about placement options, the more likely the transfer will be denied.

The juvenile may testify at the transfer hearing. Under §5032, "Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions." It is unclear whether such statements, although not routinely admissible, may be used for impeachment.

Any statements at the transfer hearing must be carefully tailored to ensure that they have some relation to the issues to be decided at the hearing, or the statements may become admissible at the guilt determination phase. See U.S. v. Cheyenne, 558 F.2d 902, 906-07 (8th Cir. 1977); U.S. v. Spruille, 544 F.2d 303, 307 (7th Cir. 1976). Counsel should be very wary about any cross-examination and should try to get a ruling forbidding cross-examination or granting immunity to the juvenile prior to the hearing. See, e.g., Simmons v. U.S., 390 U.S. 377 (1968) (testimony given by defendant in an adult criminal prosecution in order to establish standing to object to illegally seized evidence may not be used against him at trial on the issue of guilt or innocence). Counsel should also be wary about the possibility of a two-point enhancement under U.S.S.G. §3C1.1 for obstruction of justice. See U.S. v. Romulus, 949 F.2d 713 (4th Cir. 1991) (§3C1.1 enhancement appropriate for juvenile, later transferred to adult jurisdiction, who lied about his age before the magistrate).

A transfer hearing is a "preliminary hearing in a criminal case," and the traditional rules of evidence therefore do not apply. Doe, 871 F.2d at 1255; E.K., 471 F. Supp. at 929. The evidence admitted, nonetheless, must "measure up to the essentials of due process and fair treatment." Doe, 871 F.2d at 1255;
In *E.K.*, the district court held that the transcript of testimony by an FBI agent was admissible at the transfer hearing. The agent had been the sole witness at a preliminary hearing. The transcript of that hearing recited substantive charges told to the agent by relevant tribal police and residents. *Id.* at 928-29. In *Doe*, the Fifth Circuit ruled that live testimony reciting second and third-hand hearsay regarding the juvenile's commission of an armed robbery was admissible. *Id.* at 1255.
18.04.03 Appeal

If the district court grants the government's motion to transfer, the legal and practical value of the right to be tried as a juvenile is destroyed unless the order to transfer may be immediately appealed. Such an order may thus be subject to an interlocutory appeal. *U.S. v. Bilbo*, 19 F.3d 912 (5th Cir. 1994); *U.S. v. Gerald N.*, 900 F.2d 189, 190-91 (9th Cir. 1990); *In Re Sealed Case (Juvenile Male)*, 893 F.2d 363, 366-67 (D.C. Cir. 1988); *U.S. v. A.W.J.*, 804 F.2d 492, 493-93 (8th Cir 1986); *U.S. v. C.G.*, 736 F.2d 1474, 1476-77 (11th Cir. 1984). Similarly, an order denying the government’s motion to transfer may be appealed immediately because, upon conclusion of the juvenile adjudication, the “government’s right to try [the juvenile] as an adult would be forever barred by the Double Jeopardy Clause. *U.S. v. Doe*, 94 F.3d 532, 535 (9th Cir. 1996). A juvenile has a right to appeal and to counsel on appeal despite the objections of his or her parents to the appeal. *U.S. v. M.I.M.*, 932 F.2d 1016, 1018 (1st Cir. 1991). The district court’s factual findings will not be set aside unless they are clearly erroneous. *U.S. v. A.D.J.*, 108 F.3d 851, 853 (8th Cir. 1997); *Wellington*, 102 F.3d at 506. The standard of review of the sufficiency of the evidence in a juvenile adjudication is identical to that in federal criminal appeals. *U.S. v. De Leon*, 768 F.2d 629, 631 (5th Cir. 1985).

18.04.04 Constitutionality of Transfer Statute

In *U.S. v. J.D.*, 525 F. Supp. 101 (S.D.N.Y. 1981), a district court considered the constitutionality of §5032. In *J.D.*, the defendants argued that §5032 was unconstitutionally vague "in its recitation of factors to be considered by the court in ruling on the transfer motion." *Id.* at 102. The defense also argued that the statute did not guide the court as to how to view and utilize proof of the defendant's "present intellectual development and psychological maturity." The court held that the statutory scheme of §5032 reflects a determination that "the more mature and developed are more likely to be beyond redemption and more deserving of being held accountable for their acts" and therefore should more often be transferred to adult status. *Id.* at 104. The court therefore held that §5032 was not unconstitutionally vague.

Other attacks on the constitutionality of §5032 and its predecessors have been fruitless. See, e.g., *Brisco v. U.S.*, 368 F.2d 214, 215 (3d Cir. 1966) (although possible period of confinement under Youth Corrections Act was greater than the term of imprisonment provided by statute under which defendant was convicted, that did not make the Youth Corrections Act provisions unconstitutional); *U.S. v. Baker*, 429 F.2d 1344, 1397 (7th Cir. 1970) (Federal Youth Corrections Act not unconstitutional on account of delegation of powers to courts).

18.04.05 Dismissal of Juvenile Information and Filing An Adult Criminal Prosecution

Prosecutors may file a juvenile information and then later come to believe that the person they are prosecuting as a juvenile is, in fact, not a juvenile. In those instances, the government may try to circumvent any judicial review of their determination of the age of the juvenile by simply dismissing the juvenile information and filing adult criminal proceedings. Counsel should vigorously oppose any government attempt to circumvent the jurisdiction of §5032. Section 5032 states specifically that only in limited circumstances, "criminal prosecution on the basis of the alleged act may be by a motion to transfer . . . ."
If any evidence was taken at a probable cause hearing, counsel can argue that §5032 provides that once "evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency, subsequent criminal prosecution ... based upon such an act of delinquency shall be barred." Counsel can also argue that the Doctrine of Collateral Estoppel bars the government's dismissal and refiling. In a non-juvenile case, *U.S. v. Bernhardt*, 840 F.2d 1441 (9th Cir. 1988), the Ninth Circuit set out a three prong test to determine whether collateral estoppel exists.

**18.04.06 Motion to Transfer to Juvenile Jurisdiction**

An arrested juvenile may not want his or her parents notified of the arrest and may therefore not reveal his or her true age to the arresting agents. If this occurs, counsel may have to move the court to transfer the juvenile from adult jurisdiction to juvenile jurisdiction. There is no statutory provision for such a transfer. As a practical matter, however, such a motion, which could be fashioned as a "Motion to Transfer" or a motion to dismiss the indictment on jurisdictional grounds, should be brought at the earliest possible instance. *See U.S. v. Smith*, 851 F.2d 706 (4th Cir.) (motion to dismiss should have been granted for defendant who was indicted when he was 21 years old for a murder that he allegedly committed at age 15), *reh'g denied*, 859 F.2d 1200 (4th Cir. 1988). Under §5032, a juvenile can elect to be tried as an adult. That request by the juvenile must be timely. Notification to the clerk of the court five days before trial and within 10 days of the juvenile's initial appearance that the juvenile intended to file a motion to dismiss the juvenile information, and, if that motion were denied, the juvenile would elect to proceed as an adult, was held to be timely by the Ninth Circuit. *U.S. v. Doe*, 627 F.2d 181, 184-85 (9th Cir. 1980).

In *U.S. v. Alvarez-Porras*, 643 F.2d 54 (2d Cir. 1981), the Second Circuit considered a motion by a defendant to be treated as a juvenile. Although the court did not address the legality of such a motion, it did consider the evidence a court could rely upon in ruling on such a motion. In *Alvarez-Porras*, the defendant was illegally arrested and he represented at the time of that arrest that he was 19. Nonetheless, he testified at the transfer hearing that his true birth date would have made him four months shy of 18 at the time of his arrest. *Id.* at 66. The trial court found that the defendant lacked credibility, and had failed to produce concrete evidence of age. Therefore, the government had met its burden of proving that the defendant was over 18 at the time he violated the law. *Id.*

In *Alvarez-Porras*, the Second Circuit also held that although the initial statement by the defendant that he was 19 was inadmissible at trial because of the illegality of the arrest, it was admissible to impeach the defendant's credibility and for its truth at the transfer hearing. *Id.* at 66. The Second Circuit then held that the Constitution was not violated by requiring the defendant to come forward with credible evidence of minority. *Id.* at 67. *See also U.S. v. Castillo*, 36 F. Supp 2d 883 (D. Minn. 1999).

Obviously, any change in a client's testimony or story raises the possibility of a perjury charge, a false statements charge (18 U.S.C. §1001), or an enhancement under the guidelines for obstruction of justice. *See U.S. v. Romulus*, 949 F.2d 713 (4th Cir. 1991) (obstruction of justice enhancement under U.S.S.G. §3C1.1 appropriate for 17-year-old, transferred to adult jurisdiction, who stated to magistrate at his initial hearing that he was 19). Counsel should therefore be careful about bringing such a motion if the client has previously testified about his age or told agents his age.
18.04.07 Severing One of Two Juvenile Offenders in the Same Case To Adult Court

In *U.S. v. Anthony Y.*, 990 F. Supp. 1310 (D. N.M. 1998), the district court considered a case where the United States charged two Native American juveniles with murder. In that case, the government moved to transfer both of the juveniles to adult court. The district court then held that one juvenile should remain in juvenile court, while the other should be prosecuted as an adult.

18.04.08 Waiving Juvenile Jurisdiction

At times, a juvenile may persist in claiming to be older than 18, and a guilty plea or a conviction after trial may occur. In such a situation, defense counsel may move to withdraw the plea or vacate the jury verdict due to a lack of jurisdiction. The government may argue that the juvenile has waived juvenile jurisdiction by consenting to adult jurisdiction. Under §5032, however, a juvenile may consent to adult jurisdiction only after "he has requested in writing upon advice of counsel to be proceeded against as an adult . . . ." There is no provision in §5032 for implied waiver of juvenile jurisdiction. Under *U.S. v. Chambers*, 944 F.2d 1253 (6th Cir. 1991), federal jurisdiction over a juvenile is subject matter jurisdiction, the lack of which may be raised at any time. Therefore, under *Chambers*, absent a written waiver under §5032, a juvenile should not be deemed to have waived juvenile jurisdiction simply by entering a plea or being tried in an adult court.

18.04.09 Avoiding Transfer by Plea

A district court may refuse to accept an admission to a juvenile information if the admission is tendered to defeat transfer to adult jurisdiction. *U.S. v. Hayes*, 590 F.2d 309, 311 (9th Cir. 1979).

18.04.10 Suppression of Statements

The constitutional protections of *Miranda v. Arizona*, 384 U.S. 436 (1966), extend to adults and juveniles alike. *Application of Gault*, 387 U.S. 1 (1966). If a juvenile requests a probation officer or a parent, that request, under the totality of the circumstances approach, may invoke the *Miranda v. Arizona* rights:

"[A] 15-year-old cannot be judged by the more exacting standards of maturity" in determining whether a statement or confession was made voluntarily. *Haley v. Ohio*, 332 U.S. 596, 599 (1948). The *Application of Gault* totality of the circumstances test mandates inquiry into all the circumstances surrounding the interrogation, such as: the juvenile's age, experience, education, background, intelligence, and whether he had the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality
approach will allow the court the necessary flexibility to take this into account in making a waiver determination.

*Fare v. Michael C.*, 442 U.S. 707, 725 (1979); see also *U.S. v. Palmer*, 604 F.2d 64 (10th Cir. 1979).

The meaning of “voluntary” in the context of juvenile confessions may soon be clarified further by the Ninth Circuit, which has just ordered an en banc rehearing of a case in which it held the confession of a juvenile voluntary and admissible, although he had been drinking, was interrogated in the middle of the night, and his parents were not notified of his detention. *U.S. v. Doe*, 109 F.3d 626 (9th Cir. 1997). While the majority believed the lack of parental notification was the only issue, and held that it did not affect whether the confession was voluntary, (109 F.3d at 630), the dissenting judge considered the lack of parental notification, as well as other factors, of considerable importance in assessing the voluntariness of the confession. Id. at 632-34 (Gilmore, J. dissenting).

The Ninth Circuit has a three-part test for reviewing Juvenile Delinquency Act claims regarding parental notification. First, has the government violated the Act's requirements. See *U.S. v. Doe*, 862 F.2d 776, 779 (9th Cir. 1988). If so, the court must next determine whether the government's conduct was so egregious that it deprived the juvenile of due process of law. See *id*. If the answer is yes, reversal is required. See *id*. If the answer is no, the court must still decide whether the error was prejudicial. See *Doe*, 862 F.2d at 779. If the defendant was prejudiced, and irrespective of whether the government's conduct undermined the fundamental fairness of the proceedings, the court has the discretion to reverse the conviction so as to ensure that the "prophylactic safeguard for juveniles not be eroded or neglected . . . ." *Id.* at 781

In the Eleventh Circuit the Court of Appeals rejected a juvenile’s argument that a confession given after his arrest on state court charges should be suppressed in a trial on federal charges because of a failure to notify his parents of his arrest. *U.S. v. Kerr*, 120 F.3d 239 (11th Cir. 1997). The court reasoned that the protections of the Act, including the parental notification requirement were not triggered until the juvenile was charged with a federal violation.

After the juvenile is taken into custody, the juvenile's parents, guardian, or custodian must be notified of the rights of the juvenile and the nature of the alleged offense. 18 U.S.C. §5033.

Failure to notify a parent does not make a juvenile's confession involuntary or a product of ignorance, but it is a factor the court will consider in determining whether a confession was voluntary. *Rone v. Wyrick*, 764 F.2d 532, 535 (8th Cir. 1985); *Miller v. Maryland*, 577 F.2d 1158, 1159 (4th Cir. 1978).

Title 18 U.S.C. §5032 states, in part: "Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admitted for subsequent criminal prosecutions.” In *U.S. v. Cheyenne*, 558 F.2d 902, 906-07 (8th Cir. 1977), the Eighth Circuit held that only those pre-hearing statements that have some relation to the transfer hearing itself are inadmissible.
Delay prior to arraignment may also affect the admissibility of a juvenile's post-arrest statements. See section 18.04.03 for a discussion of cases that address the question of delayed arraignment.
18.05 JUVENILE ADJUDICATION

Juvenile adjudications are adjudications of status and are not adjudications of criminal liability. *U.S. v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir. 1980); *U.S. v. Hill*, 538 F.2d 1072, 1075 (4th Cir. 1976); *U.S. v. King*, 482 F.2d 454, 456 (6th Cir. 1973). The government must prove beyond a reasonable doubt that a juvenile is a delinquent. *In re Winship*, 397 U.S. 358, 368 (1969). The government, however, need not prove the age of the accused at the time of the offense beyond a reasonable doubt. *U.S. v. Frasquillo-Zomosa*, 626 F.2d 99, 102 (9th Cir. 1985).

18.05.01 Arraignment

Section 5033 states that, "The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate." In *U.S. v. Doe*, 701 F.2d 819 (9th Cir. 1983) (*Doe I*), the Ninth Circuit considered how delayed arraignment affected the admissibility of a juvenile's statements. In *Doe I*, the government failed to notify the juvenile's mother immediately. Defense counsel conceded that the delay had no adverse effect on the fairness of the adjudication because the mother was immediately contacted by defense counsel. Additionally, the government voluntarily declined to use statements made by the juvenile prior to the arraignment. The Ninth Circuit held that there was no due process violation because the prosecution did not benefit from the failure to notify the juvenile's mother immediately. *Id.* at 822.

In *Doe I*, the court also considered whether delay between the juvenile's arrest and arraignment was "unreasonable" under §5033. The government made a good faith effort to arraign the juvenile as soon as possible, but no magistrate was available until two days after the arrest of the juvenile. Additionally, the agents were very busy the day the juvenile was arrested and they gave priority to more urgent cases, including a woman in late pregnancy and women with infants and small children. Because of the exigencies and because the government did not use the pre-arraignment statement of the juvenile, the court found the juvenile had appeared before a magistrate "forthwith" but held that "[u]nder less urgent circumstances the government should give priority to the arraignments of juveniles in custody." *Id.* at 824.

In *U.S. v. Doe*, 862 F.2d 776 (9th Cir. 1988) (*Doe II*), the court considered whether a 36-hour delay in arraigning a juvenile was "reasonable." The government offered no exigent circumstances to explain the delay other than the mere facts of arrest and transportation of the juvenile from a processing facility to the juvenile detention center. The court of appeal rejected "the expansive proposition that a delay of 36 hours is reasonable whenever the detained juvenile is arrested at night and is suspected of alien smuggling." *Id.* at 780. The court held that such a delay was not "reasonable," and remanded the case to determine whether the juvenile was prejudiced by the governmental conduct, with instructions that the district court must reverse the juvenile's conviction and dismiss all the charges against him if there was prejudice. *Id.* at 781.

18.05.02 Probable Cause Hearing or Indictment
"No person should be held to answer for a[n] . . . infamous crime, unless on presentment or indictment of a grand jury . . . ." U.S. Const. amend. V. Because a juvenile may be put into custody for more than one year, juvenile delinquency should be an "infamous" crime requiring an indictment or presentment. See, e.g., U.S. v. Moreland, 258 U.S. 433, 446-48 (1922) (any crime punishable by a term in a prison is infamous); 18 U.S.C. §4083 (a person punished with more than one year of confinement may be confined in a penitentiary). Nonetheless, adjudication as a delinquent is not a conviction of a "crime," but rather the determination of status. Frasquillo-Zomosa, 626 F.2d at 101; U.S. v. Hill, 538 F.2d at 1075; King, 482 F.2d at 456. The Fifth Amendment therefore probably does not require indictment or a probable cause hearing in juvenile cases. See, e.g., Indian Boy X v. U.S., 565 F.2d 585, 595 (9th Cir. 1977); Hill, 538 F.2d at 1076.

Juveniles who are detained because they are suspected of committing criminal acts are entitled under the Fourth and Fifth Amendments to a prompt probable cause hearing. See, e.g., Indian Boy X v. U.S., 565 F.2d 585, 595 (9th Cir. 1977); Hill, 538 F.2d at 1076. Nonetheless, the Act does not provide for such a hearing and 18 U.S.C. §5032 states that, "The Attorney General shall proceed by information . . ." rather than by an indictment that establishes probable cause. There is no statutory procedure guaranteeing an accused juvenile that a detached and neutral magistrate will determine whether there is probable cause to hold that juvenile. See also Gerstein v. Pugh, 420 U.S. 103 (1975) (it violates the Fourth Amendment to detain a defendant on an information without any probable cause determination). See infra section 18.05.05.01 for a discussion of Gerstein, and for constitutional attacks on pretrial detention without a probable cause hearing or an indictment.

18.05.03 Jury Trial

In McKiever v. Pennsylvania, 403 U.S. 528 (1970), a plurality of the Supreme Court held that juveniles do not have a right to a jury trial. The continued vitality of McKiever may be somewhat diminished. The concurring and dissenting opinion of Justice Brennan rested on the logic that juries are required where juvenile proceedings are closed to the public but are not required where they are open to the public. Justice Harlan concurred in not announcing a rule giving juveniles a right to jury trials because, "criminal jury trials are not constitutionally required of the states, either as a matter of Sixth Amendment law or due process." Id. at 557 (Harlan, J., concurring opinion).

Justice Harlan is no longer on the Court, and it is unlikely that any member of the present Court would attack the vitality of Duncan v. Louisiana, 391 U.S. 145 (1968), which Justice Harlan refused to follow in McKiever. Further, under §5038, the records from juvenile delinquency proceedings cannot be released to the public and neither the name nor picture of any juvenile can be made public in connection with a juvenile delinquency proceeding. Therefore, under Justice Brennan's logic, because a federal juvenile proceeding is private, a juvenile being prosecuted under the Act should be entitled to a jury trial. Nonetheless, all the circuit courts of appeal that have considered that issue have denied a juvenile the right

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5 The Supreme Court in Kent v. U.S., 383 U.S. 541 (1965), declined to decide whether detention without a probable cause hearing was legal in juvenile cases. Id. at 545 n.3.

18.05.04 Other Constitutional Rights

Prosecuting a juvenile in an adult court after an adjudicatory proceeding in juvenile court violates the Double Jeopardy Clause of the Fifth Amendment. *Breed v. Jones*, 421 U.S. 519, 541 (1974). However, under the separate sovereign doctrines, a federal prosecution under §5032 after a previous plea of guilty to the same charges in tribal court is not barred by §5032. *U.S. v. Juvenile Female*, 869 F.2d 458, 460-61 (9th Cir. 1989). Title 18 U.S.C. §5032 states that, in part,

once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

In *U.S. v. Parker*, 989 F.2d 948 (8th Cir. 1993), the Eighth Circuit held that a juvenile prosecution, begun by complaint and a preliminary hearing pursuant to Fed. R. Crim. P. 5.1, which was transferred to adult jurisdiction after the preliminary hearing, was not barred by double jeopardy. In *Parker*, the Eighth Circuit held that the adult prosecution was a prosecution in the same proceeding as the juvenile prosecution, and therefore was barred by double jeopardy.

Likewise, juveniles are entitled to have the government prove, beyond a reasonable doubt, that they are delinquent. *In re Winship*, 397 U.S. 358 (1970). Juveniles are also entitled to the protections of *Miranda; Application of Gault*, 387 U.S. 1 (1966). Juveniles are entitled to notice of charges, right to counsel, the privilege against self-incrimination, the right to confront and cross-examine, to have their parents notified of the charges and the right to counsel. *Id.* at 31-57. Juveniles are also entitled to the application of the Ex Post Facto Clause. *U.S. v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987) (an amendment to §5032 allowing transfer of a 15-year-old to adult jurisdiction is a substantive change that may not be applied retroactively under the Ex Post Facto Clause).

18.05.05 Bail and Pretrial Detention

Bail in juvenile cases is very different from adult cases. Under 18 U.S.C. §5034, if a juvenile is in custody during the initial appearance, there are no provisions for posting of any security with the court. The court is either to release the juvenile to his or her parents or guardians or, after a hearing, detain the juvenile without bail. Because there are no provisions for bail, §5034 may be vulnerable to a due process or Eighth Amendment challenge. However, §5034 mandates release unless the government meets a burden that is higher than the burden that must be met in setting bail for adults. See 18 U.S.C. §3142. Also, as discussed below, in section 18.05.05.01, the Act is likewise defective for failing to provide for indictment or a probable cause hearing prior to detention.
18.05.05.01 Fourth Amendment Attacks on Pretrial Detention

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court considered the State of Florida's procedure whereby a person arrested without a warrant and charged by information is jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination, whether by indictment or probable cause hearing. The Court in *Gerstein* noted that for a person in prolonged detention, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. *Id.* The Supreme Court, therefore, held that the Fourth Amendment requires a "judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* See also *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (*Gerstein* requires a probable cause hearing within 48 hours of arrest).

The Fourth Amendment analysis of *Gerstein* focuses on whether the arrested person was detained or had restricted liberty pending further proceedings ("the sole issue is whether there was probable cause for detaining an arrested person pending further proceedings."). *Id.* at 120; "the Fourth Amendment probable cause determination is addressed only for pretrial custody." *Id.* at 123. "Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Id.* at 125 n.26. The *Gerstein* Fourth Amendment analogy should therefore also apply to detained juveniles.

In the Eighth Circuit, there is no Fourth Amendment violation if a juvenile is arrested after the issuance of a warrant supported by probable cause. *U.S. v. Allen*, 574 F.2d 435, 439-40 (8th Cir. 1978). Nonetheless, the Fourth Amendment requirements of *Gerstein* are still not satisfied under the Act if the arrest was without a warrant and the prosecutor proceeds by information, which may be filed without leave of court, and therefore without a probable cause determination by a judge or magistrate. *See Fed. R. Crim. P. 7.* The Act therefore violates the Fourth Amendment if a juvenile arrested without a warrant is not given a probable cause hearing and is detained at the initial appearance. *See also Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974) (the Fourth Amendment requires a probable cause hearing before jailing a juvenile in a curfew violation); *Cooley v. Stone*, 414 F.2d 1213, 1214 (D.C. Cir. 1969) (juvenile is entitled to a probable cause hearing before being detained).

18.05.05.02 Due Process Attacks on Pretrial Detention

The Act also violates due process by allowing a juvenile to be detained for up to 30 days before trial without a probable cause hearing or indictment. In *Schall v. Martin*, 467 U.S. 253 (1983), the Supreme Court upheld, over due process attack, a state juvenile detention statute. In that case, a New York law allowed pretrial detention upon a finding that there was a "serious risk" that the arrested juvenile may commit another crime while awaiting trial. Under that statute, the detained juvenile was entitled to a probable cause hearing within three days of his detention and a trial of his alleged delinquency within 14 days of a probable cause hearing. In *Schall*, the Court framed the question as whether "preventive detention of juveniles . . . is compatible with `fundamental fairness' required by due process." *Id.* at 263. The Supreme Court identified two inquiries that must be resolved in order to answer that question:
First, does preventive detention . . . serve a legitimate state objective? And, second, are the procedural safeguards contained in the [New York juvenile statutes] adequate to authorize the pretrial detention of at least some juveniles charged with crimes?

*Id.* at 263-64 (citations omitted).

The Court in *Schall* held that pretrial detention "serves a legitimate regulatory purpose compatible with the `fundamental fairness' demanded by the Due Process Clause in juvenile proceedings." *Id.* at 268 (citation omitted). The Court noted that because the state has a legitimate interest in preventive detention and that preventive detention was non-punitive, the remaining question to be decided was whether there was sufficient "protection against erroneous and unnecessary deprivations of liberty" prior to fact finding. *Id.* at 274. The Court held that the pretrial detention allowed by the New York statute did not violate due process because the statute provides for a probable cause hearing as well as notice of the hearing, and a statement of facts and reasons for the detention by the court prior to any detention.

Despite the fact that juvenile adjudications are labeled "civil" and juvenile process is shot through with "good intention," juvenile adjudications require criminal due process safeguards because "[a] proceeding where the issue is whether the child will be found to be `delinquent' and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *In re Winship*, 397 U.S. 358, 365-66 (1969) (quoting *Application of Gault*, 387 U.S. 1, 36 (1967)). Therefore, despite the civil nature of adjudications under the Act, the same due process rights afforded adults under *Gerstein* should apply to juveniles. *Accord Kent v. U.S.*, 383 U.S. 541 (1965) (the *parens patriae* philosophy of juvenile adjudications "is not an invitation to procedural arbitrariness"). *Id.* at 554-55.

In sum, the procedure whereby a juvenile can be detained for up to 30 days without trial and without a probable cause hearing of any sort, whether through indictment or otherwise, violates a juvenile's due process rights and Fourth Amendment right to be free from unreasonable seizure. Unfortunately, a conviction will not be vacated on the ground that the defendant was detained pretrial without a determination of probable cause. *Gerstein*, 420 U.S. at 119. To litigate this issue, counsel may have to bring a class action, such as in *R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir. 1983). Other possible remedies include dismissal, declaratory relief, or habeas corpus. Counsel may also request a timely probable cause hearing.

**18.05.06 Speedy Trial**

Speedy trial issues are also very different for juveniles. Under 18 U.S.C. §5036, a juvenile "who is in detention pending trial" must be brought to trial within 30 days "from the date upon which such detention has begun." The statutory exceptions are delay caused by the juvenile or his attorney, delay consented to by the juvenile or his attorney, or when it is "in the interest of justice." Under §5036, "[d]elays attributable solely to court calendar congestion cannot be considered in the interest of justice" and any dismissals are with prejudice "except in extraordinary circumstances." A delay based on the government's motion to transfer is in "the interests of justice," and any delay caused by the juvenile is likewise excluded under the 30 day rule. *U.S. v. Romulus*, 949 F.2d 713 (4th Cir. 1991). In *Romulus*, the period of time
in which the government was unaware of the juvenile's age was delay "caused by the juvenile." *Id.* The Fifth Circuit, after a review of the legislative history of §5036, held that the 30-day limit under §5036 does not apply to a juvenile who is out of custody on restrictive conditions. *U.S. v. Cuomo*, 525 F.2d 1285 (5th Cir. 1976). Additionally, the Ninth Circuit in *U.S. v. Doe*, 149 F.3d 945, 950 (9th Cir. 1998) followed the Fifth and Seventh Circuits holding that “a juvenile defendant must be detained in a physically restrictive detention amounting to ‘institutionalization’ before the speedy trial protection of 18 U.S.C. §5036 applies.”

The point at which the Speedy Trial clock begins to run can be confusing if a state or other local jurisdiction initiates the detention and delinquency proceedings, and then refuses jurisdiction. In such a case, the 30-day period runs from the earlier of:

1. the date the Attorney General certifies, or in the exercise of reasonable diligence, could have certified to the jurisdictional conditions set out in 18 U.S.C. §5032; or

2. the date that the federal government formally assumes jurisdiction over the juvenile. *U.S. v. Andy*, 549 F.2d 1281, 1283 (9th Cir. 1977).

In the Fourth, Fifth, Seventh and Tenth Circuits, however, the 30-day period begins to run on the date that the juvenile is taken into custody for the charged offense. *U.S. v. Romulus*, 949 F.2d 713 (4th Cir. 1991); *U.S. v. Doe*, 882 F.2d 926 (5th Cir.), *reh'g. denied*, 888 F.2d 1388 (5th Cir. 1989); *U.S. v. Sechrist*, 640 F.2d 81, 83-85 (7th Cir. 1981); *U.S. v. Doe*, 642 F.2d 1206 (10th Cir. 1981).

The Fourth Circuit has also considered when the 30 day clock began to run where FBI agents arrested a Chinese national who was first placed in administrative detention by the INS pending deportation proceedings. *U.S. v. Juvenile Male*, 74 F.3d 526 (4th Cir. 1996). Six weeks after the arrest, the INS confirmed the juvenile’s status as a lawful resident of the United States, dismissed the deportation proceedings and released the juvenile into the custody of the United States Marshal. A week later the government erroneously filed a criminal complaint against the juvenile, who was then brought before a Magistrate Judge. Two days later the government filed an information charging the juvenile with delinquency. The Fourth Circuit rejected the argument that 30 day clock began to run when the juvenile was detained by the INS and, focusing on the phrase “detention pending trial,” held that detention for purposes of §5036 did not begin until the information was filed. *Id.* at 529-30.

A juvenile brought to trial on the thirty-first day following arrest is entitled to a dismissal with prejudice. *U.S. v. Gonzalez-Gonzalez*, 522 F.2d 1040, 1044 (9th Cir. 1975). Advising that a trial date is "convenient" does not constitute a waiver of defendant's right to a speedy trial, even if the "convenient" date is beyond the 30 days. *Id.* Nonetheless, if any representation that may reasonably be interpreted as a request for a continuance is made, the 30-day rule is waived, even without the consent of the juvenile. *U.S. v. Dazen*, 607 F.2d 816, 817 (9th Cir. 1979).

If a juvenile is excluded by the Immigration and Naturalization Service and re-enters the country, the time spent in detention prior to exclusion will not count under the 30-day rule. *U.S. v. Bent*, 702 F.2d
210, 213 (11th Cir. 1983). In Bent, a four-day delay due to reassignment of the trial to a different judge because of an FBI investigation of the original trial judge was "in the interest of justice in the particular case" and therefore was not grounds for dismissal. Id. Similarly, a delay caused by the government’s appeal of an order denying its motion for transfer is a delay that is “in the interests of justice,” because of the Double Jeopardy Clause implications if the juvenile adjudication proceeded. U.S. v. Doe, 94 F.3d 532, 535-36 (9th Cir. 1996) (rejecting the argument that appellate court congestion, like trial court congestion, should not be considered a delay “in the interest of justice”).
18.06 SENTENCING

To sentence a juvenile, the court must hold a disposition hearing within 20 days of the finding of delinquency, unless a "further study" of the juvenile is ordered by the court. 18 U.S.C. §5037(a). The "further study" occurs when the "court desires more detailed information concerning an alleged or adjudicated delinquent . . . ." Id. Under such circumstances, the court "may commit [the juvenile], after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency." 18 U.S.C. §5037(d). At the disposition hearing, after considering any pertinent United States Sentencing Commission policy statements, "the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to §3556, place him on probation, or commit him to official detention." 18 U.S.C. §5037(a).

Counsel should always remind the court that the purpose of the Act is rehabilitation and not punishment. See Fagerstrom, 311 F.2d at 720:

We can continue upon the same path . . . locking children up in institutions, often for acts which are not crimes, where the only 'rehabilitation' is brutalization or, at best, alienation. Alternatively, we can seize upon a unique opportunity--the chance to develop new methods of redirecting that behavior that endangers society, unhampred by the forms and restrictions of our traditional juvenile correction system.

The Supreme Court in Kent v. U.S., 383 U.S. 541, 544 (1966) identified the rehabilitative goal of juvenile sentencing. The purpose of the juvenile justice system is to determine "the needs of the child and society rather than adjudicating criminal conduct." The Supreme Court has also recently noted that the Act did not completely reject the rehabilitative objectives of the juvenile justice system. U.S. v. R.L.C., 503 U.S. 291 (1992). Counsel should also point out to the court sentencing a juvenile, that the entire statutory scheme for transferring a juvenile to adult status is premised on the juvenile's possibility of rehabilitation. See U.S. v. Gerald N., 900 F.2d 189 (9th Cir. 1990); 18 U.S.C. §5032. The Act also provides for the least restrictive means of detention of a juvenile. 18 U.S.C. §5039. Counsel should always vigorously pursue rehabilitative options for a convicted juvenile.

18.06.01 Probation

Probation is always an option for a juvenile. For a juvenile less than 18 years old, probation may not extend beyond the sooner of the following:

(a) the date when the juvenile becomes 21 years old; or
(b) five years, if the crime would have been a felony or a misdemeanor, or one year if it would have been an infraction.

If a juvenile is between 18 and 21 years old at the dispositional hearing, the probation may not extend beyond the sooner of the following:

(a) three years; or
(b) five years, if the crime would have been a felony or a misdemeanor, or one year if it would have been an infraction.


18.06.02 Custody

A juvenile who is less than 18 years old at the time of sentencing may only be put into custody until the date such juvenile becomes 21 years old or for the maximum authorized term of imprisonment if the juvenile had been tried and convicted as an adult, whichever comes first. 18 U.S.C. §5037.

In U.S. v. Juvenile P.W.M., 121 F. 3d 382, 384 (8th Cir. 1997) the Eighth Circuit considered §5037. In Juvenile P.W.M., the district court sentenced the sixteen year-old juvenile to custody to the age of 21. However, if the juvenile had been sentenced as an adult, his guideline range would have been four to ten months. In that case, the Eighth Circuit reversed after it held that a juvenile can not receive a greater sentence that “an appropriately comparable adult would have received, in order to fix the upper limit of the juvenile’s sentence.” See section 18.06.04.

A juvenile who is between 18 and 21 years old at the time of sentencing may not be put into custody beyond five years, if convicted of a crime that would be a Class A (maximum of life), B (maximum of 25 years), or C (maximum of 12 years) felony for an adult. See 18 U.S.C. §3559. In any other case, that juvenile may not be put into custody for more than three years or the maximum term authorized had the juvenile been tried and convicted as an adult, whichever is earliest. 18 U.S.C. §5037. Counsel should be very wary of the provision allowing additional custody for juveniles who are between 18 and 21 years old at the time of sentencing. Having a juvenile sentenced prior to his or her eighteenth birthday may limit the range of custody that can be imposed by as much as several years.

18.06.03 Examples

For example a 16-year-old's delinquent behavior involved a violation of 18 U.S.C. §201(b)(1)(C), bribing a public official. Section 201(b)(1)(C) carries a maximum sentence of 15 years which makes it a Class C felony. 18 U.S.C. §3559. If the dispositional hearing occurs when the juvenile is 17, the judge may impose a probationary sentence that will extend until the juvenile turns 21 years old (four years). A juvenile who is 15 years old at the dispositional hearing may be given five years probation (or until the juvenile is 20 years old), because the five-year maximum period of probation under §5037 runs out before the 15-year-old juvenile will turn 21.

If the 16-year-old in our example is given a custodial sentence, under §5037 the maximum sentence may not extent beyond the lesser of the date the juvenile becomes 21 or the maximum term of imprisonment
had the juvenile been tried and convicted as an adult. The maximum custodial sentence is therefore five years, because the juvenile will turn 21 ten years before the maximum term of imprisonment under §201(b)(1)(C). A juvenile who is 17 years and 11 months at the time of sentencing, however, can only be given four years and one month, or until he is 21 years old. If that juvenile were sentenced two months later, the maximum sentence would be five years under §5037(c)(2)(A), which states that a juvenile "between 18 and 21 years old and who if convicted as an adult would be convicted of a Class A, B, or C felony, has a maximum sentence of five years."

18.06.04 Sentencing Guidelines and Parole

Title 18 U.S.C. §5041, which formerly allowed juvenile offenders to be paroled out of custody, was repealed as part of the Sentencing Reform Act of 1984. Pub. L. No. 98-473,Title II §214(b), Oct. 12, 1984, 98 Stat. 2014; U.S. v. Marco L., 868 F.2d 1121, 1124 (9th Cir. 1989). Nonetheless, the Sentencing Guidelines do not apply to juveniles. Id. The "maximum term of imprisonment that would be authorized" had the juvenile been prosecuted as an adult (§5037(c)(1)(B)) is the maximum of the juvenile's guideline range or the statutory maximum, had the juvenile been tried as an adult. U.S. v. R.L.C., 503 U.S. 291 (1992).

For example, the base offense level is 10 if the juvenile from the example in section 18.6.3 is prosecuted as an adult (for offering a bribe), under §2C1.1 of the U.S.S.G. If there are no other specific offense characteristics (in this case it must be assumed that the bribe was less than $2,000), the base offense level stays at 10. If the defendant then is given a two-level reduction for acceptance of responsibility under §3E1.1 of the guidelines and there are no other adjustments, the base offense level becomes eight. For a person with a criminal history category of I and a base offense level of eight, the guidelines are two to eight months. If the facts of the cases are identical and there are no reasons to depart, the adult and the juvenile have a maximum period in custody of eight months.

18.06.05 Sentencing in Magistrate's Court

A juvenile who consents may be tried before a magistrate. 18 U.S.C. §3401(g). However, "No term of imprisonment shall be imposed by the magistrate in any such case." 18 U.S.C. §3401(g). There is, therefore, a great advantage to consenting to a magistrate's jurisdiction. Nonetheless, a juvenile does not have an absolute right to be tried or to enter a plea before a magistrate. U.S. v. Lopez-Garcia, 683 F.2d 1226, 1229 (9th Cir. 1982).

18.06.06 Placement of Juveniles

A continuing problem is where to put a juvenile offender who has been sentenced to custody. The Federal Bureau of Prisons ("BOP") does not house juveniles, and, therefore, when a juvenile is sentenced by the federal courts, the BOP tries to place the juvenile in a contract institution. The contracting process is difficult for the contractor and because very few juveniles are placed through BOP, few contractors have incentive to get the BOP contract. Counsel, therefore, must carefully research the available facilities and programs. The first step is usually to contact the U.S. Probation office for the local district.
18.06.06.01 California

The BOP has a contract with California Youth Authority to house juvenile delinquents from California. CYA has many different levels of facilities to house the juvenile, from maximum security institutions to forest fire fighting camps.

A juvenile from San Diego is initially sent to Norwalk for one month. At Norwalk the juvenile is evaluated to determine educational, psychological, and conduct disorders. These evaluations, along with recommendations from the sentencing judge and the juvenile's probation officer, are used to determine the placement of the juvenile.

CYA has contracts with private residential treatment centers to help juveniles with emotional, psychological, and mental disabilities. San Diego County has contracts with residential treatment centers that provide programs for juveniles who do not suffer from such disabilities. These programs are probably good, but no contract exists with BOP.

18.06.06.02 Residential Treatment Centers That Have Had BOP Contracts

Missouri River Adolescent Development Center
Chamberlin, South Dakota. (605) 734-5525
Contact with Federal BOP through Minneapolis
Jack Swiderski
(612) 334-4075
Federal Office Building
212 3rd Avenue South, Room 135
Minneapolis, MN  55401

Missouri River Adolescent Development Center is located at two sites along the Missouri River. There is a 130-bed capacity between the two sites, and the juvenile may be rotated between the sites.

No minimum length of stay is required. The facility will not accept sex offenders or psychologically disturbed juveniles. The program offers drug and alcohol education, high school and GED. Vocational training is available in kitchen and facilities maintenance. The juveniles are taught survival skills needed to cope with daily life through positive peer pressure. Off-campus, outward-bound-type activities are part of the recreational programs.

McCrosson Boys Ranch, Sioux Falls, South Dakota
(605) 339-1203
BOP Contact:  Tom Nicks
(612) 334-4075
Federal Office Building
McCrosson Boys Ranch is an open, long-term residential group home. McCrosson will not take overly aggressive or violent juveniles. A juvenile with a strong gang background who exhibits no desire to enter a different life will probably not be accepted. The minimum length is nine months. McCrosson stresses education. The juvenile is taught to accept responsibility for his own conduct. The program begins on the Ranch school. Once the juvenile has shown positive behavior for nine weeks, he is mainstreamed into a public school. The Boys Ranch uses the school system at Trivalley and Sioux Falls. Once in school, the juvenile is given more free time. The free time is to be used to learn to make choices, work on the ranch, get a job away from the ranch, or participate in sports. Any activity chosen must coincide with the demonstrated level of responsibility.

Juveniles at the ranch work with horses and participate in parades, wagon trains, and other public activities.

Our Home Rediscovery Program, Inc., Huron, South Dakota  
(605) 353-1025  
Doug Morano  
BOP Contact: Jack Swiderski (651) 674-7443

Our Home has facilities for drug and alcohol abusing juveniles, inhalant abusers, and adolescent sexual offenders. Any juvenile with a drug or alcohol problem may be accepted into the chemical abuse facilities. The chemical abuse facilities are at residential treatment facilities with a 45-day program. The sexual offender program is also a residential treatment facility, but the program length is normally over one year.

Both the chemical abuser facilities and the sexual offender program have closed classroom education tailored for the individual juvenile. In the closed classroom, the juvenile is in class only with other juveniles in the facility.

A Group Care facility takes in juveniles with behavior problems. The average stay is between 6 to 12 months. The juvenile is mainstreamed into public schools through the Huron public school system.

A transitional care facility is set up for juveniles who have progressed from the chemical abusers program and the sexual offenders program. It is designed to help the juvenile learn to adapt to mainstream life in society. The programs will not take overly violent juveniles or juveniles with severe psychological problems.

Intermountain Youth, Santa Fe, New Mexico  
(505) 986-8481, 982-2376
Contact with BOP through Dallas, Texas
Michael Ginster (214) 767-9700

Intermountain Youth is a community-based treatment program designed for Native American juveniles with social disabilities. While it is mostly used for Native American youth, it has a contract with BOP and does accept other juveniles.

The juvenile is placed in either a therapeutic home or an apartment complex, depending upon the juvenile's level of independence. The youth is taught skills necessary to cope with everyday life and live successfully in a family. Daily and weekly chores are assigned, including a weekly cooking duty. The juvenile must work either to finish high school or toward a GED. Recreation is highly structured and includes camp-type activities.

Glen Mills School, Philadelphia, Pennsylvania
Local Contact: Dave Light 674-5817
Director of Admissions: Bernie Kreig (800) 441-2064
Contact with BOP through Linda Ford of Community Correction in Philadelphia, PA.

Glen Mills is a 750-student residential school for delinquent boys. It uses peer pressure and group confrontation to correct conduct. The school specializes in teaching gang kids the skills and discipline necessary to be positive members of a non-gang society. Juveniles who have severe emotional disturbances or psychosexual problems, who have been molested, who have committed arson, or who are high runaway risks are not accepted. A minimum stay of 12 months is required. The school has 14 different vocational programs and offers 14 varsity sports. It holds state championships in many of these and was recently been national champion in power lifting. The juvenile may work toward a high school diploma.

Juveniles who are required to remain in the institution for the duration of their sentence are not accepted. Glen Mills wants the liberty to determine the juvenile's ability to visit home.

OTHER FACILITIES INCLUDE:

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<td>El Centro, CA 92243</td>
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<td>Washington Ridge Youth Conservation Camp</td>
<td>Nevada City, CA 95959</td>
<td>(916) 265-4623</td>
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<td>SRCC: Class/Diagnostic Center</td>
<td>Norwalk, CA 90650</td>
<td>(562) 868-9979</td>
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<td>Our Home, Inc. Adolescent Sexual Adjustment Program</td>
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<tr>
<td>Irma, WI 54442</td>
<td></td>
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<tr>
<td>(715) 536-8386</td>
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</tbody>
</table>

### 18.07 FUTURE USE OF JUVENILE CASES

Under 18 U.S.C. §5038, information about the juvenile record may not be released except in limited circumstances. Nonetheless, those prior adjudications of delinquency may come back to haunt the juvenile later in life.

#### 18.07.01 Sentencing Under the Sentencing Reform Act of 1984

Under §4A1.2(d)(2), a sentencing court may consider past juvenile sentences to calculate a defendant's criminal history category. Under that section, if the defendant was released from confinement of a sentence of 60 days or more within five years of the commencement of the instant offense, the juvenile sentence may be counted.
In *U.S. v. Williams*, 891 F.2d 212 (9th Cir. 1989), the defendant argued that four of his 10 criminal history points should not be counted because they were the result of two juvenile adjudications. Relying primarily on *Baldasar v. Illinois*, 446 U.S. 222 (1980), the defendant argued that consideration of those two juvenile adjudications violated the Due Process Clause. The Ninth Circuit held that it was not a violation of the defendant’s due process rights to use prior non-jury juvenile adjudications to enhance the sentence under the U.S.S.G. In addition, the court found that a commitment to juvenile hall may be characterized as a "sentence of imprisonment" under §4A1.2(d)(2)(A). The court found that the appropriate inquiry was not whether juvenile hall was equivalent to prison but whether commitment to juvenile hall is a sentence to confinement. Because of the deprivation of liberty, the court found that commitment to juvenile hall is a form of confinement and therefore within §4A1.2(d)(2)(A).

In *U.S. v. Kirby*, 893 F.2d 867 (6th Cir. 1990), the Sixth Circuit considered a similar issue. In *Kirby*, the defendant argued that under Kentucky law an adjudication of delinquency by the juvenile court cannot be deemed a conviction and therefore a juvenile record cannot be used to enhance a criminal history category under the U.S.S.G. The Sixth Circuit rejected that argument, finding that federal law, not Kentucky law, controls the sentencing disposition if the convictions were federal offenses. Guideline §4A1.2(d)(2)(A) provides instructions for computing criminal history relating to offenses prior to age 18, and specifically directs the addition of two points for juvenile convictions. As a result the adding of points for juvenile convictions was proper.

### 18.07.02 Enhanced Penalties Under 21 U.S.C. §841(b)(1)(A)

If a person has been convicted of an offense under 21 U.S.C. §841 and has a "prior conviction for a felony drug offense," the sentence is enhanced. For instance, under §841(b)(1)(A)(i) (possessing with intent to distribute more than one kilogram of a mixture containing a detectible amount of heroin), a person is subject to a mandatory minimum sentence of 10 years. A person with a "prior conviction for a felony drug offense," has a mandatory minimum sentence of 20 years. A person with two prior felony drug convictions is subject to a mandatory term of life imprisonment without release. These enhanced penalties do not apply where the priors are juvenile delinquency adjudications.

Adjudication as a delinquent under the Act is not a conviction of a crime but rather a determination of status. *U.S. v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir.), cert. denied, 449 U.S. 987 (1980); *U.S. v. Hill*, 538 F.2d 1072, 1075 (4th Cir. 1976); *U.S. v. King*, 482 F.2d 454, 456 (6th Cir.), cert. denied, 414 U.S. 1076 (1973). Further, 18 U.S.C. §5031 defines "a substantive offense of juvenile delinquency, which is based upon the commission of an act which would be a crime if committed by an adult." *Frasquillo-Zomosa*, 626 F.2d at 101; *U.S. v. Mechem*, 509 F.2d 1193, 1196 (10th Cir. 1975). Finally, an adjudication of juvenile delinquency under the Act is neither a felony nor a misdemeanor. *U.S. v. Gonzalez-Cervantes*, 668 F.2d 1073 (9th Cir. 1981). Because a juvenile adjudication is neither a conviction nor a felony, it therefore should not enhance a sentence under §841(b)(1)(A).
Nonetheless, there may be a different result under §841(b)(1)(B) (the five-year mandatory minimum section) and §841(c) (the no mandatory minimum section). Under those sections there is an enhancement:

after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotics drugs, marijuana, or a depressant or stimulant substances . . . .

Subsections 841(b)(1)(B) and 841(c), however, include "offenses punishable under this paragraph" and felonies "under any provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or foreign country . . . ." The language may include adjudications of juvenile delinquency because an act of juvenile delinquency may be alleged as a violation of §841, which could make it an "offense punishable under" that subsection. Nonetheless, juvenile delinquency is "punishable" under 18 U.S.C. §5037, not under the penalty provisions of 21 U.S.C. §841, and therefore should not create a sentence enhancement under §841. Also, a finding of delinquency is not a "conviction." Frasquillo-Zomosa, 626 F.2d at 101; Hill, 538 F.2d at 1075; King, 482 F.2d at 456.

18.07.03 Use of Juvenile Adjudications as Predicate Offenses under the Armed Career Criminal Act

In 1988 the Armed Career Criminal Act was amended by the Anti-Drug Abuse Act of 1988. Under the Armed Career Criminal Act, in certain circumstances a felon in possession of a firearm may be subject to a term of custody from 15 years to life. 18 U.S.C. §924; see Chapter 13 of the Manual. Before a felon may be subject to the 15-years-to-life provisions of the Armed Career Criminal Act, the felon must have committed three predicate felonies. In 1988, the Armed Career Criminal Act was amended to include as a predicate felony an act of juvenile delinquency that involved the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for a term in excess of one year if committed by an adult. The use of juvenile adjudications has not yet been challenged, and strong arguments can be raised that such adjudications do not satisfy constitutional requirements. See supra section 18.05.04.

18.07.04 Future Impeachment

Juvenile adjudications are generally not admissible to impeach a witness unless the witness is someone other than the accused and the conviction could be admissible to attack the credibility of an adult "if the court is satisfied that admission evidence is necessary to a fair determination of the issue of guilt or innocence." Fed. R. Evid. 609(d); Davis v. Alaska, 415 U.S. 308 (1974).
CHAPTER 19
 PROVIDING REPRESENTATION UNDER THE CRIMINAL JUSTICE ACT

19.01 INTRODUCTION

This chapter provides an overview of the Criminal Justice Act (CJA), 18 U.S.C. §3006A, its implementation and administration. Cites to the CJA in this chapter are current as of November 13, 2000. Guidance on interpreting and applying the CJA is provided in the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (Guidelines), Volume VII, Guide to Judiciary Policies and Procedures, promulgated by the Judicial Conference of the United States with the assistance of its Committee on Defender Services. A reference copy of the Guidelines is available at the office of the clerk of court. Cites to the Guidelines in this chapter are current as of June 14, 2000.

In 1964, the Congress enacted the CJA to provide effective representation for those persons charged with criminal offenses who lack the financial resources necessary to retain private legal services. The CJA provides for compensation, and reimbursement of "reasonably incurred" expenses, of court-appointed counsel [3006A(d)] and persons providing investigative, expert, and other services [3006A(e)]. It also authorizes funds for training such individuals [3006A(i)].

Each district court is required to establish a plan for furnishing representation under the CJA [3006A(a)]. A bar association, legal aid agency, or a federal defender organization may furnish representation, but the plan must provide for representation by private attorneys in a substantial proportion of cases [3006A(a)(3)]. A district's plan must be approved by the judicial council of the circuit [3006A(a)], which also approves a supplemental plan for CJA representation on appeal [3006A(a)(3)]. A district's CJA plan is kept on file in the clerk’s office.

Any judicial district or part of a district, or two adjacent districts or parts of districts, in which at least 200 CJA appointments are required annually, may establish a federal public or community defender organization [3006A(g)(1)]. Federal public defender organizations are staffed by salaried attorneys and support personnel, who are federal employees [3006A(g)(2)(A)]. Community defender organizations are

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1 The Judicial Conference of the United States, established pursuant to 28 U.S.C. §331, is the policy-making body for the United States courts.
non-profit organizations of salaried defense counsel and support staff, funded by grants from the judiciary [3006A(g)(2)(B)].

Questions about the **processing and payment of CJA claims** should be directed to your district’s clerk’s office (or the local official assigned responsibility for processing CJA vouchers).

Inquiries concerning **CJA policies** should be directed to the appropriate district office (i.e., the clerk’s office or the federal defender office). Questions which your local designated official are unable to answer may be directed to the Defender Services Division of the Administrative Office of the U.S. Courts, Washington, D.C. 20544, (202) 502-3030.

**19.02 APPOINTMENT OF COUNSEL**

**19.02.01 Eligibility for CJA Counsel**

Determining financial eligibility for representation under the CJA is a judicial function performed by a federal judge or magistrate judge after appropriate inquiry into a person's financial status. *U.S. v. Harris*, 707 F.2d 653 (2d Cir. 1983), *cert. denied*, 464 U.S. 997 (1983). *See also U.S. v. Lyons*, 898 F.2d 210 (1st Cir.), *cert. denied*, 498 U.S. 920 (1990). Counsel should be provided as soon as feasible after a financially eligible person is taken into custody, first appears before a federal judge or magistrate judge, is formally charged, or otherwise is entitled to counsel under the CJA, whichever occurs earliest. A person seeking appointment of counsel normally completes and executes a **CJA Form 23** (Financial Affidavit in Support of Request for Attorney, Expert or Other Court Services Without Payment of Fee) before a judicial officer or employee. Employees of law enforcement agencies or U.S. attorney's offices should not participate in the completion of the **CJA Form 23** or seek to obtain information from a person requesting the appointment of counsel concerning his or her eligibility. *See paragraph 2.03 of the Guidelines.*

The eligibility standard for obtaining CJA representation is whether a person's net financial resources and income are insufficient to enable him or her to obtain qualified counsel, taking into consideration the cost of providing: (1) the defendant and his or her dependents with the necessities of life; and (2) the defendant's release on bond if financial conditions are imposed. The financial status of the person's family should not be considered unless the family indicates a willingness and financial ability to retain counsel promptly. *Barry v. Brower*, 864 F.2d 294 (3d Cir. 1988). *See paragraphs 2.04 and 2.06 of the Guidelines.*

A person may be found **partially eligible** for CJA representation. If a person’s net financial resources and income are in excess of the amount needed to provide the individual and his or her dependents with the necessities of life and to provide for the defendant’s release on bond, but insufficient to pay fully for retained counsel, the judicial officer will appoint CJA counsel and order the defendant to pay available excess funds to the clerk of court as reimbursement for the cost of representation furnished under the Act. *See paragraph 2.05 of the Guidelines. Cf. Wood v. U.S.*, 387 F.2d 353 (5th Cir. 1968), *cert. denied*, 396 U.S. 924 (1969).
Any doubts as to a person's eligibility should be resolved in that person’s favor. Erroneous
determinations of eligibility may be corrected at any time. See paragraph 2.04 of the Guidelines.

19.03 TYPES OF PROCEEDINGS COVERED BY THE CJA

19.03.01 Mandatory Appointment of Counsel

The CJA provides that representation shall be provided for any financially eligible person who:

a) is charged with a felony or Class A misdemeanor;
b) is a juvenile alleged to have committed an act of juvenile delinquency;
c) is charged with a probation violation;
d) is under arrest, when such representation is required by law;
e) is charged with a supervised release violation or faces modification, reduction, or
   enlargement of a condition, or extension or revocation of a term of supervised release;
f) is subject to a mental condition hearing under chapter 313 of title 18 U.S.C.;
g) is in custody as a material witness;
h) is entitled to appointment of counsel under the sixth amendment to the Constitution;
i) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or
j) is entitled to the appointment of counsel under 18 U.S.C. §4109 related to international
   prisoner transfer proceedings.

In addition, financially eligible persons seeking to vacate or set aside a death sentence under 28
U.S.C. §§2254 or 2255 are entitled to appointment of counsel pursuant to 21 U.S.C. §848(q)(4)(B);
those charged with a federal capital crime are entitled to appointment of two attorneys at least one of whom
shall be learned in the law applicable to capital cases, pursuant to
18 U.S.C. §3005. See paragraphs 2.01 A(1)(i)-(xi) and 6.01 of the Guidelines. See infra section 19.11
for information on providing representation in death penalty cases.

19.03.02 Discretionary Appointment of Counsel

Counsel may be authorized under the CJA if the court "determines that the interests of justice so
require" for any financially eligible person who:

a) is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which
   a sentence to confinement is authorized;
b) is seeking relief under 28 U.S.C. §§2241, 2254, or 2255. See generally Weygandt v.
   Look, 718 F.2d 952 (9th Cir. 1983); LaMere v. Risley, 827 F.2d 622 (9th Cir. 1987).
   But see section 19.11.01, regarding mandatory appointment of counsel for death
   sentenced inmates seeking relief under these provisions.

See paragraph 2.01 A(2) of the Guidelines.
CJA counsel also may be appointed for a financially eligible person who:

a) is charged with civil or criminal contempt and faces loss of liberty; see Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985), cert. denied, 474 U.S. 1061 (1986);

b) is called as a witness before a grand jury, court, Congress or a federal agency or commission which has the power to compel testimony and where there is reason to believe that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty; In Re DiBella, 518 F.2d 955 (2d Cir. 1975);

U.S. v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972);

c) is proposed for processing under a "pretrial diversion" program;

d) is held for international extradition under chapter 209 of Title 18 U.S.C.; or

e) under 18 U.S.C. §983(b)(1), has standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute, and is represented by counsel appointed under 18 U.S.C. §3006A in connection with a related criminal case.

This list is not intended to be all inclusive. See paragraph 2.01 F of the Guidelines.

19.03.03 Cases Not Covered by the CJA

Cases or proceedings which are not covered by the CJA include the following:

a) petty offenses, where confinement is not authorized;

b) corporate defendant cases;

c) civil rights actions by prisoners under 42 U.S.C. §1983 [counsel, however, may seek attorneys fees under 42 U.S.C. §1988];

d) civil actions to protect federal jurors' employment [but see 28 U.S.C. §1875(d)(1) for authority to appoint and compensate counsel (payable out of defender services appropriations) in civil actions to protect jurors' employment];

e) administrative deportation proceedings before the Immigration and Naturalization Service.

19.03.04 Appointment in Ancillary Matters

Appointed counsel may provide representation in "ancillary matters appropriate to the proceedings" pursuant to subsection (c) of the CJA. An ex parte application [for determining whether the matter is ancillary and compensable under the CJA] may be submitted to the judicial officer presiding in the principal matter for which counsel has been appointed, prior to providing representation in the other case or proceeding. Otherwise, a memorandum should be submitted to the judicial officer at the end of the case justifying the representation as ancillary. See paragraph 2.01 F(5) of the Guidelines.

To be ancillary, a matter must be closely related to the facts and circumstances surrounding the principal criminal charge. Ancillary representation should support one of the following objectives:
(1) to protect a Constitutional right;
(2) to contribute in some significant way to the defense of, or to enforce a plea agreement in, the principal criminal charge;
(3) to aid in preparation for trial or disposition of the principal charge;
(4) to preserve the interests of a CJA client in, or to effectuate the return of, real or personal property pursuant to 21 U.S.C. §881, 19 U.S.C. §1602, or similar statutes, or Fed. R. Crim. P. 41(e), which property, if recovered by the client, may be considered for reimbursement to the CJA. *U.S. v. Martinson*, 809 F.2d 1364 (9th Cir. 1987). See also paragraph 2.04 of the *Guidelines* regarding reimbursement.

The scope of representation in an ancillary matter should be limited to the aspect of the proceedings which relates to the principal criminal charge and the *correlative objective sought* to be achieved in providing the representation (e.g., a CJA defendant in a criminal stock fraud case should be represented by CJA counsel at the defendant's deposition in a parallel civil fraud action for the limited purpose of providing advice concerning the client's Fifth Amendment rights). Ancillary representation is considered part of the main proceeding, and no separate case compensation maximum applies. See paragraph 2.01 F(5) of the *Guidelines*.

**19.03.05 Representation of Multiple Defendants in a Case**

Separate counsel should usually be appointed for multiple defendants in a criminal case. However, if defendants make a waiver on the record and good cause is shown, an attorney may be appointed to represent more than one person. In this situation, a separate order of appointment should be entered for each defendant, and the attorney may be compensated up to the statutory maximum for each person represented. Time spent in common on the cases should be prorated between the vouchers submitted for each case. See paragraphs 2.10 and 2.24 of the *Guidelines*.

**19.03.06 Appointment of Co-counsel in a Non-capital Case**

An additional attorney may be appointed in an extremely difficult case where the court finds it is necessary and in the interest of justice to do so. See paragraph 2.11 B of the *Guidelines*. The court's finding must be included on the appointment order. Each attorney may be compensated up to the statutory maximum. In the more typical case, when one attorney is appointed, appointed counsel may claim compensation for non-duplicative services furnished by a partner or associate, and with prior approval, for non-affiliated counsel, within the maximum compensation allowed under the CJA. See paragraph 2.11 A of the *Guidelines*. See infra section 19.11.01 regarding appointment of more than one attorney in death penalty cases.

**19.03.07 Appointment of Standby Counsel**

When a person has waived representation by counsel, the judicial officer may appoint an attorney as "standby counsel" to protect the integrity and continuity of the proceedings. Standby counsel appointed under the court’s inherent authority is not appointed under the CJA. Instead, he or she serves as an expert
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or consultant to the court pursuant to 5 U.S.C. §3109, and **does not represent the defendant.** Cf. *U.S. v. Mills*, 895 F.2d 897 (2d Cir.), **cert. denied**, 495 U.S. 951 (1990). Such standby counsel may be appointed regardless of whether the defendant is financially able to obtain representation. **See** paragraph 2.17 of the *Guidelines.*

Standby counsel also may be appointed to be available to assist with a pro se defendant’s defense. Only when such defendant is financially eligible, and counsel actually renders representation, may counsel be compensated under the CJA. **See** paragraph 2.17 of the *Guidelines.*

**19.03.08 Substitution of Counsel**

If an attorney is substituted for an attorney previously appointed in a case, the total compensation paid to both attorneys should exceed the case compensation maximum only where the case involves extended or complex representation. **See generally U.S. v. Allen**, 789 F.2d 90 (1st Cir.), **cert. denied**, 479 U.S. 846 (1986). The attorneys should complete separate vouchers, with the second attorney indicating that his or her appointment was a substitution. Approval of payments to either attorney will not occur until the end of the trial to ensure appropriate apportionment of compensation. **See** paragraph 2.25 of the *Guidelines.*

**19.03.09 Transferred Cases**

Unless special circumstances exist, whenever a case is transferred to another district, the district **receiving** the transferred case should appoint counsel and the previous appointment of counsel should be terminated. **See** paragraph 2.12 of the *Guidelines.* The transferee district may continue the original appointment of counsel in the interest of justice and economy. If the appointment of original counsel is continued, the aggregate of the attorney’s time in both districts is subject to the case compensation maximum.

**19.03.10 New Appointments**

A new appointment is made, and a separate case compensation limitation applied, for each person represented in the following proceedings:

 a) new trial after motion, mistrial, reversal, or remand on appeal;
 b) probation revocation proceedings;
 c) appeal, including interlocutory appeals;
 d) bail appeals to a court of appeals;
 e) extraordinary writs;
 f) mental competency hearings pursuant to 18 U.S.C. §§4243, 4245, and 4246.

**See** paragraph 2.13 of the *Guidelines.*
A new appointment is not necessary when an attorney appointed by a magistrate judge continues to represent the defendant in district court, except on appeal from a judgment rendered by a magistrate judge in a misdemeanor case. See paragraph 2.12 of the Guidelines.

19.04 COMPENSATION OF APPOINTED COUNSEL

19.04.01 Hourly Rates

Appointed counsel are compensated at an hourly rate of $70 for in-court time and $50 for out-of-court time for work performed on or after January 1, 2000, unless a higher hourly rate (of up to $75 per hour) has been implemented by the Judicial Conference for the district involved. See paragraph 2.22 A of the Guidelines. In death penalty cases (federal capital prosecutions and federal capital habeas corpus proceedings) commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, the presiding judicial officer sets the compensation rate for appointed counsel in an amount not to exceed $125 per hour (unless raised by the Judicial Conference in accordance with 21 U.S.C. §848(q)(10)(A)). The hourly maximums do not apply in death penalty cases commenced, and appeals perfected, before April 24, 1996. See paragraph 6.02 of the Guidelines. See infra section 19.11.04 regarding compensation of counsel in capital cases. The clerk of the court or other official who administers the CJA panel should be contacted regarding the applicable hourly rate(s) for a particular district.

19.04.02 Case Compensation Claims

Appointed counsel claims compensation for time spent and reimbursement of expenses incurred in providing CJA representation on a CJA Form 20 (Appointment of and Authority to Pay Court Appointed Counsel), or in death penalty cases, on a CJA Form 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel). See paragraphs 2.20 and 6.02 D of the Guidelines. See infra section 19.06.01 for specific instructions regarding preparation and submission of vouchers.

Appointed counsel may receive compensation up to the case compensation maximum amounts (listed below) upon approval of the presiding judicial officer. Claims for compensation in excess of these amounts may be paid upon appropriate certification by the presiding judicial officer and approval by the chief judge of the circuit or his or her delegate. 18 U.S.C. §3006 A(d)(3). The case compensation maximum amounts apply to compensation only, not to expenses. See paragraph 2.22 B(1)(i) of the Guidelines. Case compensation maximums for attorneys are inapplicable in death penalty cases. See paragraph 6.02 A of the Guidelines. See infra section 19.11.04 regarding compensation of counsel in death penalty cases.

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2 "In-court" time refers to time spent in the courtroom, in chambers, or during other periods in the court day when appointed counsel cannot reasonably leave the courthouse to perform other work (e.g., during short recesses or jury deliberations when counsel is requested to remain at the courthouse). All other attorney time is considered to be "out-of-court" time.

3 Rates may be adjusted periodically.
The presiding judicial officer may certify a compensation amount in excess of the applicable case compensation maximum when the case involves extended or complex representation and the excess amount is necessary to provide fair compensation. See paragraphs 2.22 B(1)(i) and B(3) of the Guidelines. U.S. v. Bailey, 581 F.2d 984 (D.C. Cir. 1978); U.S. v. Hunter, 394 F. Supp. 997 (D.D.C. 1975). Excess compensation claims must be accompanied by a memorandum supporting counsel's claim that these criteria are met. See paragraph 2.22 C(2) of the Guidelines. The circuit chief judge (or delegate) may approve the full amount of excess compensation claimed or a lesser amount. In re Baker, 693 F.2d 925 (9th Cir. 1982). If no excess compensation is approved by the circuit chief judge (or delegate), appointed counsel will receive the case compensation maximum amount.

The Federal Courts Improvement Act of 2000, effective November 13, 2000, amended subsection (d)(2) of the CJA to increase the case compensation maximum amounts. Courts must determine whether compensation claims submitted on a CJA Form 20 (Appointment of and Authority to Pay Court Appointed Counsel) are governed by the new maximums or by the former maximums. If any representational services were provided on or after November 13, 2000, the new case maximums apply to the entire representation, including services performed before November 13. If all representational services were completed before November 13, 2000, the former case maximums apply. The following are the case compensation maximum amounts (with the former maximums indicated in parentheses):

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<tr>
<th>Type of Proceeding</th>
<th>Case Compensation Maximum</th>
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<tbody>
<tr>
<td></td>
<td>Trial Court Level</td>
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<tr>
<td>Felonies [except federal capital prosecutions]</td>
<td>$5,200 ($3,500)</td>
</tr>
<tr>
<td>Misdemeanors</td>
<td>$1,500 ($1,000)</td>
</tr>
<tr>
<td>Proceedings under 18 U.S.C. §4106A (for paroled offenders transferred from a foreign country)</td>
<td>$1,200 ($750)</td>
</tr>
<tr>
<td>Verification proceedings under 18 U.S.C. §§4107 or 4108 (relating to prisoner transfer proceedings to and from the United States and a foreign country)</td>
<td>$1,500 ($1,000)</td>
</tr>
<tr>
<td>Pre-trial diversion</td>
<td></td>
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<tr>
<td>Alleged felony offense</td>
<td>$5,200 ($3,500)</td>
</tr>
<tr>
<td>Alleged misdemeanor offense</td>
<td>$1,500 ($1,000)</td>
</tr>
<tr>
<td>Proceedings under 18 U.S.C. §983 (for services provided by counsel appointed under 18 U.S.C. §983(b)(1) in connection with certain</td>
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4 Appendix A (CJA Forms) in the Guidelines contains forms that the court can use in its discretion in non-capital cases for review of vouchers seeking compensation in the excess of case compensation maximums: CJA Forms 26 and 27 (Supplemental Information Statement for a Compensation Claim in Excess of the Statutory Case Compensation Maximum), for use in the district court and court of appeals, respectively, and CJA Forms 26A and 27A (Guidance to Attorneys in Drafting the Memorandum Required for a Compensation Claim in Excess of the Case Compensation Maximum), for use in the district court and court of appeals, respectively.
Providing Representation under the Criminal Justice Act

19.04.03 Compensation for Travel Time

Appointed counsel may claim time for necessary and reasonable travel. *U.S. v. Reed*, 658 F.2d 624 (8th Cir. 1981), *cert. denied*, 455 U.S. 1002 (1982); *see also U.S. v. Mateos-Sanchez*, 864 F.2d 232 (1st Cir. 1988). Travel time includes only those hours spent in or awaiting transit, and not time spent at a hotel or other place of accommodation. Travel time is compensated at a rate not to exceed the out-of-court rate. When travel is made for purposes in addition to providing representation, the time should be apportioned so that counsel is compensated only for that time which is reasonably attributable to providing representation. *See* paragraph 2.26 of the *Guidelines*.

19.04.04 Prohibition on Unauthorized Acceptance of Other Compensation

Attorneys may not accept payment from or on behalf of the person represented without authorization from the judicial officer on CJA Form 7 (Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds). If such payment is approved, compensation from CJA funds will be reduced accordingly. *See* paragraph 2.22 E of the *Guidelines*.

19.05 EXPENSES

19.05.01 Reimbursable Out of Pocket Expenses

Appointed counsel will be reimbursed for expenses "reasonably incurred" in providing CJA representation. 18 U.S.C. §3006A(d)(1); *see* paragraph 2.27 of the *Guidelines*. Reimbursable expenses should be itemized on the CJA Form 20 (or CJA Form 30 for capital cases) and reasonably documented.
While there is no statutory limitation on the amount of expenses which may be reimbursed, the presiding judicial officer may disallow any expense not reasonably incurred. Reimbursable expenses include, but are not limited to, the costs for travel, transcripts (see below), computer assisted legal research, telephone calls, telegrams, copying and photographs. See paragraphs 2.27 A-D and 2.31B of the Guidelines. Counsel also may be reimbursed for expenses reasonably incurred in defending against actions alleging malpractice of counsel in furnishing representational services under the CJA. There is no reimbursement for such expenses if a judgment is rendered against counsel. The Federal Courts Improvement Act of 2000, which became effective on November 13, 2000, amended subsection (d)(1) of the CJA to allow for the new malpractice reimbursement authority.

Where determined to be necessary and appropriate in a specific case, appointed counsel may receive interim reimbursement of extraordinary and substantial expenses. See paragraph 2.27 C of the Guidelines.

Expenses for investigative, expert or other services obtained under subsection (e) of the CJA are not considered out-of-pocket expenses and should be claimed on the CJA Form 21 (Authorization and Voucher for Expert and Other Services), or in death penalty cases, on the CJA Form 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services), not on the CJA Form 20 or 30. See paragraphs 2.27, 3.04, 3.05, and 6.03 E of the Guidelines. Receipts or supporting documentation must be attached for all travel expenses (transportation and lodging) and any expenses over $50.

Reimbursement of the costs of transcripts should be requested on a CJA Form 24 (Authorization and Voucher for Payment of Transcript). The preferred method of payment is for the court reporter to claim compensation directly on a CJA Form 24, although counsel may pay for a court authorized transcript and seek reimbursement on a CJA Form 24. Transcripts are discussed further in section 19.10.03. See paragraphs 2.27 A and 3.12 of the Guidelines.

Reasonable travel and subsistence expenses are reimbursable, including mileage for travel by privately owned automobile at the rate prescribed for federal judiciary employees on official business. Actual expenses for parking, ferry fares, and bridge, road and tunnel tolls may be claimed. Expenses associated with using methods of transportation other than privately owned automobiles, as well as subsistence expenses, must be itemized and claimed on an actual expense basis. Expense payments on a per diem basis are not allowed. In determining whether actual expenses are reasonable, counsel should be guided by current travel and subsistence limitations for federal judiciary employees. The clerk’s office can provide information on such limitations. See paragraph 2.27 B of the Guidelines.

Compensation for legal research and assistance performed by law students may be claimed as a reimbursable expense on the CJA Form 20 (or in capital cases, on the CJA Form 30), if not duplicative of work performed by counsel. See paragraph 2.31 A of the Guidelines.

The cost of appointed counsel’s use of computer assisted legal research may be claimed as a reimbursable expense (on the CJA Form 20 or 30), or the cost of employing a commercial legal research firm may be claimed as a compensable service (on the CJA Form 21 or 31), if the total amount charged
for the use or service does not exceed the total attorney compensation that reasonably would have been approved if counsel had performed the work manually. A claim for computer assisted legal research requires: (1) a brief statement of the issues researched; (2) an estimate of attorney time that would have been required to complete the research manually; and (3) a copy of the bill. To obtain authority for commercial computer assisted legal research services, counsel should explain the need for the services and estimate the attorney time required to research manually. See paragraphs 2.31 B and 3.15 of the Guidelines.

19.05.02 Non-Reimbursable Expenses

Expenses related to the following activities generally are not reimbursable (see paragraph 2.28 of the Guidelines):

a) general office overhead (except that unusual or extraordinary expenses which would normally be charged to a fee paying client are claimed as subsection (e) services on a CJA Form 21 or 31; see paragraph 3.16 of the Guidelines).

b) items and services of a personal nature (e.g., personal items purchased for or on behalf of the person represented, such as new clothes, haircuts, cigarettes, food; costs of services and related expenses that cannot be considered legal representation, such as assisting defendants in disposing of their personal property, arranging for placement of defendants’ minor children, assisting the defendant in executing probation conditions, and providing legal assistance in matters unrelated to litigating the case, although incidental to the defendant's arrest).

c) filing fees (appointed counsel are not required to pay filing fees in CJA cases). Amendments to the miscellaneous fee schedules for district and appeals courts, effective January 1, 1995, provide that no fees shall be charged for cases under the CJA.

d) printing of briefs (but commercial copying is reimbursable).

e) service of process on fact witnesses (fees, travel costs, and expenses for service of process are governed by Fed. R. Crim. P. 17 and 28 U.S.C. §1825; arrangements should be made with the U.S. Marshals Service for service of process on defense fact witnesses); and

f) taxes, paid on attorney compensation received pursuant to the CJA.

See paragraphs 2.28 A-F of the Guidelines.

19.06 PAYMENT PROCEDURES

19.06.01 Voucher Preparation and Submission

Vouchers must be submitted no later than 45 days after the final disposition of the case, unless good cause is shown. See paragraph 2.21 of the Guidelines. A memorandum supporting a compensation claim less than the statutory maximum may be required by local rule, standing order, or the presiding judicial officer. Attorneys claiming compensation in excess of the case compensation limit must submit with the
vouchers a detailed memorandum justifying their claims. See paragraph 2.22 C (1) and (2) of the Guidelines.

Prior to submission to the presiding judicial officer, vouchers generally are checked for mathematical accuracy and compliance with the Guidelines by the clerk of court or other official who administers the CJA panel. If the amount of a voucher certified by the presiding judicial officer exceeds the case compensation limitation, the voucher is forwarded to the chief judge of the circuit, or his or her delegate, for approval. See paragraph 2.22 C(2) of the Guidelines. Upon receiving the necessary approvals, the voucher is processed for payment by the office of the clerk. Incomplete information may result in processing delays.

19.06.02 Interim Payments to Counsel

When considered necessary and appropriate in a specific case, appointed counsel may receive periodic or interim payment of compensation or reimbursement of expenses. Usually this occurs in extended and complex cases, or when expenses are extraordinary and substantial. See paragraphs 2.30 and 2.27 C of the Guidelines. Appendices E and F of the Guidelines contain procedures for authorizing interim payment of compensation and expenses for counsel and persons providing other services, as well as sample memorandum orders. Each interim voucher will be assigned a number when processed for payment.

19.06.03 Reimbursement to the CJA Appropriation

Whenever the presiding judicial officer finds that funds are available for reimbursement to the CJA appropriation from or on behalf of a person represented, the judicial officer will direct that such funds be paid by check or money order to the clerk of court for deposit in the United States Treasury. See paragraph 2.22 E of the Guidelines.

At the time of the person's sentencing, the judicial officer will make a final determination as to whether the defendant has funds available to reimburse the CJA appropriation for some or all of the costs of representation. Future earnings should not be considered or subject to a reimbursement order. Other income or after-acquired assets received within one hundred eighty days after the date of the court's reimbursement order, however, may be available to reimburse the CJA appropriation. Reimbursement should not be made a condition of probation under the CJA or any other authority. See paragraphs 2.04, 2.05, 2.06, and 2.22 E of the Guidelines.

19.06.04 Public Disclosure of Information Pertaining to Payments

In 1998, subsection (d)(4) of the CJA was amended to require that amounts paid to appointed attorneys in cases commenced on or after April 24, 1966, be made publicly available pursuant to a specific process; the timing and type of disclosure depend on when the case was filed and the type of service provider involved (“attorney” or “other than counsel”). That subsection of the statute “sunsetted” on January 24, 2000, but the Judicial Conference adopted as a matter of policy the disclosure provision and its requirement that attorneys be given reasonable notice prior to disclosure in order to allow them to
request redaction of information to protect the interests of their clients. (A further amendment to the CJA, which also sunsetted but continues as a matter of policy, provides that in death penalty cases where the underlying alleged criminal conduct took place on or after April 19, 1995, the amount of the fees does not justify limited disclosure of payments to attorneys). See paragraph 5.01 of the Guidelines for the disclosure provision and a list of factors that would justify limiting disclosure. Typically, disclosure is accomplished through release by the court of the top sheets of the CJA Form 20 or CJA Form 30; supporting documentation is not covered and need not be disclosed at any time.

19.07 INVESTIGATIVE, EXPERT AND OTHER SERVICES

19.07.01 Availability of Services

19.07.01.01 Services for Persons Represented by CJA Counsel

Subsection (e) of the CJA provides that presiding judicial officers may authorize appointed counsel to obtain investigative, expert or other services necessary for adequate representation. U.S. v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979). The cost of these services, including reimbursement of reasonably incurred expenses, is funded by the CJA. See paragraphs 3.01 and 3.02 of the Guidelines. Services which may be obtained under subsection (e) include, but are not limited to, investigators, psychiatrists, psychologists, court reporters, interpreters, neurologists, and laboratory experts in the area of ballistics, fingerprinting, and handwriting. See paragraph 3.16 of the Guidelines. See infra section 19.10.01 below for special provisions related to psychiatric and related services.

19.07.01.02 Services for Persons Not Represented by CJA Counsel

Persons with retained counsel who are unable to afford the costs of necessary services, and financially eligible pro se litigants, may request authorization to obtain investigative, expert, or other services necessary for adequate representation under the CJA. See paragraph 3.01 of the Guidelines. See generally Christian v. U.S., 398 F.2d 517 (10th Cir. 1968); U.S. v. Smith, 893 F.2d 1573 (9th Cir. 1990).

Persons with retained counsel who need investigative, expert or other services may obtain these services under the CJA if their financial resources are insufficient to pay for the necessary services, although sufficient to provide them and their dependents with the necessities of life, their release on bond, and to pay a reasonable fee to their attorney. In considering requests for subsection (e) services by a defendant represented by retained counsel, the court should inquire into the fee arrangement between the retained attorney and the defendant. U.S. v. DeFreitas, 410 F.Supp. 241 (D.N.J. 1976), aff’d 556 F.2d 569 (3d Cir. 1977), cert. denied, 434 U.S. 847 (1977); see also U.S. v. Martinez, 385 F. Supp. 323 (W.D. Tex. 1974), aff’d 522 F.2d 1279 (5th Cir. 1975), cert. denied, 425 U.S. 906 (1976). If the court finds the fee arrangement unreasonable in relation to fees customarily paid in the community for such services, or finds it was made with a gross disregard of the defendant’s trial expenses, the court may order the attorney to pay out of such fees all or part of the costs of the services and expenses. See paragraph 3.01 A of the Guidelines.
19.08 PROCEDURES FOR OBTAINING SERVICES

19.08.01 Without Prior Court Authorization in Non-Capital Cases

If court authorization is not granted in advance of obtaining the subsection (e) services, the total compensation which may be paid for services in non-capital cases under the CJA, exclusive of expenses, is $300. The $300 limit may be waived if the presiding judicial officer, in the interest of justice, finds that timely procurement of necessary services could not await prior authorization. See paragraph 3.02 B of the Guidelines.

19.08.02 With Prior Court Authorization in Non-Capital Cases

Requests for authorization to obtain subsection (e) services in non-capital cases may be made to the presiding judicial officer by ex parte application. These applications shall be heard in camera and shall not be disclosed without the defendant’s consent. The applications shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of these requests ensures that defense strategies are not revealed. Cf. U.S. v. Gaddis, 891 F.2d 152 (7th Cir. 1989). See paragraph 3.03 of the Guidelines.

If court authorization is granted prior to obtaining subsection (e) services, compensation for such services may be paid upon approval by the presiding judicial officer in amounts up to $1,000 per organization or individual, exclusive of expenses. Payments in excess of $1,000 may be made when certified by the presiding judicial officer and approved by the chief judge of the circuit or his or her delegate as necessary to provide fair compensation for services of an unusual character or duration. Advance approval of the circuit chief judge should be obtained if it can be anticipated that the cost of the services will exceed $1,000. See paragraph 3.02 A of the Guidelines.

Counsel should estimate the cost of services in advance of obtaining them. In providing prior approval, courts may or may not limit compensation to the original estimate amount; if it appears that the cost of the subsection (e) service will exceed the amount authorized by the presiding judicial officer, counsel should seek supplemental advance authorization to incur the additional expense.

A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case. See paragraph 3.02 A of the Guidelines. Compensation maximums apply to the services provided by one or more experts to accomplish a particular purpose. Compensation from CJA funds for services provided by a second expert to complete work initiated by another expert would be subject to the maximum limitation for subsection (e) services ($1,000 with prior court authorization or $300 without prior authorization) minus the amount paid to the original expert, unless excess compensation is authorized.

19.08.03 Payment Procedures

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5 This maximum is inapplicable in death penalty cases; a maximum has been established for death penalty cases that commenced, or death penalty appeals perfected, on or after April 24, 1996. See infra section 19.11.04.
All claims for payment of subsection (e) services, with the exception of transcripts, should be made on a **CJA Form 21** (Authorization and Voucher for Expert and Other Services). Expenses for transcripts, as discussed in section 19.10.03, should be claimed on the **CJA Form 24** (Authorization and Voucher for Payment of Transcript). Generally, the person providing services is named as the payee on the **CJA Forms 21** or **24**, eliminating the need for counsel to pay for subsection (e) services and seek reimbursement. If, however, counsel has paid the person providing subsection (e) services directly, counsel's name may be listed as the payee on the **CJA Forms 21** or **24**. See Appendix A of the Guidelines for examples of CJA Forms. After the services have been performed, all claims for subsection (e) services must be approved by the presiding judicial officer and, in the case of excess compensation claims, by the circuit chief judge or his or her delegate. See paragraphs 3.02 A and B of the Guidelines.

When considered necessary and appropriate in a specific case, the presiding judicial officer may arrange for periodic or interim payments to a person providing services under subsection (e). See paragraph 3.06 of the Guidelines. Appendix F of the Guidelines contains procedures for authorizing interim payment for these services and sample memorandum orders.

The **CJA Form 21** should be submitted for approval after the completion of the service, **no later than 45 days** after the final disposition of the case, unless good cause is shown.

**19.09 POLICIES REGARDING INVESTIGATIVE, EXPERT AND OTHER SERVICES**

**19.09.01 Psychiatrists and Psychologists**

Counsel may request authorization to obtain psychiatric and related services under subsection (e) of the CJA when necessary for an adequate defense. Psychiatric and related services are obtained pursuant to the CJA when the purpose of an examination is to assist the defense and counsel wishes to select the expert conducting the examination, and to control disclosure of the examination report (i.e., keep it confidential from the court and the government). Otherwise mental condition examinations and accompanying expert testimony generally are paid from funding sources other than the CJA. See paragraph 3.11 B of the Guidelines. **U.S. v. Rinchack**, 820 F.2d 1557 (11th Cir. 1987). Payment of fees and expenses of expert witnesses providing an examination or testimony regarding a person's mental condition pursuant to 18 U.S.C. §§4241-4246 generally is the responsibility of the Department of Justice. See chart entitled "Responsibility for Payment of Psychiatric and Related Expert Services," included in chapter III of the Guidelines, to determine proper payment sources of psychiatric and related subsection (e) services.

**19.09.02 Extraordinary Office Expenses**

Unusual or extraordinary office expenses incurred as a result of CJA representation may be considered as subsection (e) expenses and claimed on a **CJA Form 21** with payment made directly to the person providing the services. In determining whether an expense is unusual or extraordinary, consideration is given to whether there would be an additional charge to a fee-paying client under the same circumstances. See paragraph 3.16 of the Guidelines.
19.09.03 Transcripts

Transcripts are considered a service necessary for adequate representation under subsection (e) of the CJA. Transcript payments can also be reimbursed as expenses under subsection (d). *Cf. U.S. v. Pulido*, 879 F.2d 1255 (5th Cir. 1989). Special procedures apply to requests for transcripts. The *CJA Form 24* is used to request authorization and payment for transcripts, regardless of whether the court reporter or reporting service is paid directly, or counsel pays the court reporter and seeks reimbursement. Compensation limitations for subsection (e) services do not apply to transcripts. *See* paragraph 3.12A of the *Guidelines*. The presiding judicial officer has final authority to approve any reasonable and necessary transcript costs. Approval of the presiding judicial officer should be sought before the court reporter begins the transcription service. An estimate of the cost of the transcription is not required in order to obtain advance approval of the presiding judicial officer.

The cost of the original transcript may be charged to the party which first requests a transcript. Other parties are then charged the copy rate. In the alternative, the total cost of a transcript may be apportioned among the parties, in which case CJA funds pay only the transcription costs of CJA defendants. *See generally* Court Reporters’ Manual, Volume VI, *Guide to Judiciary Policies and Procedures*.

*Accelerated transcript* costs (i.e., for expedited, daily or hourly transcript service), however, may not be routinely apportioned among parties in CJA cases. Judicial Conference policy discourages furnishing accelerated transcript services in criminal proceedings, but allows them when necessary and required by either the prosecution or defense. When accelerated transcript services are provided, the requesting party must pay for the original transcript and the other parties receive copies at the copy rate. *See* paragraph 3.12 B of the *Guidelines*.

In multi-defendant cases involving CJA counsel, only one transcript should be purchased from the court reporter on behalf of CJA defendants unless the court reporter provides the other copies for CJA counsel at commercially competitive duplication rates. One of the appointed counsel or the clerk of court should arrange for the transcript duplication at commercially competitive rates. A separate copy should be prepared for each CJA defendant whose transcript request has been approved by the court. When accelerated transcripts are requested, the court may grant an exception to the above policy when such policy impedes delivery of accelerated transcripts to CJA defendants. *See* paragraph 3.12 C of the *Guidelines*.

Special authorization of the presiding judicial officer is necessary for counsel to obtain certain portions of the trial transcript, such as the voir dire and opening statements, and for special services such as accelerated transcription. *See generally* Court Reporters’ Manual, Volume VI, *Guide to Judiciary Policies and Procedures*.

19.09.04 Witness Fees

Fees and expenses of fact witnesses for persons represented under the CJA are paid by the Department of Justice pursuant to Fed. R. Crim. P. 17(b) and 28 U.S.C. §1825. If advance travel funds
are required, counsel should request the court to direct in the subpoena order that the U.S. Marshals Service provide a travel advance. CJA funds are not used to pay travel expenses in this situation. See paragraph 3.13 A of the Guidelines. However, if the witness is a U.S. government employee testifying as to information gathered in furtherance of his or her official duties, the employing agency pays the employee for travel expenses and may not receive witness fees on behalf of the employee. See 28 C.F.R. 21.2(d). Expenses related to the service of subpoenas on fact witnesses also are not compensable under the CJA. See Fed. R. Crim. P. 17(b).

Fees and expenses of defense expert witnesses generally are paid from CJA funds on a CJA Form 21. If the expert witness is providing an examination or testimony regarding the person's mental condition, the CJA or the Department of Justice has responsibility for payment, depending upon the purpose of the examination or testimony. See chart entitled “Responsibility for Payment of Psychiatric and Related Expert Services,” included in Chapter III of the Guidelines. See supra section 19.10.01.

19.09.05 Deposition Costs

Expenses incurred in the taking of fact witness depositions (e.g., notarial fees, interpreters, transcripts), including expenses incident to witness attendance at the deposition, are paid by the Department of Justice pursuant to Fed. R. Crim. P. 17(b), regardless of which party requested the deposition. However, expenses incident to attendance by appointed counsel and the CJA defendant at fact witness depositions are paid by the Department of Justice only if the government is the requesting party. These expenses are paid by the CJA if the defense is the requesting party. See paragraph 3.13 B of the Guidelines. Claims for expenses to be paid by the Department of Justice shall be submitted to the U.S. Attorney's office.

Expenses incurred in the taking of expert witness depositions, including the costs of attendance by appointed counsel and the CJA client, are paid by the Department of Justice if the government is the requesting party, and by the CJA if the defense is the requesting party. See paragraph 3.13(B) of the Guidelines.

19.10 DEATH PENALTY REPRESENTATION

19.10.01 Appointment of Counsel in Capital Cases

Financially eligible persons charged with a federal capital offense are entitled to appointment of two attorneys, at least one of whom is learned in capital case law, in accordance with 18 U.S.C. §3005, and if necessary for adequate representation, more than two attorneys may be appointed pursuant to 21 U.S.C. §848(q)(4)(A). In appointing counsel in federal capital prosecutions, the court is required to consider the recommendation of the federal public defender, or if a district does not have a federal public defender organization, of the Administrative Office of the U.S. Courts. See paragraph 6.01B of the

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6 18 U.S.C. § 3005. To assist the Administrative Office and federal public defenders with this responsibility, the Judicial Conference Committee on Defender Services established the Federal Death Penalty Resource Counsel Project.
Guidelines. Pursuant to 21 U.S.C. §848(q)(4)(B), financially eligible persons seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. §§2254 or 2255 are entitled to appointment of one or more qualified attorneys. Due to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel. See paragraph 6.01A of the Guidelines.

Title 21 U.S.C. §848(q)(8) provides that unless replaced by similarly qualified counsel pursuant to a motion from the counsel or defendant, appointed counsel shall represent the defendant in every subsequent stage of available judicial proceedings. This includes pre-trial proceedings, trial, sentencing, motions for new trial, appeals, applications for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings. See paragraph 6.01 D(2) of the Guidelines. CJA representation may be provided only in connection with federal court proceedings, see In re Lindsey, 875 F.2d 1502 (11th Cir. 1989), except with regard to certain emergency situations in state court (e.g., representation required to obtain a stay of execution).

**19.10.02 Attorney Qualifications:**

a) For representation prior to judgment, pursuant to 21 U.S.C. §848(q)(5), one of the attorneys appointed must have been admitted to practice in the court in which the case will be prosecuted for not less than five years and must have three or more years experience in the actual trial of felony prosecutions in that court. Pursuant to 18 U.S.C. §3005, one appointed attorney must be knowledgeable in the law applicable to capital cases.

b) For representation after judgment, pursuant to 21 U.S.C. §848(q)(6), one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have three or more years experience in handling appeals of felony cases in the court.

c) Attorney qualifications may be waived, pursuant to 21 U.S.C. §848(q)(7), for good cause, if the attorney appointed has the background, knowledge and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

The three experienced capital litigators staffing this project work with appointing judges, federal defenders, and the Administrative Office to identify attorneys whose qualifications meet statutory standards and are appropriate to the needs of particular cases. They also are available to provide advice on attorney compensation and the obtaining of investigative and expert services.

7 A new Appendix I (Federal Death Penalty Cases) in the Guidelines contains the recommendation adopted by the Judicial Conference on September 14, 1998, from the report of the Committee on Defender Services’s Subcommittee on Federal Death Penalty Cases entitled Federal Death Penalty Cases: Recommendations Concerning Cost and Quality of Defense Representation. Appendix I also contains commentary to the report, which, although it has not been approved by the Judicial Conference, provides useful information pertaining to the recommendations.

8 The Committee on Defender Services has provided funding for three capital habeas practitioners who serve as habeas assistants and training counsel to aid the courts, the Defender Services Division, and appointed counsel by providing advice and training regarding federal capital habeas corpus matters.
See paragraph 6.01 C of the Guidelines.

19.10.03 Attorneys Previously Providing Representation

Attorneys from state or local public defender organizations, legal aid agencies or other private non-profit organizations, if qualified under paragraph 6.01 C of the Guidelines, may be appointed when the presiding judicial officer determines that they will provide the most effective representation. Such appointments may be in place of, or in addition to, the federal defender organization or CJA panel attorney appointment, or an attorney appointed pro hac vice in accordance with paragraph 2.01D of the Guidelines. Qualified state post-conviction counsel should be appointed when the case enters the federal system unless a conflict of interest exists. See paragraph 6.01 D(1) of the Guidelines.

19.10.04 Compensation of Counsel in Capital Cases

The CJA hourly and case compensation maximums for appointed counsel do not apply in death penalty cases (federal capital prosecutions and federal capital habeas corpus proceedings). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in death penalty cases commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, the presiding judicial officer sets the compensation rate for appointed counsel in an amount not to exceed $125 per hour (unless raised by the Judicial Conference in accordance with 21 U.S.C. §848(q)(10)(A)). In death penalty cases commenced, or appeals perfected, before April 24, 1996, the presiding judicial officer determines exclusively the compensation rate and amount reasonably necessary to obtain qualified counsel to represent the defendant. See paragraph 6.02 A of the Guidelines.

The Judicial Conference urges presiding judicial officers to compensate counsel at a rate and in an amount sufficient to cover appointed counsel’s general office overhead and to ensure adequate compensation for representation provided. The Judicial Conference has recommended that presiding judicial officers set the hourly compensation rate in death penalty cases between $75 to $125 per hour for both in-court and out-of-court time. See paragraph 6.02 B(1) of the Guidelines.

If it is determined the death penalty will not be sought following counsel’s appointment in a case in which a defendant is charged with a death eligible offense, the court may consider whether the number of counsel initially appointed is necessary to ensure effective representation or to avoid disrupting the proceeding, and continue these appointments, or make an appropriate reduction. The court may continue to pay the rate previously approved, or prospectively reduce such rate, considering the need to compensate counsel fairly, and the time and resource commitment counsel has and will continue to make. See paragraph 6.02 B(2) of the Guidelines.

Interim payments to counsel are urged in death penalty cases. (See generally paragraphs 2.30 B and 6.02 C of the Guidelines for interim payments to counsel in death penalty cases; Appendix E of the Guidelines for procedures regarding interim payment of compensation in death penalty cases.) Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission. See paragraph 6.02 E of the Guidelines.
19.10.05 Case Compensation Claims

Appointed counsel's compensation for time spent (as well as reimbursement of expenses incurred) in providing CJA representation in death penalty proceedings should be claimed on a CJA Form 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel). See paragraph 6.02 D of the Guidelines.

19.10.06 Case Budgeting in Federal Capital Habeas Corpus Proceedings and Federal Death Penalty Cases

Courts are encouraged to require appointed counsel to submit (ex parte) a proposed initial litigation budget for court approval that will be subject to modification as the case proceeds, confirming the court’s and the attorney’s fees and expense expectations. An ex parte pretrial conference to facilitate early agreement on a litigation budget should be considered. A budget, reflecting the court’s and counsel’s understandings on all matters affecting counsel compensation and reimbursement and payments for investigative, expert and other services, should be incorporated in a sealed initial pretrial order. See subparagraphs 6.02 F(1) and (2) of the Guidelines.

The budget includes, but is not limited to the following:

a) the hourly counsel compensation rate (see paragraphs 6.02 A and B of the Guidelines);

b) in capital habeas corpus cases; the best preliminary estimate of the cost of all services (counsel, expert, investigative, and other) for the entire case (the court may require defense counsel to prepare budgets for shorter time intervals);

c) in federal death penalty cases:
   i) prior to prosecution decision to seek death penalty authorization: preliminary estimate of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time the Department of Justice determines whether to authorize the death penalty;
   ii) after prosecution decision to seek death penalty authorization: preliminary estimate of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (the court may require defense counsel to prepare budgets for shorter time intervals);
   iii) death penalty not sought: as soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and the hourly compensation rate should be reviewed in accordance with subparagraph 602 B(2).

d) agreement that counsel will advise the court of significant changes to the estimates in the order;

e) agreement on a date for a subsequent ex parte case budget pretrial conference;

f) procedure and schedules for submission, review, and payment of interim compensation vouchers (see paragraphs 6.02 C and E of the Guidelines);

g) the form for submitting compensation and reimbursement claims (see paragraph 6.02 D of the Guidelines) and the matters those submissions should address; and

h) the authorization and payment for investigative, expert, and other services (see paragraph 6.03 of the Guidelines).
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See paragraph 6.02 F(3)(a)-(h) of the Guidelines.

An approved budget should guide counsel’s time and resource use by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court for good cause. See paragraph 6.02 F(4) of the Guidelines.

19.10.07 Case Management in Federal Capital Habeas Corpus Proceedings

Judges are encouraged to employ case management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases. See paragraph 6.02 G of the Guidelines.

19.11 AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE, EXPERT AND OTHER SERVICES IN CAPITAL CASES

19.11.01 In General

Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant in a federal death penalty case or a federal capital habeas corpus proceeding, the court should authorize the defendant’s attorney to obtain such services. For federal death penalty cases and federal capital habeas corpus proceedings commenced, and appeals perfected, on or after April 24, 1996, no ex parte request for such services may be considered unless counsel makes a proper showing concerning the need for confidentiality. See paragraph 6.03 A of the Guidelines.

For capital cases commenced, and appeals perfected, before April 24, 1996, in accordance with 21 U.S.C.§848(q)(9) prior to that provision’s amendment by AEDPA, upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the defendant’s representation, whether connected to guilt or sentencing issues, the presiding judicial office shall authorize the defendant’s counsel to obtain such services for the defendant. See paragraph 6.03 A of the Guidelines.

For all capital cases, upon a finding that timely procurement of necessary investigative, expert or other services could not await prior authorization, the presiding judicial officer may authorize such services nunc pro tunc consistent with paragraph 3.02 B of the Guidelines. Unless otherwise specified in paragraph 6.03 of the Guidelines, the provisions of Chapter III apply to the authorization and payment of such services in capital cases. See paragraph 6.03 A of the Guidelines.

19.11.02 AEDPA Limitation: Inapplicability to Pre-AEDPA Cases

For federal death penalty cases and federal capital habeas corpus proceedings commenced, and appeals perfected, on or after April 24, 1996, pursuant to 21 U.S.C. §848(10)(B), the fees and...
expenses for investigative, expert, and other services are limited to $7,500, unless a court, or magistrate judge if the services were rendered in a case disposed of entirely before such magistrate judge, certifies payment in excess of that amount as necessary to provide fair compensation for services of an unusual character or duration, and the excess payment amount is approved by the circuit chief judge (or delegate). The $7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually. See paragraph 6.03 B of the Guidelines.

Once the payments total $7,500, the circuit chief judge (or delegate), must approve additional payments. Advance approval should be obtained from the court and the circuit chief judge (or delegate), if it can be anticipated that payments for investigative, expert, and other services will exceed the statutory maximum. See sample form in Appendix C of the Guidelines; paragraph 6.03 B of the Guidelines.

For capital death penalty cases commenced, and appeals perfected, before April 24, 1996, in accordance with 21 U.S.C. §848(q)(10) prior to that provision’s amendment by the AEDPA, the presiding judicial officer shall set compensation for investigative, expert, and other services in an amount reasonably necessary to obtain such services, without regard to CJA or AEDPA maximum limitations. See paragraph 6.03 B of the Guidelines.

19.11.03 Consulting Services in Federal Capital Habeas Corpus Cases and in Federal Death Penalty Cases

Where necessary for adequate representation, subsection (e) of the CJA and 21 U.S.C. §848(q)(9) authorizes the reasonable employment and compensation of expert attorney consultants to provide “light consultation” services to appointed and pro bono lawyers in federal capital habeas corpus and federal death penalty cases in such areas as: records completion, determining the need to exhaust state remedies, identifying issues, reviewing draft pleadings and briefs, and the authorization process to seek the death penalty. “Light consultation” services are those a lawyer in private practice would typically seek from another lawyer who specializes in a particular legal field, as opposed to “heavy consultation” services, which include, but are not limited to, reviewing records, researching case-specific legal issues, drafting pleadings, investigating claims, and providing detailed case-specific advice to counsel, if such tasks take a substantial amount of time. An expert attorney consultant shall not be paid an hourly rate exceeding what an appointed counsel could be authorized to be paid. Courts may wish to require that an appointed counsel who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the Administrative Office’s Defender Services Division if there is no federal defender in the district or if the federal defender has a conflict of interest, regarding who could serve as an expert attorney consultant. See paragraph 6.03C of the Guidelines.

19.12 INTERIM PAYMENTS TO PERSONS PROVIDING INVESTIGATIVE, EXPERT AND OTHER SERVICES

For federal death penalty cases and federal capital habeas corpus proceedings commenced, and appeals perfected, on or after April 24, 1996, 21 U.S.C. §848(q)(10)(B), as amended, provides a $7,500 payment maximum for the total cost of fees and expenses for investigative, expert, and other services. Courts are urged to permit interim payments of compensation in capital cases, see paragraph
6.03 D of the Guidelines; and the special procedures for effecting interim payments, including a sample special memorandum order that must be used in these cases, are set forth in Appendix F of the Guidelines. See also the case budgeting techniques recommended in paragraph 6.02F of the Guidelines. Other interim payment arrangements effectuating a balance between relieving service providers of financial hardships and the practical application of the circuit chief judge’s statutorily imposed responsibility to provide meaningful review of claims for excess payment may be devised in consultation with the Defender Services Division of the Administrative Office of the U.S. Courts.

For capital cases commenced, and appeals perfected, before April 24, 1996, there are no expert service maximums. The procedures for effectuating interim payments, and a sample of the separate memorandum order that must be used in those cases, are set forth in Appendix F of the Guidelines. See paragraph 6.03 D of the Guidelines.

19.12.01 Payment Procedures

For death penalty proceedings, expenses for investigative, expert, or other services obtained under 21 U.S.C. §848(q)(9) and/or subsection (e) of the CJA should be claimed on the CJA Form 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services). Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission. See paragraphs 6.03 E and F of the Guidelines.
CHAPTER 20

INDIAN JURISDICTION IN FEDERAL COURT

Updated by

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20.01 INTRODUCTION

This chapter presents a discussion of the origin and scope of federal criminal jurisdiction in Indian cases. It also concerns related subjects, such as Indian status, Indian land, and topics of special concern.

The federal statutes authorizing the exercise of federal criminal jurisdiction in Indian Country are few in number and found primarily in 18 U.S.C. §§1151, 1152 and 1153. The language of these sections not only limits the application of federal Indian criminal jurisdiction to Indian Country, but also draws significant jurisdictional distinctions based on whether the victim or the accused is an Indian. The basis for these classifications lies in the purposes for which federal jurisdiction was conferred, initially to protect the interest of settlers from the Indians, and later to protect the Indians against their hostile neighbors. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978). See generally William Canby, American Indian Law 123-126 (1998 ed.); Robert Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 521 (1976).

20.02 HISTORICAL BACKGROUND

Federal authority over Indian country derives from a basic doctrine of federal Indian law: the dependent status of Indian tribes. In one of the earliest cases involving an examination of the tribal-federal relationship, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the United States Supreme Court characterized the Indian tribes as “domestic dependent nations.” The Court found the basis for this relationship, and subsequent authority over the tribes by Congress, in the Supremacy Clause of the Constitution, “which empowers Congress to ‘regulate commerce with foreign nations, and among the

several states, and with the Indian tribes.”’ Id. at 18-20. As dependent nations, the Indian tribes were found to be subject to the overriding sovereignty of the federal government because their rights as independent nations were diminished and they held and occupied the reservations only by the consent of the United States. See Oliphant, 435 U.S. 191; U.S. v. Rogers, 45 U.S. (4 How.) 567 (1846); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

Congressional legislative power over criminal jurisdiction in the Indian territories was firmly established in U.S. v. Rogers, 45 U.S. (4 How.) 567 (1846). The defendant in Rogers, a white man, had sought to avoid federal prosecution for the murder of another white man in the Indian territory by claiming Indian status for himself and the victim, through marriage and adoption into the Cherokee tribe. The Rogers court held, however, that “Congress may by law punish any offense there, no matter whether the offender be a white man or an Indian.” Id. at 572. Thus, “Congress had undoubted constitutional power to prescribe a criminal code applicable in Indian country.” U.S. v. Antelope, 430 U.S. 641, 648 (1977) (citing U.S. v. Kagama, 118 U.S. 375 (1886)).

20.03 WHO IS AN INDIAN?

20.03.01 Statutory Attempts at Definition

A crucial issue to address in any discussion of federal Indian jurisdiction is, of course, the meaning of the term “Indian.” Congress, invoking its power to define the term, has does so for a variety of purposes, including eligibility for social programs, preference in government hiring and administration of tribal property. There is, however, no single statute that defines what an Indian is for all federal purposes. Felix Cohen, Handbook of Federal Indian Law 23-24 (1982 ed.). Under 18 U.S.C. §1153(a), for example, the Major Crimes Act simply refers to an Indian as an Indian. Indian tribes themselves are unsure how to define who is an Indian for tribal status purposes. See David Foster, Who is a “Real” Indian? Tribes Struggle for Answer, Ariz. Republic, Feb. 3, 1997, at 133.

Most of the federal statutes utilizing the term “Indian” contain the requirement of tribal membership or enrollment, partly because “enrollment is a common evidentiary means of establishing Indian status.” U.S. v. Broncheau, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 849 (1979); see also U.S. v. Keys, 103 F.3d 758 (9th Cir. 1996). Mere eligibility for enrollment also has been established as a criterion for determining status. For example, eligibility for enrollment is used in defining a child as Indian pursuant to the Indian Child Welfare Act, which established exclusive tribal court jurisdiction in adoption

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2 The terms “Indian” and “white man” are used at various places in this article because they are the terms used in many of the older cases. Their usage is continued for consistency.

3 Examples offered by Cohen include 25 U.S.C. §479, the Indian Self-Determination and Education Assistance Act from 1975, which defines an Indian as “a person who is a member of an Indian tribe”; 42 U.S.C. §3002(5) and (6), the Older Americans Act 1965; 25 U.S.C. §1452(b), the Indian Financing Act of 1974; 20 U.S.C. §1221(h) the Indian Education Act from 1972. 25 C.F.R. 11.2(c) (1976) does define an Indian for purposes of the jurisdiction of the courts of trial offenses. The definition includes “any person of Indian descent who is a member of any recognized Indian tribe now under federal jurisdiction.”

20.03.02 Status Defined for Criminal Jurisdiction

20.03.02.01 Inclusion

Determining Indian status for criminal jurisdiction purposes is often an imperfect and subjective science. U.S. v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). When faced with the status problem, courts utilize a test first suggested in U.S. v. Rogers, 45 U.S. (4 How.) 567 (1845), which considers: (1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian. See U.S. v. Torres, 733 F.2d 449, 456 (7th Cir.), cert. denied, 469 U.S. 864 (1984); U.S. v. Dodge, 538 F.2d at 786. See generally Felix Cohen, supra at 23-27. As to the weight of the factors, the most important is recognition either by the tribe or by the federal government.

While tribal enrollment serves as a significant part of the test for “Indian-ness,” it is neither the only nor determinative means. U.S. v. Keys, 103 F.3d 758 (9th Cir. 1996); U.S. v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979); U.S. v. Indian Boy X, 565 F.2d 585, 594 (9th Cir. 1977). Official enrollment as a tribal member is not essential for finding Indian status for federal jurisdiction purposes. Ex parte Pero, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939); see also U.S. v. Ives, 504 F.2d 935, 953 (9th Cir. 1974) (evidence of racial identification went beyond mere enrollment), vacated on other grounds, 421 U.S. 944 (1975). As a substitute for formal enrollment, courts will consider other factors such as informal government recognition through the receipt of assistance reserved only to Indians, enjoyment of benefits of tribal affiliation, and social recognition as an Indian through residence on a reservation and participation in Indian social life. Keys, 103 F.3d 758; U.S. v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995).

20.03.02.02 Exclusion

In the past, full-blooded Indians could be excluded from Indian status for at least three reasons: (1) membership in a terminated tribe, (2) receipt of a patent for allotted land; and (3) adoption of a non-Indian lifestyle. Robert Clinton, Criminal Jurisdiction Over Indian Lands, 18 Ariz. L. Rev. 521 (1976). In U.S. v. Heath, 509 F.2d 16 (9th Cir. 1974), the Ninth Circuit held that the Indian Termination Act extinguished the federal government’s special relationship with the tribe. Id. at 19, cited with approval in U.S. v. Antelope, 430 U.S. 641 at n. 7 (1977). The Indians became subject to state court rather than federal court jurisdiction and were to be treated in a similar manner to other citizens.

20.03.02.03 Burden of Proof
The burden of proof is on the government to sustain the jurisdiction of the court with evidence concerning the Indian status of the defendant or the victim, and the question should go to the jury as one of fact, not presumption. *U.S. v. Torres*, 733 F.2d 449, 457 (7th Cir.), *cert. denied*, 469 U.S. 864 (1984) (citing *Lucas v. U.S.*, 163 U.S. 612, 617 (1896)). *But see, U.S. v. Lawrence*, 51 F.3d 150, 151 (8th Cir. 1995) (while many subsidiary facts go into the determination of whether a person qualifies as an “Indian,” ultimately the determination is a conclusion of law); *Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995) (reviewing district court’s application of facts to law *de novo*). This burden can be met through all manners of evidence, though the most common appears to be certificates of tribal rolls, canceled tribal dividend checks, or medical and school records indicating Indian affiliation. *Torres*, 733 F.2d at 457; *Heath*, 509 F.2d 16 (9th Cir. 1974) (court determined the victim as tribally enrolled sufficient to allege jurisdiction for purposes of 18 U.S.C. §1152). Moreover, the time the offense was committed is the most appropriate point to gauge the victim’s status as an Indian. *Lawrence*, 51 F.3d at 153.

In a case of first impression, the Ninth Circuit held that a state police officer without authority to arrest a tribal member has authority to stop a reckless driver to determine if he is a tribal member. *U.S. v. Patch*, 114 F.3d 131 (9th Cir. 1997).

# 20.04 WHAT IS “INDIAN COUNTRY”?


An appropriate definition of Indian Country for jurisdictional purposes can be difficult and problematic. Congress attempted to deal with this problem in 1948, by providing a definition within 18 U.S.C. §1151. The section reads:

§1151 Indian Country Defined. Except as otherwise provided in §§1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (As amended May 24, 1949, c. 139, §25, 63 Stat. 94).

The term Indian Country refers to lands set apart by Congress for tribal and federal jurisdiction. *See U.S. v. Johns*, 437 U.S. 634, 648 (1978); *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm’n*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). All territory within the limits of an Indian reservation is included within subsection (a). In other words, Congress must have intended not only to reserve the land for a tribe’s use, but also to allocate jurisdiction to federal and tribal governments. *Id.*

The focus on the land’s actual use rather than formal designation is made clear in §1151. While subsection (a) of §1151 refers to Indian reservations, subsection (b) mentions dependent Indian communities. A dependent Indian community results when land is set apart for Indian use while the United States retains title to the land. *See U.S. v. McGowen*, 302 U.S. 535, 539 (1937). The United States then acts as a guardian to the Indians, who occupy the land as wards of the government. *Id.* Canby, *supra* at 122. Several factors go to determining what qualifies as a dependent Indian community, and thus as Indian Country:

1. Whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory;

2. The nature of the area in question, the relationship of inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area;

3. Whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interest, or needs of the inhabitants as applied by that locality, and

4. Whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.


Subsection (c) of §1151 attempts to clarify the status of Indian land held under allotments. Prior to 1948, allotment programs often created checker-board jurisdictional patterns within a reservation because states possessed jurisdiction over allotted lands. Under subsection (c), allotments came under the definition of Indian Country as long as Indian title has not been extinguished. *See Clinton, supra* at 509; *see also Ballinger v. U.S.*, 216 U.S. 240 (1910) (where Indian claimed allotment having satisfied provision of Act, Secretary of Interior powerless to alter allotment even for salutary public purpose).
Subsequent cases interpreting §1151 have further expanded the definition of Indian Country. See *Indian Country*, 829 F.2d at 973. For example, a significant percentage of Indians living in federal low-income housing in a city close to a reservation can make that project a dependent community. *U.S. v. South Dakota*, 665 F.2d 837 (10th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *U.S. v. Mound*, 477 F. Supp. 156, 160 (D.S.D. 1979). On the other hand, the mere fact that Indians live in a community and are receiving federal aid does not create federal jurisdiction. *Weddell v. Meierhenny*, 636 F.2d 211 (8th Cir. 1980).

In a case of first impression, the Tenth Circuit addressed the question of which community is the appropriate community of reference to determine dependent Indian community status. *Pittsburg & Midway Coal Mining Co.*, 52 F.3d at 1543-44. In this civil case, the court faced the issue of whether a mine was part of “Indian Country” and therefore subject to taxation by the Navajo Nation. The court focused on two “organizing principles” for determining the community of reference: (1) the status of the area in question as a community; and (2) the status of the area in question within the context of the surrounding area. *Id.* at 1543-44. Utilizing these principles, the Tenth Circuit held that the district court erred by focusing too narrowly on the mine site as the appropriate community of reference. *Id.* at 1545.

Once set aside for the use and occupancy by a tribe, the land retains the status of Indian Country until such status is specifically terminated by Congress. *Beardslee v. U.S.*, 541 F.2d 705 (8th Cir. 1976). Courts have refused to find that the status of land that was Indian Country has changed because a non-Indian owns the land. *Id.* Reservation status or status as Indian Country will also often survive the opening of the area to settlement by non-Indians. *Id.* Many reservations contain large tracts and even towns settled and incorporated by non-Indians under state law. *Canby, American Indian Law* at 100. These tracts and towns still meet the definition of Indian Country for criminal jurisdictional purposes. *Id.*

By statute, state highways and roads crossing Indian reservations remain Indian Country despite grants of right of way. 18 U.S.C. §1151; see *Ortiz-Barraza v. U.S.*, 512 F.2d 1176 (9th Cir. 1975). The Supreme Court distinguished this designation in the civil context in *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). In *Strate*, the Court found that a tribal grant of right of way to North Dakota for a state highway rendered the land equivalent to non-Indian fee land for non-member governance purposes. *Id.* at 454.

The Ninth Circuit has held that a state police officer without authority to arrest a tribal member can nonetheless stop a reckless driver on tribal land to determine if he is a tribal member. *U.S. v. Patch*, 114 F.3d 131 (9th Cir. 1997).

**20.04.02 Extinguishment**

Once it has been established that a reservation existed or land had been set aside for dependent Indian communities, it is necessary to determine whether the land was removed from its status as Indian Country by extinguishment of Indian title, termination or cession. This question can result in a difficult issue of fact, especially when the land has been opened to heavy settlement. In such a case, the court must decide whether the intent of Congress was to permit non-Indians to own land within the reservation or
whether the intent was to open an area for settlement as public land thereby extinguishing a portion of the reservation. “A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.” Mattz v. Arnett, 412 U.S. 481, 505 (1973). Ambiguous congressional statements, therefore, are resolved in favor of the land remaining Indian Country.

Determining whether the site of an offense is Indian Country is a legal question to be decided by the court. Cook, 922 F.2d at 1031; U.S. v. Sohappy, 770 F.2d 816, 822 n.6 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986); U.S. v. Levesque, 681 F.2d 75, 78 (1st Cir. 1982).

20.05 CRIMINAL JURISDICTION IN INDIAN COUNTRY

Federal crimes that are applicable to all persons in all places, such as mail theft or treason, are of general jurisdiction. Federal criminal jurisdiction over Indians in Indian Country, as defined above, is much narrower, and much more confusing.

To determine criminal jurisdiction in Indian Country, one must begin by establishing the race of the accused and the victim. Although jurisdiction over crimes committed by Indians in Indian Country was originally vested exclusively with the tribes, Congress has greatly limited this jurisdiction by making certain criminal acts federal offenses. Chief among the congressional acts granting federal courts criminal jurisdiction in Indian Country are the Major Crimes Act, 18 U.S.C. §1153 and the Federal Enclaves Act, 18 U.S.C. §1152, also known as the General Crimes Act. The Major Crimes Act mandates federal jurisdiction over fourteen major intra-Indian offenses committed in Indian Country. The Federal Enclaves Act provides for federal court jurisdiction over offenses committed in Indian Country that violate the general laws of the United States as to offenses on Federal Enclaves. The Federal Enclaves Act does not confer state jurisdiction, and does not extend either to offenses committed by one Indian against another Indian or to Indian perpetrators who have previously been punished by the local law of the tribe. For those offenses which are not specifically enumerated in the federal criminal code, the Assimilative Crimes Act, 18 U.S.C. §13, incorporates state law and makes the violation of state criminal law within a federal enclave a federal offense. In short, jurisdiction over crimes committed by Indians in Indian Country lies with the tribe and/or the federal courts, but does not lie with state courts absent express congressional consent, such as that provided by Public Law 280 (discussed infra at section 20.05.02.01).

The various jurisdictional ramifications arising from the nature of the act, the race of the persons involved, and the location of the act are explored below. A general chart of criminal jurisdiction by offenses and crimes will serve as a reference to this confusing area:

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<tr>
<th>DESCRIPTION OF OFFENSE</th>
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<th>TRIBAL SECTION</th>
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<tr>
<td>General federal jurisdiction crimes</td>
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<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Territorial jurisdiction crimes</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
In P.L. 280 states\(^4\) & No & Yes & No & S-20.05.02.1

In non-P.L. 280 states

<table>
<thead>
<tr>
<th>Crimes by Indians</th>
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<td>No</td>
<td>Probably(^5)</td>
</tr>
<tr>
<td><strong>Non-Major Crimes Act crimes</strong></td>
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<td></td>
</tr>
<tr>
<td>Indian victim</td>
<td>Maybe(^6)</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Non-Indian victim</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Victimless</td>
<td>Maybe(^7)</td>
<td>No</td>
<td>Yes</td>
</tr>
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<table>
<thead>
<tr>
<th>Crimes by non-Indians</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Indian victim</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Non-Indian victim</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Victimless</td>
<td>Yes</td>
<td>Maybe(^8)</td>
<td>No</td>
</tr>
</tbody>
</table>

### 20.05.01 Federal Jurisdiction

Many federal crimes, such as murder, are limited to the “special maritime and territorial jurisdiction of the United States.” 18 U.S.C. §1111. Other offenses, such as drug offenses or mail theft, are not so limited. See, e.g., 21 U.S.C. §841; 18 U.S.C. §1708 *et seq.*; see also *U.S. v. Juvenile Male* (3 cases),

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\(^4\) This chart assumes that the P.L. 280 states have mandatory jurisdiction. See *infra* 20.05.02.01.

\(^5\) Although the BIA once refused to accept Indian criminal codes that asserted jurisdiction over Major Crimes Act offenses, there is no authority barring such jurisdiction and some tribes routinely assert it.

\(^6\) Federal courts have jurisdiction over lesser-included offenses as part of Major Crimes Act prosecutions, even though there would be no jurisdiction over the lesser offense if it were charged by itself.

\(^7\) Federal jurisdiction is doubtful, but there are no recent cases and “victimless crime” is a flexible concept that is not well defined.

\(^8\) State jurisdiction may depend on whether the crime involves a tribal interest.
118 F.3d 1344 (9th Cir. 1997) (RICO); U.S. v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991) (firearms); Walks on Top v. U.S., 372 F.2d 422, 425 (9th Cir.) (assaulting a federal officer in violation of 18 U.S.C. §§ 111 and 1114 is a general law of the United States that extends to offenses committed by one Indian against another), cert. denied, 389 U.S. 879 (1967); cf. U.S. v. Schrader, 10 F.3d 1345 (8th Cir. 1993) (assault of tribal officer under a 638 law enforcement contract is considered an assault on a federal law enforcement officer even if tribal officer was conducting tribal law enforcement). See generally William Canby, supra at 142-44. This section, therefore, primarily discusses the limits on application of “territorial jurisdiction” crimes to Indian reservations in states that have not assumed exclusive jurisdiction over Indian Country.
20.05.01.01 Territorial Jurisdiction Crimes Committed by Indians

A. Major Crimes

1. Coverage—An Indian who commits one of the fourteen offenses in the Major Crimes Act against any person in Indian Country is subject to federal prosecution. 18 U.S.C. §1153. The Act reads as follows:

§1153 Offenses Committed Within Indian Country. (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, and assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under §661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

The original Act allowed for federal jurisdiction over seven major crimes. Act of Mar. 3, 1885, Chap. 341, §9, 23 stat. 385. Today, the Act covers fourteen crimes and is the major federal jurisdictional statute for crimes committed on Indian land by Indians. It has undergone many amendments since 1885 as more crimes were included. For example, in 1966, carnal knowledge and assault with intent to commit rape were added. See P.L. 89-707. In 1968, P.L. 9-284 added assault resulting in serious bodily injury. Kidnaping was included in 1976 by P.L. 94-297. The Comprehensive Crime Control Act of 1984, P.L. 98-473, added involuntary sodomy and maiming. Most recently, P.L. 99-654 (Cit. 6) included sexual abuse of a minor.

The Major Crimes Act was inspired by and passed within two years of an extremely unpopular Supreme Court decision, Ex Parte Crow Dog, 109 U.S. 556 (1883). In that case, a Sioux Indian, Crow Dog, murdered another Sioux Indian, Spotted Tail, within Indian Country. Crow Dog was convicted in a federal district court and sentenced to death. The Supreme Court, however, held that there was no federal jurisdiction and that only the Indian tribe possessed jurisdiction to try and punish an Indian for the murder of another Indian. Crow Dog went free. Id. at 572.

Soon after the Major Crimes Act was enacted, the Supreme Court held in *U.S. v. Kagama*, 118 U.S. 375 (1886), that the Act was within the constitutional authority of Congress because the federal government owed a duty of protection to the dependent Indian tribes. *Id.* at 384; see *U.S. v. Keys*, 103 F.3d 758 (9th Cir. 1996). The Major Crimes Act survived a constitutional challenge in the wake of *U.S. v. Lopez*, 514 U.S. 549 (1995). See *U.S. v. Lomayaoma*, 86 F.3d 142 (9th Cir.), *cert. denied*, 519 U.S. 909 (1996); see also *Keys*, 103 F.3d 758. This is discussed further below in section 20.05.06.03.

2. Preclusion—The Major Crimes Act can be viewed as an intrusion into the otherwise exclusive jurisdiction of the Indian tribes. *Keeble v. U.S.*, 412 U.S. 205, 209 (1973); *U.S. v. Young*, 936 F.2d 1050 (9th Cir. 1991); *U.S. v. Center*, 750 F.2d 724 (8th Cir. 1984). The federal jurisdiction provided by the Act precludes state jurisdiction in those states that have not assumed jurisdiction over Indian land within their boundaries. Criminal jurisdiction over crimes committed in Indian Country is normally either federal or tribal. *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985). In the six states that have assumed statutory jurisdiction under 18 U.S.C. §1162, however, there is no federal jurisdiction.9 Federal and tribal jurisdiction is concurrent in those states that have assumed voluntary jurisdiction under 25 U.S.C. §431. See *U.S. v. High Elk*, 902 F.2d 660 (8th Cir. 1990).

The more difficult issues is whether Indian tribes may exercise concurrent jurisdiction with the federal government over the major crimes specified in the Act. See *Wheeler*, 435 U.S. 313 (1978); *Young*, 936 F.2d 1050. No language in the federal statutes or in legislative history prohibits tribes from exercising concurrent jurisdiction over criminal acts. However, a tribal court may only impose punishment of one year in prison and/or a fine of $5,000. Title 25 U.S.C. §1302 (1970) (amended 1986). Despite the limited ability of tribal courts to impose punishment for major offenses, it is not uncommon for a defendant to be prosecuted in tribal court before federal prosecution, resulting in increased punishment. Such double punishment generally does not violate the Double Jeopardy Clause. However, several recent cases have addressed the issue. See infra at 20.05.06.02.

3. Major Crimes Act Offenses—The majority of crimes listed in the Major Crimes Act, such as murder, assault, and sexual abuse, are defined by federal statutes. See, e.g., 18 U.S.C. §§1111, 113, 2241. Major Crime Act offenses not defined and punished by federal law are to be defined and punished by the applicable state law. 18 U.S.C. §§1153(b); see *U.S. v. Bear*, 932 F.2d 1279 (9th Cir. 1990) (state definition of burglary used); *U.S. v. Burnside*, 831 F.2d 868, 870 (9th Cir. 1987) (Arizona definition of sodomy used because no federal definition), *cert. denied*, 486 U.S. 1013 (1988); *U.S. v. Maloney*, 607 F.2d 222, 225 (9th Cir. 1979) (look to state law where no federal definition), *cert. denied*, 445 U.S. 118 (1980).

State law is most commonly referred to in order to define burglary. There is no federal definition of generic burglary, although certain special burglaries are defined. *Cf.* §2115 (burglary of post office); §2116 (burglary of a sailing or steamship post office); 18 U.S.C. §2118 (burglary involving controlled

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9 These states are Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. Those few individual Indian reservations that are exempted are listed. See 18 U.S.C. § 1162.
substances). Thus, the state definition is used for general burglary. E.g., U.S. v. Bear, 932 F.2d 1279, 1282-83 (9th Cir. 1990). The use of state law creates difficult issues regarding sentencing. These are discussed infra at “Sentencing Considerations,” in section 20.06. A similar issue in the Armed Career Criminal Act, 18 U.S.C. §924(e), lead the Supreme Court in Taylor v. U.S., 495 U.S. 575 (1990) to define burglary generically for sentencing purposes.

4. Lesser Included Offenses—Some crimes listed in the Major Crimes Act include lesser offenses that are not listed in the Act. In Keeble v. U.S., 412 U.S. 205 (1973), the Supreme Court broadened the scope of the Major Crimes Act when it held that, because Indians are entitled to be tried under the Act “in the same manner” as non-Indians committing the same crime, and Indian charged with committing a felony against an Indian victim under the Act was entitled to a lesser-included offense instruction despite the absence of any independent federal jurisdiction over the lesser offense. See also U.S. v. Bowman, 679 F.2d 798 (9th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); U.S. v. John, 587 F.2d 683, 688 (5th Cir. 1979); Felicia v. U.S., 495 F.2d 353 (8th Cir. 1974). It should be emphasized that lesser offenses cannot be the subject of an initial charge by complaint or indictment. See Keeble, 412 U.S. 205; Bowman, 679 F.2d 798. Whether a lesser-included offense is appropriate is, of course, controlled by U.S. v. Schmuck, 489 U.S. 705 (1989).

Extensions of Keeble—[1]-lesser included offenses need not be federal crimes. The lesser included offenses can be state crimes even though in Keeble, the lesser included offense at issue was simple assault as defined by 18 U.S.C. §113(e). U.S. v. Iron Shell, 633 F.2d 77, 90-91 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); U.S. v. Pino, 606 F.2d 908, 915 (10th Cir. 1979). [2] Keeble did not address whether federal courts could actually impose sentence on a lesser-included offense conviction or whether such sentencing would impermissibly expand the reach of the Major Crimes Act. It was subsequently argued that federal courts lacked such jurisdiction and that it fell to the tribes to prosecute and punish the defendant for any lesser offense. Courts rejected this argument, upholding such sentencing as consistent with Keeble’s emphasis on parity of treatment between Indian and non-Indian defendants. Bowman, 679 F.2d at 800; John, 587 F.2d at 688; Felicia, 495 F.2d at 355. The Ninth Circuit, however, has found this expansion of Major Crimes Act jurisdiction “troublesome.” Bowman, 679 F.2d at 800. [3] The Fourth Circuit decided that a jury could still be given a lesser included offense instruction even after the trial court granted acquittal for insufficiency of the evidence on the statutory felony counts. U.S. v. Walkingeagle, 974 F.2d 551, 554 (4th Cir. 1992), cert. denied, 507 U.S. 1019 (1993).

6. Gun Counts—Despite the fact that firearm offenses are not listed in the Major Crimes Act, courts have upheld federal jurisdiction to charge use of a firearm in a crime of violence. *U.S. v. Laughing*, 855 F.2d 659 (9th Cir. 1988); *U.S. v. Goodface*, 835 F.2d 1233 (8th Cir. 1987). Both *Laughing* and *Goodface* reasoned that prosecution under 18 U.S.C. §924(c) was available because the underlying felony (i.e., assault) was listed in the Major Crimes Act and the Act provides that the laws and penalties of the United States apply to its offenses.

7. Conspiracy—The government argues that conspiracy is a general law of the United States that applies to Indians as well as all others regardless of the location of the crime. See *U.S. v. Dodge*, 538 F.2d 770, 776 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). This argument is contrary to the legislative history of the Major Crimes Act, which states that the crimes enumerated therein are the only ones subject to federal jurisdiction. The legislative history notes only two exceptions to this rule: (1) for crimes committed in Indian Country in those states where federal laws have ceded complete or concurrent jurisdiction to certain states; and (2) for crimes that are “peculiarly Federal,” such as assaulting a federal officer or defrauding the United States. *U.S. v. Markiewicz*, 978 F.2d 786, 799-800 (2d Cir. 1992), *cert. denied sub. nom*, *Beglen v. U.S.*, 506 U.S. 1086 (1993). As a result of this history, the *Markiewicz* court concluded that not all federal statutes of general applicability apply of their own force to Indian territories, *id.* at 793, 799, but only those that involve a peculiar federal interest. *Id.* at 799-800. Under this analysis, both *Laughing* and *Dodge* can be explained as cases involving crimes with peculiarly federal interests. In *Dodge*, the Eighth Circuit found jurisdiction over a conspiracy to obstruct, impede, and interfere with law enforcement officials at Wounded Knee, in violation of 18 U.S.C. §§ 231(a)(3) & 371. *U.S. v. Dodge*, 538 F.2d at 780 (during civil disorder, “law enforcement officials were engaged in the performance of their duties...a federally-protected function”). In *Laughing*, the Ninth Circuit found jurisdiction over a §924(c) charge, which can be understood as a peculiarly federal crime by virtue of the Congressional declaration in the National Gun Control Act of 1968 and subsequent amendments regulating firearms as a special federal interest. See *U.S. v. Biswell*, 406 U.S. 311, 315 (1972).

The Ninth Circuit declined to adopt the “peculiar federal interest” rationale and held that 18 U.S.C. §371, the federal conspiracy statute, is a “statute of nationwide applicability, and therefore applies equally to everyone, everywhere within the United States, including Indians in Indian country.” *U.S. v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994), *cert. denied*, 516 U.S. 826 (1995). The court found jurisdiction over the alleged conspiracy, the objects of which—kidnaping, assault, and burglary—are all listed as substantive offenses in the Major Crimes Act.

8. Other Crimes of “General Applicability”—[1]In *U.S. v. Boots*, 80 F.3d 580, 593 (1st Cir. 1996), the First Circuit decided that federal wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 was also a crime that applied equally to everyone, including Indians, and the government therefore had jurisdiction. The court recognized that the question remains open to whether the crimes must have a “peculiar” or “independent” federal interest that needs to be protected. *Id.* at 593. [2]The Ninth Circuit recently reaffirmed that RICO charges are crimes of general applicability. It therefore applies to Indians even though it is not an enumerated offense under §1153. *U.S. v. Juvenile Male (3 cases)*, 118 F.3d 1344 (9th Cir. 1997); *see also U.S. v. Farris*, 624 F.2d 890, 893-894 (9th Cir. 1980) (18 U.S.C. §1955

B. Other Crimes

1. Against Indians—Excepting crimes of general federal applicability, there is no federal jurisdiction over non-Major Crimes Act offenses committed by Indians against Indians. Federal Enclaves Act, 18 U.S.C. §1152. Lesser offenses of Major Crimes Act offenses cannot be brought in an initial charge or indictment. Keeble, 412 U.S. 205. See §20.05.01.01(7) and (8) for further discussion of this issue. E.g., Boots, 80 F.3d 580 (wire fraud); Begay, 42 F.3d 486 (conspiracy of substantive Major Crime offenses).

2. Against Non-Indians—The general criminal laws of the United States extend to Indian Country, unless the crime was committed by an Indian against an Indian, the tribe has already punished the offender, or treaties stipulate to the contrary. Federal Enclaves Act, 18 U.S.C. §1152. The Act reads:

§1152 Laws Governing. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Because the Federal Criminal Code is not exhaustive, Congress has provided for the federal use of state criminal law definitions of crimes that occur within federal jurisdiction but are not defined by federal law. Assimilative Crimes Act, 18 U.S.C. §13. The Act reads:

§13 Laws of States Adopted for Areas Within Federal Jurisdiction. (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b) For purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, Territory, Possession, or District, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered
to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

The Assimilative Crimes Act is limited to those offenses not defined by federal law. It applies to Indian Country under the Federal Enclaves Act, 18 U.S.C. §1152, unless the crime is by one Indian against a person or property of another Indian, or punishable by tribal law. _Williams v. U.S._, 327 U.S. 711 (1946) (Assimilative Crimes Act held to apply in Indian Country); _U.S. v. Burland_, 441 F.2d 1199 (9th Cir.), _cert. denied_, 404 U.S. 842 (1971); _U.S. v. Sosseur_, 181 F.2d 873 (7th Cir. 1950).

Jurisdiction under the Enclaves Act can overlap with jurisdiction conferred by the Major Crimes Act when an Indian defendant and a non-Indian victim are involved. In such an instance, the Major Crimes Act has been deemed the more appropriate act to confer jurisdiction over Indians who commit crimes against non-Indians. _Henry v. U.S._, 432 F.2d 114, 117 (9th Cir. 1970) (Major Crimes Act’s language of “other persons” applies to non-Indian victims), _modified on other grounds_, 434 F.2d 1283 (9th Cir.), _cert. denied_, 400 U.S. 1011 (1971).

3. Victimless Crimes–Federal jurisdiction probably should not extend to victimless or consensual crimes committed by Indians, because Congress considers such matters subject to exclusive tribal jurisdiction. _U.S. v. Quiver_, 241 U.S. 602 (1916) (Indian not subject to federal prosecution for adultery committed with another Indian in Indian Country). _But see U.S. v. Sosseur_, 181 F.2d 873 (7th Cir. 1950) (Indian convicted of operating slot machines on an Indian Reservation located within the State of Wisconsin; no tribal punishment had been imposed).

20.05.01.02 Territorial Jurisdiction Crimes Committed By Non-Indians

A. Against Indians

Crimes committed by Non-Indians against Indians in Indian Country are subject to federal jurisdiction under the Federal Enclaves Act, 18 U.S.C. §1152. This Act includes all crimes listed in the general federal code and, by incorporation through the Assimilative Crimes Act, 18 U.S.C. §13, and additional state-defined crimes not covered by the Federal Criminal Code.

B. Against Non-Indians

Although the literal text of the Federal Enclaves Act implies otherwise, federal courts have no jurisdiction over crimes committed by non-Indians against other non-Indians in Indian Country. Those crimes are exclusively within state jurisdiction. _Draper v. U.S._, 164 U.S. 240 (1896); _U.S. v. McBratney_, 104 U.S. 621 (1882).
The exception to the Enclaves Act for crimes committed by non-Indians against non-Indians is not based on any language contained in §1152. Its roots are found in a trilogy of Supreme Court decisions spanning close to seventy years: McBratney, 104 U.S. 621; Draper, 164 U.S. 240, and New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). In these cases, the Court found state jurisdiction to be applicable to crimes between non-Indians in Indian country. In McBratney, both the defendant and the murder victim were non-Indian. In overturning the federal conviction, the Court found that the State of Colorado had acquired upon its admission into the union criminal jurisdiction over its own citizens and other white persons within the whole of the territory within its limits. Since no exceptions to this authority had been made for the Ute Reservation under the grant of statehood, the Court reasoned that state law extends to the reservation when only non-Indians are involved in the crime. Accord Draper, 164 U.S. 240; Martin, 326 U.S. 496; see also U.S. v. Wheeler, 435 U.S. 313, 325 n.21 (1978); U.S. v. Antelope, 430 U.S. 641, 643 n.2 (1977).

As a result of this exception, §1152 is confined to “interracial” crimes–crimes in which either the perpetrator or the victim, but not both, is Indian. In Donnelly v. U.S., 228 U.S. 243 (1913), the Court rejected an attempt to narrow the scope of §1152 still further to exclude crimes against Indians by non-Indians. The defendant argued that under the rationale of McBratney, California’s admission to the union conferred on the state the “undivided authority to punish crimes committed upon an Indian reservation, excepting crimes committed by Indians.” Id. at 271. The Court concluded otherwise, stating that “offenses committed by or against Indians are not within the principle of the McBratney and Draper cases.” Id.

C. Victimless Crimes

Victimless crimes committed by non-Indians in Indian Country are also subject to federal jurisdiction under 18 U.S.C. §1152. If McBratney, 104 U.S. 621, and Draper, 164 U.S. 240, are broadly construed, states may claim concurrent jurisdiction. The distinction might rest on whether the crime involves some tribal interest.

20.05.01.03 General Federal Jurisdiction Crimes

Neither the Major Crimes Act nor the Assimilative Crimes Act has an effect of restricting the application of general federal criminal statutes to Indian Reservations. See, e.g., U.S. v. Rogers, 45 U.S. (4 How.) 567 (1846); U.S. v. Yannott, 42 F.3d 999, 1004 (6th Cir. 1994), cert. denied, 513 U.S. 1182 (1995); U.S. v. Blue, 722 F.2d 383 (8th Cir. 1983). Some acts, therefore, are federal crimes no matter where in the United States they are committed or by whom. These include, for example, violations of the various drug laws, mail thefts, and assaults on federal officers. Such crimes are exclusively within federal jurisdiction. Id.; U.S. v. Boots, 80 F.3d 580 (1st Cir. 1996) (wire fraud); U.S. v. Schrader, 10 F.3d 1345 (8th Cir. 1993) (assaulting an officer); U.S. v. Farris, 624 F.2d 890 (9th Cir. 1980) (RICO). However, under Markiewicz, 978 F.2d 786, the Second Circuit found that there also must be a “peculiar federal interest” to extend general applicable federal statutes into Indian Country. But see Begay, 42 F.3d 486 (rejecting Markiewicz approach and finding conspiracy a general federal offense applicable to Indians). See generally Richard W. Garnett, Once More Into The Maze: United States v. Lopez, Tribal
Under this provision, the following states have assumed total or partial jurisdiction: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington.

20.05.01.04 Review of Tribal Court Detention

Under the Indian Civil Rights Act, 25 U.S.C. §1303, a person subject to detention by order of a tribal court may have the legality of that detention reviewed in federal court by a writ of habeas corpus. The Supreme Court has held this to be the exclusive means of federal court enforcement of the provisions of that Act. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The substantive provisions of the Act (25 U.S.C. §1302), govern the outcome of the habeas proceedings.

20.05.02 State Jurisdiction

20.05.02.01 Public Law 280 States

The discussion of state criminal jurisdiction over Indians and Indian Country provided by this chapter applies only to those states that have not assumed such jurisdiction under Public Law 280, 18 U.S.C. §1162. Under Public Law 280, passed in 1953, Congress conferred jurisdiction over criminal offenses and civil causes of action arising in Indian Country upon Alaska (with certain exceptions), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation) and Wisconsin, and authorizes the other states to assume such jurisdiction if they so choose.10 18 U.S.C. §1162; 28 U.S.C. §1360. Subsection (a) of §1162, which enacted Public Law 280, now provides that the listed states “shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within the Indian country as they have elsewhere within such State or Territory.” Subsection (c) of 18 U.S.C. §1162 provides that 18 U.S.C. §§ 1152 and 1153 “shall not be applicable within the areas of Indian Country listed in subsection (a).”

Passage of P.L. 280 provoked immediate controversy among the tribes. Tribes particularly criticized the fact that P.L.280 permitted states to assume jurisdiction without the consent of the affected tribes. Responding to this criticism, Congress amended P.L. 280 in the 1968 Indian Civil Rights Act to provide that no state could assume jurisdiction over a tribe without first gaining that tribe’s consent through a special election. 25 U.S.C. §§1321(a), 1322(a). Only Utah has assumed jurisdiction under P.L. 280 since passage of the Indian Civil Rights Act. The 1968 amendment also gives states the right to retrocede all or part of their jurisdiction to the federal government. 25 U.S.C. §1323(a). Nebraska, for example, has retroceded criminal jurisdiction to the federal courts.

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10 Under this provision, the following states have assumed total or partial jurisdiction: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington.
States voluntarily assuming criminal jurisdiction, it is important to note, do not exercise that jurisdiction exclusively. Because 18 U.S.C. §1152 and 1153 remain in effect, there is both concurrent federal and state criminal jurisdiction. See U.S. v. High Elk, 902 F.2d 660 (8th Cir. 1990) (shared jurisdiction in non-mandatory Public Law 280 states). Assumption of all criminal jurisdiction in these later states is, moreover, voluntary. Indeed, states can choose to assume only partial jurisdiction under Public Law 280, such as control of air and water pollution. See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) (sustaining partial assumption against equal protection and statutory attacks).

20.05.02.02 Crimes Committed by Indians in Non-Public Law 280 States

States have no jurisdiction over crimes committed by Indians in Indian Country. Applicable state laws control outside Indian Country. See 18 U.S.C. §1153.

20.05.02.03 Crimes Committed by Non-Indians in Non-Public Law 280 States

A. Against Indians

B. Against Non-Indians

Although the Federal Enclaves Act, 18 U.S.C. §1152, on its face applies to crimes committed by non-Indians against non-Indians in Indian Country, the Supreme Court has held that such crimes are exclusively within state jurisdiction. *U.S. v. McBratney*, 104 U.S. 621 (1882). The Court subsequently adhered to this ruling in a case in which Montana had disclaimed jurisdiction over Indian lands as a condition of acquiring statehood. *Draper v. U.S.*, 164 U.S. 240 (1896). These cases are important for at least two reasons: (1) they make it impossible to view questions of state jurisdiction in wholly geographic terms; and (2) they establish the principle, now important in the civil area, that states may be permitted to exercise jurisdiction when Indian interests are not affected. These decisions have been criticized by scholars in the area. See, e.g., William Canby, *American Indian Law* 130 (1998 ed.).

C. Victimless Crimes

When Indian interests are not affected, state jurisdiction may extend to victimless crimes committed by non-Indians in Indian Country. Such state jurisdiction will probably be concurrent with federal jurisdiction. Where tribal interests are affected, however, federal jurisdiction should be exclusive.

20.05.03 Tribal Jurisdiction

20.05.03.01 Territorial Jurisdiction Crimes Committed by Indians

Tribal court jurisdiction over tribal-member Indians is inherent and is not dependent upon any delegation of power by the federal government. *U.S. v. Wheeler*, 435 U.S. 313 (1978). However, at least one court has determined that tribal court jurisdiction over non-member Indians was delegated. *See Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998). Again, this does not include those crimes that are of general jurisdiction not dependent on Indian status or situs (e.g., mail theft). *Id.* at 330 n.30.

It is not clear whether the Major Crimes Act, 18 U.S.C. §1153, excludes tribes from concurrent jurisdiction for the crimes listed therein. Many tribes, however, routinely exercise jurisdiction over larceny -- a crime covered by the Major Crimes Act. In *Keeble v. U.S.*, 412 U.S. 205 (1973), the Court held that the Major Crimes Act reached lesser-included misdemeanors in some circumstances; the Act now reaches a number of offenses long thought to be exclusively under tribal jurisdiction. *See supra* at 20.05.01(A)(4). Tribal authority thus substantially overlaps federal jurisdiction despite the limit on tribal punishments contained in the Indian Civil Rights Act, 25 U.S.C. §1302(7). Concurrent tribal jurisdiction in such cases is retained. Because double jeopardy is generally not a bar to tribal prosecution following federal jeopardy, *U.S. v. Wheeler*, 435 U.S. 313, 330-32 (1978), there is no apparent risk to assertion of concurrent jurisdiction. In fact, despite the Major Crimes Act, the government frequently leaves the prosecution of certain crimes to the tribes.
The Indian Civil Rights Act of 1968, 25 U.S.C. §1302(7) (as amended 1986 P.L. 99-570, §4217), limits jurisdiction of tribal courts in criminal cases to offenses carrying penalties not exceeding one year imprisonment or $5,000 fine, or both. The Act also imposes most of the constitutional protections contained in the Bill of Rights on the tribes, with two exceptions: (1) the Act does not prohibit the establishment of religion by a tribe, although it does protect the free exercise of religion; and (2) the Act does not provide the right of appointed counsel. 25 U.S.C. §1301-1303. Additionally, the Supreme Court has held that the only federal remedy for tribal violations of the Act is a writ of habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

It is reasonably certain that the Federal Enclaves Act, 18 U.S.C. §1152, does not limit concurrent tribal jurisdiction over offenses covered by the Act. Similarly, federal liquor prohibition laws applicable to Indian Country are not preemptive of concurrent tribal jurisdiction over liquor offenses by Indians.

### 20.05.03.02 Crimes Committed by Non-Indians or Non-Tribal Members

Tribes have no jurisdiction to punish crimes by non-Indians committed in Indian Country. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). Although the exercise of such jurisdiction was deemed inconsistent with the tribes’ status as domestic dependent nations, the Court indicated that Congress could confer such jurisdiction. To date, Congress has not done so. Where a tribe retains the right to exclude non-members from their territory, the tribe can probably try a non-Indian for a tribal offense as long as the only punishment is banishment from tribal territory.

In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court held that Indian tribes lack jurisdiction over non-member Indians. *Id* at 688. Congress amended the Indian statutes to give tribal courts such authority. 25 U.S.C. §1301(4). “Indian” generally now means any person who would be considered an Indian under 18 U.S.C. §1153, regardless of tribal affiliation. However, some recent cases suggest that member/non-member Indian distinctions may be significant in terms of ex post facto and double jeopardy issues. *See infra* at 20.05.06.02.

### 20.05.04 Liquor Laws

Several federal criminal statutes define federal court jurisdiction over illegal possession, sale, or manufacture of liquor in Indian Country. 18 U.S.C. §§1154, 1156, 1161, 3055, 3113, 3488, 3618-19. Under §1161, liquor transactions in Indian Country are not subject to prohibition under federal law, provided that those transactions are “in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country.” The Supreme Court has held that this provision authorizes, rather than preempts, state regulation of Indian liquor transactions. *Rice v. Rehner*, 463 U.S. 713 (1983).

### 20.05.05 Gambling in Indian Country
Under 18 U.S.C. §1166(d), the federal government has exclusive jurisdiction over criminal prosecutions unless the tribe has transferred such jurisdiction to the state pursuant to a compact approved by the Secretary of the Interior.
20.05.06 Constitutional Interplay of Criminal Jurisdiction

20.05.06.01 Equal Protection

Because criminal jurisdiction in Indian law is so fragmented, different participants in the same or similar crimes may be subject to different jurisdictions and different substantive laws, depending on whether they are Indian or non-Indian. This result does not violate principles of equal protection. *U.S. v. Antelope*, 430 U.S. 641 (1977). In *Antelope*, the Supreme Court held that federal legislation with respect to Indian tribes is “not based on impermissible racial classifications,” because it is “rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” *Id.* at 646. *See also Morton v. Mancari*, 417 U.S. 535 (1974). “Indian,” in other words, is a political, not racial, classification. *Id.* at n.24.

20.05.06.02 Double Jeopardy

Tribes have inherent sovereign powers not derived from the federal government, and principles of double jeopardy generally do not bar prosecution in federal court subsequent to conviction in tribal court. *U.S. v. Wheeler*, 435 U.S. 313 (1978). However, this matter has been a subject of recent litigation.

The principles of double jeopardy do not bar prosecution of tribal-member Indians in federal court subsequent to conviction in tribal court. U.S. Const. amend V; *U.S. v. Wheeler*, 435 U.S. 313 (1978). As the Supreme Court explained in *U.S. v. Wheeler* in 1978, the tribes have inherent sovereign powers not derived from the federal government. *Id.* Tribes have no jurisdiction, however, to punish crimes by non-Indians committed in Indian Country. Although the lack of such jurisdiction was deemed inconsistent with the tribes’ status as domestic dependent nations, the Court indicated that Congress could confer such jurisdiction. To date, Congress has not done so. Where a tribe retains the right to exclude nonmembers from their territory, the tribe can properly try a non-Indian for a tribal offense so long as the only punishment is banishment from tribal territory. *See Oliphant*, 435 U.S. 191.

In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court held that an Indian tribe lacks jurisdiction over Indians who are not members of the tribe. In what is sometimes referred to as the “Duro fix,” Congress subsequently amended the Indian statutes to give tribal courts such authority. See 25 U.S.C. §1301(4). “Indian” generally now means any person who will be considered an Indian under the Major Crimes Act. 18 U.S.C. §1153.

The Eighth Circuit confronted a new issue raised by this legislation. In *U.S. v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998), *reh’g en banc granted and op. vacated and aff’d district court by equally divided en banc*, 165 F.3d 1209 (8th Cir. 1999) (en banc), an Eighth Circuit panel held that the dual sovereignty exception to double jeopardy does not apply to an Indian tribe’s prosecution of an Indian who

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belongs to a different tribe. In *Weaselhead*, a tribe prosecuted a non-tribal Indian for a sexual offense. The federal authorities then brought a federal charge under the Major Crimes Act. The Eighth Circuit found that the statutory change which granted the tribe’s criminal jurisdiction over other Indians is neither inherent nor sovereign, but rather exists solely as authority of the United States delegated by Congress. Because the power of the tribe to punish non-tribal Indians and the power of the federal government to charge the defendant subsequently both came from the same source - Congress - there was a double jeopardy bar. *Id.*

The Eighth Circuit subsequently granted *en banc* review and vacated the opinion. Thereafter, in an *en banc* decision, the Eighth Circuit by a vote of an equally divided *en banc* court, affirmed the district court’s denial of the double jeopardy claim. *U.S. v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999) (en banc), *aff’d by an equally divided court*, 36 F.Supp. 908 (D. Neb. 1997).

The Ninth Circuit has grappled with similar issues. In *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), a non-tribal Indian petitioner in a habeas case maintained that a tribal prosecution of him was barred because his alleged criminal activity predated the Duro fix. Therefore, he argued, retroactive application of the Duro fix to his alleged criminal activities would violate the Ex Post Facto Clause of the Constitution. The Ninth Circuit court agreed with Means. It concluded that Congress had affirmatively delegated jurisdiction to the tribes which consequently became the same sovereign as the United States. *Id.*

After *Means*, the Ninth Circuit contemplated the *Weaselhead* issue in *U.S. v. Enas*, 204 F.3d 915 (9th Cir.), *reh’g en banc granted*, 219 F.3d 1138 (9th Cir. 2000). In *Enas*, the district court dismissed a federal indictment for assault charges where the defendant had been convicted in tribal court for the same crime. In reversing the district court’s dismissal, the Ninth Circuit panel construed the *Means* holding as dicta and adopted the Eight Circuit’s *Weaselhead* analysis. The *Enas* Panel states that *Means* did not mean what it said, as the “language in *Means* treating the congressional language as an ‘affirmative delegation of jurisdiction’ was not necessary to the court’s decision.” *Id.* at 917. This issue will continue to be litigated in the future.

Thus, the *Weaselhead*-type challenge may not yet be entirely resolved. Under *Wheeler* and *Duro*, and following the analysis of *Weaselhead* decision, the following situation could exist. Two Indians are charged with committing a crime against another in Indian Country. One Indian, A, is a tribal member; the other Indian, B, is not. Both Indians are convicted in tribal court. There is no double jeopardy protection for A because his tribe has inherent sovereignty over him. It still could be argued that double jeopardy protects B from federal prosecution. B may be protected by double jeopardy because the tribe may have no inherent sovereignty over him; the jurisdiction to try him may be interpreted as conferred by Congress, as is federal jurisdiction.

**20.05.06.03 Commerce Clause and Indian Commerce Clause**

**A. Major Crimes Act**
In the wake of *U.S. v. Lopez*, 514 U.S. 549 (1995), the Major Crimes Act was unsuccessfully challenged as an unconstitutional extension of Congress’ Commerce Clause power. *U.S. v. Lomayaoma*, 86 F.3d 142 (9th Cir.), *cert. denied*, 519 U.S. 909 (1996). The Ninth Circuit rejected this argument, reasoning that unlike Congress’ more limited authority to legislate pursuant to the Interstate Commerce clause, Congress has virtually unfettered plenary power under the Indian Commerce Clause to regulate Indian affairs. *Id.* at 143-44; *see U.S. v. Keys*, 103 F.3d 758 (9th Cir. 1996).

**B. Eleventh Amendment Sovereign Immunity and the Indian Gaming Regulatory Act**

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court held that Congress does not have power under either the Indian Commerce Clause or the Interstate Commerce Clause to abrogate a state’s Eleventh Amendment immunity from suit. In so holding, the court implicitly rejected petitioner’s argument that the abrogation of state’s sovereign immunity is “necessary to protect Indian Tribes from state action denying federally guaranteed rights.” *Id.* at 1125-26; *see also Keys*, 103 F.3d 758.

**20.06 SENTENCING CONSIDERATIONS**

As with practically every facet of substantive criminal law, there are different sentencing ramifications of each jurisdictional statute. The federal sentencing guidelines apply to crimes under the Major Crimes Act and the Assimilative Crimes Act. *U.S. v. Bear*, 932 F.2d 1279, 1281 n.1 (9th Cir. 1990). Congress specifically enacted such legislation. *Id.*

**20.06.01 Major Crimes Act**

The federal sentencing guidelines apply to violations of the Major Crimes Act that are defined by federal statutes. Courts were initially split on the issue of what sentencing law applies to those offenses (notably burglary) that are to be “defined and punished” according to state law. *Compare U.S. v. Norquay*, 905 F.2d 1157 (8th Cir. 1990) (federal sentencing guidelines apply so as to eliminate disparities between Indian and non-Indian defendants except that state law sets maximum and/or minimum terms), *with U.S. v. Bear*, 932 F.2d 1279 (9th Cir. 1990) (United States Sentencing Guidelines do not apply to Indian burglary; criticizing Eighth Circuit for mixing together a “potpourri” of state and federal law). In 1990, Congress amended 18 U.S.C. §3551(c) to make the guidelines applicable to Major Crimes Act and Assimilative Crimes Act offenses. *Bear*, 932 F.2d at 1281 n.1.

**20.06.02 Assimilative Crimes Act**

Under the Assimilative Crimes Act, Congress stated that defendants shall receive the same punishment as they would in the state. It has been held that the guidelines apply to Assimilative Crimes, with the notable proviso that state law sets minimum and maximum floors and ceilings for sentences. *U.S. v. Garcia*, 893 F.2d 250 (10th Cir. 1989), *cert. denied*, 494 U.S. 1070 (1990); accord *U.S. v. Young*, 916 F.2d 147, 150 (4th Cir. 1990); *U.S. v. Leake*, 908 F.2d 550 (9th Cir. 1990); *see also U.S. v.*
Marmolejo, 915 F.2d 981, 984 (5th Cir. 1990) (supervised release is considered part of sentence). In 1990, Congress specifically amended the statute to make guidelines applicable to Major Crimes Act and Assimilative Crimes Act offenses. Bear, 932 F.2d at 1282 n.1.
20.06.03 Tribal Convictions

Under the Federal Sentencing Guidelines, tribal convictions and sentences do not count in assessing criminal history points. See U.S.S.G. §4A1.2. Tribal misdemeanors, however, may be considered in setting a sentence. See U.S. v. Hookano, F.2d (9th Cir. 1992) (considering defendant’s past criminal history in setting jail term within guideline range). Under §4A1.3(a), the guidelines expressly allow an upward departure to reflect tribal offenses. Courts have departed upwards on this basis. See, e.g., U.S. v. Drapeau, 110 F.3d 618 (8th Cir. 1997).

Unfortunately, Nichols v. U.S., 511 U.S. 738 (1994) also has implications for tribal sentences. In Nichols, the Court held that a defendant’s prior uncounseled misdemeanor may be considered in subsequent sentencing so long as the uncounseled misdemeanor conviction did not result in a sentence of imprisonment. Nichols overruled a number of decisions that had barred consideration of uncounseled misdemeanors for upward departures. E.g., U.S. v. Brady, 928 F.2d 844, 853-54 (9th Cir. 1991) (collecting cases). Apparently, a court may now consider uncounseled misdemeanors for a departure under adequacy of criminal history, but only if no imprisonment resulted. Even so, this remains open to challenge on the reliability of tribal convictions. It should be noted, furthermore, that many tribal convictions fall under sentences that may be excluded due to their nature. See U.S.S.G. §4A1.2(c). Departures are still possible under §4A1.3. See Drapeau, 110 F.3d 618.

20.06.04 Departures

The Sentencing Reform Act mandates that the Commission bear in mind the uniqueness of Indian issues. Prior to the promulgation of the guidelines the Commission was urged, at public hearings and in written submissions, to consider the special circumstances that surround sentencing Indian offenders and to be sensitive to the tribes’ sense of justice. When the guidelines were finally issued, however, special consideration of Indians fell under Chapter 5H factors that were disfavored in sentencing.

Nonetheless, in districts that regularly deal with Indian defendants, federal courts have recognized the uniqueness of Indian crime. In U.S. v. Big Crow, for example, the Eight Circuit upheld the appropriateness of a downward departure, from four to two years imprisonment in an Indian assault case. The departure was based on the high rate of unemployment, alcohol abuse and socio-economic deprivations on an Indian Reservation. The question before the Court was whether the Commission had considered these dire economic straits in setting sentencing ranges. The Eight Circuit, in affirming the departure, found that the Commission had not considered that tribal culture did not prepare tribal members to deal with devastating socio-economic difficulties found on the Reservations.

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13 See Id.
Koon v. U.S., 518 U.S. 81 (1996), may be of special relevance in the cases of Indian defendants where unusual and extraordinary factors often take a case out of the heartland. A less restrictive use of departures may allow courts to consider the uniqueness of Indian culture in sentencing. While this is not an unprecedented departure, it may be particularly applicable to Indian offenders. ⑭

20.07 VENUE CONSIDERATIONS

As stated above, the fact that an offense is within Indian Country and involves Indians could, under §1153 or 1154, make it a federal offense. Venue rules, however, still apply. Difficulty arises because many reservations extend over state lines, and therefore exactly where an offense took place may be a matter of controversy. Venue is not one of the elements of the offense the government must prove. U.S. v. Kaytso, 868 F.2d 1020 (9th Cir. 1989). It is, however, a question of fact and necessary for setting the trial. Id. The government bears the burden of proof. Id.

20.08 SPECIAL DEFENSES

20.08.01 Freedom of Religion

A possible defense to some criminal acts committed by Indians is that the behavior is protected by the Free Exercise Clause of the First Amendment. The Supreme Court, however, significantly eroded application of this defense in Employment Div., Dep’t. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (use of peyote for Indian ceremonial purposes not protected by the First Amendment). In Smith, the Court held that if a criminal law is generally applicable, not religiously motivated, and only incidentally prohibits certain religious activities, then the law does not violate the Free Exercise Clause. The only exception that applies to criminal laws is where another substantial constitutional issue is raised, i.e., freedom of speech, in which case the criminal law may be held unconstitutional.

In the context of the Bald and Golden Eagle Protection Act, which admittedly burdens the practice of Native American religions by restricting the ability of adherents to obtain and possess eagle feathers, the Ninth Circuit has held that it was the “least restrictive” means to protecting a threatened and endangered species. U.S. v. Hugs, 109 F.3d 1375 (9th Cir. 1997). For purposes of a free exercise challenge, the Act was found to serve compelling governmental interests.

⑭ Cultural consideration can be as grounds for departure. See, e.g., U.S. v. Sherpa, 97 F.3d 1239 (9th Cir. 1996) (consideration of “the defendant’s Buddhist beliefs in reincarnation and punishment for simple acts, lack of knowledge of Western culture or of drug trafficking among the Nepali, and a neighborly obligation in Sherpa culture”); U.S. v. Valdez-Gonzalez, 957 F.2d 643 (9th Cir. 1992) (permitting consideration of the social, economic and international politics of the drug trade along the Mexican border for downward departure); U.S. v. Swapp, 719 F.Supp 1015 (D. Utah 1989) (unique cultural history of religious extremist group allows departure). See generally Cultural Issues in Criminal Defense (James G. Connell III and Rene L. Valladares eds. 2000) (survey of various cultural issues in all aspects of criminal defense).
Also relevant to the religion defense is the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. §1996 (1981). AIRFA does not create any judicially enforceable rights and requires no more than compliance with the First Amendment. AIRFA merely requires that federal agencies consider the effects of regulations on traditional Indian religious practices. AIRFA is basically just a statement of governmental policy and has not been successful as a defense to criminal prosecutions. See U.S. v. Dion, 476 U.S. 734 (1986); U.S. v. Thirty-Eight (38) Golden Eagles, 649 F. Supp. 269 (D. Nev. 1986).

20.08.02 Indian Treaties

Some actions by Indians can be defended on the grounds that the acts are protected by an Indian treaty. The defendant generally must be an enrolled member of the tribe and have committed the acts on an Indian reservation covered by treaty. Some treaty rights are implicit, such as the right to hunt and fish on a reservation. The government can argue that treaty rights have been abrogated by the applicable criminal law. Courts are reluctant to find abrogation of treaty rights and Congress must show a clear intent to abrogate those rights. See Dion, 476 U.S. at 739-40.

20.08.03 Eagles and Other Protected Birds

The Eagle Protection Act, 16 U.S.C. §668(a), and the Migratory Bird Treaty Act, 16 U.S.C. §703, make it unlawful to kill, possess, barter, or sell bald and golden eagles or eagle parts such as feathers. Many Indians use bald and golden eagle feathers for religious purposes. Permits are available for the use of feathers in Indian religious ceremonies, but under no circumstances can eagle feathers be sold or bartered. The Supreme Court in U.S. v. Dion, 476 U.S. 734, 745 (1986), held that the Eagle Protection Act abrogated all Indian eagle hunting treaties. See also U.S. v. Fryberg, 622 F.2d 1010 (9th Cir.), cert. denied, 449 U.S. 1004 (1980) (Eagle Protection Act abrogated hunting treaty rights on reservation); cf. U.S. v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (Act survived free exercise challenge because of government’s compelling interest in protection and least restrictive means). However, Indian treaty rights for possible hunting and use of other birds may survive the Migratory Bird Treaty Act. See U.S. v. Bresette, 761 F.Supp 658 (D. Minn. 1991) (Indian treaty rights not abrogated by enactment of Migratory Bird Treaty Act).

The sale or barter of eagles cannot be defended on the grounds that the eagle parts were obtained prior to the enactment of the applicable statutes. See Andrus v. Allard, 444 U.S. 51 (1979). Bird parts acquired prior to the enactment of the statutes may legally only be possessed or transported, but not sold or bartered.

20.08.04 Cultural Defenses

Cultural defenses are fact specific to the case and to the tribe. Extensive investigations and expert consultations are necessary to develop this type of defense. See generally, Michael D. Gordon and Jon M. Sands, American Indian Culture and Federal Crimes in Cultural Issues in Criminal Defense (James G. Connell III and Rene L. Valladares, eds. 2000) (overview of cultural issues and defenses with case illustrations).
20.09 CAPITAL CRIMES AND “THREE STRIKES”

Significantly, the congressional crime initiatives in areas of capital punishment and three-strike legislation have contained “opt in” provisions for the Indian tribes. 18 U.S.C. § 3598. Since 1994, and in spite of aggressive lobbying by law enforcement and pressure from many U.S. Attorneys in Indian jurisdiction district, no Indian tribe other than the Sac and Fox of Oklahoma has “opted in” for the death penalty or “three strikes” under the 1994 Anti-Crime Bill.

These reasons for such a reluctance among the Indian tribes to opt in for the death penalty and “three strikes” legislation deals with issues concerning their sovereignty, implementation, and culture and world view. The issues troubling to the tribes can be summarized as:

P Capital punishment is considered contrary to most Indian tribal cultures and religions.
P Opting in means turning over to the U.S. Attorney and Department of Justice (virtually all non-Indians) the power to determine which Indians would face the death penalty.
P Indians are represented on federal court juries in extremely low numbers.
P Racial issues strongly impact the death decision. Although the death penalty statute requires the jury to certify that it did not take race into account in imposing the death penalty, in Indian Country cases the defendant and often the victim’s status is an element of proof to obtain federal jurisdiction. As such, the jury must expressly consider race in reaching its decision.
P Opting in would result in a potential distinction between Indian defendants, who would face the death penalty under federal jurisdiction, while non-Indian defendants would, if the victim was non-Indian, not face a death penalty.
P The death penalty is not a deterrent generally, and that is especially true in the alcohol related and mostly intra-family murders which form the great majority of Indian Country murder. The penalty for first degree murder under federal statute is life without release.15

During the congressional hearings on the 1994 Crime Bill, when the “opt in” provision was being debated, the Navajo Nation, which is the country’s largest and most populous tribe with the Reservation the size roughly of West Virginia, testified why there must be an “opt in” provision. In arguing for the “opt in” position, the Navajo Nation summarized its opposition to the death penalty as follows:

The issue, for the Navajo Nation and the other Indian tribes, is not whether the death penalty is good or bad, but whether Indian tribes should have the right to determine for themselves the severity of the punishment for major crimes committed on their Reservations. It is incumbent upon

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the federal government to allow Indian tribes the choice of whether the death penalty should be extended to our territory.

Finally, the death penalty is counter to the cultural beliefs and traditions of the Navajo people who value life and place great emphasis on the restoration of harmony through restitution and individual attention. The vast majority of major crimes committed on the Navajo Nation and within other Indian Reservations are precipitated by the abuse of alcohol. The death penalty will not address the root of the problem; rather rehabilitation efforts will be more effective.\(^\text{16}\)

As of March 15, 2000, all the Indian tribes but one have declined to “opt in” for either capital punishment or “three strikes” under the 1994 Anti-Crime Bill. Thus, there is no death penalty for first degree murder under the Major Crimes Act.


\section*{20.10 SUGGESTED READING}

William Canby, \textit{American Indian Law} (1998 ed.)


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\(^{16}\) This view recently was reaffirmed in a letter from the Navajo Attorney General opposing the seeking of the death penalty against a Navajo. Letter from Herb Yazzie, Attorney General, Navajo Dept of Justice and Donovan D. Brown, Sr., Acting Chief Prosecutor, Navajo Dept of Justice, to John J. Kelley, U.S. Attorney, District of New Mexico (Oct. 23, 1998) (“The Navajo People overwhelmingly oppose the death penalty.”).
CHAPTER 21
PROBATION AND SUPERVISED RELEASE

by

Vincent J. Brunkow and Heather M. Angove

21.01 INTRODUCTION

“Do not let what you cannot do interfere with what you can do.” These words from the legendary basketball coach, John Wooden, describe how a defendant should approach post conviction supervision, and how defense counsel should approach defending his or her case. In nearly all cases there will be post conviction supervision of probation or supervised release. The court has the authority to severely restrict the liberty of those on supervision, but most aspects, including supervision itself, are actually left to the court’s discretion. Thus, defense counsel must have a sufficient knowledge of probation and supervised release to insure that it “involves no greater deprivation of liberty than is reasonably necessary.” 18 U.S.C. §3583(d)(2).

21.02 IMPOSITION, LENGTH, EARLY TERMINATION AND TOLLING

21.02.01 Supervised Release

A court must impose a term of supervised release following incarceration only where required by statute of conviction, or where the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. §3561(b). 18 U.S.C. §3583(a). In all other situations imposition of a term of supervised release is at the discretion of the court. Id. See also Johnson v. U.S., ___ U.S. ___, 120 S. Ct. 1795, 1805 (2000) (noting that, “[s]upervised release departed from the parole system it replaced by giving district courts the freedom to provide post-release supervision for those, and only those, who needed it.”). The Sentencing Guidelines, however, direct a court to impose a term of supervised release to follow a sentence of imprisonment of more than one year. U.S.S.G. §5D1.1(a) (1995). Nevertheless, the court may depart from this guideline where appropriate. See U.S.S.G. §5D1.1 n.1.

If a term of supervised release is not specifically required by statute, the court may impose a term of one, three or five years of supervised release, depending on the length of potential incarceration for the offense. 18 U.S.C. §3583(b). The term is determined by the classification of the offense under 18 U.S.C.
§3559. For a Class A or Class B felony a term of supervised release may not exceed five years; Class C or Class D felony may not exceed three years; and a Class E felony or a Class A Misdemeanor may not exceed one year. 18 U.S.C. §3583(b). See U.S. v. Guzman-Bruno, 27 F.3d 420, 423 (9th Cir. 1994) (plain error to sentence defendant to five years supervised release which exceeded statutory maximum of three years for a Class C felony pursuant to 18 U.S.C. §3583(b)(2)). The Juvenile Delinquency Act does not authorize a term of supervised release for an adjudicated juvenile in addition to a term of official detention. See U.S. v. Doe, 53 F.3d 1081, 1083 (9th Cir. 1995).


Most circuits have recognized that a court may include a term of supervised release even when imposing the statutory maximum term of imprisonment. See U.S. v. Jenkins, 42 F.3d 1370, 1371 (11th Cir. 1995); U.S. v. Watkins, 14 F.3d 414, 415 (8th Cir. 1994); U.S. v. Jamison, 934 F.2d 371, 373 (D.C. Cir. 1991); U.S. v. Montenegro-Rojo, 908 F.2d 425, 433-34 (9th Cir. 1990); U.S. v. Butler, 895 F.2d 1016, 1017-18 (5th Cir. 1989). The court may not order consecutive terms of supervised release on multiple counts, however, even when the terms of imprisonment for the underlying crimes must be imposed consecutively. U.S.S.G. §5G1.2 commentary.

In the interest of justice and based on the conduct of the defendant, early termination of a term of supervised release may be justified. The defendant may request termination of supervised release any time after serving one year of supervision. 18 U.S.C. §3583(e)(1). The court should consider the same factors for imposing sentence under 18 U.S.C. §3553(a) in determining whether to grant an early termination of supervised release.

Where a defendant is deported or excluded from the United States, a court may not order that upon release from prison, the period of supervised release be tolled until the defendant reenters the United States. See U.S. v. Juan-Manuel, 222 F.3d 480 (8th Cir. 2000); U.S. v. Balogun, 146 F.3d 141 (2d Cir. 1998). In Balogun, the defendant, pursuant to a plea agreement, agreed to be deported after completing his prison term. Id. at 142. The district court ordered that the supervised release be tolled upon his exclusion and resumed upon his legal reentry into the United States if reentry occurred before March 18, 2017. Id. The Second Circuit reversed and held that Congress did not grant the district court
the authority to toll the term of supervised release under these circumstances. *Id.* at 147. **But see** *U.S. v. Isong*, 111 F.3d 41 (6th Cir. 1997) (sentencing court has discretionary authority to suspend supervised release upon deportation).

The period of supervised release is not tolled where the client is in pre-trial detention on another case. *See U.S. v. Morales-Alejo*, 193 F.3d 1102, 1105-06 (9th Cir. 1999) (pre-trial detention does not constitute "imprisonment" within the meaning of 18 U.S.C. §3624(e) and does not operate to toll a term of supervised release.)

### 21.02.02 Probation

A defendant may receive a sentence of probation unless convicted of a Class A or B felony; prohibited by statute of conviction; or the defendant is sentenced at the same time to imprisonment. 18 U.S.C. §3561(a). A court’s authority to impose probation is based solely on statute. *See Affronti v. U.S.*, 350 U.S. 79, 83 (1955). The authorized length of probation for a felony is between one and five years; for a misdemeanor, not more than five years; for an infraction not more than one year. 18 U.S.C. §3561(c). The Guidelines permit a court to impose a sentence of probation if the sentencing range falls in a Zone A or B of the Sentencing Table. U.S.S.G. §5B1.1(a). If in Zone B, the court must impose a condition of intermittent confinement, community confinement, or home detention. U.S.S.G. §5B1.1(a)(2). Where the applicable guideline range is in Zone C or D, a sentence of probation is not authorized, by the Guidelines, and the court must impose a custodial sentence. U.S.S.G. §§5C1.1(d), 5C1.1(f). Probation is authorized for juveniles as one of the sentencing alternatives under the Juvenile Delinquency Act. *See* 18 U.S.C. §5037(a); *U.S. v. Doe*, 53 F.3d 1081, 1083 (9th Cir. 1995).

Multiple terms of probation run concurrently with each other, regardless of whether the terms were imposed together or at different times. 18 U.S.C. §3564(b). A term of probation runs concurrently with any other federal, state, or local term of probation, supervised release, or parole for another offense which the defendant is currently serving or begins serving during the term of probation. *Id.* A term of probation does not run while the defendant is in custody for any conviction of a federal, state, or local crime unless the custodial period is less than 30 consecutive days. *Id.*

The defendant may request early termination of probation. In the case of a misdemeanor or an infraction, the term of probation may be terminated and the defendant relieved of his sentence at any time. For a felony conviction probation may be terminated at any time after one year. 18 U.S.C. §3564(c). Early termination of probation must be warranted by the conduct of the defendant and in the interest of justice. *Id.* The court may also extend a term of probation at any time prior to the expiration or termination of probation after a hearing. 18 U.S.C. §3564(d). An extension of probation is authorized if less than the maximum authorized term was previously imposed pursuant to the provisions applicable to the initial setting of probation. *Id.*

### 21.03 CONDITIONS OF SUPERVISED RELEASE AND PROBATION
When imposing sentence the court will set conditions of supervised release or probation. Conditions for supervised release and probation must reasonably relate to the factors used to impose sentence. See 18 U.S.C. §3553(a). A court may only impose conditions to the extent that such conditions involve no greater deprivation of liberty and property than reasonably necessary. 18 U.S.C. §§3563(b), 3583(d). Defense counsel’s goal is to achieve the least restrictive conditions possible for the defendant. More extensive conditions increase the possibility that the defendant will encounter revocation proceedings in the future.

21.03.01 Mandatory Conditions

Some conditions of supervised release and probation are mandatory. The court must order that the defendant not commit another federal, state, or local crime during the term of supervision; not unlawfully possess a controlled substance; not use illegal controlled substances; and submit to a drug test within 15 days of release on the term of supervised release and at least two additional drug tests thereafter. 18 U.S.C. §3583(d). Under 18 U.S.C. §3583(d), the court must determine the number of drug tests that the defendant must submit to and thus the court may not delegate that responsibility to the probation officer. See U.S. v. Bonanno, 146 F.3d 502, 511 (7th Cir. 1998). But see U.S. v. Smith, 45 F. Supp. 2d 914, 918 (M.D. Ala. 1999) (§3583(d) does not prevent probation officers from administering drug tests). The court has the authority to waive the drug testing condition where the court finds that reliable sentencing information shows a low risk of future substance abuse by the defendant. 18 U.S.C. §§3563(a)(5), 3583(d). For a first time domestic violence conviction, the defendant is also required to attend a court-approved rehabilitation program if it is geographically available to the defendant. 18 U.S.C. §§3563(a)(4), 3583(d).

A defendant sentenced to probation must also be ordered to make restitution, pay an assessment, and notify the court of any material change in economic circumstances that might affect the defendant’s ability to pay restitution, fines, or assessments. 18 U.S.C. §3563(a)(6)-(7). For a felony conviction, the court must further order that the defendant either make restitution to the victim of the offense, give notice to the victims of the offense ordered pursuant to 18 U.S.C. §3555, reside in a specified location, or refrain from residing in a specified location, unless the court finds this would be unreasonable due to extraordinary circumstances. 18 U.S.C. §3563(a)(2). Any conviction for a sex offense described in 18 U.S.C. §4042(c)(4), requires the defendant to report the address where they reside and any subsequent change of residence, and that the person register in any state where the person resides, is employed, carries on a vocation, or is a student. 18 U.S.C. §§3563(a)(8), 3583(d). Supervision by the probation office is not a mandatory requirement of either probation or supervised release.

21.03.02 Discretionary Conditions

In addition to the mandatory conditions, courts normally impose standard conditions of supervised release and probation. These discretionary conditions are set forth in 18 U.S.C. §§3563(b), 3583(d). Generally, the sentencing court’s authority to impose discretionary conditions is the same for both probation and supervised release. The court may only impose non-mandatory conditions which reasonably relate to the factors considered in imposing sentence and to the extent that such conditions involve only such
deprivations of the defendant’s liberty and property reasonably necessary for the purposes of imposing probation or supervised release. 18 U.S.C. §§3563(b), 3583(d).

One important difference between probation and supervised release, however, is that the probation statute authorizes the imposition of discretionary conditions that are reasonably related to 18 U.S.C. §3553(a)(2)(A), while the supervised release statute does not. Compare 18 U.S.C.§3563(b) with 18 U.S.C. §3583(d)(1). Section 3553(a)(2)(A) states: “The court in determining the particular sentence to be imposed shall consider . . . the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” (emphasis added). Thus, a court may impose a condition of probation for the purpose of punishing the defendant, while it cannot for a condition of supervised release.

Counsel should object to any condition not related to the goals of supervised release or probation. Even common conditions such as prohibiting an offender from possessing a firearm have been successfully challenged. See U.S. v. Voda, 994 F.2d 149 (5th Cir. 1993). In Voda, the appellate court found an abuse of discretion where the district court imposed a probation condition prohibiting possession of a firearm on an offender convicted of negligent discharge of a pollutant. Id. at 154. The Fifth Circuit noted the defendant’s nonviolent misdemeanor conviction had no connection with the use or possession of a firearm or dangerous weapon. Id. at 153. The defendant had no history of violence, and nothing in the presentence report indicated any tendency toward violence. Concluding that Voda’s past behavior did not indicate that possession of a firearm would make him dangerous, the court held “there is no need to impose this condition to protect the public from future crimes by Voda.” Id. at 153-54. See also U.S. v. Bass, 121 F.3d 1218, 1223 (8th Cir. 1997) (holding that the district court abused its discretion by imposing a condition of probation requiring submission to warrantless search for alcohol where there was no evidence that the defendant abused alcohol or that use of alcohol played a role in his offense); U.S. v. Prendergast, 979 F.2d 1289, 1293 (8th Cir. 1992) (holding that condition that individual convicted of wire fraud not possess alcohol inappropriate since no evidence showed person used alcohol); and U.S. v. Stafford, 983 F.2d 25, 28-29 (5th Cir. 1993) (holding that condition that tax evader give probation officer access to any financial information and fully cooperate with IRS was too broad because it interfered with the individual’s ability to question tax liability); U.S. v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) (holding that special condition of supervised release that defendant not father any more children was not reasonably related to the sentencing factors).

When a defendant agrees to conditions he or she has effectively waived any future argument that the conditions are unconstitutional or violate statutory authority. See U.S. v. Janko, 865 F.2d 1246, 1247 (11th Cir. 1989) (condition of probation is not unconstitutional where it resulted from a negotiated plea agreement and was requested by the defense as an appropriate sentence).

Unfortunately, many intrusive conditions have been upheld even without the defendant’s consent. The following sections discuss case law dealing with common discretionary conditions of supervised release and probation.

21.03.02.01 Freedom of Speech
Conflicts often arise between an offender’s First Amendment rights and the discretionary conditions a court imposes on probation or supervised release. For that reason, restrictions on freedom of speech must be designed to rehabilitate the defendant and to protect the public. *U.S. v. Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990).

Conditions prohibiting general discussion of lawful topics are likely to be found unreasonable. For example, a probation condition banning expression of opinion as to the validity or constitutionality of tax laws was held invalid. *Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971). The Ninth Circuit, in dicta, also indicated that “it is unlikely that probation can be conditioned on the probationer refraining from communicating his views on the probation system or receiving and reading certain periodicals which are otherwise lawfully available.” *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975). However, the Ninth Circuit found no First Amendment infringement in a condition of supervised release prohibiting the defendant from possessing sexually stimulating material where defendant pled guilty to two counts of abusive sexual contact in violation of 18 U.S.C. §§1153, 2244(a)(1), and 2246. *U.S. v. Bee Jr.*, 162 F.3d 1232, 1234-35 (9th Cir.), cert. denied, 119 S. Ct. 1509 (1998).

Courts have the authority, however, to prohibit advocating the violation of laws. The court in *Porth* also noted that a condition prohibiting “public speeches designed to urge or encourage others to violate the laws” is valid. *Porth*, 453 F.2d at 334. Courts have upheld conditions restricting freedom of speech in a variety of other circumstances. See *U.S. v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) (holding that probationer convicted of embezzlement and conversion received condition that she “not receive any financial renumeration or any other thing of value from any speaking engagements, written publications, movies, or any other media coverage dealing with her involvement in th[e] offense”); *Peete*, 919 F.2d at 1181 (6th Cir. 1990) (Hobb’s Act offender was prohibited from participating in public service while on probation); *U.S. v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) (abortion clinic protester was sentenced to a term of probation on the condition that, *inter alia*, she not “harass, intimidate or picket in front of any gynecological or abortion family planning services center”).

**21.03.02.02 Association Conditions**

Courts have upheld conditions prohibiting association when the restriction involves association with people directly involved in the offense or people that could involve the defendant in future criminal activity. See *U.S. v. Hughes*, 964 F.2d 536,542 (6th Cir. 1992) (finding valid a condition prohibiting union official convicted of violating Internal Revenue Code and false statement statutes from participating as an authority figure in union-financed political action committees); *U.S. v. Showalter*, 933 F.2d 573, 575-76 (7th Cir. 1991) (finding valid a condition that offender convicted of possessing unregistered firearm be prohibited from associating with neo-Nazis and skinheads, or other groups embracing violence or the threat of violence.); *U.S. v. Schiff*, 876 F.2d 272, 276-71 (2d Cir. 1989) (finding valid a condition that tax protestor disassociate himself from any organization, including one named organization, that advocated tax evasion); *U.S. v. Lawson*, 670 F.2d 923, 929-30 (10th Cir. 1982) (same); *Malone v. U.S.*, 502 F.2d 554, 556-557 (9th Cir. 1974) (finding valid a condition that prohibited illegal firearm exporter from associating with Irish liberation organizations).
In imposing association conditions, unfortunately, even very intrusive restrictions on association are upheld when necessary for supervision. In *U.S. v. Bortels*, 962 F.2d 558, 559 (6th Cir. 1992), the court upheld a condition prohibiting the offender from associating with her fiancé. The defendant had led police on a high-speed chase when she was informed that her fiancé, the passenger in the car, was going to be placed under arrest. *Id.* at 559. The appellate court found that the condition was reasonably related to rehabilitation and protection of the public. *Id.* at 560.

### 21.03.02.03 Notice to Third Parties

Courts have also upheld conditions requiring defendants to take affirmative steps to notify third parties of their name and of the crime of which they were convicted. As a condition of supervised release, a probation officer may direct a defendant to notify third parties "of risks that may be occasioned by the defendant's criminal record or personal history or characteristics . . . ." U.S.S.G. §5D1.3(c)(13). In *U.S. v. Coenen*, 135 F.3d 938 (5th Cir. 1998), the Fifth Circuit held valid a condition of supervised release that requires a defendant convicted of transmitting child pornography to give notice of his crime to law enforcement officials, neighbors, and school officials is appropriate. Because of the nature of the offense and the social worker's report concerning the defendant, "the district court did not abuse its broad discretion in finding that children might be at risk, and that, therefore, community notification is necessary to protect them from such risks." *Id.* at 946.

### 21.03.02.04 Restrictions on Visiting Certain Locations or Travel

Courts frequently impose a condition that an offender reside in a specific place or area or refrain from residing in a specified area. 18 U.S.C. §3563(14). In *Malone v. U.S.*, 502 F.2d 554, 557 (9th Cir. 1974), the court upheld a condition prohibiting the offender, who had been convicted of unlawful exportation of firearms, from frequenting Irish pubs. *Id.* at 556. The crime was based on the offender's sympathy to the Irish independence movement. The Ninth Circuit also upheld a condition that prevented an offender convicted of unlawful entry into a military installation from being located within 250 feet from the installation. *U.S. v. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981). *See also U.S. v. Bee, Jr.* 162 F.3d 1232 (9th Cir.) (upholding condition prohibiting offender convicted of engaging in abusive sexual contact with a child under 12 from possessing sexually stimulating materials and prohibiting him from frequenting any place where such material or entertainment is available), *cert. denied*, 119 S. Ct. 1509 (1998).

Conditions that a defendant be banished (and thus effectively deported) and that he serve his probation term outside the United States have been struck down. *See U.S. v. Abushaar*, 761 F.2d 954, 960 (3d Cir. 1985). In *Abushar*, the Third Circuit held that the district court abused its discretion when it imposed the condition that the defendant be deported because that authority lies outside the sentencing judge's authority. *Id.* at 960. Although 18 U.S.C. §3583(d) permits a court to order deportation as a condition of supervised release and thus casts doubt on *Abushar*, the enactment of IIRIRA, 8 U.S.C. §1229a(a) in 1996 "eliminates any jurisdiction district courts enjoyed under §3583(d) to independently order deportation." *U.S. v. Romero*, 122 F.3d 941, 943 (11th Cir. 1997). *See also U.S. v. Hernandez*, 145 F.3d 1433, 1440 (11th Cir. 1998). Thus, under current law it seems district courts cannot independently order deportation as a condition of supervised release or probation.
A condition of probation that restricts travel based solely on flight-risk has also been struck down. See *U.S. v. Friedberg*, 78 F.3d 94 (2d Cir. 1996), *appeal after remand, U.S. v. Porotsky*, 105 F.3d 69 (2d Cir. 1997). In *Friedberg*, the Second Circuit held that the district judge's denial of defendant's request to travel to Russia for business purposes constituted abuse of discretion. *Id.* The Court reiterated that the twin aims of probation are the rehabilitation of the defendant and the protection of the public. *Id.* at 96. In this case, the district judge made no findings as to how the travel restriction is related to these two goals. A probation condition based on flight-risk alone is simply not sufficiently related to these two goals and thus such a condition is inappropriate. *Id.*
21.03.02.05 Searches

Often courts will impose as a condition of probation or supervised release that the defendant submit to search of person and/or property upon request. Although this seems highly intrusive, courts uphold this condition arguing that it is reasonably related to rehabilitation and public safety. Some courts, however, are careful to limit the condition to searches conducted by probation officers; and, for other law enforcement officials, they require either a warrant or a valid exception to the warrant requirement as authority for the search. See U.S. v. Ooley, 116 F.3d 370, 372 (9th Cir. 1997) (search must be “a true probation search and not an investigative search”). But see U.S. v. McCarty, 82 F.3d 943, 947-48 (10th Cir. 1996) (probation officer cannot act as “stalking horse” for the police, yet police officers may act as agents of probation officer and conduct a warrantless search if accompanied by a probation officer).

Defendants have successfully challenged search conditions on the grounds that there was no reasonable relationship to the condition and the underlying crime. In U.S. v. Consuelo-Gonzalez, 521 F.2d 259, 261 (9th Cir. 1975), the Ninth Circuit reversed the defendant’s conviction based on a warrantless search of her premises. The search was conducted pursuant to the probation order and the court held that the condition in that case did not comport with the “purposes intended to be served by the Federal Probation Act.” Id. at 262. The court went on to note that such a condition could have been imposed but that it had to meet the reasonableness standards of the Fourth Amendment. Id. More recently, U.S. v. Stoural, 990 F.2d 372, 373 (8th Cir. 1993) struck down a similar condition on reasonableness grounds. See also U.S. v. Prendergast, 979 F.2d 1289, 1293 (8th Cir. 1992) (abuse of discretion for court to impose a search condition of supervised release not reasonably related to underlying offense).

21.03.02.06 Conditions of Employment

Restrictions on employment are authorized under 18 U.S.C. §3563(b)(5). This provision allows for conditions on an offender’s employment having a reasonably direct relationship to the conduct constituting the offense, and for limitations on the extent of the offender’s participation in a specified occupation. These conditions have been upheld in several circuits. See U.S. v. Brockway, 769 F.2d 263-64 (5th Cir. 1985) (upholding a condition prohibiting a former sheriff who brutalized a pretrial detainee from working in law enforcement); U.S. v. Alexander, 743 F.2d 472, 481 (7th Cir. 1984) (upholding a condition preventing a defendant who was convicted of fraud in connection with his scale business from maintaining any proprietary interest in a scale business); U.S. v. Villarin Gerena, 553 F.2d 723, 727 (1st Cir. 1977) (upholding condition requiring Puerto Rican police officer to resign from position where he was convicted of violating citizens rights under color of state law); Whaley v. U.S., 324 F.2d 356, 359 (9th Cir. 1963) (upholding imposition of probation condition prohibiting defendant, who had been found guilty of impersonating FBI agent while working in automobile and boat repossession business, from engaging in repossession business). But see U.S. v. Richmond, 550 F. Supp. 605, 609 (E.D.N.Y. 1982) (defendant’s resignation from Congress and withdrawal as a candidate for reelection were void in that they represented an unconstitutional interference by the executive with legislative branch of government and with the rights of the defendant's constituents and interfered with principle of separation of powers).
Any conditions on employment should be consistent with the Guidelines provision U.S.S.G. §5F1.5. The court may impose a condition of probation or supervised release prohibiting the defendant from participating in a specific occupation, or employment, or limiting the terms in which the defendant may do so, only if it is determined that: (1) a reasonably direct relationship existed between the defendant’s occupation, business or profession and the conduct relevant to the convicted offense; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is a reasonable basis to believe that the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted. U.S.S.G. §5F1.5(a). If the court imposes a condition of probation or supervised release restricting the defendant’s involvement in a particular occupation, the condition should only exist for the minimum time and to the minimum extent necessary to protect the public. U.S.S.G. §5F1.5(b). A restrictive condition that affects the offender’s employment should be challenged to show that pertinent reasons exist for the restriction only to the extent reasonably necessary to protect the public. See U.S. v. Doe, 79 F.3d 1309, 1319 (2d Cir. 1996); U.S. v. Cooper, 171 F.3d 582, 586 (8th Cir. 1999) (restriction on employment as a truck driver bears no relationship to defendant’s underlying offense).

The court may attempt to impose conditions requiring a defendant to notify potential clients of business-related offense. The Second Circuit has reversed an order requiring third party notification in U.S. v. Doe, 79 F.3d 1309 (2d Cir. 1996). In Doe, an accountant, who also happened to be an attorney, plead guilty to aiding and abetting the preparation of a false income tax return and received a sentence of probation. The district court required him to notify his clients of his conviction, which he feared would put him out of business. Id. at 1311-12. The Second Circuit noted that the sentencing court’s “discretion to impose occupational restrictions is not unfettered.” Id. at 1320. The court held the district court’s notification was improper on the record before it. Concluding that the notification condition was not reasonably necessary to protect the public, the matter was remanded for further fact finding. Id. at 1322-24.

21.03.02.07 Drug Testing

Defense counsel should challenge the drug testing condition requiring the offender to submit to drug testing where the underlying conviction is not related to drug use or where the defendant’s background shows a low risk of future substance abuse. In U.S. v. Stoural, 990 F.2d 372, 373 (8th Cir. 1993), the Eighth Circuit held that a person convicted of conversion of funds should not be required to submit to urine testing or warrantless searches because, based on his offense and lack of substance abuse history, it was an unreasonable condition. The Ninth Circuit in Portillo v. U.S., 15 F.3d 819, 823 (9th Cir. 1994), held that an order requiring the defendant submit a urine sample for presentence report was in error where the record did not show the offense of theft (under 18 U.S.C. §661) had any connection to drug use. Id. at 823. Although the defendant in Portillo was ordered to submit the urine sample for a presentence report, the court’s reasoning may be extended to conditions of probation or supervised release where the underlying offense has no reasonable correlation to drug use. But see U.S. v. Carter, 159 F.3d 397, 400-01 (9th Cir. 1999) (upholding conditions requiring drug testing, outpatient drug treatment, abstention from alcohol and from abuse of prescription medicine where the defendant had a history of suicide attempt by prescription drug overdose but where the defendant was convicted of a crime unrelated to drugs. Id. at 401.
21.03.02.08 Payment of Attorney Fees and Court Costs

The circuits are split as to whether the condition of repayment of attorneys fees and CJA is proper. See U.S. v. Evans, 155 F.3d 245 (3d Cir. 1998) (conditioning defendant's supervised release on reimbursement of counsel fees is not related to any of the statutory goals); U.S. v. Lorenzini, 71 F.3d 1489, 1493 (9th Cir. 1995) (repayment of attorney's fees is not a valid condition of probation, because “condition is not reasonably necessary to any legitimate sentencing objective”); U.S. v. Turner, 628 F.2d 461, 467 (5th Cir. 1980) (holding that condition to repay court-appointed counsel fees not permitted because it is not an explicit condition set forth in probation statute). But see U.S. v. Merric, 166 F.3d 406 (1st Cir. 1999) (repayment of attorney's fees as a condition of supervised release is appropriate); U.S. v. Santarpio, 560 F.2d 448, 455 (1st Cir. 1977) (holding that such a condition “might be thought to bear a reasonable relationship to the treatment of the accused and the protection of the public” in cases where the defendant is able to pay the fees) [internal quotation marks omitted]; U.S. v. Gurtunca, 836 F.2d 283, 287-88 (7th Cir. 1987) (noting that sentencing judge has exceptional degree of flexibility in determining probation conditions). Note, however, that the Ninth Circuit has suggests that the validity of a condition requiring payment of attorneys fees and CJA costs may depend on whether supervised release or probation is involved. See U.S. v. Eyler, 67 F.3d 1386, 1394 (9th Cir. 1995). In Eyler, the Court noted that 18 U.S.C. §3553(a)(2)(A), governing conditions on probation, is much more punitive in nature than provisions governing supervised release. Id. See also U.S.S.G. §5B1.4 (identifying possible discretionary conditions of supervised release and not including repayment of CJA funds or attorney’s fees among them).

21.04 MODIFYING CONDITIONS

Courts have the authority to modify the conditions of a term of probation or supervised release pursuant to 18 U.S.C. §3563(c) and 18 U.S.C. §3583(e). See U.S. v. Miller, 205 F.3d 1098 (9th Cir. 2000) (holding that district court may modify any portion of fine for which payment is an express condition of supervised release under 18 U.S.C. §3583(e)(2)). Before making a negative modification to the conditions of a term of probation or supervised release there must be a hearing and assistance of counsel. Fed. R. Crim. P. 32.1(b). Where a favorable modification is sought, no hearing is necessary as long as the government attorney has been notified and has had a reasonable time to object. By the express terms of the Rule, an extension of probation or supervised release is not favorable to the person on supervision. Id.

The rights granted to a probationer or supervised releasee in modifying conditions are subject to waiver. See U.S. v. Stocks, 104 F.3d 308, 312 (9th Cir. 1997); U.S. v. Jones, 957 F. Supp. 1088, 1092-93 (E.D. Ark. 1997). Any waiver of the Rule 32.1 procedural rights, however, must be knowing, intelligent, and voluntary. Id. In Stocks, the probationer appealed his probation revocation, stating his waiver of rights under Fed. R. Crim. P. 32.1(b) was defective because he was not given assistance of counsel to advise him whether the waiver was in his best interest. The court found nothing in the Constitution, statute, or rule which required the probationer to have counsel advise him regarding the waiver of his rights. Id. The court made specific findings that the probationer had previously agreed to modify the terms of his probation and knew of the ramifications. Further, the probation officer made no threats and
had no tools to compel the probationer’s consent. The Stocks courts’ assessment of the relationship between a probation and a probation officer is highly questionable and should be challenged.

It is important that the releasee receives clear notice as to his or her procedural rights before any modification in the conditions occurs. Where the government provides clear notice of modification and right to a hearing and assistance of counsel, due process does not require a separate hearing before a judge to determine whether the waiver was knowing and voluntary. See U.S. v. Chambliss, 766 F.2d 1520, 1521-22 (11th Cir. 1985). Thus, defense counsel should advise all defendants at sentencing that they should be consulted before agreeing to any modification of conditions of supervised release or probation.

21.05 REVOCATION PROCEEDINGS

21.05.01 Federal Rules of Criminal Procedure

Revocation of probation or supervised release is governed by Federal Rule of Criminal Procedure 32.1. When a person is being held in custody for an alleged violation of probation or supervised release, a prompt preliminary hearing is required to determine whether probable cause exists to detain the person for a revocation hearing. When in custody, the person must be given: (1) notice of the preliminary hearing and its purpose and of the alleged violation; (2) an opportunity to appear at the hearing and present evidence in the person’s own behalf; (3) 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 witnesses; and (4) notice of the person’s right to be represented by counsel. Fed. Rule Crim. P. 32.1(a)(1); see also Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973). If probable cause is found, the person shall be held for revocation hearing. If the government fails to establish probable cause the court must dismiss the proceeding. Fed. R. Crim. P. 32.1(a).

An individual is not entitled to a preliminary hearing if not taken into custody pending the revocation hearing. See Fed. R. Crim. P. 32.1 Advisory Committee Notes; U.S. v. Strada, 503 F.2d 1081 (8th Cir. 1974). Thus, a preliminary hearing is not required where the defendant appears voluntarily or is released on bond. A preliminary hearing is also not required if the probationer was in custody pursuant to a new charge. See Fed. R. Crim. P. 32.1 Advisory Committee Notes; Thomas v. U.S., 391 F. Supp. 202, 204 (W.D. Pa. 1975). The person may be released pending the revocation hearing. The burden is on the defense to show by clear and convincing evidence that the person will not flee or pose a danger to the community. 18 U.S.C. §3143; U.S. v. Loya, 23 F.3d 1529, 1531 (9th Cir. 1994).

When an individual is arrested in a district other than the district having jurisdiction, the procedures are set forth in Fed. R. Crim. P. 40(d). There are three basic scenarios for out of district arrests. First, jurisdiction may be transferred to the place of arrest to proceed according to Rule 32.1. Fed. R. Crim. P. 40(d)(1). Second, if the alleged violations occurred in the district of arrest, then the magistrate must conduct a preliminary hearing, and depending on a finding of probable cause, either hold the person to answer in the district court having jurisdiction, or dismiss the proceedings. Fed. R. Crim. P. 40(d)(2). Third, if the violations did not occur in the district of arrest, the magistrate cannot order the person to
appear in the district court with jurisdiction until after a finding that the individual before the court is the person named in the warrant. The magistrate must also be presented with certified copies of the judgment, the warrant, and the application for the warrant. Fed. R. Crim. P. 40(d)(3).

The Supreme Court has held there is no Constitutional requirement of counsel in revocation cases unless needed to promote the fundamental fairness of due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Such cases arise “where the probationer has not committed the alleged violation of the conditions upon which he is at liberty . . . or has claims that there are substantial reasons which justified or mitigated the violation and make revocation inappropriate.” *Id.* at 790. Under the Criminal Justice Act, however, a person has a right to appointed counsel whenever charged with a violation of probation or supervised release. 18 U.S.C. §3006A(a)(1)(C), and 18 U.S.C. §3006A(a)(1)(E).

### 21.05.02 Due Process Rights

Due process protections apply to revocation proceedings. Although revocation proceedings are not considered a stage of criminal prosecution, the Supreme Court has held that due process requires revocation proceedings be conducted according to principles of fundamental fairness. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Fundamental fairness requires that the probationer receive written notice of the alleged violations, disclosure of the evidence against him, opportunity to be heard in person and to present witnesses and written evidence, a neutral hearing body, and written statement by the fact finder as to evidence relied on and reasons for revocation. *Gagnon*, 411 U.S. at 786. *See also* Fed. R. Crim. P. 32.1(a)(2)(A)-(E). The supervisee is also entitled to an opportunity to prove that he or she did not violate the conditions of supervision, that there was a justifiable reason for violation of the conditions, or that revocation is not the appropriate remedy. *Morrissey*, 408 U.S. at 487. Further, the defendant must have an opportunity to refute or impeach the evidence against him or her in revocation proceedings in order to assure that only verified facts will be relied upon in finding a violation. *See U.S. v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993).

The accused is entitled to cross examine witnesses unless the court finds good cause exists for not allowing the confrontation. Fed. Rule. Crim. P. 32.1(a)(1)(C) and (2)(D); *Black v. Romano*, 471 U.S. 606, 612 (1985); *U.S. v. Martin*, 984 F.2d 308, 314 (9th Cir. 1993) (finding a violation of due process right of confrontation where district court refused to allow defendant to retest urine samples or refute evidence showing drug possession). Where courts deny right to confront witnesses, they must do so only after balancing the defendant’s due process rights against the explanation for why live testimony is impractical. *U.S. v. O’Meara*, 33 F.3d 20 (8th Cir. 1994) (remanding where district court did not engage in the required balancing before admitting hearsay evidence). *But see U.S. v. McCormick*, 54 F.3d 214, 220 (5th Cir. 1995) (admitting hearsay testimony of urinalysis tests); *U.S. v. Penn*, 721 F.2d 762, 766 (11th Cir. 1983) (same).

A defendant is entitled to a "written notice of the alleged violation" at his revocation hearing. Fed R. Crim. P. 32.1(a)(2)(A). In addition, when the revocation petition alleges a new crime and the "offense being charged is not evident from the condition of probation being violated, a defendant is entitled to receive notice of the specific statute he is charged with violating." *U.S. v. Havier*, 155 F.3d 1090, 1093
Notice of the specific statute provides the defendant with the fairest opportunity to identify the elements of the crime and present the strongest defense. *Id.*

After the revocation hearing, the defendant is entitled to a written statement of the reasons for the revocation. *See Gagnon v. Scarpelli,* 411 U.S. 778, 786 (1973); *U.S. v. Stephenson,* 928 F.2d 728, 733 (6th Cir. 1991) (requiring lower court to express in writing evidence it has relied on and reasons for revocation); *U.S. v. Smith,* 767 F.2d 521, 524 (8th Cir. 1985) (remanding for sentencing court to make written statement giving reasons why government revoked defendant’s probation). However, most courts have held that an oral statement on the record by the judge explaining the reasons for revocation satisfies due process. *See U.S. v. Daniel,* 209 F.3d 1091 (9th Cir. 2000) (oral findings on the record comport with due process); *U.S. v. Copeland,* 20 F.3d 412, 414 (11th Cir. 1994) (oral findings, if recorded or transcribed, can satisfy the requirements of due process when those findings create a record sufficiently complete to advise the parties and the reviewing court of the reasons for the revocation and the evidence relied upon); *U.S. v. Gilbert,* 990 F.2d 916 (6th Cir. 1993) (district judge’s oral recitation in support of revocation of supervised release, satisfied requirement that “written statement” be provided, insofar as hearing was transcribed verbatim); *U.S. v. Copley,* 978 F.2d 829, 831 (4th Cir. 1992) (transcribed oral finding can serve as a “written statement” for due process purposes when the transcript and record compiled before the trial judge enable the reviewing court to determine the basis of the trial court's decision); *U.S. v. Kindred,* 918 F.2d 485, 488 (5th Cir. 1990) (evidence presented at revocation hearing overwhelmingly showed violation of supervised release, no written statement was necessary); *U.S. v. Barth,* 899 F.2d 199, 201-02 (2d Cir. 1990); *U.S. v. Yancey,* 827 F.2d 83, 88 (7th Cir. 1987).

### 21.05.03 Jurisdiction

#### 21.05.03.01 Probation

The district court has jurisdiction to impose a term of probation, and modify, reduce, or enlarge probation conditions under 18 U.S.C. §§3561, 3563(c). A magistrate judge has the power to grant probation and to revoke, modify or reinstate the probation term of any person originally sentenced to probation by a magistrate judge under 18 U.S.C. §3401(d). A magistrate may not conduct probation revocation proceedings unless the following conditions have been met: (1) defendant’s probation was imposed for a misdemeanor; (2) the defendant consented to trial, judgment, and sentence by a magistrate judge; and (3) the defendant initially was sentenced by a magistrate judge.” *U.S. v. Colacurcio,* 84 F.3d 326, 329 (9th Cir. 1996). *But see U.S. v. Waters,* 158 F.3d 933, 938 (6th Cir. 1998) (magistrate judges may conduct final revocation hearings in felony cases also). The defendant’s consent is a crucial factor for providing magistrate jurisdiction. Even the district court’s independent review of the magistrate’s report or recommendation cannot correct the lack of jurisdiction over a probation revocation hearing where the defendant has not provided consent. *Colacurcio,* 84 F.3d at 329.

#### 21.05.03.02 Supervised Release

A district court has the authority to impose, modify, extend or revoke a term of supervised release under 18 U.S.C. §3583. A magistrate has jurisdiction to modify, revoke, or terminate a term of
supervised release of any person originally sentenced to supervised release by a magistrate judge. 18 U.S.C. §3401(h); U.S. v. Crane, 979 F.2d 687 (9th Cir. 1992) (holding that magistrate has jurisdiction to revoke supervised release term). The district court may authorize a magistrate judge to conduct a hearing to modify, revoke, or terminate a term of supervised release, including any evidentiary hearings, and submit proposed findings of fact and recommendations including a recommended disposition. 18 U.S.C. §3401(i). The defendant’s consent is still required under any supervised release proceedings under §3401(h) and (i). See U.S. v. Colacurcio, 84 F.3d 326, 332 (9th Cir. 1996). But see U.S. v. Waters, 158 F.3d 933, 938-39 (6th Cir. 1998) (rejecting the argument that consent is required in revocation of supervised release hearings).

21.05.03.03 Petition to Revoke

Another issue in jurisdiction with regards to the filing of a petition to revoke that counsel should note is the petition to revoke probation or supervised release, an Order to Show Cause. Most circuits have either expressly or implicitly allowed the probation officer to petition the district court for action. See U.S. v. Meija-Sanchez, 172 F.3d 1172 (9th Cir. 1999); U.S. v. Davis, 151 F.3d 1304 (10th Cir. 1998); U.S. v. Kindred, 918 F.2d 485, 487 (5th Cir. 1990) (same); U.S. v. Young, 756 F.2d 64 (8th Cir. 1985) (same); U.S. v. Schwartz, 881 F. Supp. 159, 161 (E.D. Pa. 1995), aff'd, 46 F.3d 1120 (3d Cir. 1994). One district court, however, has held that this practice of allowing the probation officer to petition the court for revocation of supervised release is not authorized by statute and constitutes an illegal practice of law. U.S. v. Jones, 957 F. Supp. 1088, 1091 (E.D. Ark. 1997). The court noted the plain language of 18 U.S.C. §3603(8)(B) and U.S.S.G. §7B1.2 provides for the probation officer to report violations of conditions of release, not petition the court for revocations. The court also noted as a matter of policy, the probation officer is to be an advocate for the probationer or releasee. In petitioning the court, the probation officer assumes the role of advocate for the government, which is clearly not the role of a probation officer. Id. at 1091.

21.05.03.04 Initiation

A term of probation begins on the day the sentence is imposed, unless otherwise ordered by the court. 18 U.S.C. §3564(a). Probation will run concurrently with other terms of probation, whether imposed at the same time or at different times. 18 U.S.C. §3564(b). A term of probation will not run where a probationer is in custody for over thirty consecutive days relating to a conviction of a federal, state, or local crime. 18 U.S.C. §3564(b).

Supervised release begins the day the prisoner is released from custody and is subject to the conditions of supervised release. U.S. v. Vallejo, 69 F.3d 992, 994-95 (9th Cir. 1995); 18 U.S.C. §3624(e). The term of supervised release runs concurrent to any federal, state, or local term of probation or supervised release or parole for another offense the person is subject to or becomes subject to during the term of supervised release. 18 U.S.C. §3624(e). The term of supervised release does not run while the releasee is in custody in relation to a federal, state, or local conviction unless the custody is for less than 30 consecutive days. 18 U.S.C. §3624(e). The Ninth Circuit has held that §3624(e) is interpreted to mean that a term of supervised release begins when the defendant first becomes subject in fact to the
conditions of supervised release. *U.S. v. Vallejo*, 69 F.3d 992, 994-95 (9th Cir. 1995). In *Vallejo*, the defendant’s supervised release was revoked, due to a state felony conviction, and he was sentenced to a one year prison term. He argued that his term of supervised release began the day he was actually released on bail for retrial on remand after 17 months for the reversed conviction. The court held that 18 U.S.C. §3624(e) is not ambiguous. The defendant was not subject to the conditions of supervised release while on bond. Thus, the time did not meet the goals under the supervised release statute. *Id.* at 994. *See also U.S. v. Crane*, 979 F.2d 687, 691 (9th Cir. 1992) (fugitive status and state custody toll running of supervised release); *U.S. v. Johnson*, __U.S.__, 120 S. Ct. 1114, 1118 (2000) (supervised release does not begin until individual is released from prison, even if individual has served excess time in prison).

### 21.05.03.05 Termination

The court’s jurisdiction over violations of probation or supervised release is extended beyond the term of probation or supervised release where a warrant or summons has issued for an alleged violation before the actual term has ended. 18 U.S.C. §§3565(c), 3583(I). Delayed revocation is authorized for any period reasonably necessary beyond the term of probation or supervised release for the adjudication of such matters as long as a warrant or summons was issued prior to expiration of the term. 18 U.S.C. §§3565(c), 3583(I). The statute as well as the case law interpreting it suggest that if no warrant or summons is issued the court loses jurisdiction over the probationer or releasee. *See U.S. v. Schmidt*, 99 F.3d 315 (9th Cir. 1996) (holding that court retained jurisdiction after probation term expired because it issued summons one year earlier). Thus, conduct constituting a violation does not extend jurisdiction unless a warrant or summons is issued before the expiration of supervision.

The mere issuance of a warrant, however, does not indefinitely extend the sentencing court’s jurisdiction over a probationer. *U.S. v. Hill*, 719 F.2d 1402 (9th Cir. 1983). In *Hill* the warrant was not executed for more than two and a half years. Because the government could not provide any justification for their failure to execute the warrant, the delay was held to be unreasonable. The court declared, “if we adopted the government’s position a warrant issued *ex parte* could be held against an unknowing probationer indefinitely, and executed at any time for reasons unrelated to the original violation.” *Id.* at 1405. *See also U.S. v. Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983); *U.S. v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979); *Greene v. Michigan Department of Corrections*, 315 F.2d 546, 547 (6th Cir. 1963).

### 21.05.03.06 Discovery

At the revocation hearing, the defendant is entitled to written notice of the alleged violation and disclosure of all the evidence against him. Fed. R. Crim. P. 32.1(a)(2)(A) and (B). Upon request of either party, the court must order the production of witness statements as defined in Federal Rule of Criminal Procedure 26.2. Fed. R. Crim. P. 32.1(c)(1). If the party does not comply with the order, the court may not consider the testimony of the witness. Fed. R. Crim. P. 32.1(c)(2).

### 21.05.03.07 Rules of Evidence
The Federal Rules of Evidence generally do not apply in revocation proceedings for probation or supervised release. Federal Rule of Evidence 1101(d)(3) states that the rules of evidence do not apply in proceedings granting or revoking probation. The Eleventh Circuit and Ninth Circuit have extended this rule to supervised release revocation proceedings. *U.S. v. Frazier*, 26 F.3d 110, 113-14 (11th Cir. 1994) (noting that Congress equated supervised release revocation with probation revocation based on the Federal Rules of Criminal Procedure, Rule 32.1 in particular); *U.S. v. Walker*, 117 F.3d 417 (9th Cir. 1997) (accepting the *Frazier* rationale holding that the Federal Rules of Evidence do not apply to supervised release revocation proceedings). See also *U.S. v. Stephenson*, 928 F.2d 728 (6th Cir. 1991) (court may consider hearsay in deciding whether to revoke supervised release if hearsay is proven to be reliable).

21.05.03.08 Hearsay and the Confrontation Clause

Hearsay may be admissible in a revocation proceeding. The admission of hearsay evidence, however, may violate the defendant’s right to confront adverse witnesses. Although the right of confrontation in a revocation proceeding is not as compelling as the right of an accused at trial, the government must demonstrate “good cause” to deny this right. *U.S. v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993). In determining whether to admit hearsay testimony the court must balance the defendant’s right to confront adverse witnesses with the government’s reasoning for denying it. *U.S. v. O’Meara*, 33 F.3d 20, 20-21 (8th Cir. 1994); *U.S. v. Zentgraf*, 20 F.3d 906, 909 (8th Cir. 1994). In balancing, the court should consider the importance of the evidence to the court’s finding, the defendant’s opportunity to refute evidence, the consequences of the court’s finding, the difficulty and expense of procuring witnesses, and the traditional indicia of reliability borne by the evidence. *Martin*, 984 F.2d at 311-12.

A court’s failure to weigh the releasee’s right to confrontation against the Government’s "good cause" for denying it is error. See *U.S. v. Comito*, 177 F.3d 1166 (9th Cir. 1999) (reversing lower court’s revocation of supervised release where the hearsay consisted of unsworn verbal allegations and the government failed to offer any evidence supporting the proffered reason for the declarant’s absence); *U.S. v. Reynolds*, 49 F.3d 423, 426 (8th Cir. 1995) (reversing lower court’s revocation of supervised release based on lower court’s failure to balance releasee’s “right to confrontation against the government’s asserted reason for not calling any complainant”); *U. S. v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) (holding that lower court’s failure to “weigh Frazier’s right of confrontation against the government’s reasons for not producing the witness” violated the his due process rights).

In *U.S. v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994), the Eighth Circuit addressed the question of what constitutes sufficient good cause for the government’s failure to produce a reliable adverse witness. In *Zentgraf*, the government called a police officer to testify to the collaborator’s confession in which he incriminated the releasee in a burglary during his term of supervised release. The Eighth Circuit held that the district court violated the releasee’s right to confront adverse witnesses because the lower court failed to engage in the required balancing, weighing the defendant’s Confrontation right against the government’s proffered good cause for denying cross-examination. Id. at 909. The court stated:
A prisoner-witness’ ‘preference’ not to testify, even though motivated by a concern about being labeled a snitch, does not make his live testimony undesirable or impractical, at least absent a satisfactory showing that testifying would place the prisoner-witness in danger of great bodily harm from which he could not adequately be protected by prison officials.

*Id.* at 910. *See also Reynolds*, 49 F.3d at 426 (reversing lower court’s revocation of supervised release based on lower court’s failure to balance releasee’s “right to confrontation against government’s reason for not calling any complainant”).

### 21.06 EXCLUSIONARY RULE

In *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 368 (1998), the Supreme Court held that the Exclusionary Rule does not apply in state parole revocation hearings. Prior to *Scott* several courts found the Exclusionary Rule applicable in federal probation or supervised release revocation proceedings. *See U.S. v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978) (holding that evidence obtained by unconstitutional search not admissible in probation revocation hearing); *U.S. v. Rea*, 678 F.2d 382, 388-90 (2d Cir. 1982) (holding that evidence was inadmissible at revocation hearing based on the officer’s unreasonable conduct); *U.S. v. Winsett*, 518 F.2d 51, 54 n.5 (9th Cir. 1975) (noting that “when the police at the moment of the search know that a suspect is a probationer, they may have a significant incentive to carry out an illegal search even though knowing that evidence would be inadmissible in any criminal proceeding . . . thus, in such circumstances, extension of the exclusionary rule to the probation revocation proceeding may be necessary to effectuate Fourth Amendment safeguards”). Post *Scott*, however, each Circuit to address the issue has held that the Exclusionary Rule does not apply in probation or supervised release revocation proceedings. *See U.S. v. Herbert*, 201 F.3d 1103, 1104 (9th Cir. 2000) (noting that *Scott* forecloses the exception created in *Winsett*); *U.S. v. Armstrong*, 187 F.3d 392, 394 (4th Cir. 1999) (*Workman* superseded by *Scott*).

### 21.07 SELF-INFRINGEMENT

During revocation proceedings an individual has a right to invoke the Fifth Amendment privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984), *reh’g denied*, 466 U.S. 945 (1984). The court may revoke supervision, however, if the invocation of rights interferes with the compliance of conditions of supervision. *See U.S. v. Ross*, 9 F.3d 1182 (7th Cir. 1993), *vacated on other grounds*, 511 U.S. 1124 (1994). In *Ross*, the Seventh Circuit upheld a revocation of supervised release where the offender refused to answer questions at a hearing per his Fifth Amendment rights. *Id.* at 1191. The court noted a distinction between a revocation based on a refusal to fulfill conditions, and a revocation based on the assertion of the Fifth Amendment privilege, which would not stand. *Id.* The court stated, “We cannot accept that he has an additional right to avoid express conditions upon which he was granted probation, or in this case, supervised release.” *See also U.S. v. Pierce*, 561 F.2d 735, 740 (9th Cir. 1977) (Fifth Amendment rights are waived if there is a refusal to invoke Fifth Amendment and a failure to give reason as to why there was no invocation).

### 21.08 FAIR WARNING
Due process requires that an individual receive fair warning that an activity is prohibited. *U.S. v. Tham*, 884 F.2d 1262, 1265 (9th Cir. 1989). A court may impute knowledge where the activity is a criminal act, but when the proscribed acts are not criminal, the individual must receive actual notice. *U.S. v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987). See also *U.S. v. Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983) (no notice of reporting requirements because prior probation officer did not enforce them). Defense counsel can use the fair warning requirement to defend against violations of conditions that do not clearly prohibit the alleged conduct.

21.09 BURDEN OF PROOF

To revoke probation the court must be reasonably satisfied that a probationer has violated the conditions of probation. See *U.S. v. Goad*, 44 F.3d 580, 585 (7th Cir. 1995); *U.S. v. Francischine*, 512 F.2d 827, 829 (5th Cir. 1975) (noting that evidence that would meet standard of guilt beyond a reasonable doubt need not be found for order revoking probation). The court may revoke a defendant’s supervised release only where a violation of a condition has been shown by a preponderance of the evidence. 18 U.S.C. §3583(e)(3); *U.S. v. Lomayaoma*, 86 F.3d 142, 146 (9th Cir. 1996); *U.S. v. Meeks*, 25 F.3d 1117, 1123 (2d Cir. 1994). The evidence relied upon to revoke a term of probation or supervised release must be reliable. See *U.S. v. Stephenson*, 928 F.2d 728 (6th Cir. 1991) (holding testimony of probation officer and defendant’s admission that “there was some pushing in there” was not reliable evidence to show an assault in hearing to revoke supervised release, and drinking a twelve pack of beer at home each weekend was not sufficient evidence to revoke supervised release for excessive use of alcohol); *Taylor v. U.S. Parole Comm’n*, 734 F.2d 1152, 1155-56 (6th Cir. 1984) (holding that testimony of probation officer summarizing an arrest report did not meet the preponderance of the evidence standard).

21.10 REVOCATION

A finding that a violation has occurred is only the first step in the revocation process. The court must still decide whether the violation warrants revocation. *U.S. v. Gallo*, 20 F.3d 7, 13 (1st Cir. 1994) (citing *Black v. Romano*, 471 U.S. 606, 611 (1985)). Even someone who admits a violation must be given “an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation.” *U.S. v. Holland*, 850 F.2d 1048, 1051 (5th Cir. 1988). Before revoking supervision the court should consider the probationer’s effort to comply with the terms of supervision and all mitigating circumstances which would excuse the conduct. *U.S. v. Holland*, 874 F.2d 1470, 1473 (11th Cir. 1989). Whenever possible counsel should offer alternatives to incarceration that deal with the violation conduct, such as drug treatment programs for someone who tests positive for drugs. Knowing the available programs in the district, and working with the probation officer can save the client from incarceration.

Revocation of probation or supervised release is mandatory when the person possesses a controlled substance, possesses a firearm in violation of law, or refuses to comply with a drug testing condition. See 18 U.S.C. §§3565(b), 3583(g). Mandatory probation revocation for one of the above reasons provides that the court shall revoke the sentence of probation and resentence the defendant to a term of imprisonment. 18 U.S.C. §3565(b). For supervised release the court will revoke the term of supervised release and sentence the defendant to serve a term of imprisonment not to exceed the maximum
term of imprisonment authorized by statute. 18 U.S.C. §§3583(g), (e). The Guidelines also state, in a policy statement, that the court is to revoke supervision when the individual commits a Class A or B felony. U.S.S.G. §7B1.3.

There is considerable debate whether a positive urinalysis for drug use is evidence of possession of drugs for purposes of mandatory revocation of probation and supervised release. The 1994 Crime Bill does not address this issue. However, at least one circuit has found that testing positive for drugs is not a basis for mandatory revocation. U.S. v. Wright, 92 F.3d 502 (7th Cir. 1996). But see U.S. v. Baclaan, 948 F.2d 628, 630 (9th Cir. 1991) (holding that drug use both prior to and after release constituted possession for §3583(g) purposes).

21.11 SENTENCING

21.11.01 Guidelines

If the court finds a violation of supervised release or probation it is required to consider Chapter Seven of the Sentencing Guidelines before imposing sentence. U.S. v. Forrester, 19 F.3d 482 (9th Cir. 1994). The Sentencing Commission, through policy statements, has created a Revocation Table to “provide guidance” on the appropriate sentencing range for revocations. See U.S.S.G. Ch 7 pt. A1. and §7B1.4(a). While consideration of Chapter Seven is mandatory, most Circuits have found that they are not binding on the court. See U.S. v. Hurst, 78 F.3d 482, 484 (10th Cir. 1996); U.S. v. Davis, 53 F.3d 638, 640-41 n.6 (4th Cir. 1995); U.S. v. Hill, 48 F.3d 228, 231-32 (7th Cir. 1995); U.S. v. Milano, 32 F.3d 1499, 1502-03 (11th Cir. 1994); U.S. v. Mathena, 23 F.3d 87, 93 (5th Cir. 1994); U.S. v. Sparks, 19 F.3d 1099, 1101 n. 3 (6th Cir. 1994); U.S. v. Anderson, 15 F.3d 278, 283-84 n.6 (2d Cir. 1994); U.S. v. O’Neil, 11 F.3d 292, 302  n.11 (1st Cir. 1993); U.S. v. Levi, 2 F.3d 842, 845 (8th Cir. 1993); U.S. v. Hooker, 993 F.2d 898, 900-01 (D.C. Cir. 1993).

The Sentencing Guidelines treat violations of supervised release and probation similarly. Depending on the date of offense, however, Chapter Seven may not apply to violations of probation. See infra section 21.11.03. To determine Chapter Seven Guideline sentence for a violation, first determine the classification of the violation. U.S.S.G. §7B1.1(a). Each type of violation is given a certain grade. Grade A violations are defined as any conduct punishable by more than one year in custody that is either a crime of violence, controlled substance offense, possession of a firearm or destructive device, or an offense punishable by more than 20 years. Grade B violations constitute any other conduct punishable by more than one year of imprisonment. Grade C violations are conduct punishable by one year or less or any other violation of a condition of supervision. If there is more than one violation, the Guidelines direct the court to use the violation having the most serious grade. U.S.S.G. §7B1.1(b). Thus, the classification of the violation has direct consequences for the defendant. See U.S. v. Wright, 92 F.3d 502, 505-06 (7th Cir. 1996) (remanding where record does not support Grade A supervised release violation but rather a Grade C violation, remanded).

Under the guidelines not all violations must result in incarceration. While revocation is mandatory for a finding of a Grade A or B violation, the court may revoke, extend, or modify conditions of supervised
release or probation for a finding of a Grade C violation. U.S.S.G. §§7B1.3(a)(1) and (2). If custody is to be imposed, the range of imprisonment is determined by the grade of violation and criminal history category at time the person was sentenced to supervision. See U.S.S.G. §7B1.4. Upward or downward departures may be applicable. U.S.S.G. §7B1.4. See Commentary Application Notes 2, 3, and 4 Revocation Table. Where the sentence imposed exceeds the suggested sentencing guidelines, however, the judge must state the specific reasons for imposing a sentence different from the guidelines. U.S. v. Schmidt, 99 F.3d 315, 320 (9th Cir. 1996) (citing to 18 U.S.C. §3553(c)(2)).

21.11.02 Allocution

Generally, a defendant has a due process right to address the court before sentence is imposed. Federal Rule of Criminal Procedure 32(c)(3)(C) [formerly 32(a)(1)(C)] states that “[b]efore imposing sentence, the court must address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence.” The circuits are split, however, on whether a defendant has a right to allocution at a sentencing hearing after a revocation of probation or supervise release. See U.S. v. Carper, 24 F.3d 1157, 1162 (9th Cir. 1994).

The court in Carper held that the right of allocution applies to proceedings to impose a new sentence after probation or supervised release is revoked. Carper, 24 F.3d at 1162. Applying this rule, it concluded that it is not harmless error to deny a defendant’s right of allocution when a court imposes a sentence which, in its discretion could have been shorter. Id. See also U.S. v. Kaniss, 150 F.3d 967 (8th Cir. 1998) (defendant has the right of allocution but is not entitled to have the invitation to speak repeated); U.S. v. Anderson, 987 F.2d 251, 261 (5th Cir. 1993) (remanding where court denied right of allocution at probation revocation hearing).

The Sixth Circuit, however, holds that allocution is not required at a probation revocation hearing, although it is encouraged. See U.S. v. Coffey, 871 F.2d 39, 41 (6th Cir. 1989). The Sixth Circuit has also held that the right of allocution does exist in revocation of supervised release hearings because in such hearings a sentence is imposed for a new crime, while a sentence for a violation of probation is imposed for the original offense. See U.S. v. Waters, 158 F.3d 933, 943-44 (6th Cir. 1998). The Seventh Circuit distinguishes between cases where the imposition of the sentence is deferred and cases where the execution of the sentence is deferred. See U.S. v. Barnes, 948 F.2d 325, 329 (7th Cir. 1991). When the sentence is imposed but the execution is deferred, the punishment is predetermined and thus the defendant does not have the right of allocution a second time at a subsequent hearing to revoke probation. Id. By contrast, when the imposition of sentence is deferred, the defendant retains the right of allocution at a subsequent hearing because the sentence has yet to be imposed. Id. Thus, where a court suspends imposition of sentence without determining the sentence the defendant would receive should the defendant violate a condition of probation, the defendant retains the right to allocution at the subsequent probation revocation hearing. Id.

21.11.03 Revocation of Probation
The sentence upon a revocation of probation is dependent on the year in which probation was granted. Violations of probation are controlled by 18 U.S.C. §3565. Prior to September 13, 1994, the district court was required to “impose any other sentence that was available . . . at the time of the initial sentencing.” 18 U.S.C. §3565(a)(2) (1988). Based on this language many Circuits held that the district court was limited to the guideline range that applied to the original offense of conviction, and departures had to be based on facts present at the original sentencing. See U.S. v. Alli, 929 F.2d 995, 998 (4th Cir. 1991); U.S. v. White, 925 F.2d 284, 286-87 (9th Cir. 1991); U.S. v. Von Washington, 915 F.2d 390, 391-92 (8th Cir. 1990); U.S. v. Smith, 907 F.2d 133, 135 (11th Cir. 1990).

The Crime Bill of 1994 made amendments to allow courts to impose any appropriate sentence under subchapter A (18 U.S.C. §§3551-3559) by deleting the “at the time of initial sentencing” language. 18 U.S.C. §3565(a)(2) (1994). Thus, a reading of the current statutes state that a court shall consider Chapter Seven probation revocations. See 18 U.S.C. §3565(a) with 18 U.S.C. §3553(a)(4)(B) and 28 U.S.C. §994(a)(3). Despite the language contained in §3553(a)(4)(B), that “in the case of a violation of probation” the court shall consider the Sentencing Commission's guidelines or policy statements regarding violations of probation, some circuits still hold that the court may impose any sentence available at the original sentence. U.S. v. Iversen, 90 F.3d 1340, 1345 (8th Cir. 1996) (holding that district court required to consider Chapter Seven, but had discretion to impose any sentence within range of sentences available at time of initial sentencing); U.S. v. Plunkett, 94 F.3d 517, 519 (9th Cir. 1996) (holding that district court may rely upon either the initial guideline range or the Chapter Seven policy statements in sentencing a probation violation).

When dealing with a probation violation counsel should determine the guideline range of the original offense and also the Chapter Seven sentencing range. Obviously, counsel should argue for which ever produces the lowest sentence. If the individual was placed on probation prior to September 1994, and the range at the initial sentencing is lower, counsel should argue that the Ex Post Facto Clause prohibits a sentence greater than the high end of the initial guideline range. If the initial sentencing range is higher, counsel should argue that 18 U.S.C. §3553(a)(4)(B) specifically requires the court to consider the Chapter Seven policy statements. But see U.S. v. Schaefer, 120 F.3d 505 (4th Cir. 1997) (district court cannot apply the amended provisions of §3565(a)(2) to impose a sentence lower than previously allowed). If the individual was placed on probation after September 1994, and the range at the initial sentencing is lower, counsel can cite Plunkett to allow the court to use the initial sentencing range.

Upon revocation of probation, a court can sentence a defendant to a custodial term and in addition, to a term of supervised release. See U.S. v. Vasquez, 160 F.3d 1237 (9th Cir. 1998). Even though §3565 was amended in 1994, it continues to give the court discretion to sentence a probation violator to the range of sentences available at the time the offender was originally sentenced. Id. at 1239.

21.11.04 Revocation of Supervised Release

The most common revocation issue for supervised release centers around whether the district court can impose a new term of supervised release after imposing a custodial sentence. The 1994 Crime Bill added 18 U.S.C. § 3583(h) which expressly allowed a new term of supervised release after revocation.
Prior to 1994, a majority of circuits did not allow the imposition of another term of supervised release following incarceration. Recently, however, the Supreme Court held that district courts have the authority to order terms of supervised release following reimprisonment even in offenses committed prior to the addition of subsection h. *Johnson v. U.S.*, ___U.S.__, 120 S.Ct. 1795, 1807 (2000).

**21.11.05 Concurrent or Consecutive Sentences**

A court may order a revocation sentence to run concurrent to any other custodial sentence that the defendant is serving. 18 U.S.C. §3584(a) provides, in pertinent part, that “if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run consecutively or concurrently.” The guidelines, however, in policy statements, state that a revocation sentence is to be served consecutively to any other term of imprisonment imposed for any criminal conduct, whether or not the sentence of imprisonment is being served resulting from conduct that is the basis of the revocation. U.S.S.G. §7B1.3(f). Despite the language in the Guidelines, all circuits agree that the sentencing court has the discretion to order concurrent sentences. *See U.S. v. Schaefer*, 107 F.3d 1280, 1285 (7th Cir. 1997), *cert denied*, 522 U.S. 1052 (1998). Most circuits reconcile maintain that the Guidelines and the statute can be reconciled by allowing the sentencing court to impose concurrent sentences as a departure. *Schaefer*, 107 F.3d at 1285 n.7.

A court also has the discretion to impose consecutive terms of imprisonment following the revocation of concurrent sentences of supervised release. *See U.S. v. Jackson* 176 F.3d 1175 (9th Cir. 1999). *See also U.S. v. Quinones*, 136 F.3d 1293 (11th Cir. 1998); *U.S. v. Johnson*, 138 F.3d 115 (4th Cir. 1998); *U.S. v. Cotroneo*, 89 F.3d 510 (8th Cir. 1996). However, once a defendant is released from custody, his supervised release term must run concurrently to any other term of supervised release or probation. *See U.S. v. Hernandez-Guevara*, 162 F.3d 863, 877-78 (5th Cir. 1998) (holding that §3624(e) prohibits consecutive supervised release terms), *cert. denied*, 119 S. Ct. 1375 (1999); 18 U.S.C. § 3624(e).

**21.12 CONCLUSION**

This chapter has attempted to familiarize defense counsel with the statutes and case law regarding probation and supervised release. Awareness of these legal principles undoubtably will assist counsel in preventing or successfully defending the dreaded Order to Show Cause why supervision should not be revoked. Counsel should also remember that revocations can be avoided by encouraging communication and cooperation between the client and probation officer.
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THE BAIL REFORM ACT OF 1984

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