

# **CRIMINAL DEFENSE MANUAL**

**FEDERAL PUBLIC DEFENDER  
DISTRICT OF NEW JERSEY**

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FEDERAL PUBLIC DEFENDER**

**2010 EDITION**

## INTRODUCTION

This publication marks the 2010 Edition of the Criminal Defense Manual for the District of New Jersey, which is published and distributed by the Federal Public Defender Office, District of New Jersey. The manual is an adaptation and revision of an in-house project by the Federal Community Defender Office, Eastern District of Pennsylvania. That office graciously allowed us to use their manual as a basis for our project and, for that, we owe them particular thanks and enduring gratitude. The 2010 Edition replaces and revises the 2000 Edition.

The publication of the manual is part of the overall mission our Office has undertaken to provide support to the CJA Panel attorneys in this district. We offer it in conjunction with our other programs: CJA Mentor Program, Federal Defender Newsletter, periodic distribution of federal criminal defense materials, CJA attorney orientation, and various training programs.

Updating, revising, and producing the Criminal Defense Manual requires substantial effort and resources. Thanks are owed to Richard Coughlin, Federal Public Defender, who supervised the revision for the 2010 Edition, Julie McGrain, Esquire, Research and Writing Attorney in the District of New Jersey (Camden), and summer law clerks, Jennifer Abrams, Matthew Magliaro, and Emily Borden, for their tireless efforts in editing this manual.

We expect to maintain the quality of the manual by demonstrating the same commitment that led to its development. We are proud to provide the Criminal Defense Manual to all of our CJA colleagues and encourage you to offer any comments, suggestions, or criticisms so that future editions can be improved.

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## CHAPTER ONE

### INITIAL CONTACTS WITH THE FEDERAL SYSTEM

#### A. GRAND JURY TARGET LETTERS

Although most clients enter the federal criminal justice system as a result of having been charged in a complaint or an indictment, counsel may be appointed to represent an individual who has not yet been indicted, but has received a target letter indicating that he/she is either the "target" or subject of a grand jury investigation.<sup>1</sup> The U.S. Attorney's Office in the district where the grand jury investigation is being conducted sends a letter, which typically includes the charges under consideration and advises the recipient to contact an attorney or, if he/she cannot afford one, to contact the Federal Defender Office.<sup>2</sup> The assigned Assistant United States Attorney ("AUSA") signs the letter and includes his/her phone number.

#### B. CHARGING BY INFORMATION VERSUS BY INDICTMENT

Having counsel appointed at the pre-indictment level can be an advantage to the client. In the rare case, it may be possible to present enough evidence and/or equities to preclude an indictment. More often, however, if the client admits the behavior under investigation and knows the government has sufficient evidence, he/she may wish to offer to plead to certain charges in an information in order to bypass the traditional indictment. Rule 7 of the Federal Rules of Criminal Procedure governs waiver of an indictment:

**(b) Waiver of Indictment.** An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be

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<sup>1</sup> Target letters are not the same as grand jury subpoenas and, for the purposes of this discussion, persons who have received subpoenas to testify before the grand jury are assumed to be individuals who are not the subject of an investigation and thus not likely to be charged. See Chapter Three, supra, which deals with representing witnesses before the grand jury for further information.

<sup>2</sup> See Appendix - Target Letter

prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, **waives in open court prosecution by Indictment.**<sup>3</sup>

Proceeding by information rather than indictment can be helpful in several ways. Initially, it signals to the judge that the defendant has accepted responsibility and intended to enter a plea from the outset. More importantly, a carefully framed information can lessen or narrow the defendant's guideline exposure. For example, in a fraud case, an early plea agreement may achieve a limit on the loss amount by avoiding further government investigation or documentation.

**C. FED. R. CRIM. P. 3 (COMPLAINT) AND FED. R. CRIM. P. 4 (ARREST WARRANT OR SUMMONS UPON COMPLAINT)**

Typically, agents arrest individuals as a result of a complaint and an accompanying arrest warrant.<sup>4</sup> Alternatively, an individual may be arrested based on an indictment and warrant.<sup>5</sup> Shortly after an individual is arrested, he/she is brought before the duty magistrate judge for his/her initial appearance. Occasionally, the individual is served with a summons to appear for the initial appearance.

**D. CASES "ASSUMED" BY THE FEDERAL GOVERNMENT FROM THE STATE SYSTEM**

In select cases, the U.S. Attorney's Office assumes jurisdiction over a pending state case and prosecutes that case in federal court. Cases most often assumed by the federal government involve individuals with prior felony drug or firearm convictions who are charged in a case

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<sup>3</sup> See Appendix - Waiver of Indictment.

<sup>4</sup> See Appendix - Complaint and Arrest Warrant.

<sup>5</sup> See Appendix - Indictment.

involving drugs and/or guns. Because of their prior convictions, in all likelihood these individuals are exposed to more severe penalties in federal court than in the state system. Additionally, pursuant to the federal Bail Reform Act, 18 U.S.C. § 3141, pretrial detention is likely to be sought by the government and ordered by the court.

Generally, an agreement exists between the state and federal governments that the state case will be dismissed once the federal authorities arrest the person and bring him/her before a magistrate judge for an initial appearance. Counsel should not, however, presume that the state charges will be dismissed. Counsel for the defendant in the state case and/or the AUSA may have to become involved in order to persuade the state prosecutor to dismiss the charges.

Even if the state case has been dismissed, state court counsel should be contacted to determine whether the state prosecutor had provided discovery. Because state discovery rules are broader and more civilized than the federal rules, it may be possible to obtain more material, including police reports, and to learn more about the government's case from the state file than from the material provided by the AUSA.

#### **E. FED. R. CRIM. P. 5 – INITIAL APPEARANCE**

Initial appearances take place before the United States Magistrate Judge who is designated the "duty" magistrate judge.<sup>6</sup> In general, the Federal Public Defender Office is assigned to represent all individuals without counsel at the initial appearance since the need for appointed counsel is not determined before that time. When multiple individuals are arrested, the court may require the presence of CJA attorneys at the initial court appearance.

Although the CJA Plan for the district provides that counsel should be given the first

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<sup>6</sup> Magistrate judges are on duty for the week in Newark and for the month in Trenton and Camden.

opportunity to speak with the newly arrested defendant, as a practical matter, Pretrial Services will often interview the defendant prior to the initial appearance. If the interview is not completed, Pretrial Services will attempt to interview the defendant before his/her detention hearing. Pretrial Services Officers will not question a defendant about his/her charges.

Pretrial Services prepares a report, which includes the defendant's biographical information, work history, and criminal record. A copy is provided to the parties and to the court for use during the proceeding.<sup>7</sup> The report may not be retained by the parties without permission of the Pretrial Services Office or the court. Since this report is the first reliable source of the client's prior record, either take notes or ask permission to keep a copy of the entire report or, at least, the prior record portion of it.<sup>8</sup> Be aware that Pretrial Services will provide Probation with any information it receives, and thus any inconsistencies or discrepancies between Pretrial Services' information and Probation's information can adversely affect the defendant at sentencing. The defendant is not required to submit to an interview, so, if bail is not probable, there may be no reason to permit the interview.

At the initial appearance, the AUSA will inform the magistrate judge whether the government is moving to detain the defendant pretrial and, if the defendant is charged by complaint, may briefly state the probable cause for the arrest. (An indictment satisfies the finding of probable cause.) At the initial appearance, the judge may advise the defendant who his/her appointed counsel is, and will set a date for the next proceeding, which will be a preliminary hearing and/or a detention hearing. If the government is not moving to detain the defendant,

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<sup>7</sup> See Appendix - Pretrial Services Report.

<sup>8</sup> See Section L of this Chapter, supra, for a discussion concerning Pretrial Services.

counsel should attempt to negotiate conditions of release with the AUSA.

### **1. Appointment of Federal Counsel**

The magistrate judge is usually responsible for determining whether a defendant is eligible for appointed counsel. The standards and considerations in federal court are more flexible than in state court, and proof of “indigence” is not required. The standard for appointment is contained in 18 U.S.C. § 3006A, which directs that counsel should be appointed “for any person financially unable to obtain adequate representation.” The magistrate judge evaluates each defendant’s individual situation, and will consider the resources available as well as the nature and complexity of the charges. Every defendant who requests appointed counsel must complete a financial affidavit and swear under oath to the truthfulness of its contents.<sup>9</sup>

If it is determined that a defendant qualifies for the appointment of counsel and that the Federal Defender Office cannot be assigned, the magistrate judge will provide the defendant with the name and address of the attorney who has been appointed to represent him/her. The magistrate judge selects the CJA attorney from a list of approved panel attorneys maintained by the clerk’s office.

Some defendants may be ordered to reimburse the Administrative Office of the United States Courts for the cost of representation. This reimbursement does not affect compensation of appointed counsel. Counsel will receive payment from the CJA funds regardless of any reimbursement order.

### **F. PROCESSING**

At the time of arrest or initial appearance, the United States Marshals will fingerprint,

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<sup>9</sup> See Appendix - Financial Affidavit.

photograph, and obtain personal data from the defendant. Generally, this process occurs prior to the court appearance. If the defendant is not processed before the initial appearance, afterward, he/she will be taken to the Marshals' Office in the U.S. Courthouse for processing. Although counsel can accompany the defendant, counsel need not be present while the defendant is processed. Counsel will not be allowed in the cellblock area where the processing is done.

**Therefore, advise the defendant not to discuss or to volunteer any information concerning his/her case during processing at the Marshals' Office.**

**G. FED. R. CRIM. P. 28 – INTERPRETERS**

The U.S. Attorney's Office or the Clerk of the Court is responsible for ensuring that an interpreter is present at all court appearances for any client who requires these services. Often the same interpreter will provide services to several co-defendants. It is often possible, and desirable, to use the interpreter who is present for the court proceeding to interview the client later. These interpreters are generally very reliable, and it is far more convenient to conduct the interview at the courthouse rather than at some remote jail. Be aware that interpreters can be retained to help interview the defendant and to prepare the defense, thus avoiding confidentiality problems.

Although most court interpreters are professional and understand their role, **MAKE IT VERY CLEAR TO THE INTERPRETER THAT ANY AND ALL DISCUSSIONS WITH THE DEFENDANT ARE STRICTLY CONFIDENTIAL AND THAT HE/SHE IS NOT TO DISCUSS THESE CONVERSATIONS WITH ANYONE ELSE.**

An interpreter can be retained by filing an ex parte motion with the court requesting the necessary funds. If an interpreter is needed to assist in speaking with a client in custody, written confirmation must be made with the respective warden before arriving at the facility. Use of

other prisoners to translate conversations is never advisable and may very well constitute malpractice. Make the necessary arrangements to secure the services of an interpreter in advance to avoid any problems. If the defendant's primary language is one that is not frequently encountered, interpreting services, the foreign language departments of local universities, or the Federal Defender Office can be contacted to assist in finding competent interpreters.

#### **H. FED. R. CRIM. P. 5.1 – PROBABLE CAUSE HEARINGS**

Probable cause hearings rarely occur in the District of New Jersey. When probable cause hearings do occur, they are usually in conjunction with a detention hearing. Individuals arrested by complaint and warrant are entitled to probable cause hearings only if no indictment is returned before the applicable time limit expires, which is ten days if the defendant is in custody and twenty days if he/she is released on bail.<sup>10</sup>

When a felony arrest occurs before indictment, the AUSA will often request a three-day continuance of the detention hearing and use the time to obtain an indictment, rather than hold a probable cause hearing. This practice accomplishes, at least, two things for the government. First, in cases involving drugs or violence, the government is able to use the indictment as a substitute for testimony at the detention hearing.<sup>11</sup> In addition, because the return of the indictment eliminates the need for a probable cause hearing, defense counsel loses the opportunity to learn anything about the government's case.

Because hearsay is admissible at probable cause hearings, the government need not call the arresting officer or any witnesses to the incident. Instead, the government usually calls an agent

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<sup>10</sup> See Fed.R Crim.P. 5.

<sup>11</sup> See United States v. Suppa, 799 F.2d 115, 120 (3d Cir. 1986).

from the same "group" or squad as the arresting agent as a witness at these hearings. This practice avoids the possibility of creating inconsistent statements that might later be used against the government at trial. Be prepared for the prosecutor merely to call the agent to the stand and have him/her adopt the affidavit attached to the complaint and warrant, and then to ask no other questions. Insist on the right to cross-examine the agent as to the source of the information in the affidavit, the reliability of the source, the source's ability to observe, the source's motive, etc. The AUSA will object to cross-examination on the basis that the hearing is not intended to be a discovery proceeding, and most magistrate judges will likely allow very little latitude at the hearing. If useful information was revealed, the transcript from any hearing before a magistrate may be ordered by submitting a CJA Form 24.<sup>12</sup>

In the unlikely event that probable cause is not found, the magistrate judge will dismiss the case. The government may then either re-arrest the defendant or indict him/her. If probable cause is found, the government must obtain an indictment unless the defendant agrees to plead to an information and waives his right to an indictment.

The defendant may choose to waive the right to a probable cause hearing. Waivers frequently occur in cases where the defendant has cooperated prior to the appointment of counsel or when it is obvious at that stage that a negotiated plea is likely and that the client may benefit by pleading to an information. In addition, a waiver or consent to a continuance can be used as leverage to obtain discovery.<sup>13</sup>

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<sup>12</sup> See Appendix - CJA Form 24.

<sup>13</sup> See *id.*

## I. 18 U.S.C. §§ 3141 & 3143 – DETENTION HEARINGS<sup>14</sup>

Detention hearings are critical proceedings in the federal system, because if the defendant is detained, he/she will more than likely remain in custody until trial, curtailing his/her freedom and making it more difficult to prepare a defense. Detention hearings are held before the duty magistrate judge. They must be conducted within three days of the defendant's arrest on federal charges unless the defense requests a continuance. A continuance of up to five days from the time of arrest may be sought.

The government will invariably present its case for detention using proffered testimony. That is, the AUSA will outline the charges against the individual, the exposure the charges carry, and any and all other relevant information, including the strength of the government's evidence, the defendant's immigration status, the role, if any, of weapons, and the defendant's record. When a detention hearing is conducted at the same time as a probable cause hearing, an agent will be called to testify. Counsel can, however, object to the proffered testimony and insist on an opportunity to cross-examine the witnesses. To convince a judge that live testimony is required, counsel must demonstrate that a specific need for it exists, such as where the credibility of the person is a critical issue.<sup>15</sup>

The detention order must provide that the defendant be afforded a reasonable opportunity for private consultation with counsel.<sup>16</sup> Male defendants detained pending trial are currently held at the following facilities: Camden Vicinage - Federal Detention Center, 7<sup>th</sup> & Arch Streets, in

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<sup>14</sup> Suggested reading prior to a detention hearing: Federal Defenders of San Diego, Inc., Defending a Criminal Case, Volume 1, Chapter One (2010) [hereinafter, "Defending a Criminal Case"].

<sup>15</sup> See United States v. Delker, 757 F.2d 1390, 1396 (3d Cir. 1990).

<sup>16</sup> See Parker v. United States, 848 F.2d 61, 63 (5<sup>th</sup> Cir. 1988).

Philadelphia, PA; Camden County Correctional Facility, Camden, NJ; Salem County Jail, Salem, NJ; Trenton Vicinage - Monmouth County Correctional Facility, Freehold, NJ; Newark Vicinage - Passaic County Correctional Facility, Paterson, NJ; Hudson County Jail, Kearny, NJ, or Bergen County Jail, Hackensack, NJ.<sup>17</sup>

If the defendant is detained, 18 U.S.C. § 3142(f)(2) provides the opportunity to seek reconsideration:

The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other persons and the community.

Because the Rule refers to “bail fixed” by a magistrate judge, it is unclear whether a detention order is covered by this rule. Any bail order entered by a magistrate judge must first be reconsidered by a magistrate judge before the district court can review the matter.<sup>18</sup> The district court has de novo appellate review of detention decisions.<sup>19</sup> The emergency judge hears these appeals, unless the case has been assigned to a specific judge. The government also has the right to appeal an order of release.

### **1. Individuals Held On No Other Charges**

Detention is most often sought in cases where a defendant has a significant prior record

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<sup>17</sup> When locating a client, it is helpful to have his/her Marshals' number available for identification purposes. Pretrial detainees can be located with the help of the Marshals Office: (856) 757-5024 (Camden), (609) 989-2069 (Trenton), or (973) 645-2402 (Newark). Sentenced prisoners can be located via the Federal Bureau of Prison's Inmate Locator System, available at [www.bop.gov](http://www.bop.gov).

<sup>18</sup> See Local Criminal Rule 46.1(b)(2).

<sup>19</sup> See 18 U.S.C. § 3145.

and is charged with drug and/or firearms offenses, or where he/she poses "risk of flight" and/or a danger to the community.<sup>20</sup> Thus, be prepared to rebut the allegations that the defendant is either a risk of flight or a threat to the community, and to offer the magistrate judge adequate alternatives to incarceration that would ensure the defendant's appearance at all court proceedings and minimize any perceived threat to the community.<sup>21</sup> Note that in the case of firearms offenses, case law holding that the presumption of dangerousness cannot be relied upon by the government, was revised by Congress effective July 2006. Also, be prepared to call defense witnesses at the detention hearings. Employers, friends, neighbors, and family members can be called to support the position that certain conditions or a combination of conditions would ensure the defendant's appearance at all subsequent hearings and to undermine the concern that the defendant is a threat to the community.<sup>22</sup>

Further, because the Pretrial Services report contain an assessment of the defendant's risk of flight and danger to the community that will be used by the court, review the report prior to the detention hearing in order to correct any misinformation. Alternatively, if there is a delay between the arrest and detention hearing, it is often possible to influence Pretrial's assessment of the defendant by providing information and suggesting potential bail packages to the Pretrial Services Officer. If family or friends are willing to post property or money to secure the client's release, provide that information, along with the name and addresses of the individuals who are willing to

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<sup>20</sup> See 18 U.S.C. § 3142.

<sup>21</sup> See Appendix - Detention Motion.

<sup>22</sup> Be aware that the government can only rely upon the threat to the community rationale in certain types of cases. See, e.g., United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (community threat is not basis for detention in fraud cases).

help.

## **2. Individuals Held On State Charges**

The decision whether the defendant should remain in state custody or be moved to federal custody will depend upon the nature and status of the state charges and the likelihood of receiving a concurrent sentence. This decision can become critical at a later date when the issue of credit for time served or of concurrent time arises. This question often turns on which court had primary jurisdiction. If the defendant remains in state custody, he/she will generally not be eligible for credit toward the federal sentence.<sup>23</sup> On the other hand, if he/she is moved to federal custody, he/she will likely not receive credit toward the state sentence. Generally, a state prosecutor, rather than a federal prosecutor, will be more willing to recommend a concurrent sentence. Additionally, 18 U.S.C. §3584 and/or the sentencing guidelines often restrict the discretion of the court imposing concurrent time.<sup>24</sup> In many cases, therefore, it is imperative that the defendant be moved to federal custody and sentenced on the federal charge before the state charge is resolved.

## **J. BAIL**

If the prosecutor agrees to the defendant's release, there are various types of bail available, contingent upon in the defendant's specific circumstances.

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<sup>23</sup> See Appendix - Bureau of Prisons Policy Concerning Credit.

<sup>24</sup> See U.S.S.G. § 5G1.3. But see United States v. Saintville, 218 F.3d 246, 248-49 (3d Cir. 2000) (finding no abuse of discretion in district court's direction that federal sentence run partially concurrent and partially consecutive with longer state sentence, even though lower court did not make explicit findings on issue, because split sentence avoided having federal sentence totally subsumed within state sentence and thus required separate punishment for federal offense).

### **1. P.R. (Personal Recognizance) Bail**

Occasionally, a second signature on the bond, usually of a family member or other financially responsible person, is necessary to secure P.R. bail.

### **2. Cash Bail**

Bail is usually set at 10% of the bond, i.e., if the bail is \$50,000.00, the defendant must pay \$5,000.00. Note that the money is returned in full if the defendant meets all the bail conditions.

### **3. Property Bail**

Posting real property can be a time-consuming exercise. Therefore, the magistrate judge's deputy clerk and the Pretrial Services Officer should be contacted before arriving in court to determine which documents are needed. When real property is posted, an appraisal of the property, a title search, the deed, and a recent tax bill receipt are usually required. Some requirements for posting real estate as bail, however, can be waived by the magistrate judge. For example, the local rule requiring that the posted property be valued at twice the value of the bond is often waived. If the judge insists on all requirements, Pretrial Services may be helpful in assisting the defendant with these procedures. In some cases, alternative bail arrangements can be made to afford the defendant an opportunity to obtain the appropriate paperwork.<sup>25</sup> Note that the property posted need not be located in New Jersey.

## **K. ARRAIGNMENTS**

The district court judge assigned to the case usually conducts arraignments.<sup>26</sup> At the

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<sup>25</sup> See Appendix - Order Posting Property as Bail.

<sup>26</sup> Several district judges in Camden allow the magistrate judges conduct arraignments.

arraignment, counsel should inform the court: "I have reviewed the indictment with my client, he/she understands the charges, we waive formal reading of the indictment and enter a plea of not guilty to all charges." After entering the plea, the court enters a standing order for discovery and inspection, which includes a pretrial motion schedule and a trial date.<sup>27</sup>

At times, the initial appearance will coincide with the arraignment, and there may therefore be appointment of counsel and bail issues that the district judge must resolve. The judge can either ask the Defender assigned to the hearings to handle the arraignment or arraign the defendant without counsel and then appoint counsel for all other proceedings. If a bail hearing is required, the district judge will often refer the matter to a magistrate judge to resolve.

#### **L. 18 U.S.C. §§ 3152 – PRETRIAL SERVICES**

Pretrial Services' involvement begins as soon as the defendant is arrested. Whether the defendant is on bail or in custody, a representative of Pretrial Services will meet with him/her to obtain background information, particularly that which is relevant to his/her "danger to the community" and "risk of flight" propensities.

Counsel is often not appointed until after the defendant has spoken to a representative of Pretrial Services. The government's use of statements made to Pretrial Services Officers is restricted by 18 U.S.C. § 3153(c)(1)-(3). The information provided to Pretrial Services may, however, be included in Probation's reports for purposes of sentencing. Misstatements to the Pretrial Services Officer may result in obstruction points in the Presentence report.<sup>28</sup> As

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<sup>27</sup> See Appendix - Order for Discovery and Inspection; see also Chapters Three, Four, and Six, *supra*, for details on pretrial motions.

<sup>28</sup> See U.S.S.G. § 3C1.1.

previously noted, it is, therefore, extremely important to review Pretrial's report with the client to ensure its accuracy.

It is often possible to use programs or resources available to Pretrial Services as a substitute for cash or property to obtain the defendant's release. The magistrate judge may consider adding conditions to the terms of release in exchange for a lower bail and/or P.R. bond. Pretrial Services also has the capability of securing and paying for detoxification and rehabilitation programs for clients under their supervision. While time spent in such a program is not credited toward the sentence, participation in these programs may provide a basis for departure for post-offense rehabilitation.<sup>29</sup> Assuming that the defendant is ultimately eligible for a sentence that allows probation and/or a split sentence (a period of detention followed by community confinement), his/her performance on pretrial supervision may prove helpful in persuading the sentencing court not to incarcerate him/her.

### **1. Pretrial Supervision**

A client is assigned a particular Pretrial Officer who will monitor his/her pretrial release. A Pretrial Services Office is located in each courthouse: Newark (973) 645-2230; Trenton (609) 989-2056; and Camden (856) 757-5107. The frequency of client contact with Pretrial Services varies greatly among clients.

## **M. THE UNITED STATES ATTORNEY'S OFFICE**

The U.S. Attorney's Office is the charging authority in federal court. The office is divided into criminal and civil divisions. This manual deals exclusively with the criminal section.

As discussed previously, the government brings federal charges by either an indictment,

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<sup>29</sup> See United States v. Sally, 116 F.3d 76, 79 (3d Cir. 1997).

complaint, or an information. Often, the federal prosecutor has more leeway to negotiate charges when the defendant is charged by an information, rather than by an indictment.<sup>30</sup>

Individual AUSAs have limited discretion in dismissing charges against an indicted defendant. Once the individual has been indicted, the United States Attorney must approve the dismissal. This requirement does not mean necessarily that if a defendant chooses to plead that he/she must plead to all counts.<sup>31</sup> If the case is resolved pre-indictment, however, counsel may be able to better define actual offense conduct and thus limit the information that Probation uses for sentencing purposes.

AUSAs do have some discretion in determining which defendants they will move to detain, what bail and pretrial diversion recommendations to make, which persons they will use as cooperating witnesses, the representations they will make concerning any assistance by the defendant, and which counts they will move on in cases without indictments. Also, although most AUSAs tend to adhere strictly to Rule 16 for discovery purposes, some are willing to be more forthcoming if they believe disclosure will help to resolve the case.

Each case will also have a lead agent who represents the agency that investigated the matter. This agent will generally attend every hearing and proffer session. He/she will sit next to the AUSA throughout the trial<sup>32</sup> and at sentencing. The agent also will certainly influence the

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<sup>30</sup> For information on the parameters established by the Department of Justice concerning the conduct of federal prosecutors, see Appendix - DOJ Policy for Conduct of Federal Prosecutors: (1) Communication with persons represented by counsel and (2) Plea bargaining under the Sentencing Reform Act.

<sup>31</sup> However, even if counts are dismissed, the conduct in these counts will likely be considered at sentencing for guideline purposes. See the discussion of relevant conduct in Chapter Eight, supra.

<sup>32</sup> See Fed. R. Evid. 615.

AUSA's recommendation at sentencing, particularly where cooperation is an issue.<sup>33</sup>

#### **N. THE UNITED STATES MARSHALS OFFICE/BUREAU OF PRISONS**

Once a defendant has been sentenced to a term of custody or ordered held without bail before to trial, he/she is remanded to the custody of the United States Marshals Office. The Marshals' cellroom is located on the fifth floor of the U.S. Post Office & Courthouse in Newark, in the basement of the courthouse in Trenton, and on the first floor of the courthouse in Camden. The Marshals Office is responsible for transporting prisoners between the courthouse and their respective institutions for defendants in custody before trial. If the defendant is on trial, counsel will be allowed to provide trial clothes for him/her.<sup>34</sup> Neither the Marshals nor the court will provide clothing for the defendant and expenses associated with clothing are not reimbursable under the Criminal Justice Act.

Attorneys are permitted to visit with clients in the Marshals' lock-up. A client's family and friends may not visit at the courthouse. While the Marshals ordinarily respect confidential conversations with clients, Deputy Marshals have occasionally been called to testify about attorney/client and co-defendant conversations that they overheard.

The Marshals will provide some assistance if the defendant is not receiving medical care at a county facility and will separate informants and cooperating defendants from their co-defendants while in federal custody. Because the Federal Bureau of Prisons determines where inmates are incarcerated after they have been sentenced, the Marshals Service has minimal control over the

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<sup>33</sup> Counsel can request that the case agent be sequestered at trial if the agent is a potential witness. Most judges, however, will allow the case agent to sit at counsel table throughout the trial. See Fed. R. Evid. 615.

<sup>34</sup> If the defendant is in a facility where he/she can receive clothes, the Marshals will ask counsel to deliver the clothes to the facility, not to the cell block in the courthouse. If the facility does not accept clothes, then arrangements can be made with the Marshals Office to exchange clothes in the cellroom.

defendant's placement. Presentencing requests to relocate the defendant's due to security or medical concerns should be made to the Marshals.

The Bureau of Prisons classifies sentenced defendants based on the Bureau's criteria and commits defendants to the various institutions based on its evaluation. As of April 2006, that function was removed from regional offices and centralized at a BOP Office in Grand Prairie, Texas. One very important factor in the designation process is whether the defendant is permitted to surrender voluntarily to the designated institution. As a general matter, when a client is permitted to surrender voluntarily, the Bureau of Prisons automatically reduces his/her classification by one level. That reduction makes it much easier for him/her to qualify for a camp or, later, for early release to a halfway house. Also, although a court cannot order the Bureau of Prisons to designate a particular facility, a recommendation can be made. Unless the security classification is inappropriate, the Bureau of Prisons often follows the court's recommendation. For prisoners sentenced to a term of sixty months or less, counsel should also ask the Court to recommend halfway house placement for at least six months. Again, the Court can only make the recommendation, but without it, the client will almost certainly receive less time in a halfway house.<sup>35</sup>

Entrance into a federal facility, i.e., FCI Fairton, to visit a client is more difficult than in state and local prisons. Arrangements must be made at least one day in advance, and a confirming facsimile should be sent to the prison at the time the appointment is made. At Fairton, the facsimile should be sent to the attorney/advisor, FCI Fairton, (856) 453-4112. If another attorney, an investigator, a paralegal or an expert witness will be accompanying counsel, advance

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<sup>35</sup> See Woodall v. Federal Bureau of Prisons, 432 F.3d 235 (3d Cir. 2005).

approval must be obtained for each individual. At least seventy-two hours notice is required so that the facility can conduct a background check on the individuals. Also, be aware that all federal facilities have very strict dress codes. Khakis, for example, may not be worn by visitors, including attorneys to FCI Fairton or Ft. Dix. Also, as tempting as it might be to avoid the long drive to a particular facility, never discuss details of the case with clients on the prison phones because all phones are monitored by the Bureau of Prisons.

## CHAPTER TWO

### **REPRESENTING THE COOPERATING DEFENDANT IN FEDERAL COURT**

Representation of cooperating witnesses remains one of the most significant and critical differences between state and federal court practice. Due to the draconian sentence a defendant would otherwise receive under the “advisory” sentencing guidelines and/or the statutory mandatory minimum sentences, a large number of clients choose to cooperate with the authorities. This avenue is particularly useful for low-level defendants in multi-defendant drug and fraud cases who are exposed to sentencing guideline recommendations that over-represent their culpability in the case. Departure motions based on cooperation agreements provide the most effective mechanism to obtain a sentence below the range mandated by the United States Sentencing Guidelines and/or any applicable statutory mandatory minimum sentence, and are the sole means of securing a downward departure from statutory mandatory minimum sentences.

Before the sentencing guidelines were made “advisory” by the United States Supreme Court in United States v. Booker, 543 U.S. 220 (2005), it was clear departures for substantial assistance pursuant to U.S.S.G. §5K1.1 may only be considered upon motion by the government.<sup>36</sup> Although there may be some doubt about the viability of that rule post-Booker, as a practical matter, government support for a non-guideline sentence based on cooperation remains critical. Furthermore, in Melendez v. United States, 116 S. Ct. 2057, 2061-63 (1996), the Supreme Court held that a §5K1.1 motion does not authorize a departure below the statutory minimum without an accompanying motion pursuant to 18 U.S.C. § 3553(e). Booker did nothing

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<sup>36</sup>See United States v. Bruno, 897 F.2d 691, 694-95 (3d Cir. 1990).

to change that requirement. When moving for a departure pursuant to §5K1.1, the government retains the discretion to request that the court impose a sentence that is below the guideline range but not below the statutory mandatory minimum.

The extent of the departure, when granted, is within the discretion of the district court. Section 5K1.1 directs 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.<sup>37</sup> Significantly, even with a government motion, the district court retains the discretion to refuse to depart based on cooperation.

A defendant's ability to challenge the refusal of the government to file a §5K1.1 motion is limited. The defendant must demonstrate that the government's refusal was either based on an unconstitutional motive or was not rationally related to any legitimate government interest.<sup>38</sup>

## **A. THE FUNDAMENTALS OF COOPERATION**

### **1. "Substantial Assistance"**

Section 5K1.1 permits a court to depart from the guidelines upon motion of the government indicating that the defendant has provided "substantial assistance" in the investigation or prosecution of another who has committed an offense. To qualify for a departure, the cooperation must result in "substantial assistance" to the government. Notably, "substantial assistance" is not defined. While providing information that results in the arrest and/or conviction of another individual is generally required, the government has tremendous latitude in determining

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<sup>37</sup> See United States v. Torres, 251 F.3d 138 (3d Cir. 2001).

<sup>38</sup> See Wade v. United States, 504 U.S. 181, 185-86 (1992).

whether the cooperation is “substantial.” Proactive involvement by the cooperating defendant may be requested, including tape recording conversations and/or conducting controlled meetings with the target.

A defendant’s “good faith effort” to provide “substantial assistance” is no longer sufficient to justify a departure. Nonetheless, if an Assistant United States Attorney is reluctant to file the motion, contending that the information provided did not, for example, result in an arrest or conviction and is therefore not “substantial,” it can be argued that the defendant made a good faith effort to cooperate and that his/her effort, coupled with any benefit the government received for the cooperation, such as corroborating information and/or new leads into ongoing criminal activity, warrants a departure. The only way to accomplish this, absent a motion by the government, is to convince the court that the government breached the plea agreement with its refusal to file the motion and to request specific performance.<sup>39</sup>

## **2. 18 U.S.C. § 3553(e)**

A departure has significant importance in cases involving statutory mandatory minimum sentences. As indicated above, while a motion pursuant to U.S.S.G. § 5K1.1 permits a departure below the guideline range, in order to obtain a departure below the statutory mandatory minimum, a motion by the government pursuant to 18 U.S.C. § 3553(e) is also required. The language governing departures from statutory mandatory minimum sentences mirrors the language of the guidelines:

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

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<sup>39</sup> See generally Santobello v. New York, 404 U.S. 257 (1971); United States v. Swint, 223 F.3d 249 (2000).

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 28 U.S.C. § 994.

A government motion based upon cooperation is the only mechanism by which a departure below the statutory mandatory minimum sentence can be obtained. Therefore, when the government is agreeing to move for a departure, it is vital to ensure that the government is also agreeing to move for a departure below any applicable statutory mandatory minimum sentence. This agreement must be embodied in the plea agreement.

### **3. Uncertainty of Benefit**

If a client is contemplating cooperating, stress that neither the defense nor the prosecution is able to promise a specific result at sentencing. This information is particularly important if the cooperating defendant has not been exposed to the federal sentencing system and believes that the prosecutor can specify the sentence. While the law permits a plea that includes a negotiated sentence or a cap on the defendant’s exposure,<sup>40</sup> the U.S. Attorney for the District of New Jersey rarely consents to such a plea, particularly in cases where the defendant is represented by appointed counsel. It is therefore imperative that the defendant understand that even if the prosecutor agrees to file a downward departure motion, whether the motion is granted and the extent of any departure rests within the sole discretion of the court. The client should also be advised that a court’s refusal to exercise its discretion to depart downward and the extent of the departure are unlikely to change through appeal.

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<sup>40</sup> See Fed. R. Crim. P. 11(e)(1)(C).

#### **4. Timing**

Perhaps the most disconcerting aspect of cooperation is the urgency of the decision. Often, the nature of the case requires that a client cooperate before his/her arrest becomes public and/or the information stale. Additionally, in a multi-defendant case, cooperation may be sought only from a limited number of defendants and a delay in deciding whether to cooperate may result in a withdrawal of the offer by the government. The potential benefit in light of what is requested of the defendant must therefore be evaluated at a time when counsel has very little information about the case and even less certainty about the benefit to the client.

Frequently, by the time counsel meets the client, he/she has already begun cooperating with the government. The client may be under the impression that the agents promised not to pursue prosecution in exchange for his/her cooperation. Correct that misperception and then determine (and explain to the client) what the further cooperation entails, the potential benefits, and whether continuing to cooperate is in the client's best interest.

#### **5. Discovery**

Because the offer to cooperate often occurs pre-indictment, counsel will not have the benefit of discovery. Typically, the government will not offer to provide discovery material, and it is not required to do so under the Federal Rules of Criminal Procedure. Nonetheless, request disclosure of all material pursuant to Fed. R. Crim. P. 16. Most AUSAs will provide some, if not all, Rule 16 information.

#### **6. Proffer Agreements**

Most cooperation arrangements are initiated with a proffer letter or proffer agreement.<sup>41</sup>

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<sup>41</sup> See Appendix - Proffer Letter.

Note that the “standard” proffer agreement is ever-changing. Additionally, the various divisions within the U.S. Attorney’s Office have different “standard” proffer agreements. Generally, the standard proffer agreement affords a defendant some, albeit limited, protection from proffered information being used against him/her at sentencing or in formulating new charges. The agreement is limited to federal prosecutors. As a result, counsel should be cautious of proceeding with a proffer if local or state law enforcement agents are present.

Ideally, the proffer agreement should include language which acknowledges that U.S.S.G. § 1B1.8 applies to the defendant's cooperation. Section 1B1.8 restricts the use of certain incriminating information provided by the defendant during the course of cooperating, including limiting its use in determining the applicable guideline range.<sup>42</sup> Section 1B1.8 also limits the use of proffered information to enhance a sentence and offers some protection from proffered information being used to determine the defendant’s criminal history category.<sup>43</sup> Whether facts revealed under the cooperation agreement may be used to deny a downward departure is an open issue.

Finally, because there is no formal record of what transpires during proffers, an attorney's notes may prove critical should there ever be a question as to whether a defendant provided certain information, contradicted him/herself in subsequent proffer meetings, or if any other problems arise from proffered information. Thus, be vigilant in recording what occurred during a proffer session.

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<sup>42</sup> See U.S.S.G. § 1B1.8 & comment. (n.5).

<sup>43</sup> See U.S.S.G. § 1B1.8(a) & comment. (n.2)); see United States v. Shacklett, 921 F.2d 580, 584 (5<sup>th</sup> Cir. 1991).

## **7. Plea Agreements**

Due to the advent of electronic filing, the United States Attorney became concerned about the easy disclosure about the identity of cooperating witnesses. In response a new plea agreement mechanism was developed by cooperating defendants. Instead of a single plea agreement that memorializes the cooperation and the rights of the parties, there are now two documents that are executed. The first is the plea agreement which is silent about the cooperation; the second is a letter between the parties which memorializes the cooperation agreement. The biggest risk for the defendant with his arraignment is that the plea agreement usually requires a plea to the highest court and limits or prohibits any requests for departures on non-guideline sentences. As a result, if the prosecutor declines to file the departure motion, the defendant has no recourse and no ability to ask for a lesser sentence.

The following is standard language found in the letter accompanying the plea agreement:

John Smith shall cooperate fully with this Office. As part of that obligation, John Smith shall truthfully disclose all information concerning all matters about which this Office and other government agencies designated by this Office may inquire of him. In addition, John Smith shall also make himself available at all reasonable times requested by the representatives of the government and shall truthfully testify in all proceedings, including grand jury and trial proceedings, as to any subject about which he is questioned. Furthermore, John Smith agrees to provide this Office, upon request, all documents and other materials relating to matters about which this Office inquires of him. Full cooperation includes participating in, if requested, affirmative investigative techniques, such as making telephone calls, tape recording conversations, making controlled purchases and/or deliveries and introducing law enforcement officials to other individuals. All such activity by John Smith must be conducted only at the express direction and under the supervision of the Office and federal law enforcement personnel.

## **8. Effect of Government's Refusal to File a Departure Motion**

The government cannot refuse to file a motion based on an unconstitutional motive, such as race or religion. The Supreme Court has made it very clear that, should the defendant allege a due process violation, the defendant must establish that the government failed to file a motion as a result of an unconstitutional motive. Unless the defendant specifically alleges that the government failed to file the motion due to unconstitutional motives, the defendant is not entitled to discovery or an evidentiary hearing on this issue.<sup>44</sup>

Under the current arrangement, it is unclear the government can argue that the question is whether the separate letter can be said to be a part of the plea agreement. The government must file a motion because it is contractually obligated to do so.<sup>45</sup> Finally, if the defendant's cooperation included factors not adequately taken into consideration by U.S.S.G. § 5K1.1, the defendant may be able to move for a departure or non-guideline sentence on that basis but only if that possibility is left open under the plea agreement.<sup>46</sup>

## **9. Filing of Departure Motion**

As noted earlier, a motion for a downward departure based on a defendant's cooperation must be filed by the government. Consult with the AUSA prior to the submission of the motion

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<sup>44</sup> See Wade v. United States, 504 U.S. 181, 184 (1992); United States v. Romolo, 937 F.2d 20, 24 (1<sup>st</sup> Cir. 1991); United States v. La Guardia, 902 F.2d 1010, 1018 (1<sup>st</sup> Cir. 1990); United States v. Smitherman, 889 F.2d 189, 191 (8<sup>th</sup> Cir. 1989), cert. denied, 494 U.S. 1036 (1990).

<sup>45</sup> See United States v. Conner, 930 F.2d 1073, 1075 (4<sup>th</sup> Cir.), cert. denied 112 S. Ct. 420 (1991); United States v. Khan, 920 F.2d 1100, 1106 (2d Cir. 1990), cert. denied, 499 U.S. 969 (1991); United States v. Rexach, 896 F.2d 710, 714 (2d Cir.), cert. denied, 498 U.S. 969 (1990).

<sup>46</sup> See United States v. Garcia, 926 F.2d 125 (2d Cir. 1991) (court does not need prosecutor's motion to reward defendant whose early cooperation broke "log jam" in prosecution; assistance amounted to assistance to judicial system which was not adequately taken into consideration by guideline). But see United States v. Lockyer, 966 F.2d 1390 (11<sup>th</sup> Cir. 1992) (where defendant agreed to plead to information and to waive any pretrial motions, substantial assistance to judiciary does not warrant downward departure).

to ensure that all aspects of the client's cooperation are included in the motion, and review the final motion before it is submitted. While most AUSAs are reluctant to include a sentencing recommendation in the motion, counsel may be able to persuade the AUSA to include a recommendation, particularly if the case is before a judge who seeks the government's recommendation. Also, consider detailing the defendant's cooperation in the sentencing memorandum in order to present the defendant's cooperation in the most favorable light.

At the time of sentencing, the court must rule on the § 5K1.1 motion. The court may not postpone ruling on the basis of possible post-sentencing cooperation by the defendant.<sup>47</sup> In the event that the defendant continues to cooperate after sentencing, the government can move for a reduction in his/her sentence under Rule 35.<sup>48</sup>

## **B. PRACTICAL ASPECTS OF COOPERATION**

### **1. Disclosure of Cooperation**

Frequently, clients who are interested in cooperating hesitate to do so for fear of retaliation. The government may be able to offer some protections: Initially, only the assigned agents and prosecutors will know he/she is cooperating. In rare instances and with an adequate showing of need, references to cooperation in court can be made at side bar, and all documents, including the plea agreement, can be filed under seal and impounded. The client should be advised, however, that, in all likelihood, his/her identity and the nature of his/her cooperation will become public.

If the client is in custody, the United States Marshals Service may need to be apprised of a

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<sup>47</sup> See United States v. Howard, 902 F.2d 894, 896-987 (11<sup>th</sup> Cir. 1990).

<sup>48</sup> See infra § B(7).

defendant's cooperation in order to keep him/her separate from co-defendants. For the client's protection, the institution may house him/her "in the hole" in order to protect him/her. If this occurs, contact the U.S. Marshals Office and the Assistant United States Attorney and request that the client be transferred to another institution. In extreme cases, the client's admission to the witness protection program may be considered. Due to the severity of the program, however, particularly for individuals in custody, the witness protection program should be considered very carefully by the client.

## **2. Scope and Mechanics of Cooperation**

Before the decision to cooperate is made, the client must fully understand the rules of engagement. Emphasize that his/her cooperation must be complete. Also explain that cooperating may involve providing information/testimony against friends and family, meeting with government agents on a regular basis, participating in meetings with targets, wearing a recording device, or performing other distasteful and potentially dangerous activities.

The first few hours of a proffer meeting often involve a test of the client's credibility by the government. The government may have a wealth of information concerning a defendant's associates, family, daily life, etc. The cooperator may have been under investigation for weeks, months, or even years prior to the first proffer session. Problems will arise if a client attempts to minimize his/her involvement or to withhold information from the government.

## **3. Nature of Information Sought**

Prior to the client's cooperation, determine the nature of information the government hopes to obtain. Be as specific as possible, and, at the very minimum, insist on knowing what charges will be discussed at the proffer session. During the proffer session, questioning should be

limited to the charges discussed prior to the start of the proffer. Often during a proffer concerning one type of criminal conduct, an agent will attempt to discuss what may be an unrelated crime and/or type of conduct. Should this happen, do not allow the proffer to continue without speaking to the defendant to discuss the implications of continued cooperation. In evaluating whether to expand the parameters of the proffer, counsel must consider whether continued discussion will increase the defendant's exposure at sentencing.

#### **4. State Charges or Charges in Another Federal District As A Result Of Federal Cooperation**

In some situations, the possibility exists that state charges could be brought against the defendant as a result of his/her federal cooperation. The protection afforded a defendant by the United States Government will **not** protect him/her from state charges should local authorities pursue an investigation as a result of their cooperation with the federal government. While N.J. Crim. Code Title 2C:1-11 operates to protect a defendant from double jeopardy, do not assume that it applies to all potential charges.

Additionally, while there is usually some coordination between the various United States Attorney Offices, do not assume that the protection being offered a defendant by one office includes any other jurisdiction. Again, evaluate this risk and discuss it with the client at the outset. As with the possibility of state charges, consult with other attorneys to gauge the practice of the state or neighboring district in similar situations.

#### **5. Granting and Extent of Departures**

Having set the § 5K1.1 downward departure process in motion, the government cannot

dictate the extent to which the court will depart.<sup>49</sup> Granting a motion based upon an individual's cooperation with the government rests with the discretion of the sentencing court.<sup>50</sup>

## **6. Post -Sentencing Cooperation**

Post-sentencing cooperation occurs in limited circumstances. In those situations, the government can file a motion to reduce a sentence based on an agreement to cooperate.<sup>51</sup> However, that motion must be filed within one year of the imposition of sentence or of the completion of the cooperation.<sup>52</sup> Notwithstanding this possibility, proceeding to trial, hoping for the best, and then deciding to cooperate upon conviction is not sound strategy in the vast majority of cases. Rule 35 motions are most commonly made where the defendant has been cooperating but, for some reason, chooses not to postpone sentencing until she/he completes the cooperation.

## **7. Refusal to Cooperate**

It is clear under U.S.S.G. § 5K1.2 that refusal to cooperate is not to be considered as an aggravating sentencing factor. Nonetheless, it is unclear whether a refusal will be considered by a court to determine the appropriate sentence within the advisory guideline range. The Seventh Circuit has held that the guidelines' ban on considering a defendant's refusal to cooperate applies only to departures, not to the determination of the where within the presumptive range of the

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<sup>49</sup> See United States v. Spiropoulos, 976 F.2d 155, 163 (3d Cir. 1992).

<sup>50</sup> See United States v. Denardi, 892 F.2d 269, 270-72 (3d Cir. 1989), cert. denied, 110 S. Ct. 3221 (1990).

<sup>51</sup> See Fed. R. Crim. P. 35.

<sup>52</sup> See id.

guidelines a defendant should be sentenced.<sup>53</sup>

## **C. ABORTED COOPERATION**

### **1. The Defendant Wants A Trial And Wants To Testify After Cooperating**

The primary danger of proffer sessions is that the defendant's statements during the meetings can be used to impeach him/her if the information provided by him/her during those sessions contradicts his/her trial testimony. Moreover, a trial defense that contradicts the client's statements during the proffer, will also risk opening the door to the proffer statements. The AUSA can and will call the case agent to testify as to his/her recollection of what the defendant said during the proffer(s). Counsel may also become a witness, which would result in the need for new counsel for the defendant. Additionally, if the defendant tells a new and improved version of his/her story at trial, he/she risks an enhancement of his/her guideline range for obstruction of justice adjustment pursuant to U.S.S.G. § 3C1.1, as well as a perjury charge.<sup>54</sup> Furthermore, the judge who presides over the trial will often be the defendant's sentencing judge, and if the defendant's credibility is impeached it may impact on the sentence imposed.

### **2. The Defendant Wants To Enter A Guilty Plea Without Following Through On The Cooperation Agreement**

The current standard language in cooperating agreement letters requires a waiver of the defendant's right under Fed. R. Crim. P. 11(e)(6) or Fed. R. Evid. 410 to move for the suppression of statements he/she made.<sup>55</sup> Additionally, the government may seek to obtain

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<sup>53</sup> See United States v. Klotz, 943 F.2d 707, 710 (7<sup>th</sup> Cir. 1991).

<sup>54</sup> The client also faces this possibility if he/she changes his/her story not at trial but before a grand jury.

<sup>55</sup> See Appendix - Standard Cooperating Plea Agreement.

testimony from the defendant despite his/her withdrawal from the agreement. If the defendant is awaiting sentencing, such compelled testimony might impact on the sentence he/she receives.

Argue that to compel a defendant's testimony prior to sentencing violates his/her Fifth Amendment protection in light of the possibility of a new trial after appeal. Although this rarely occurs, the government can immunize the defendant, seek a contempt finding, and use the threat of jail to force him/her to testify.

#### **D. CONCLUSION**

Despite the potential hazards associated with cooperating with the federal government, doing so may be the defendant's only alternative to spending many years in federal custody. Make sure that the defendant understands what is expected and required of him/her should he/she cooperate and the consequences of inadequate cooperation.

## CHAPTER THREE

### PRETRIAL CONSIDERATIONS

The initial concern of defense counsel in a federal criminal case should be pretrial matters such as discovery, pretrial motions, and investigations. This Chapter will deal with discovery under Federal Rule of Criminal Procedure 16, as well as other procedural rules and case law that must be considered in the early preparation of a federal criminal matter.

#### **A. DISCOVERY IN CRIMINAL CASES IN FEDERAL COURT**

One of the most startling, disorienting, and disturbing differences between the practice of criminal law in the New Jersey District Court and the New Jersey Superior Court is the discovery process. While the practice in New Jersey Superior Court is generally characterized by disclosure and candor, which promote fairness and ensure the integrity of the process, the discovery practice in New Jersey District Court is byzantine, archaic, and designed to impede candor and disclosure. The result often is an aura of distrust, a culture of concealment, and a disturbing level of gamesmanship. Although this result is in part an unavoidable by-product of the Federal Rules of Criminal Procedure and the ancillary discovery procedures, it is both unfortunate and unnecessary.

It is unfortunate for a number of reasons, not the least of which are the perceptions of unfairness and the doubts regarding the integrity of the process that it creates. An ancillary problem is the perception among many defense lawyers that prosecutors do not diligently investigate for information that is subject to Rule 16 disclosure, much less for Brady and Giglio material. Likewise, there is a perception that definitions are narrowed to the point that disclosure is strictly limited to the bare minimum required by the most rigid reading of the rules. This problem is compounded by the perception that government discovery violations are often

subject to no discernable sanction.

The problems this creates for the criminal justice system are profound and troubling. Court time is wasted on last minute discovery motions and related hearings concerning whether a particular item is indeed subject to disclosure and what, if any, remedy is appropriate. These hearings are, frankly, one of defense counsel's best opportunities to change the focus of a trial, and it is truly unfathomable why government attorneys consistently put themselves in this position.

Despite this opportunity, the down sides to dilatory discovery practice far outweigh any advantages. Clients, particularly those who have been through the state system are, at a minimum, astounded when they are advised of how little discovery they will receive. More often, they doubt their attorney's commitment, and their suspicions about the resolve of appointed counsel are heightened. Even worse is the wholly inexcusable effect created when discovery is provided incrementally. Not only is the client's initial optimism shattered, but the resultant anger he/she feels is then directed at counsel for the failure to obtain the discovery at an earlier date. Any confidence that had developed is eviscerated and the integrity of the process consequently suffers.

The final tangible effect of current government policy is that AUSAs appear to resist compliance with even the minimal obligations imposed by law. From a defense lawyer's perspective, it often appears that federal prosecutors feel little institutional incentive to provide discovery. Indeed, the perception is that there is some fear that by providing discovery, defense counsel will gain some advantage as a result of access to information about the case. It is difficult to imagine a concept that could be more contrary to any reasonable person's expectations about

how a criminal justice system should operate. The idea that a trial should be characterized by surprise, deception, and mystery is medieval, if not malevolent. The theory seems to be that if defense counsel is prepared, the government's evidence may not hold up and a conviction may not result. To put it another way, the restrictive discovery practice is not designed to promote justice, but is instead intended to give the government an unfair advantage.

The justification for the practice, of course, is something more benign. Usually, the argument is that early disclosure of witness statements, agent reports, grand jury testimony documents, and other materials will lead to witness tampering, obstruction of justice, and other instances of misconduct designed to undermine the trial process. Whatever legitimacy these concerns may hold in a particular case, they nonetheless cannot justify the blanket approach that exists within this district. Years of far more open discovery practice in state court demonstrate that the government's concerns are more illusory than real. Moreover, with the erosion of any real distinction between the types of cases brought in federal court and state court, any legitimacy that might have attached to those concerns is further undermined. The fact is that cases where concerns about witness tampering and obstruction of justice are real are few and far between, and can be handled on a case-by-case basis.

Further evidence of the lack of foundation for the government's unduly strict adherence to Rule 16 and other discovery rules is found through comparing the practice in this district to the approach taken by other U.S. Attorney Offices and by other District Courts. It is not uncommon for federal prosecutors in other districts to institute open discovery policies within their offices. This practice greatly diminishes the need for last minute discovery motions as well as the likelihood that discovery violations will occur. Additionally, open discovery policies help

eliminate problems for counsel, and, ultimately, the court, that are occasioned by late or piecemeal discovery.

Similarly, a sampling of standing discovery orders from around the country discloses that other courts have recognized the problem and attempted to address it by institutionalizing a more progressive approach. Among the many examples of more enlightened discovery practices are the following:

1. Witness lists. Witness lists are exchanged at a designated time before trial. Southern District of Mississippi, District of New Hampshire, District of Vermont.
2. Preservation of tapes, notes, and other memoranda. This provision orders the government not to purposefully destroy any tapes, notes, reports, or communications generated in connection with a case until it is resolved. District of New Mexico, Middle District of Tennessee.
3. Jencks disclosure. This provision is phrased as an agreement by the government to disclose Jencks material at a specific time before trial. The provision permits the government to withdraw from the agreement in a particular case at its discretion. District of New Hampshire, Eastern District of Kentucky, District of Connecticut, Eastern District of Virginia.
4. Additional Jencks disclosure. Disclosure of Jencks material for other proceedings. This provision incorporates the Rule 26.2 requirements in the standing order. District of Connecticut, Eastern District of Oklahoma.
5. Search warrants. An explicit direction to provide all warrants, applications, supporting affidavits, testimony, returns and inventories. District of Connecticut, District of Vermont.
6. Brady disclosure. The Brady provision includes a reminder to the government to disclose information relevant to guilt or to punishment. District of Connecticut, District of Vermont.
7. Identification procedures. A number of orders contain a reference to identification procedures. The disclosure requirement

includes a specific request that the government produce photographs used in a line-up, show-up, photo spread, or, if no photograph exists, a requirement that the government notify the defendant whether an identification procedure took place and the results of the procedure. District of Connecticut, District of Hawaii, Middle District of Tennessee, Western District of Washington.

8. Giglio disclosure. Giglio material is subject to disclosure at least twenty days before trial. District of New Hampshire.

9. Inspection of property. The government is required to permit the defendant, counsel, and any experts to inspect any automobile, vessel, or aircraft, and further requires the government counsel to assist defense efforts to gain access to such property by advising the agency in possession of the items that inspection was permitted by court order. Middle District of Tennessee.

10. Entrapment as a defense. If a defendant advises the government of an intention to rely upon an entrapment defense and provides a written summary of the evidence of that defense, the government is required to disclose a synopsis of any other crimes, wrongs, or acts upon which the government would rely to rebut the defense. Western District of Washington.

These are only a few of the provisions contained in standing orders for discovery in other United States District Courts. Their existence and use demonstrate that a more progressive approach to discovery can be used without posing any threat to the government's ability to prosecute its cases.

## **B. DISCOVERY REQUESTS AND FED. R. CRIM. P. 16**

Discovery requests should be made early, to allow as much time as possible before deciding whether the defendant should accept a plea offer from the government or proceed to trial and to review the materials before trial strategy decisions are made. Also, discovery material often proves invaluable in predicting the potential guideline sentencing range in the event of conviction. Most United States District Judges in New Jersey enter a formal, pre-printed standard

order for discovery and inspection, referencing certain provisions of Fed. R. Crim. P.16.<sup>56</sup> This order is generally entered on the date of arraignment on the indictment, and sets certain time limits for compliance.

The first four paragraphs of Fed. R. Crim. P. 16(a)(1) begin "**Upon request by the defendant** the government **shall . . .**" (emphasis added). This language makes clear that Rule 16 becomes applicable upon the specific request of defense counsel. In certain cases, in addition to sending the prosecutor a letter requesting discovery, consider filing a discovery motion in order to preserve the record adequately.<sup>57</sup>

#### **1. Fed. R. Crim. P. 16(a)(1)(A) – Statements Of The Defendant**

Rule 16 includes all written or recorded statements by the defendant in the possession of the government including statements that will be used only for impeachment purposes by the government. This material includes the substance of any relevant oral statement made to a known government agent. Those statements should be produced pretrial. The rough notes of agents who may have spoken to the defendant during the course of their investigation should also be requested.<sup>58</sup>

#### **2. Fed. R. Crim. P. 16(a)(1)(B) – Criminal Records**

Upon request, the prosecution must provide a defendant with his/her prior criminal record. Be very familiar with the defendant's record and anticipate Fed. R. Evid. 404(b) problems well in

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<sup>56</sup> See Appendix- Order for Discovery and Inspection.

<sup>57</sup> See Appendix - Letter Request for Discovery; see also United States v. Bagley, 473 U.S. 667, 678 (1985) (failure to disclose evidence after specific request more likely to be held "material" since defense counsel may have detrimentally relied on evidence not being in existence).

<sup>58</sup> See United States v. Harris, 543 F.2d 1247, 1248 (9<sup>th</sup> Cir. 1976).

advance of trial in order to file a motion in limine opposing the government's use of such evidence. Review the criminal history thoroughly, particularly the out-of-state annotations of the extract, which may be unfamiliar. Traffic matters, such as D.U.I., should be explored as well because of possible guideline impact.

The defendant's prior criminal record is of paramount importance given the impact it has on sentencing considerations. Always check the record and the charges to see if the defendant is in mandatory minimum, career offender, or armed career criminal territory. The most immediate source of information concerning the defendant's criminal history is Pretrial Services, which will have run a check of the defendant's history prior to the bail/detention hearing.

### **3. Fed. R. Crim. P. 16(a)(1)(C) – Documents And Tangible Objects**

This rule allows for the inspection of all physical evidence that the government intends to use in its case-in-chief at trial, that is material to the defense, or that was obtained from the defendant. This rule allows the material in possession of the government to be inspected, tested, weighed, analyzed, etc. For example, the government must allow the defense to weigh the drugs because of the impact the weight has on sentencing under the guidelines.

### **4. Fed. R. Crim. P. 16(a)(1)(D) – Scientific Reports And Examinations**

Rule 16(a)(1)(D) allows access to all such reports that are in possession of the government or may become known by exercise of due diligence and that are material to preparation of the defense or are intended for use by the government as evidence at the trial.

### **5. Fed. R. Crim. P. 16(a)(1)(E) – Expert Witnesses**

Upon request, counsel is entitled to a written summary of the testimony of any expert witness that the government intends to use in its case-in-chief. The witness' qualifications,

opinion, and bases for the opinion should be provided. Be aware that the government takes a rather narrow view of this rule and that it may therefore become necessary to file a pretrial motion in order to obtain full compliance.

#### **6. Fed. R. Crim. P. 16(b) – Reciprocal Discovery**

Rule 16(b) applies to the same type of documents requested by the defense that were covered in paragraphs three, four, and five above. The rule requires that **“upon compliance with such request by the government[,]”** the defense shall provide reciprocal discovery. The reciprocal provisions regarding experts can be triggered by the defense filing notice pursuant to Fed. R. Crim. P. 12.2. Special concern arises under § (b)(1)(C) with respect to expert witnesses. The defense may be required to reveal important aspects of the defense and subject its expert to pretrial interviews by the government.

#### **C. OTHER DISCLOSURE BURDENS PLACED ON THE DEFENSE**

Several of the Federal Rules of Criminal Procedure place the burden on the defense to give the government notice of its intent to present affirmative defenses or produce defense witness statements. The government will usually request this information when it provides discovery in a case.

##### **1. Fed. R. Crim. P. 26.2 - Production Of Statements Of Witnesses**

This rule governs which statements the defense must produce should the government request statements of defense witnesses. This rule is, in essence, reverse Jencks, and it applies only upon request by the government. Review the definition of “statement” in the rule, because it may protect investigators’ reports. In any case, the need to have the investigator make contemporaneous notes when interviewing a potential witness should be considered.

## **2. Fed. R. Crim. P. 12.1 - Notice Of Alibi**

Be sure to read and to abide by this rule when an alibi defense is anticipated, or the defense or may be precluded pursuant to Fed. R. Crim. P. 12.1(d). Disclosure must be made within ten days of a written demand by the prosecutor. Be aware that § (f) prohibits the use of any such information provided by the defendant if the alibi defense is later withdrawn.

## **3. Fed. R. Crim. P. 12.2 - The Insanity and Other Defenses**

Rule 12.2 governs the insanity defense as well as other mental health based offenses and discovery obligations incumbent upon the defendant in such cases. Be aware that the rule directs that "[i]f there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense."<sup>59</sup> The notice must be given within the time for filing of pretrial motions, although the court may allow late filing for good cause. Note also that § (c) may allow for a government expert to examine the defendant.

## **4. Fed. R. Crim. P. 12.3 - Notice Of Defense Based Upon Public Authority**

The defendant must provide the government with the names, agencies, and witnesses that he/she will rely upon to establish this defense. The government should respond with an admission or denial of such public authority.

## **D. DEPOSITIONS AND 18 U.S.C. § 3503 – FED. R. CRIM. P. 15**

Depositions may be taken in criminal cases and the testimony introduced at trial, if the proponent of such testimony can show that the witness is unavailable pursuant to Fed. R. Evid. 804(a)(5) and that exceptional circumstances exist. Should the government attempt to introduce

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<sup>59</sup> Fed. R. Crim. P. 12.2(a).

deposition evidence, a Sixth Amendment confrontation clause objection should be made.<sup>60</sup> The deposition will, however, probably be admissible at trial under Fed. R. Evid. 804(2) if the witness is unavailable.

#### **E. SUBPOENAS – FED. R. CRIM. P. 17**

Rule 17(e)(1) allows the defense to subpoena potential witnesses in any part of the United States, while Fed. R. Crim. P. 17(e)(2) provides a mechanism to subpoena witnesses abroad. Pursuant to Fed. R. Crim. P. 17(b), the court can order that defense witnesses be brought to court at the government's expense. Rule 17(c) allows the court to order pretrial production of documents in order to determine whether they should be turned over to the defendant.<sup>61</sup> However, because a subpoena duces tecum is not intended as a discovery tool, counsel should be prepared to show that the documents sought are needed to prepare for trial.

#### **F. PRETRIAL CONFERENCES – FED. R. CRIM. P. 17.1**

Once the indictment or information has been filed, a pre-trial conference is available at the request of the court, the defense, or the government. If counsel believes that the government is not providing all appropriate discovery, resolution of that issue may be addressed by means of a pretrial conference.

#### **G. TRANSCRIPTS**

The court must provide an indigent defendant with transcripts of prior proceedings if the transcripts are needed to prepare and to present an effective defense or appeal.<sup>62</sup>

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<sup>60</sup> The rule governing the introduction of deposition testimony in the Third Circuit was set forth in United States v. Wilson, 601 F.2d 95 (3d Cir. 1979).

<sup>61</sup> See United States v. Nixon, 418 U.S. 683, 698 (1974).

<sup>62</sup> See Britt v. North Carolina, 404 U.S. 226, 227 (1971).

## **H. RULES GOVERNING THE TRANSFER OF CASES FROM ONE FEDERAL JURISDICTION TO ANOTHER**

### **1. Fed. R. Crim. P. 20 - Transfer Where Defendant Pleads Guilty**

Rule 20 applies to cases where the defendant has been arrested in a district other than the one in which the offense was indicted. In these cases, the defendant may be given the opportunity to plead guilty in the arresting jurisdiction, as opposed to being returned to the charging jurisdiction **subject to the approval of the United States Attorney for each district**. These proceedings are best coordinated prior to the court appearance by speaking to the local AUSA and, if need be, to an AUSA in the demanding jurisdiction. Keep in mind, however, that this rule only applies to cases that will be disposed of through a guilty plea.

### **2. Fed. R. Crim. P. 21 - Transfer Of Trial**

Rule 21 applies to the transfer of a trial from one jurisdiction to another upon motion by the defendant alleging prejudice in the district where the case has been brought.<sup>63</sup>

### **3. Fed. R. Crim. P. 22 - Timing Of Transfer Motions**

Rule 22 provides a time frame for transfer motions brought pursuant to Rules 20 and 21.

### **4. Fed. R. Crim. P. 5 - Commitment To Another District**

These hearings are also known as "removal hearings." They occur when the defendant has been arrested in a district other than the one in which the indictment or complaint and warrant originated and the prosecuting (demanding) jurisdiction wants him/her back for prosecution. Be sure to consider the possibility of the previously discussed Rule 20 transfer of the case to this district for a plea when that would be in the defendant's best interest. Explain the choice to the

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<sup>63</sup> See United States v. Passodelis, 615 F.2d 975, 977 (3d Cir. 1980).

defendant, and then explore the option with the prosecutor if the defendant wishes to transfer the case.

Removal hearings take place before the duty magistrate judge. When an indictment has been filed, the government need only establish the defendant's identity. With a complaint and warrant, the government must establish identity and probable cause. Be aware that hearsay is admissible at these hearings and that anything the defendant says can and will be used against him/her in the demanding jurisdiction.

The identification hearing determines whether the defendant is the same individual named in the indictment by the demanding jurisdiction. Identification is proven by photographs, fingerprints, and/or by the testimony of agents from the demanding jurisdiction. Assuming identification is **not** an issue, stipulating to identification may avoid the probable extended detention of the defendant in New Jersey to await an evidentiary hearing, but limit the stipulation for purposes of the removal hearing **only**.

Bail issues will also be decided at these hearings. On occasion, the magistrate judge will release the defendant on bail and allow him/her to surrender to the demanding jurisdiction. Factors that affect the bail decision include the nature of the pending charges, prior record, family considerations, Pretrial Services' recommendation, and/or the consent of the demanding jurisdiction.

Procedures for individuals arrested due to violations of probation or supervised release also are outlined in Fed. R. Crim. P. 5(d). Note that there is no language in this section of the rule mandating detention of the defendant pending his/her removal to the demanding jurisdiction. In reality, however, convincing a magistrate judge to afford bail to such individuals is difficult. It is a

good practice to call the AUSA in the demanding jurisdiction to try to negotiate bail, reasonable release conditions, and a surrender date on the violation.

On the other hand, individuals arrested for failing to appear in the demanding jurisdiction shall be held by the magistrate:

(e) **Arrest for Failure to Appear:** Upon production of the warrant or a certified copy thereof and upon a finding that the person before the magistrate is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued. (Emphasis added).

Magistrate Judges are afforded more latitude in situations where an individual was previously detained or conditionally released in the demanding jurisdiction:

(f) **Release or Detention:** . . . [T]he federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, **but will not be bound by that decision**. If the federal magistrate amends the release or detention decision or alters the conditions of release, the magistrate shall set forth the reasons in writing. (Emphasis added).

## I. **THE JENCKS ACT– 18 U.S.C. § 3500**

The Jencks Act was passed by Congress in response to Jencks v. United States, 353 U.S. 657 (1957), which held that a defendant is entitled to **pretrial** discovery of government witnesses' statements. The act, in relevant part, changed the time frame regarding disclosure of prior testimony so that production is not required **until after the witness has testified** on direct examination at trial. 18 U.S.C. § 3500 provides in pertinent part:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Generally, the practice in this district is that the government will provide Jencks material at

least one day in advance of the witness' appearance at trial, but at times a prosecutor will not deviate from the letter of the rule. In those situations, counsel should consider filing a motion for the early production of Jencks material. A pretrial conference could also be requested to explain the defense position to the judge, who may be able to persuade the prosecutor to reach some agreement with respect to the production of Jencks material. If nothing else, the conference will put the judge on notice that if the prosecutor does not provide Jencks prior to trial, a substantial recess will be needed in order to review the material and to conduct follow-up investigation. However, remember that Fed. R. Crim. P. 26.2 allows for disclosure when a witness testifies at other hearings as well.<sup>64</sup>

The other critical Jencks issue is whether a "statement" by a witness qualifies as Jencks material, as defined in 18 U.S.C. § 3500(e). All grand jury testimony qualifies, as well as other recorded, verbatim statements made by the witness.<sup>65</sup> The troublesome area involves government reports relating to the substance of witness interviews. When a government agent interviews a prospective government witness, there are usually rough notes taken and almost always the interviewing agent prepares a report. The rough notes taken by a government agent are not discoverable as the witness' "statement" unless the witness reviewed or approved the notes,<sup>66</sup> or the notes were "a substantially verbatim recital of an oral statement made by said witness and

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<sup>64</sup> See Fed. R. Crim. P. 26.2(g).

<sup>65</sup> See 18 U.S.C. §§ 3500(e)(2) & (3).

<sup>66</sup> See 18 U.S.C. § 3500(e)(1); see also Goldberg v. United States, 425 U.S. 94, 98 (1976) (notes taken during witness interview qualified as Jencks material where information was read back to witness for corrections); United States v. Ogbuehi, 18 F.3d 807, 810-11 (9<sup>th</sup> Cir. 1994) (in camera review of interview notes taken by prosecutor proper when prosecutor read back notes to witness for accuracy, although notes were not verbatim or ever shown to witness).

recorded contemporaneously . . . .”<sup>67</sup>

Rough notes taken by the interviewing agent are probably not discoverable as Jencks statements of the agent.<sup>68</sup> 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.<sup>69</sup> For this reason, counsel should ask the court to order the preservation of rough notes at an early stage. If a defendant can show that Jencks material has been destroyed, the witness’ testimony should be stricken.<sup>70</sup> No showing of prejudice is required.<sup>71</sup> Notwithstanding this provision, the agent’s destruction of those notes is generally held to be harmless error.<sup>72</sup> Nonetheless, the agent’s reports, which incorporates these notes, are discoverable.

## **J. BRADY MATERIAL**

The prosecutor must disclose all evidence favorable to the defendant which is “material either to guilt or punishment.”<sup>73</sup> United States v. Bagley, 473 U.S. 667 (1985) explained that evidence was material if there was a reasonable probability that had the evidence been disclosed to the defense, the result would have been different. Impeachment evidence may come within the

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<sup>67</sup> See 18 U.S.C. § 3500(e)(2); see also United States v. Smith, 984 F.2d 1084 (10<sup>th</sup> Cir. 1993) (agent’s interview notes of government witness are Jencks “statements” if substantially verbatim), cert. denied, 510 U.S. 873 (1993); United States v. Rewald, 889 F.2d 836 (9<sup>th</sup> Cir. 1989) (court’s failure to review FBI reports of witness interviews for Jencks material required remand.)

<sup>68</sup> See United States v. Griffin, 659 F.2d 932, 937-38 (9<sup>th</sup> Cir. 1981), cert. denied, 456 U.S. 949 (1982).

<sup>69</sup> See United States v. Harris, 543 F.2d 1247, 1251 (9<sup>th</sup> Cir. 1976).

<sup>70</sup> See 18 U.S.C. §§ 3500(b) & (d).

<sup>71</sup> See United States v. Well, 572 F.2d 1383, 1384 (9<sup>th</sup> Cir. 1978).

<sup>72</sup> See United States v. Ammar, 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983); see also United States v. McKoy, 78 F.3d 446, 451 (9<sup>th</sup> Cir. 1996) (Jencks Act violation should have resulted in mistrial, not suppression), cert. denied, 519 U.S. 817 (1996).

<sup>73</sup> See Brady v. Maryland, 373 U.S. 83, 87 (1963).

Brady rule if the reliability of the witness may be determinative of the defendant's guilt or innocence.<sup>74</sup> Also, there appears to be no denial of due process if the Brady material is disclosed in time for its effective use of trial.<sup>75</sup>

Be aware that Brady suggests that the defense must request the information. While Brady must be interpreted expansively by defense counsel, all Brady requests must be **SPECIFIC** in order to protect the record and to force the government to comply with the requests. Absence of specificity may affect the perception of the Court on appeal and the ultimate likelihood of success.

In Kyles v. Whitley, 514 U.S. 419 (1995), the government was found to have a duty to disclose exculpatory evidence, even in the absence of a request, if the withheld evidence, considered as a whole, results in a "reasonable probability" that a different outcome would have obtained. The defendant should show that the suppression of the evidence "undermined confidence in the outcome of the trial." The question of good faith is irrelevant, and the obligation exists even if the police have failed to disclose the evidence to the prosecutor.

Categories of evidence generally considered to be Brady material are a witness' prior record,<sup>76</sup> witness statements that are favorable to the defendant,<sup>77</sup> the existence of witnesses favorable to the defense,<sup>78</sup> and psychiatric reports showing the defendant's legal insanity.<sup>79</sup> Other examples of Brady material which must be produced include promises of immunity to a

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<sup>74</sup> See United States v. Starusko, 729 F.2d 256, 260 (3d Cir. 1984).

<sup>75</sup> See United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983).

<sup>76</sup> See United States v. Strifler, 851 F.2d 1197, 1202 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989).

<sup>77</sup> See Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968).

<sup>78</sup> See United States v. Wilkins, 326 F.2d 135, 136 (2d Cir. 1964).

<sup>79</sup> See Ashley v. Texas, 319 F.2d 80, 85 (5th Cir.), cert. denied, 375 U.S. 931 (1963).

government witness<sup>80</sup> and prior contrary statements of a prosecution witness.<sup>81</sup> “Out of the ordinary” Brady requests, that is, information other than informant records and open cases pending against the informant should be made well in advance of trial for two reasons. One, the prosecutor may rethink his/her position regarding the indictment after reviewing all the material available against its informant, and two, the information may take some time to get from other agencies, particularly the I.N.S. and the I.R.S.

Cases such as Kyles v. Whitley, 514 U.S. 419 (1995), and United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991), make clear that it does not matter whether the requested information is in the immediate possession of the United States Attorney’s Office. If any agency of the United States government or local law enforcement has the information, it is available to the prosecutor and the defense is entitled to it if it qualifies as Brady or Giglio material.

Giglio v. United States, 405 U.S. 150 (1972), clarified that any evidence which would affect the credibility of a government witness could be construed as Brady material. This category would include any information that shows bias of the witness, motive for the witness to lie or to exaggerate testimony, credibility issues of a government witness (such as prior bad acts of dishonesty or felony convictions), and a lack of memory by the witness. The defense should also request that the personnel files of government witnesses be produced so that those files can be reviewed for possible Brady material.

If the exculpatory nature of the evidence is doubtful, the prosecutor should turn over the

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<sup>80</sup> See Giglio v. United States, 405 U.S. 150, 154 (1972).

<sup>81</sup> See Giles v. Maryland, 386 U.S. 66, 81 (1967); see also United States v. Hanna, 55 F.3d 1456, 1459-61 (9<sup>th</sup> Cir. 1995) (failure to produce grand jury testimony and pretrial statements of arresting officer which might have been inconsistent with trial testimony was reversible error).

file to the court for a Brady inspection.<sup>82</sup> If the court orders 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 to request that the material be sealed for appellate review of the trial judge's decision.<sup>83</sup> The trial court's refusal to conduct an in camera evidentiary hearing as to the existence of specifically requested exculpatory evidence that is not otherwise discoverable, such as a Jencks Act statement, requires reversal.<sup>84</sup>

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<sup>82</sup> See United States v. Lloyd, 992 F.2d 348, 352 (D.C. Cir. 1993) (case remanded for government to make redetermination as to materiality of documents that its investigation produced, and any documents not turned over to the defendant should be reviewed in camera); accord United States v. Cadet, 727 F.2d 1453, 1467 (9<sup>th</sup> Cir. 1984); United States v. Griggs, 713 F.2d 672, 674 (11<sup>th</sup> Cir. 1983); Hamric v. Bailey, 386 F.2d 390, 393 (4<sup>th</sup> Cir. 1967).

<sup>83</sup> But see United States v. Gardner, 611 F.2d 770, 775 (9<sup>th</sup> Cir. 1980) (with trial court permission, prosecutor may submit for in camera inspection only materials it deems discoverable under Brady).

<sup>84</sup> See United States v. Gaston, 608 F.2d 607, 612-14 (5<sup>th</sup> Cir. 1979).

## CHAPTER FOUR

### PRETRIAL MOTIONS

This Chapter contains a discussion of selected pretrial motions and motions in limine frequently filed. Rule 12, 3d Cir. R. 12.1, and 3d Cir. R. 7.1(a), (b)(1), (d)(1) & (g), made specifically applicable to criminal cases via Local R. 1.1, define the parameters of pre-trial motion practice.<sup>85</sup> Although Fed. R. Crim. P. 12(b) allows oral motions to be filed at the judge's discretion and does not specify when the motions must be filed, Local R. 12.1 sets a time frame for filing motions:

Defenses or objections permitted pursuant to Fed. R. Crim. P. 12 shall be made before pleading or within 30 days thereafter unless the Court at the time of arraignment on application of counsel otherwise specifies, or unless good cause is shown.<sup>86</sup>

#### **A. MOTIONS REQUESTING ENLARGEMENT OF TIME TO FILE PRETRIAL MOTIONS**

Motions requesting enlargements of time in which to file pretrial motions may be filed in this district. Typically, extensions are granted for a thirty to sixty day period. Rule 45 governs the computation of time, the procedure, and the criteria for such requests:

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if a request is made before the expiration of the period originally prescribed by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; . .

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<sup>85</sup> See Appendix - District of New Jersey Local Rules 7.1 (Civil) & 12.1 (Criminal).

<sup>86</sup> See Fed. R. Crim. P. 12(b)(1)-(5) (detailing motions that must be filed prior to trial).

Motions to enlarge are typically filed because defense counsel has not received complete discovery from the AUSA or has not had ample opportunity to review the discovery within the time frame allocated in 3d Cir. R. 12.1. In cases involving complex legal and/or factual issues or situations in which the AUSA informs counsel that discovery will not be available within the thirty day time frame, a request to extend the pretrial filing date to ten days after the AUSA anticipates the completion of discovery should be made. If discovery is not completed by the anticipated date, the AUSA should be contacted for consent for a further continuance order. If, in the alternative, the AUSA is not being diligent in the production of discovery, counsel should consider filing a motion to compel discovery or to dismiss the indictment, whichever is more appropriate.

#### **B. MOTIONS TO CONTINUE TRIAL AND THE RIGHT TO A SPEEDY TRIAL**

Once motions have been filed and argued and a trial date has been set, motions to continue trial are frowned upon by the District Court Judges in the District of New Jersey. Most judges, and more importantly, their deputy clerks, make reasonable efforts to accommodate the attorneys' schedules. Scheduling problems should be brought to the attention of the judge at the return date for pretrial motions, because that is typically the juncture when a "real" trial date is set.

District Court Judges in this district run individual calendars and are solely responsible for compliance with the Speedy Trial Act for cases on their dockets.<sup>88</sup> Once an actual trial date is set, most judges are reluctant to grant a trial continuance, and will do so only in exceptional

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<sup>87</sup> Fed. R. Crim. P. 45.

<sup>88</sup> See United States v. Rivera Constr. Co., 863 F.2d 293, 296-97 (3d Cir. 1988).

circumstances. Nonetheless, some judges are more accommodating than others; it is therefore advisable to learn the practice of the particular judge prior to requesting a continuance.

## **1. The Speedy Trial Act**

### **a. Generally**

Under the Speedy Trial Act, the critical time periods are thirty days from the arrest to the indictment and seventy days from the date the indictment is filed to trial.<sup>89</sup> The Act also provides for a mandatory thirty day defense preparatory period.<sup>90</sup>

In setting trial schedules, the Speedy Trial Act gives priority to defendants who have been detained:

The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in Section 3161(h) are excluded in computing the time limitation specified in this section.<sup>91</sup>

Cases involving unusually complex fact patterns and/or legal issues may be considered for a continuance:

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pre-trial proceedings or for trial itself within the time limits established by this section.<sup>92</sup>

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<sup>89</sup> See 18 U.S.C. § 3161(b) (thirty days from arrest to indictment); § 3161(c)(1) (trial is seventy days after indictment is filed).

<sup>90</sup> See 18 U.S.C. § 3161(c)(2) (absent written consent of defendant, matter shall not be tried less than thirty days from date on which defendant first appears through counsel or expressly waives counsel and elects to proceed pro se).

<sup>91</sup> 18 U.S.C. § 3164(b).

<sup>92</sup> 18 U.S.C. § 3161(h)(8)(B)(ii).

Sanctions for failure to comply with the Speedy Trial Act are covered in 18 U.S.C. §3162

(a)(2). The criteria a court is to consider when deciding to dismiss the case with or without prejudice to the government are:

among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re prosecution on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.<sup>93</sup>

Failure to comply with the Act permits reconsideration by the court of the conditions of confinement:

No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial.<sup>94</sup>

#### **b. Tolling The Statute**

Section 3161(h) of Title 18 governs the computation of excludable time. In effect, the filing of a pretrial motion will toll the Speedy Trial Act until the timely disposition of the motion by the trial court.<sup>95</sup> The Speedy Trial Act should be reviewed carefully prior to challenging an indictment based on post-indictment, pretrial delay.

Post-arrest pre-indictment requests for a continuance are often initiated jointly by the government and defendant on the grounds that the defendant is cooperating, may decide to

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<sup>93</sup> 18 U.S.C. § 3162; see also United States v. Taylor, 487 U.S. 326, 337 (1988) (applying test for determining whether dismissal should be with or without prejudice).

<sup>94</sup>18 U.S.C. § 3164(c).

<sup>95</sup>See 18 U.S.C. § 3161(h)(1)(F) (delay resulting from any pretrial motion or its disposition is excludable); see also United States v. Felton, 811 F.2d 190, 196 (3d Cir. 1987) (indicating that subsection (h)(1)(F) does not exclude time where court does not establish set, specific time frame for consideration of motions, as intended by Congress in Speedy Trial Act), cert. denied, 483 U.S. 1008 (1987).

cooperate, or may agree to waive indictment and to proceed by an information. Post-indictment requests for a continuance based on incomplete or untimely discovery are initiated by the defendant. Both types of continuance motions are usually granted, particularly when they are presented as a joint request.<sup>96</sup>

## **2. The Sixth Amendment Guarantee To A Speedy Trial**

The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The right to speedy trial does not attach until the defendant is indicted, arrested, or otherwise officially accused.<sup>97</sup>

The Sixth Amendment right to a speedy trial is not primarily intended to prevent prejudice to the defense caused by passage of time. The Due Process Clause and statutes of limitations serve that function.<sup>98</sup> The Sixth Amendment speedy trial guarantee is instead designed to

minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.<sup>99</sup>

In Barker v. Wingo,<sup>100</sup> the Supreme Court set forth a four-part test for evaluating a Sixth Amendment challenge. The Court announced the factors to be considered in evaluating a speedy trial challenge: the length of the delay, the reason for the delay, the prejudice suffered by the

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<sup>96</sup> See Appendix - Sample Motion Requesting Continuance.

<sup>97</sup> See 18 U.S.C. § 3161(c)(1); United States v. McKinley, 23 F.3d 181, 184 (7<sup>th</sup> Cir. 1994).

<sup>98</sup> See United States v. MacDonald, 456 U.S. 1, 8 (1982).

<sup>99</sup> See id. at 8; see also United States v. Loud Hawk, 474 U.S. 302, 310-11 (1986) (expanded MacDonald to cover situations where government appealed pretrial order dismissing indictment); infra § F(2).

<sup>100</sup> 407 U.S. 514 (1972).

defendant, and what the defendant did to assert his/her speedy trial rights.<sup>101</sup> The Court also stated that the length of the delay operates as a triggering mechanism, and that until a presumptively prejudicial delay has occurred, there is no need to engage in the remainder of the analysis.<sup>102</sup>

### **3. Statute Of Limitations**

There is no statute of limitations for capital offenses.<sup>103</sup> Most other offenses have a five year statute of limitations, although bank frauds and other types of frauds have a ten year statute of limitations.<sup>104</sup>

### **C. MOTIONS TO SUPPRESS EVIDENCE BASED ON VIOLATIONS OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS**

Pursuant to Fed. R. Crim. P.12(b), motions to suppress may be presented to the court orally or in writing, at the discretion of the particular judge.<sup>105</sup> At times, the court may decide the motion based upon the papers filed in the case without an evidentiary hearing. A discussion of the broad array of suppression motions available under the Fourth, Fifth, and Sixth Amendments is well beyond the scope of this manual. There are a myriad of excellent hornbooks and treatises available on the subject, and they should be consulted whenever counsel is faced with the

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<sup>101</sup> See id. at 530; see also, e.g., Doggett v. United States, 505 U.S. 647, 651 (1992) (8 ½ year delay; United States v. Dent, 149 F.3d 180, 184 (3d Cir. 1998) (applying Barker v. Wingo test to five year delay); United States v. Shell, 974 F.2d 1035, 1036 (9th Cir. 1992) (five year delay between indictment and arrest, attributable to government's negligence, is presumptively prejudicial; indictment dismissed despite defendant's concession that most essential witnesses and documentary evidence were still available because government failed to rebut presumption).

<sup>102</sup>See 407 U.S. at 530-31.

<sup>103</sup>See 18 U.S.C. § 3281.

<sup>104</sup>See 18 U.S.C. § 3282.

<sup>105</sup>See Fed. R. Crim. P. 12(b); see also Appendix - Sample Motion to Suppress.

possibility of a suppression issue. Careful research coupled with creative thinking and advice from seasoned colleagues will significantly expand the possibilities. A sampling of some of the materials available regarding suppression motions includes:

Federal Defenders of San Diego, Inc., Defending a Federal Criminal Case (2010).

Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (2004-2011)

Joseph G. Cook, Constitutional Rights of the Accused (3d ed. 1996)

William A. Grimes, Criminal Law Outline (1997)

#### **D. JOINDER AND SEVERANCE MOTIONS – FED. R. CRIM. P. 8, 12, 13 & 14**

Rule 8 permits joinder of offenses and of defendants. Joinder can and often will be detrimental to individual defendants at trial. It will likely also be detrimental at sentencing, given the language of the relevant conduct section of the sentencing guidelines.<sup>106</sup> The defendant can move to sever if he/she can show that the joinder was improper and that he/she was prejudiced by the joinder.<sup>107</sup> The decision to sever, however, rests within the discretion of the trial court.<sup>108</sup>

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<sup>106</sup> See U.S.S.G. § 1B1.3.

<sup>107</sup> See United States v. Quintero, 38 F.3d 1317, 1339 (3d Cir. 1994) (defendant bears burden of establishing that separate trials are necessary to prevent prejudice), cert. denied, 513 U.S. 1195 (1995); United States v. Sandini, 888 F.2d 300, 305 (3d Cir. 1989) ("The district court in exercising its discretion, balances the potential prejudice to the defendant against the advantages of joinder in terms of judicial economy. . . it is well established that judicial economy favors a joint trial where defendants are jointly indicted . . . . Consequently, the burden is on the defendant to establish a reason for a severance"), cert. denied, 494 U.S. 1089 (1990); United States v. Gorecki, 813 F.2d 40, 42 (3d Cir. 1987) (defendant claiming improper joinder under Fed. R. Crim. P. 8(a) must prove actual prejudice from misjoinder); see also Quintero, 38 F.3d at 1339 (no mandatory requirement for severance, and mutually antagonistic defenses are not prejudicial per se; there must be serious risk that joint trial will compromise specific trial right of one defendant or prevent the jury from making reliable judgment about guilt or innocence).

<sup>108</sup> See Sandini, 888 F.2d at 305 (decision to sever is reviewed for abuse of discretion).

Rule 13 is implicated when there are multiple but related indictments.<sup>109</sup> Under Rule 13, the court can try two or more indictments together if the court determines that the defendants could have been charged in a single indictment.<sup>110</sup>

Severance of defendants and/or charges is governed by Fed. R. Crim. P. 14, which provides for severance (or any other relief justice requires) should either party establish that joinder will prejudice his/her case.<sup>111</sup> Mutually exclusive defenses may sometimes require severance, such as when acquittal of one co-defendant necessarily calls for the conviction of the other.<sup>112</sup> A motion to sever will be reviewed on appeal only for abuse of discretion.<sup>113</sup>

The procedure for motions to sever is governed by Fed. R. Crim. P. 12. Rule 12 requires that a motion to sever must be brought prior to trial.<sup>114</sup>

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<sup>109</sup> Fed. R. Crim. P. 13.

<sup>110</sup> Id.

<sup>111</sup> See United States v. Ingio, 925 F.2d 641, 655 (3d Cir. 1991) (defendant entitled to severance when evidence against one defendant cannot be compartmentalized by jury; jury must be unable to make individualized determination of guilt).

<sup>112</sup> See United States v. Tootick, 952 F.2d 1078, 1081 (9th Cir. 1991). But see United States v. Zafiro, 506 U.S. 534, 537-38 (1993) (Rule 14 does not require severance as matter of law when co-defenses are mutually exclusive; severance required only if there exists serious risk that joint trial would compromise specific trial right or prevent jury from making reliable judgment of guilt or innocence); United States v. Voight, 89 F.3d 1050, 1095 (3d Cir. 1996) (asserted defenses, while in conflict with one another, were not so irreconcilable that jury could not have been able to assess guilt or innocence of defendant on an individual, independent basis; mutually antagonistic defenses exist rarely in practice), cert. denied, 519 U.S. 104 (1996).

<sup>113</sup> See United States v. Gonzalez, 918 F.2d 1129, 1137 (3d Cir. 1990), cert. denied, 499 U.S. 982 (1991) (citing United States v. Bosica, 573 F.2d 827, cert. denied, 436 U.S. 911 (1979)); see also id. (four factors court should consider when determining whether to sever are likelihood that co-defendant will testify, degree to which such testimony would be exculpatory, degree to which testifying co-defendants could be impeached, and effect on judicial economy).

<sup>114</sup> While other circuits have held that the motion must also be made at the close of trial in order to preserve the issue for appeal, see, e.g., United States v. Allen, 160 F.3d 1096, 1106-07 (6<sup>th</sup> Cir. 1998), the Third Circuit has not yet spoken on this requirement. See also Appendix - Sample Motion to Sever.

**E. MOTIONS FOR RECUSAL AND FOR A CHANGE OF VENUE – FED. R. CRIM. P. 21(A)**

**1. Recusal Of Trial Judge**

Section 455(a) of Title 28 directs that: “Any justice or judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>115</sup>

**2. Transfer Of Cases To Other Jurisdictions**

The transfer of a case due to pretrial publicity that may prejudice the defendant is governed by Fed. R. Crim. P. 21(a):

**For Prejudice in the District.** The court upon motion of the defendant shall transfer the proceeding as to that defendant 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 the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.<sup>116</sup>

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<sup>115</sup> See generally Marshall v. Jerrico, 446 U.S. 238 (1980) (Due Process Clause entitles person to impartial and disinterested tribunal in both civil and criminal cases).

<sup>116</sup> Actual Prejudice:

See Irvin v. Dowd, 366 U.S. 717, 723 (1961) (test for prejudice is whether nature and strength of opinion formed necessarily raises presumption of partiality; impartiality is not technical conception but rather state of mind).

Inherent Prejudice:

See Murphy v. Florida, 421 U.S. 794, 799 (1975) (juror exposure to information concerning defendant's priors and/or news accounts of crime charged does not presumptively deprive defendant of due process; exposure is to be reviewed by "totality of the circumstances" analysis, and once juror has given court assurances that he/she can be fair, it remains open to defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will rise the presumption of partiality."); see also Chapter Six, supra, for a discussion of Mu'Min v. Virginia, 500 U.S. 415 (1991).

Reasonable Likelihood Standard:

See Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (due process requires that accused receive trial by impartial jury, free from outside influences; given modern communications and difficulty of effacing prejudicial

Rule 21(b) for the transfer of cases to another district upon motion by the defendant for the convenience of parties and witnesses and in the interests of justice.

## **F. MOTIONS TO DISMISS INDICTMENTS**

### **1. Government Motion To Withdraw An Indictment**

Government motions to dismiss indictments are governed by Fed. R. Crim. P. 48(a). The government is entitled to a presumption of good faith in dismissing the charging document.<sup>117</sup> Be wary if the government moves to withdraw the indictment for "no apparent reason." The indictment will more than likely resurface in a new and improved version, adding charges that will invariably expose the defendant to more severe penalties. Make a record and preserve the right to question whether the government acted in good faith in dismissing the original indictment.

### **2. Indictments Dismissed By The Court**

Rule 48(b) provides a mechanism by which the court may dismiss an indictment due to pretrial delay:

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publicity from minds of the jurors, trial court must take strong measures to ensure that balance is never weighed against accused); see also United States v. Inigo, 925 F.2d 641, 655 (3d Cir. 1991) (trial was not partial despite corporate victim's unique prominence in economic and social communities where case was litigated and attention drawn to case by media); Martin v. Warden, 653 F.2d 799, 804 (3d Cir. 1981) (pre-trial publicity will not automatically taint juror; person may serve if he/she can set aside prior impression and render fair verdict based on evidence presented at trial); cert. denied, 454 U.S. 1151 (1982). See generally Government of the Virgin Islands v. Riley, 973 F.2d 224, 226 (3d Cir. 1992) (question is not whether community remembers case, but whether jurors had such fixed opinions that they could not judge guilt of defendant impartially; pretrial publicity will not automatically taint juror).

<sup>117</sup> See United States v. Dyal, 868 F.2d 424, 428-429 (11<sup>th</sup> Cir. 1989) (in dismissing indictment, information, or complaint under Rule 48(a), government is entitled to presumption of good faith); see also id. (prosecutor abides by standards of fair play and decency if s/he refuses to seek indictments until completely satisfied that s/he should prosecute and that s/he will be able promptly to establish guilt beyond reasonable doubt); United States v. Welborn, 849 F.2d 980, 983 (5<sup>th</sup> Cir. 1988) (prosecutor's request for dismissal is improper if made in bad faith, which arises when prosecution is motivated "by considerations `clearly contrary to the public interest[;]'" "the public interest is not served by harassing a defendant. When a court considers a prosecutor's motion to dismiss it must begin with the presumption that the prosecutor acted in good faith. . . . Whether deliberate or not, unjustified failure to contest a motion to dismiss waives any right to later complain that the prosecutor requested dismissal in bad faith.").

**By Court.** If there is unnecessary delay in presenting the charge to a grand jury or in filing an Information against a defendant who has been held to answer to the district court, or if there has been unnecessary delay in bringing a defendant to trial, the court may dismiss the Indictment, Information or Complaint.

Rule 48(b) does not be apply in lieu of the Sixth Amendment guarantee to a speedy trial or the Speedy Trial Act but, rather, reinforces the court's inherent power to dismiss a case. Needless to say, such dismissals are rarely granted.

### **3. Miscellaneous Defense Motions Requesting A Dismissal Of The Indictment**

There are additional grounds upon which to request that the court dismiss an indictment.<sup>118</sup>

#### **a. Double Jeopardy**

Motions to dismiss on grounds of double jeopardy merit special mention given the number of state court cases that are assumed by the federal government. The federal authorities in the District of New Jersey are assuming a significant number of cases that begin as state court prosecutions because defendants can be detained under the Bail Reform Act and because they are subject to lengthier sentences under the sentencing guidelines. However, when a defendant is convicted in state court, the United States Attorney's Office, will, in most cases, adhere to the Justice Department's Petite policy prior to bringing a case in federal court.<sup>119</sup>

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<sup>118</sup> See generally Federal Defenders of San Diego, Inc., Defending a Federal Criminal Case (2010), Volume 1, Ch. 6, Motions Practice.

<sup>119</sup> The local United States Attorney's Office will seek permission from Washington, D.C., should it believe that an individual merits dual prosecution. Because this practice is an internal procedure, there is no redress to the courts should it appear that the defendant has been targeted in violation of this policy. See generally Petite v. United States, 361 U.S. 529 (1960). Relief may, however, be sought by means of a motion to dismiss for vindictive prosecution. See Defending a Federal Criminal Case, supra Note 118, at Vol. 1, Ch. 6.

The Double Jeopardy Clause protects only against the imposition of multiple criminal punishments for the same offense. The Supreme Court has held that the proper analysis in reviewing double jeopardy claims evaluates whether each offense contains an element not contained in the other.<sup>120</sup> When a case has already been tried in state court, double jeopardy is not a bar to a subsequent federal prosecution.<sup>121</sup> Only if the same sovereign is involved and if the elements are the same, will the double jeopardy clause bar a subsequent prosecution and punishment.<sup>122</sup>

The Double Jeopardy Clause also does not bar prosecution where some of the alleged overt acts are proven with conduct that was prosecuted as a substantive crime in an earlier prosecution. Conspiracy and the underlying crime itself are separate offenses.<sup>123</sup> The clause will likewise not bar a later criminal prosecution for conduct that was punished in an earlier civil proceeding.<sup>124</sup>

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<sup>120</sup> See Blockburger v. United States, 284 U.S. 299, 303-04 (1932); see also United States v. Dixon, 509 U.S. 688, 704 (1993) (successive prosecution need not satisfy “same conduct” test to avoid double jeopardy bar ) (overruling Grady v. Corbin, 495 U.S. 508 (1990)).

<sup>121</sup> For a general discussion on the theory of double jeopardy and dual sovereignty, see generally Rinaldi v. United States, 434 U.S. 22 (1977), and Heath v. Alabama, 474 U.S. 82 (1985). See also United States v. Pungitore, 910 F.2d 1084, 1105 (3d Cir. 1990) (“‘dual sovereignty’ doctrine rests on premise that where both sovereigns legitimately claim strong interest in penalizing same behavior, they have concurrent jurisdiction to vindicate those interests, and need not yield to each other”; acquittal in state court does not preclude federal prosecution, especially for RICO violations), cert. denied, 500 U.S. 915 (1991).

<sup>122</sup> See United States v. Conley, 37 F.3d 970, 977 (3d Cir. 1994) (applying Blockburger test to money laundering and illegal gambling conspiracies); see also United States v. Calderone, 982 F.2d 42, 48 (2d Cir. 1992) (conspiracy wholly contained within longer conspiracy that was already prosecuted is barred by double jeopardy).

<sup>123</sup> See United States v. Felix, 503 U.S. 378, 388 (1992).

<sup>124</sup> See Hudson v. United States, 522 U.S. 93, 99 (1997) (remanded for determination whether monetary sanctions were merely remedial and did not constitute “punishment” that would preclude subsequent criminal prosecution); United States v. \$184,505.01 in U.S. Currency, 72 F.3d 1160, 1167 (3d Cir. 1995) (forfeiture does not constitute punishment within meaning of double jeopardy clause); United States v. Cullen, 979 F.2d 992, 994 (4<sup>th</sup> Cir. 1992) (forfeiture is not primarily an act of punishment but protects community from threat of continued

Double jeopardy might, however, bar retrial if a prosecutor engages in misconduct to thwart an imminent acquittal. Double jeopardy bars a second trial where a defendant successfully moved for a mistrial, but only if the conduct giving rise to the mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial.<sup>125</sup> Extensions of this principle should be limited to situations in which prosecutors act with the intent to avoid an acquittal that they believe is likely.<sup>126</sup> Note that the Double Jeopardy Clause is not offended when a defendant is retried after the magistrate judge has declared a mistrial, upon the defendant's request because the jury could not reach a unanimous verdict.<sup>127</sup>

## **G. MOTIONS CONCERNING EXPERTS**

### **1. Motions For Appointment of Experts**

The Criminal Justice Act allows counsel to obtain "investigative, expert, or other services necessary for adequate representation."<sup>128</sup> Section 3006A(e)(2) of Title 18 permits appointed counsel to retain experts without court approval provided the cost does not exceed \$300.00. Costs in excess of \$300.00 require pre-approval.

Pursuant to Fed. R. Crim. P. 17(b), these requests can and should be made on an ex parte basis:

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criminal activity; Double Jeopardy Clause does not apply to civil forfeitures where property itself has been instrument of criminal activity).

<sup>125</sup> See Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982).

<sup>126</sup> See United States v. Wallach, 979 F.2d 912, 916 (2d Cir.), cert. denied, 508 U.S. 939 (1993); United States v. Coleman, 862 F.2d 455, 460 (3d Cir. 1988).

<sup>127</sup> See Government of the Virgin Islands v. Paniagua, 922 F.2d 178, 182 (3d Cir. 1990).

<sup>128</sup> 18 U.S.C. § 3006A(e)(1); see also Appendix - Sample Application for Payment of Experts and Interim Payment of Expert Services.

**Defendant Unable to Pay.** Upon a defendant’s ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness’s fees and the necessity of the witness’s presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.<sup>129</sup>

## **2. Motions to Challenge The Basis of Expert Testimony**

In Daubert v. Merrell Dow Pharmaceuticals, Inc., the Supreme Court held that Fed. R. Evid. 702 provides a more liberal basis for admitting relevant scientific evidence than that of general acceptance in the relevant scientific community.<sup>130</sup> Among the factors a court should consider are whether the scientific knowledge being offered has been tested, whether the underlying theory could be falsified, whether it has been subject to peer review and publication, and whether the evidence has a particular degree of acceptance in the relevant community.<sup>131</sup> Additionally, the Court held that trial courts have broad discretion under the “gatekeeping” function to consider the Daubert factors, to the extent relevant, in determining the reliability of all types of expert testimony.<sup>132</sup> The Court emphasized that the role of the Daubert factors as reasonable measures of reliability will vary from case to case and that the trial court has broad discretion in considering the specific factors.<sup>133</sup>

The “gatekeeping” obligation announced in Daubert was extended by the Supreme Court

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<sup>129</sup> See also 18 U.S.C. § 3006A(e)(1).

<sup>130</sup> See 509 U.S. 579 (1993) (superseding Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923)).

<sup>131</sup> See id. at 593.

<sup>132</sup> See id. at 596.

<sup>133</sup> See id.

Kumho Tire Co., Ltd. v. Carmichael to encompass not only “scientific” expert testimony, but testimony based on technical or other specialized knowledge as well.<sup>134</sup> In Kumho Tire, the Supreme Court opined that although Daubert limited its “gatekeeping” requirement to scientific testimony, which was the testimony at issue in Daubert, Fed. R. Evid. 702 makes no relevant distinctions between scientific knowledge and technical or other specialized knowledge.<sup>135</sup> Consequently, the gatekeeping function properly applies to all specialized knowledge.<sup>136</sup>

The Third Circuit had previously developed its own reliability criteria in United States v. Downing.<sup>137</sup> While Daubert now controls the analysis, the factors identified in Downing remain useful. Those factors include:

(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.<sup>138</sup>

On a final note, remember that Fed. R. Crim. P. 16(b)(1)(C) imposes reciprocal discovery obligations on defense counsel with respect to expert testimony when the expert will testify.

## **H. MOTIONS IN LIMINE**

A formal notice of motion and accompanying legal memoranda can be filed with the court

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<sup>134</sup> See 526 U.S. 137, 147 (1999)

<sup>135</sup> See id.

<sup>136</sup> See id. at 152.

<sup>137</sup> See 753 F.2d 1224, 1237 (3d Cir. 1985).

<sup>138</sup> Id.

or submitted informally as letter applications.<sup>139</sup> If the issue is novel or involves extensive research, it may be helpful to file the motion several days in advance of trial. If the issue is fairly rudimentary, filing on the eve of trial may be acceptable. Following is a non-exhaustive list of motions routinely filed.

### **1. Fed. R. Evid. 404(b) Motions**

Among the most common motions in limine are 404(b) motions, which attempt to limit the prior bad act evidence that a prosecutor will be permitted to introduce against the defendant.<sup>140</sup> In order to admit prior bad act evidence, a court must be satisfied that the following criteria are met:

- (1) the evidence must have a proper purpose under Rule 404(b);
- (2) it must be relevant under Rule 402; and
- (3) its probative value must outweigh its prejudicial effect under Rule 403.<sup>141</sup>

If the evidence is admitted, the court must charge the jury to consider the evidence only for the limited purpose for which it is admitted.<sup>142</sup>

Rule 404(b) in limine motions should be used to limit or preclude the introduction of the

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<sup>139</sup> Motions in limine are not among the motions that must be filed pretrial pursuant to Fed. R. Crim. P. 12(b)(1)-(5).

<sup>140</sup> See Appendix - Sample Motion Pursuant to Fed.R.Evid. 404(b).

<sup>141</sup> See United States v. Console, 13 F.3d 641, 659 (3d Cir. 1993) (citing United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992)), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994); see also Huddleston v. United States, 485 U.S. 681, 687 (1988) (threshold inquiry court must make before admitting similar acts evidence is whether that evidence is probative of material issue other than character; court is not required to make preliminary finding that government has proved "other act" by preponderance of evidence before it submits similar evidence to jury, but, rather, evidence should be admitted if there is sufficient evidence to support finding by jury that defendant committed similar acts); cf. United States v. Murray, 103 F.3d 310, 317 (3d Cir. 1997) (evidence that defendant committed uncharged murder was not admissible in prosecution for intentional killing in furtherance of continuing criminal enterprise); United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994) (when evidence of prior bad acts is offered, proponent must clearly articulate how that evidence fits into chain of logical inferences, no link of which may be inference that defendant has propensity to commit crime charged).

<sup>142</sup> See Console, 13 F.3d at 659.

defendant's prior arrests, convictions, use of aliases, probation/parole status, etc.<sup>143</sup> Additionally, given the negative stereotype many jurors have toward non-American nationals, several appellate courts have also held that introducing information concerning the nationality of a defendant may be unduly prejudicial.<sup>144</sup>

Admission of 404(b) evidence may also be contingent upon the defense presented.

Notably, the First Circuit has held that if no defense is presented, defense counsel's opening statement cannot open the door to other crimes evidence.<sup>145</sup> Additionally, the Supreme Court, in Old Chief v. United States, held that:

A district court abuses its discretion under Rule 403 if it spurns a 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 element of prior conviction.<sup>146</sup>

There had been a split in the circuits on this issue when the stipulation concerned an element of the offense charged and the defense theory is that the offense charged never took

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<sup>143</sup> Be advised that Fed. R. Evid. 404(b) issues may arise should the defendant opt to introduce character evidence on his/her behalf. See United States v. Curtis, 644 F.2d 263, 268 (3d Cir. 1981), for a good discussion of the differences between opinion and reputation evidence when introduced to establish good character pursuant to Fed. R. Evid. 405.

<sup>144</sup> See United States v. Vue, 13 F.3d 1206, 1211 (8<sup>th</sup> Cir. 1994) (reversing conviction of two brothers of Hmong descent because government called agent to testify that 95% of cases involving heroin involve individuals of Hmong descent; court relied on Fed. R. Evid. 401 & 403 and found due process and equal protection violations); United States v. Rodriguez Cortes 949 F.2d 532, 541 (1<sup>st</sup> Cir. 1991) (admission at cocaine conspiracy trial of Columbian identity card bearing photo of defendant who was U.S. resident was sufficiently prejudicial to spoil conviction); see also United States v. Doe, 903 F.2d 16, 20 (D.C. Ct. App. 1990) (expert testimony that local retail drug market had been taken over by Jamaicans was irrelevant and unfairly prejudicial where defendants were Jamaican). But see United States v. Alzanti, 54 F.3d 994, 1007-08 (1<sup>st</sup> Cir. 1995) (permitting evidence of repressive Kuwaiti customs and practices toward domestic workers in trial of defendant on charge of holding household employee in involuntary servitude).

<sup>145</sup> See United States v. Karas, 950 F.2d 31, 37 (1<sup>st</sup> Cir. 1991).

<sup>146</sup> 519 U.S. 172, 174 (1997)

place. In United States v. Mohel, the Second Circuit held that “under Rule 404(b) bad acts evidence must be relevant to an ‘actual’ issue and that an offer to stipulate to an issue removes it from the case.”<sup>147</sup> This remains the general rule in both the Second and the Eleventh Circuits, although the Eleventh Circuit has never reversed a conviction on this basis and appears to have embraced a contrary position in earlier cases.<sup>148</sup> The Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have rejected the position of the Second Circuit, concluding that bad acts evidence may be admissible to prove an element of a crime regardless whether that element is “in dispute.”<sup>149</sup>

Other circuits have been somewhat equivocal. The First Circuit, while suggesting that a defendant’s offer to stipulate to an element renders evidence of other bad acts inadmissible to prove that element, has also stated that “[i]n the final analysis, . . . whether such an offer is accepted remains in the sound discretion of the district judge.”<sup>150</sup> The Third Circuit has noted that “district courts should generally deem prior bad acts evidence inadmissible to prove an issue that the defendant makes clear he is not contesting,”<sup>151</sup> but has refused to adopt a per se rule of

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<sup>147</sup> 604 F.2d 748, 751 (2d Cir. 1979).

<sup>148</sup> See, e.g., United States v. Tokars, 95 F.3d 1520, 1537 (11<sup>th</sup> Cir. 1996) (admitting articles about money laundering where defendant, who was charged with that offense, never stipulated in writing that intent was not an issue for jury consideration yet asserted that he never denied knowing how to launder money); United States v. Colon, 880 F.2d 650, 660 (2d Cir. 1989); see also United States v. Williford, 764 F.2d 1493, 1498 (11<sup>th</sup> Cir. 1985) (“This circuit has refused to adopt a per se rule either for or against admission of evidence when that evidence is relevant to an issue to which the defendant offers to stipulate. Rather, we analyze the offer to stipulate as one factor in making the Rule 403 determination.”).

<sup>149</sup> See United States v. Myers, 123 F.3d 350, 363 (6<sup>th</sup> Cir. 1997); United States v. Brown, 34 F.3d 569, 573 (7<sup>th</sup> Cir. 1994); United States v. Wallace, 32 F.3d 921, 927-28 (5<sup>th</sup> Cir. 1994); United States v. Mayans, 17 F.3d 1174, 1182 (9<sup>th</sup> Cir. 1994); United States v. Hernandez, 975 F.2d 1035, 1040 (4<sup>th</sup> Cir. 1992); United States v. Gano, 560 F.2d 990, 993 (10<sup>th</sup> Cir. 1977).

<sup>150</sup> United States v. Garcia, 983 F.2d 1160, 1175 (1<sup>st</sup> Cir. 1993).

<sup>151</sup> United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994).

exclusion.<sup>152</sup>

The Eighth Circuit seems to have taken inconsistent positions on the issue.<sup>153</sup> In a decision handed down after Old Chief, however, the Eighth Circuit acknowledged that the Supreme Court's decision may have resolved the Rule 404 (b) question concerning stipulated conduct once and for all.<sup>154</sup> Finally, in a case on remand for reconsideration in light of Old Chief, the D.C. Circuit held that

[A] defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant's proposed stipulation is unequivocal, and even if the defendant agrees to a jury instruction . . . Other rules of evidence may bear on the admissibility of evidence satisfying Rule 404(b) . . . For now it is enough to repeat the words of the advisory committee on Rule 404(b): if evidence is offered for a purpose Rule 404(b) permits, such as proving knowledge or intent, Rule 404(b) "does not require that the evidence be excluded."<sup>155</sup>

## **2. Fed. R. Evid. 609 Motions**

Rule 609 motions restrict impeachment by evidence of prior criminal convictions. This rule must be reviewed carefully prior to deciding who will testify on the defendant's behalf, whether the defendant will testify, and how to impeach prosecution witnesses. Take particular note of the following language of Rule 609(b):

However, evidence of a conviction more than ten years old as

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<sup>152</sup> See id.; United States v. Provenzano, 620 F.2d 985, 1003-04 (3d Cir. 1980).

<sup>153</sup> Compare United States v. Sumner, 119 F.3d 658, 660-61 (8<sup>th</sup> Cir. 1997) (supporting per se rule of exclusion) with United States v. Barry, 133 F.3d 580, 582 (8<sup>th</sup> Cir. 1998) (acknowledging general rule of circuit that "the government is not bound by a defendant's offer to stipulate") (internal quotation and citation marks omitted).

<sup>154</sup> See United States v. Spence, 125 F.3d 1192, 1194 n. 2 (8<sup>th</sup> Cir. 1997).

<sup>155</sup> United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (citations omitted).

calculated herein, is not admissible unless the proponent gives the adverse party sufficient written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

### **3. Motions To Strike Aliases From Indictment**

While this issue can often be disposed of by a 404(b) motion, a separate motion premised on United States v. Beedle<sup>156</sup>, may also be appropriate. In Beedle, the alias was included in the indictment because the prosecutor did not have the correct spelling of the defendant's name when the indictment was filed.<sup>157</sup> The government and the defense agreed to have the alias removed from the indictment. The judge, however, made reference to the alias and failed to explain the reason for the appearance of the alias on the indictment to the jury. The trial court's reference to the defendant's alias was among the reasons the Third Circuit cited in remanding this case and ordering a new trial.<sup>158</sup>

### **4. Government Motions In Limine**

In limine motions by the government have become increasingly common and should be anticipated. This is particularly so when the government expects that the defendant will raise an affirmative defense or pursue a line of cross-examination with respect to the background of a government witness. The object of the motions is to prevent the jury from hearing anything about the issue at trial.

## **I. BILL OF PARTICULARS – FED. R. CRIM. P. 7(f)**

A request for a bill of particulars should be filed in cases involving complicated fact

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<sup>156</sup> 463 F.2d 721 (3d Cir. 1972).

<sup>157</sup> Id. at 721.

<sup>158</sup> Id. at 724-25.

patterns. A bill of particulars is also advisable where the indictment is written in vague terms and provides little information as to the exact conduct that the government is alleging is criminal in nature or that constitutes the overt acts underlying a conspiracy indictment. The bill of particulars may not, however, be used to circumvent the discovery scheme of Fed. R. Crim. P. 16.<sup>159</sup> If ordered, the government's theory and evidence at trial will be limited by the bill of particulars.

## **J. MOTIONS TO CONTINUE SENTENCING**

Although there are no Speedy Trial Act, statutory, or case law considerations governing the expedient imposition of sentence, there is a standing order in this district regarding guideline sentencing. This order was revised to expand the time allotted for the preparation of the Presentence report and to adjust the time frame for the dissemination of the report, comments, and submission of memoranda to the court.<sup>160</sup> Section (f)(1) requires that:

[n]ot less than fifteen calendar days prior to the date for sentencing, the government shall submit its sentencing memorandum and any motions for departure to the Court, to the probation officer and to defense counsel. The motions for departure shall include motions based upon U.S.S.G. § 5K1.1 and/or 18 U.S.C. § 3553(e).

The standing order has also been revised to require that the defendant submit his/her sentencing memorandum and motions for departure to the Court, to the probation officer and to the government, not less than ten calendar days before the date of sentencing and any response by the government is to be submitted five calendar days prior to sentencing.

For cooperating defendants, the government will often seek a continuance of the

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<sup>159</sup> See generally United States v. Rosa, 891 F.2d 1074 (3d Cir. 1989), for a detailed discussion of the use of bills of particulars in the Third Circuit. See also Appendix - Sample Motion for Bill of Particulars.

<sup>160</sup> See Appendix - Standard Order Concerning Guideline Sentencing.

sentencing until after the government has fully taken advantage of his/her assistance. This request may be either informal or in writing, depending on the preferred practice of the court. Generally, a defendant will not be sentenced until he/she has been fully debriefed, has testified at any and all grand jury appearances, trials, sentencing hearings, and/or any other collateral proceedings in which his/her testimony may be desired. It is presumed that the cooperator's testimony is more credible at trial if sentence has yet to be imposed. Although the defendant may wish to be sentenced as soon as possible, it is often in his/her best interest to agree to the continuance until his/her cooperation has been fully exhausted so that he/she can get the maximum benefit at sentencing.<sup>161</sup>

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<sup>161</sup> Should the defendant opt to cooperate after sentencing, Fed. R. Crim. P. 35(b) allows modification of his/her sentencing within one year of the date of sentencing. See Chapter Two, supra, at § B(12).

## CHAPTER FIVE

### THE GUILTY PLEA

The majority of criminal cases in federal court are disposed of through guilty pleas. This Chapter will review fundamental issues that should be reviewed with the defendant prior to entering a plea of guilty. Although the Sentencing Guidelines are now advisory, they continue to carry considerable weight and the district court must accurately compute the advisory guidelines prior to determining the appropriate sentence. As a result, careful attention must be paid to the Sentencing Guidelines at all phases of the case, including the entering of the guilty plea.<sup>162</sup>

#### A. FED. R. CRIM. P. 11 – PLEAS

A defendant choosing to plead guilty can enter a conditional plea,<sup>163</sup> a nolo contendere plea,<sup>164</sup> or a more standard plea agreement reached with the government.<sup>165</sup> Rule 11 governs the procedures for entering guilty pleas. The essential elements of the plea colloquy are set forth in Rule 11(c)-(d),<sup>166</sup> and Rule 11(e) outlines the procedure for the entry of the plea. Finally, 11(e)(2) requires that ALL agreements made between the parties be presented to the court.

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<sup>162</sup> See United States v. Cooper, 437 F.3d 324 (3d Cir. 2006).

<sup>163</sup> See United States v. Bentz, 21 F.3d 37, 38 (3d Cir. 1994) (Rule 11 allows taking of conditional pleas in order to preserve appellate issues and is designed to conserve resources and advance speedy trial objectives; approval by both court and the government is required).

<sup>164</sup> See North Carolina v. Alford, 400 U.S. 25, 31 (1969) (plea of nolo contendere accepted provided plea represents voluntary and intelligent choice among alternative courses of action open to defendant); see also United States v. Tucker, 925 F.2d 990, 992 (6<sup>th</sup> Cir. 1991) (Alford plea not an absolute bar to acceptance of responsibility credit under the guidelines).

<sup>165</sup> See Appendix - Guilty Plea and Guilty Plea Memorandum.

<sup>166</sup> See Boykin v. Alabama, 395 U.S. 238, 242 (1969) (discussing essential elements of a guilty plea colloquy); United States v. Cleary, 46 F.3d 307, 310 (3d Cir.), (same), cert. denied, 516 U.S. 890 (1995); see also Duffy v. Cuyler, 581 F.2d 1059, 1064 (3d Cir. 1978) (sets forth impact of guilty plea colloquy on freedom of accused).

## **B. THE GUILTY PLEA IN FEDERAL COURT**

### **1. Scheduling The Plea**

The deputy clerk of the judge to whom the case has been assigned schedules the plea. For the most part, the deputy will accommodate the schedules of the attorneys. If a written plea agreement has been negotiated, prior to the plea hearing, the AUSA will provide the court with a plea memorandum that outlines the nature of the charge and the penalties, and which contains proposed factual basis questions to be posed to the defendant. Also, a copy of the information/indictment/complaint and the plea agreement is attached to the plea memorandum. A draft of the memorandum should be provided to counsel in advance to ensure that the information is accurate and that the factual basis questions are acceptable to the defendant. It is imperative that these questions be reviewed carefully with the client before the guilty plea. Some judges, however, do not stick to the “script,” and clients appearing before these judges should be prepared accordingly. Keep in mind that a defendant retains his Fifth Amendment right to not incriminate himself at both the plea hearing and at sentencing.<sup>167</sup> Questions that go beyond the elements or the plea agreement but which could lead to a greater sentence could not be answered.<sup>168</sup>

### **2. Guilty Pleas And Acceptance Of Responsibility - U.S.S.G. § 3E1.1**

One immediate consideration is the two or three point acceptance of responsibility adjustment pursuant to U.S.S.G. § 3E1.1, available to defendants who "accept responsibility" for

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<sup>167</sup> See Mitchell v. United States, 526 U.S. 314, 328-29 (1999).

<sup>168</sup> Id.

their actions.<sup>169</sup> The acceptance of responsibility reduction can reduce a defendant's exposure by several years in the upper levels of the advisory guidelines, and in the lower levels, the two points may make the defendant eligible for a "split sentence" or even probation.<sup>170</sup> While the reduction for acceptance is not limited to those clients who have pled guilty,<sup>171</sup> it is much more difficult to obtain if the defendant proceeds to trial, especially if he/she testifies and denies any element of the offense.<sup>172</sup>

Note that while Fed. R. Crim. P. 11 commands that the court disclose the mandatory minimum to the defendant during plea colloquy, disclosure of advisory guideline calculations is not required.<sup>173</sup> Erroneous legal advice regarding sentencing possibilities can expose a defense attorney to a charge of ineffective assistance of counsel leading to a retrial, mistrial, or withdrawal of the plea.<sup>174</sup>

### **3. U.S.S.G. §1B1.2 And Applicable Guidelines**

Although stipulations contained in the plea agreement are not binding on the court or on

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<sup>169</sup> See U.S.S.G. §3E1.1.

<sup>170</sup> Split sentences are available to individuals whose sentences fall within the parameters detailed in U.S.S.G. § 5C1.1, which pertains to Zone C in the Guideline Sentencing Table. These sentences allow the defendant to serve a portion of his/her sentence in less restrictive confinement than imprisonment, such as home detention or a halfway house.

<sup>171</sup> See U.S.S.G. § 3E1.1 comment. (n. 2) ("Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.").

<sup>172</sup> See *id.* comment. (n. 4) ("Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply."). U.S.S.G. § 3C1.1, comment. (n. 4(b)), Obstruction of Justice, contains a specific reference to committing perjury.

<sup>173</sup> See *United States v. DeFusco*, 949 F.2d 114, 116 (4<sup>th</sup> Cir. 1991), cert. denied, 503 U.S. 997 (1992).

<sup>174</sup> See *United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992).

Probation, judges have traditionally given such stipulations great deference.<sup>175</sup> Prosecutors can be counted on to stand by their stipulations, particularly when they agree to remain silent on sentencing recommendations.<sup>176</sup> Stipulations regarding relevant conduct and/or specific adjustments can strengthen the defense position at sentencing, even when Probation advances a counter position.<sup>177</sup>

Stipulations frequently involve the government's promise to file a downward departure motion based on the defendant's substantial assistance pursuant to U.S.S.G. §5K1.1 and 18 U.S.C. § 3553(e),<sup>178</sup> the defendant's minor or minimal role in the offense, pursuant to U.S.S.G. § 3B1.2, the monetary loss computation, pursuant to U.S.S.G. §2B1.1, and the weight of the drugs pursuant to U.S.S.G. § 2D1.1.

Nonetheless, in many instances, the court will consider the actual conduct of the defendant despite a stipulation in the plea agreement to certain facts or to the applicability of guideline provisions. In United States v. Day,<sup>179</sup> for example, the defendant entered a plea to fraud and deceit for his part in burning a boat to collect insurance money. However, because the stipulated facts amounted to arson, the Eleventh Circuit held that the guidelines most applicable to the

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<sup>175</sup> But see United States v. Singh, 923 F.2d 1039, 1044-45 (3d Cir.) (affirming denial of adjustment where acceptance of responsibility was stipulated to in guilty plea agreement and recommended by AUSA at sentencing, but Probation rejected its applicability because defendant had denied responsibility in interview), cert. denied, 500 U.S. 937 (1991).

<sup>176</sup> See United States v. Hayes, 946 F.2d 230, 233 (3d Cir. 1991) (government request for sentence within guidelines violated agreement not to make recommendation at sentencing, and due process and equity required that the sentence be vacated even though breach was inadvertent and did not influence judge).

<sup>177</sup> See Appendix - Schedule A - Stipulation Page.

<sup>178</sup> See generally Chapter Two, supra.

<sup>179</sup> 943 F.2d 1306 (11<sup>th</sup> Cir. 1991).

stipulated conduct should be applied.<sup>180</sup>

In Braxton v. United States,<sup>181</sup> the Supreme Court addressed the applicability of U.S.S.G. § 1B1.2 comment. (n.1). In Braxton, the defendant entered a plea of guilty to assault and firearm counts, and admitted that he fired a shotgun through a door opening after marshals had kicked in the door.<sup>182</sup> The district court applied the guideline for attempted murder based on the conduct stipulated to at the plea hearing. Although the Braxton Court reversed, it did not do so because the judge had relied on the stipulated conduct. Rather, the Court found that the district court misapplied U.S.S.G. § 1B1.2 because the stipulated facts lacked any information from which the requisite state of mind could be determined, and thus would not support an attempted murder conviction.<sup>183</sup>

#### **4. Pleas Including Negotiated Sentences - Fed. R. Crim. P. 11(e)(1)(C)**

Rule 11(e)(1)(C) requires that if the defendant and the government have agreed upon a sentence, that sentence must be imposed. Should the court refuse to impose the negotiated sentence, the defendant has the right to withdraw his/her plea. Although Fed. R. Crim. P. 11(e)(1)(C) permits a plea in which the sentence is agreed upon, it is a rare occurrence in this district. The United States Attorney's Office generally will not consent to this type of plea. Further, such a plea may not be accepted by some judges.

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<sup>180</sup> Id. at 1309.

<sup>181</sup> 500 U.S. 344 (1991).

<sup>182</sup> See 500 U.S. 344, 344 (1991).

<sup>183</sup> See id.; see also United States v. Parker, 874 F.2d 174, 177-78 (3d Cir. 1989) (defendant's guilty plea to charge of stealing 122 pieces of mail worth \$22,500 sufficed to establish value of loss and no further proof or stipulation was necessary, even though defendant contended at sentencing that he only took approximately 45 pieces of mail having lesser value).

In the event that an “11(e)(1)(C)” plea cannot be negotiated, the government may be willing to agree that the sentence should not exceed a given term.<sup>184</sup> Note, however, that pleas negotiated under this section of the rule are not binding upon the court.

## **5. Benefits Of A Plea**

Early plea discussions may facilitate a plea by information, with the result that the defendant is charged with offenses carrying less punitive guideline calculations.<sup>185</sup> The government may also agree to cease its investigation into the activity of the defendant, thereby limiting the information that would impact on the guideline calculation, such as the amount of loss incurred. Additionally, credit for cooperation provided after trial and/or sentencing is permissible, the court and the government will usually credit the defendant to a greater degree for timely cooperation which disposes of the case by plea.<sup>186</sup>

## **6. The Probation Office**

At the plea hearing, a referral for Presentence interview form is completed and the defendant, if released on bail, is instructed to report to Probation for an intake interview.<sup>187</sup> If the defendant is in custody, the deputy clerk will forward the referral to the Probation Office. The referral form requires that counsel indicate whether he/she wishes to be present at the Presentence

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<sup>184</sup> See Fed. R. Crim. P. 11(e)(1)(B).

<sup>185</sup> See Chapter Three, *supra*, § A (discussing charging by information and indictment).

<sup>186</sup> See Chapter Two, *supra*, (discussing cooperation process).

<sup>187</sup> See Appendix - Probation Referral Form. To ensure that the assigned Probation Officer is aware that the defendant is represented by a specific attorney, attach a business card to the paperwork and put a note on it indicating that counsel wishes to be present whenever probation speaks to the defendant or, in the alternative, that counsel requests that probation not speak with the defendant about the offense. If appropriate, submit a written version of the offense to Probation.

report interview. If so, the Probation Officer will contact counsel to schedule a date for the interview. It is strongly recommended that counsel attend all interviews.

A standardized form (Form 1) that requires information about all aspects of the defendant's background, as well as prior arrests and convictions, is utilized by Probation in preparation of the Presentence report.<sup>188</sup> Completing the Form 1 in advance of the interview with the Probation Officer not only expedites the process but also ensures accuracy.

An account of the defendant's version of the offense is also required. While Probation often requires a discussion with the defendant regarding his/her version of the offense, a written submission may be acceptable. The defendant's version of events will be considered in determining whether Probation credits him/her with acceptance of responsibility and, even more importantly in some cases, will help define the parameters of the defendant's relevant conduct pursuant to U.S.S.G. § 1B1.3.<sup>189</sup> Note that a defendant is neither required to volunteer nor to admit affirmatively relevant conduct beyond the offense of conviction. If, however, a defendant falsely denies or frivolously contests relevant conduct that the court determines to be true, he/she will be denied an adjustment for acceptance of responsibility.<sup>190</sup>

## **7. Coercive Nature of Pleas**

While a guilty plea cannot be coerced, courts have generally held that being persuaded to

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<sup>188</sup> See Appendix - Probation Form 1.

<sup>189</sup> See Chapter Eight, *infra*, for a detailed discussion and case law on these issues.

<sup>190</sup> See U.S.S.G. § 3E1.1 comment. (n.1(a)); see also Chapter Eight of this manual for a detailed discussion and case law on these issues.

accept a plea because of an offer made by the government is not "coercive."<sup>191</sup> In defendant cases where the plea offer is contingent upon the guilt of all defendants, the district court must exercise additional caution to insure the absence of coercion.<sup>192</sup>

## 8. Withdrawal of a Plea

Rule 32(d) permits the withdrawal of a plea:

If a motion for withdrawal of a plea of guilty or nolo contendere is made **before sentencing** is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of 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.

(Emphasis added).

A request to withdraw a plea prior to sentencing is difficult.<sup>193</sup> It becomes nearly impossible after sentencing.<sup>194</sup> The defendant bears the burden of establishing a "fair and just" reason to withdraw his/her guilty plea.<sup>195</sup> In practice, a request to withdraw a guilty plea is rarely

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<sup>191</sup> See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (no coercion where defendant was offered opportunity to plea in which he could plead guilty to forgery and receive five years instead of going to trial as habitual offender and risking life sentence); United States v. Oliver, 787 F.2d 124, 126 (3d Cir. 1986) (defendant's failure to cooperate with government or defendant's insufficient assistance can result in government's pursuit of more serious penalties; such conduct would not be considered coercive).

<sup>192</sup> See United States v. Burns, 684 F.2d 1066, 1071 (3d Cir. 1982), cert. denied, 103 S.Ct. 823 (1983).

<sup>193</sup> See United States v. Huff, 873 F.2d 709, 712 (3d Cir. 1989) (in deciding whether to permit withdrawal of plea, court is to consider whether defendant asserts his innocence, whether government would be prejudiced by his withdraw, and strength of defendant's reason to withdraw plea). But cf. Government of the Virgin Islands v. Berry, 631 F.2d 214, 219 (3d Cir. 1980) ("motions to withdraw guilty pleas made before sentencing should be liberally construed in favor of the accused and should be granted freely. However, at the same time we have made explicit that there is no absolute right to withdraw a guilty plea and that acceptance of the motion is within the discretion of the trial court, whose determination will only be disturbed if the court has abused its discretion.") (internal citations omitted).

<sup>194</sup> See United States v. Mainer, 383 F.2d 444, 445 (3d Cir. 1967) ("Appellant carries a heavy burden, for after sentence has been pronounced a plea of guilty may be withdrawn only to 'correct a manifest injustice.'") (citing Fed. R. Crim. P. 32(d)).

<sup>195</sup> See United States v. Isaac, 141 F.3d 477, 465, 485 (3d Cir. 1998).

granted. Note, however, that an attorney's bad advice may be fertile ground for a court to grant a motion to withdraw the plea.<sup>196</sup>

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<sup>196</sup> Cf. United States v. Lambey, 949 F.2d 133, 136 (4<sup>th</sup> Cir. 1991) (attorney's bad estimate as to guideline range not enough to allow withdrawal of plea).

## CHAPTER SIX

### THE TRIAL AND SPECIFIC DEFENSES

This Chapter addresses the procedural and practical aspects of trying a case in the District of New Jersey, and includes a substantive discussion of some specific defenses available in federal court.<sup>197</sup> Refer also to the manual published by the Federal Defenders of San Diego, Inc., which contains an excellent discussion of several defenses, in particular, duress/necessity, entrapment, outrageous government conduct, and insanity.

#### **A. THE TRIAL**

##### **1. Scheduling The Trial**

At the arraignment, the court usually sets a trial date. While in most cases, this date is flexible, in others, it is a firm date and adjournments will only be granted for compelling reasons. The judge's deputy clerk can inform counsel as to the practice of the court. If the trial needs to be rescheduled, contact the AUSA and the judge's deputy clerk immediately. Be aware that lengthy continuances are rarely granted.

##### **2. Selecting The Jury Panel<sup>198</sup>**

Rule 24, 28 U.S.C. §§ 1861-1878, and the Jury Selection Plan for the District of New Jersey govern jury selection.<sup>199</sup> Note, however, that jury selection varies according to the judge

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<sup>197</sup> The vast majority of cases that are tried in federal court are jury trials. If the defendant wishes to proceed to a bench trial by judge, approval of both the court and the AUSA is required. See Fed. R. Crim. P. 23.

<sup>198</sup> See Chapter Four, supra, § B (continuances, Speedy Trial Act, and motions for continuance).

<sup>199</sup> See Appendix - Jury Selection Plan for the District of New Jersey.

and to the case.<sup>200</sup> Furthermore, jury selection may be conducted by either the district judge or the magistrate judge, depending on the defendant's consent.<sup>201</sup>

An orientation program for all potential jurors, which includes the viewing of a film on jury duty, is conducted by a deputy clerk.<sup>202</sup> After the initial orientation and film, jury panels are directed to a courtroom where a trial is commencing. Those jurors not selected during their first appearance will be required, depending upon the court, to return either the following day or week. (A few courts, however, select juries for multiple cases at one time and from one panel.) As a result, the panel in later cases often consists of jurors who have been stricken from other cases. If a juror serves on a jury and the trial ends before the next panel is due to report, the juror will often be required to return for additional service. Federal jurors generally serve for one month.

The size of the panel varies based on the number of jurors available and the type of case. Once the panel is assembled in the courtroom, the judge provides more specific instructions regarding the process and the case. Counsel will receive only a list of the jurors' names and addresses. The deputy clerk randomly selects twelve jurors and those jurors are seated in the order called. This procedure can be important if the judge designates juror number one as the foreperson. Some judges allow the jury to elect the foreperson. Counsel should ensure that the client is appropriately dressed during and in the courtroom (and, if in custody, is unshackled)

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<sup>200</sup> See Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (federal judges accorded ample discretion in determining how to conduct voir dire); United States v. Greer, 968 F.2d 433, 435 (5<sup>th</sup> Cir. 1992), (same), cert. denied, 507 U.S. 962 (1993).

<sup>201</sup> See Peretz v. United States, 501 U.S. 923, 931 (magistrate judges may, with parties' consent, supervise jury selection in felony trial); Government of the Virgin Islands v. Williams, 892 F.2d 305, 310 (3d Cir. 1989) (district court may delegate voir dire to magistrate judge as "additional duty" as long as defendant expresses no objection), cert. denied, 495 U.S. 949 (1990) .

<sup>202</sup> The film contains some useful information about jury duty in general. At some point, counsel should take the opportunity to view the orientation film.

before the jury panel enters.

The jurors provide biographical information and answer questions posed by the judge.<sup>203</sup> Attorney voir dire is generally not permitted in this district. It is therefore imperative that counsel submit proposed voir dire questions in writing before the start of the trial.<sup>204</sup> Some judges will permit jury questionnaires to be used in complex or high publicity cases. Unfortunately, voir dire is often cursory at best.

The Supreme Court has traditionally afforded trial courts great latitude in conducting voir dire.<sup>205</sup> In some cases, however, the judge must probe specific issues. For instance, where the defendant is accused of a violent crime against a victim of a different racial or ethnic group, the trial court is compelled to voir dire the panel on the issue of racial prejudice.<sup>206</sup>

Some judges will pre-qualify a panel before any peremptory challenges are exercised. Challenges for cause are discussed at side bar to avoid the potential of infecting an entire panel.

#### **a. Peremptory Challenges**

Rule 24(b) affords the defense ten peremptory challenges and the government six peremptory challenges.<sup>207</sup> If the offense charged is punishable by death, each side is entitled to twenty peremptory challenges.

As with every other facet of jury selection, the method for exercising peremptory

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<sup>203</sup> See Appendix - Juror Biographical Questionnaire & General Questions Posed by Court.

<sup>204</sup> See Appendix - Proposed Voir Dire Questions.

<sup>205</sup> See generally Mu'Min v. Virginia, 500 U.S. 415 (1991).

<sup>206</sup> See Rosales-Lopez v. United States, 451 U.S. 182, 191 (1981).

<sup>207</sup> In multi-defendant cases, the judge may increase the number of defense peremptories and divide them among all defense counsel.

challenges varies from court to court. Many judges require the attorney to stand and announce the strike: “Your Honor, please thank and excuse juror number five.” Others provide a jury selection sheet to counsel during each round. If counsel wishes to exercise a peremptory, he/she does so by crossing a line through the juror’s name. The deputy clerk will announce the strike and call another juror.

Alternatively, some courts require that attorneys exercise strikes in strict conformance with the federal rules. Under this system, counsel must use (or lose) any strikes in a given round. For example, if counsel has two strikes in a given round but only exercises one, the second is lost. Likewise, if counsel passes in a given round, those strikes are waived.

Alternates are selected in a similar manner. After the twelve jurors are seated, each side has one peremptory challenge. Peremptory challenges not used when selecting the jury do not carry over to the alternate selection phase. The number of alternates selected will vary depending upon the length of the case. If more than two will be selected, generally in lengthy cases, judges will often permit additional peremptories. In some courts, the alternates will not know that they have been selected as alternates at the beginning of the case. Other courts are explicit about the distinction before the trial begins.

Learn the procedure followed by the court prior to selection.

**i. Peremptory Challenges - Race**

Batson v. Kentucky,<sup>208</sup> Powers v. Ohio,<sup>209</sup> and Georgia v. McCollum,<sup>210</sup> are the primary cases addressing jury selection. Batson established that race-based peremptory challenges are unconstitutional. Powers expanded Batson, declaring that white defendants likewise have standing to assert equal protection rights to keep the government from striking black venirepersons on the basis of race. Conversely, McCollum made the prohibitions of Batson applicable to the defense's use of peremptory challenges.<sup>211</sup>

Justice Blackmun's majority opinion in McCollum also served as notice of the precarious status of the peremptory challenge. He reconfirmed the Court's position that peremptory challenges are not a constitutionally protected fundamental right:

As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court has repeatedly stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.<sup>212</sup>

Defense attorneys can now expect that the government will ask for race-neutral

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<sup>208</sup> 476 U.S. 79 (1986). Batson was decided under the Equal Protection Clause of the Fourteenth Amendment. For challenges based on the Sixth Amendment right to a jury that represents a fair cross-section of the community, see Holland v. Illinois, 493 U.S. 474 (1990).

<sup>209</sup> 499 U.S. 400 (1991).

<sup>210</sup> 505 U.S. 42 (1992).

<sup>211</sup> See McCollum, 505 U.S. at 59 (“We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges.”)

<sup>212</sup> See id. at 57.

explanations for challenging potential jurors. Absent that explanation, the challenged juror will be impaneled. To use peremptory challenges effectively, defense attorneys must be familiar with the justifications for peremptory strikes that courts have accepted as race-neutral.

## **ii. Peremptory Challenges - Gender**

The Supreme Court has expanded the teachings of Batson and McCullum to prohibit peremptory strikes based on gender. In J.E.B. v. Alabama ex rel. T.B.,<sup>213</sup> the Supreme Court held that a state actor's intentional discrimination on the basis of gender in the use of peremptory strikes violates the equal protection clause.<sup>214</sup> This conclusion obtains because distinctions based on gender are afforded heightened equal protection scrutiny and gender-based peremptory challenges cannot survive such heightened scrutiny.<sup>215</sup> The Court resolved a previous circuit split over this issue.<sup>216</sup>

## **iii. Peremptory Challenges - Language Ability**

In Hernandez v. New York,<sup>217</sup> the Supreme Court permitted a prosecutor to strike Spanish-speaking Latinos because the prosecutor was uncertain whether Spanish-speaking jurors would be able to listen and to accept an interpreter's translation as the controlling testimony.<sup>218</sup> It

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<sup>213</sup> 511 U.S. 127 (1994).

<sup>214</sup> Id. at 131.

<sup>215</sup> Id.

<sup>216</sup> See also United States v. Omoruyi, 7 F.3d 880, 882 (9<sup>th</sup> Cir. 1993) (prosecutor's use of peremptory challenges to strike unmarried women violates Batson); United States v. DeGross, 960 F.2d 1433, 1440 (9<sup>th</sup> Cir. 1992) (en banc) (peremptory strikes based on gender are universally impermissible: "Whether the prosecutor or the defense exercises the strike, the excluded venire persons are harmed because discriminatory strikes are based on group membership whereas juror competence depends upon an individual's qualifications.").

<sup>217</sup> 500 U.S. 352 (1991).

<sup>218</sup> Id. at 363.

is a harsh paradox that one may become proficient enough in English to participate in a trial,<sup>219</sup> only to encounter disqualification because he/she knows a second language as well.<sup>220</sup>

Nonetheless, applying the analysis of Hernandez, the Third Circuit has held that Batson does not apply to peremptory challenges based on language ability because that classification, unlike gender or race, is not subject to heightened or strict scrutiny.<sup>221</sup>

#### **iv. Peremptory Challenges - Age, Employment & Education**

Challenges based on age, unemployment, lack of education have been accepted as race-neutral by the courts.

##### **(1) Age**

A prosecutor's explanation that he/she was striking all young, single panel members was held by the Third Circuit to be a race-neutral, non-pretextual reason sufficient to satisfy Batson.<sup>222</sup> The Fifth Circuit similarly ruled that the fact that a prospective African-American juror was too young, uneducated, and lacking a religious preference was a race-neutral reason for striking that juror.<sup>223</sup>

##### **(2) Employment Status**

A juror's unemployment status is, according to the Seventh Circuit, a race-neutral, valid

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<sup>219</sup> See e.g. 28 U.S.C. §1865(b)(2), (3) (English-language ability required for federal jury service)

<sup>220</sup> See 500 U.S. at 365.

<sup>221</sup> See Pemberthy v. Beyer, 19 F.3d 857, 870 (3d Cir.), cert. denied, 513 U.S. 969 (1994).

<sup>222</sup> See United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), cert denied, 488 U.S. 835 (1988).

<sup>223</sup> See United States v. Jimenez, 77 F.3d 95, 100 (5<sup>th</sup> Cir. 1996); see also Howard v. Moore, 131 F.3d 399, 408 (4<sup>th</sup> Cir. 1997) (both age and employment status are legitimate race-neutral factors), cert. denied, 525 U.S. 843 (1998).

reason for exclusion.<sup>224</sup> The Fifth Circuit agreed, in United States v. Pofahl. In Pofahl, the government struck one Hispanic and two black jurors because of their occupations, school bus driver and auto mechanic, as well as their dress and demeanor.<sup>225</sup> The Fifth Circuit ruled that a tendency to strike jurors on economic grounds because the government wants a "middle class" jury is acceptable.<sup>226</sup> Finally, the Third Circuit has accepted as race-neutral the prosecutor's rationale that a black, single mother of modest means living in low-income housing was more likely to have been exposed to drug trafficking than someone who did not live in low income housing, and thus she could be stricken without violating Batson.<sup>227</sup>

### (3) Education

The Fifth Circuit has held that requiring jurors to have at least a high school education was appropriate in certain cases.<sup>228</sup> In the Eighth and Seventh Circuits, peremptory challenges based on jurors' lack of education and disinterest in or confusion about the proceedings have been upheld as race-neutral.<sup>229</sup> Finally, the Third Circuit has held that a challenge based on inarticulate and evasive responses to voir dire was race-neutral.<sup>230</sup>

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<sup>224</sup>See United States v. Lewis, 117 F.3d 980, 983 (7<sup>th</sup> Cir.), cert. denied, 522 U.S. 1035 (1997).

<sup>225</sup>See United States v. Pofahl, 990 F.2d 1456, 1465 (5<sup>th</sup> Cir.), cert. denied, 510 U.S. 898 (1993) and 510 U.S. 996 (1993); see also Garcia v. Excel Corp., 102 F.3d 758, 759-760 (5<sup>th</sup> Cir. 1997) (in work injury case, permissible to strike African-American and Hispanic jurors who were unemployed or had unemployed spouses)

<sup>226</sup>See Pofahl, 990 F.2d at 1466.

<sup>227</sup>See United States v. Uwaezhoke, 995 F.2d 388, 390-91, 393-95 (3d Cir. 1993), cert. denied, 510 U.S. 1091 (1994).

<sup>228</sup>See United States v. Moeller, 80 F.3d 1053, 1060 (5<sup>th</sup> Cir. 1996).

<sup>229</sup>See United States v. Gibson, 105 F.3d 1229, 1232 (8<sup>th</sup> Cir. 1997); United States v. Hunter, 86 F.3d 679, 683 (7<sup>th</sup> Cir.), cert. denied, 519 U.S. 985 (1996).

<sup>230</sup>See United States v. Casper, 956 F.2d 416, 419 (3d Cir. 1992).

**v. Peremptory Challenges - Challenges Using A Proxy For An Impermissible Reason**

To use peremptory challenges effectively, to protect the record, and to guard against abuses by the government, defense counsel must ensure that peremptory challenges are not based on a race-neutral proxy for an unconstitutional justification. In United States v. Bishop,<sup>231</sup> the Ninth Circuit held that a peremptory strike based on the fact that the juror lived in a poor, violent area was in fact not race-neutral.<sup>232</sup> The Ninth Circuit found that the government's reasons for the strike constituted a proxy for a race-based peremptory strike:

To strike black jurors who reside in such communities (Compton) on the assumption they will sympathize with a black defendant rather than the police is akin to striking jurors who speak Spanish merely because the case involves Spanish-speaking witnesses. The Court in Hernandez strongly suggested that more was required – namely, the prosecutor's belief that the particular juror might not accept the proposed translation.<sup>233</sup>

**3. Motions In Limine - F.Rule Evid.104**

The defense will have an opportunity to argue and/or present motion(s) in limine before trial begins. Motions in limine based on Rule 404(b) and Rule 609 and motions to strike aliases, which are fairly typical in limine motions, are covered in some detail in Chapter Four § H, supra.

**4. The Record**

In this district, most judges use a stenographer. Some judges, however, utilize the tape

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<sup>231</sup> 959 F.2d 820 (9<sup>th</sup> Cir. 1992).

<sup>232</sup> Id. at 825.

<sup>233</sup> See id.; but see United States v. Uwaezhoke, 995 F.2d 388, 394 n. 15 (3d Cir. 1993) (nothing in Hernandez plurality opinion suggests that prosecutor must offer nexus between specific juror and particular case that tends to demonstrate that juror would be unable to fairly evaluate the evidence; disagreeing with Ninth Circuit's view that Hernandez "strongly suggests" that such nexus must exist for prosecutor's explanation to be facially valid), cert. denied, 510 U.S. 1091 (1994).

recording system. There are two aspects to the tape recording system which must be recognized by counsel at the outset: **First, if the trial is tape recorded, all discussions will be on the record. More importantly, if the microphones at counsel table are activated, all conversations are heard, even when court is not in session.** Avoid having any discussions with the defendant recorded.

If daily transcripts of the trial are necessary, the judge's approval will be needed. The court reporter should be informed that daily transcripts have been ordered so that he/she will be able to accommodate the request. If the judge approves a request for transcripts, counsel should file a CJA Form 24 with the clerk.<sup>234</sup> Counsel must confirm that the court has received and signed the completed CJA 24.

## **5. Pretrial Stipulations**

The AUSA is likely to seek pretrial stipulations regarding chemical analysis results, the interstate commerce element of the offense, ballistics results, the defendant's prior conviction punishable by a term of imprisonment in excess of one year, chain of custody, and the authenticity of documents. Agreeing to a stipulation may be beneficial to the case. It may also precipitate the early disclosure of Jencks or facilitate a stipulation regarding another issue. **6.**

## **Motion For Judgment Of Acquittal - Fed. R. Crim. P. 29**

A motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29, which is the equivalent of a motion for directed verdict in state court, can be made by the defendant or the court.<sup>235</sup> It can be made at the close of the government's case and/or after the defense rests,

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<sup>234</sup> See Appendix - CJA Form 24.

<sup>235</sup> See Fed. R. Crim. P. 29(a).

outside the presence of the jury.

A motion for acquittal need not be directed at all charges. Under Rule 29(a), the court may order entry of judgment of acquittal as to one or more offenses charged in the indictment or information. Section 29(b) allows the judge to reserve decision on the motion, to consider the motion after the case has been submitted to the jury, and to decide the motion either before the jury returns a verdict or even after the jury returns a guilty verdict. Section 29(c) permits the court to consider a Rule 29 motion up to seven days after the discharge of the jury, regardless of whether a verdict was returned. The court may, during the seven days, extend that time-frame. Section 29(d) addresses conditional rulings on Rule 29 motions.

#### **7. Presence Of Defendant – Fed. R. Crim. P. 43**

Rule 43 outlines when the defendant must be present and when his/her presence is optional. Pursuant to Rule 43(a), a defendant must be present at arraignment, at the time of the plea, at every stage of the trial, and at the imposition of sentence, unless otherwise provided by the rule. Circumstances under which the continued presence of the defendant at trial is not required are listed in Rule 43(b). Those instances in which the defendant's presence is never required are identified in Rule 43(c).

Rule 43 directs that a defendant who is voluntarily absent before trial shall be treated differently from one who becomes absent after the trial has begun. If a defendant flees after trial has begun, he/she may be tried and sentenced in absentia.<sup>236</sup>

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<sup>236</sup>See Fed. R. Crim. P. 43(b); see generally Crosby v. U.S., 506 U.S. 255, 262 (1993).

## 8. Jury Charges

In September 2004, a committee appointed by the Third Circuit began drafting model jury instructions for use in the Circuit. The final set of model instructions includes preliminary and final instructions, instructions for use during trial and instructions covering the most frequently litigated federal crimes and defenses. In addition to model instructions, the committee also prepared Comments to accompany each instruction, summarizing relevant Third Circuit and Supreme Court precedent. The model instructions and accompanying comments are available on the Third Circuit's website in both WordPerfect and PDF formats.<sup>237</sup>

The government will submit proposed jury instructions in virtually all cases. The proposed instructions come from a number of sources, including the Third Circuit's model instructions, edited renditions of O'Malley, Grenig & Lee<sup>238</sup> pattern instructions, or hybrid instructions developed by the government. Carefully review the submitted instructions – it is not uncommon for the proposed instructions to contain argument or overstatements of the holding in a particular case. Also, supplement or correct any inaccuracies the proposed instructions contain.

Defense counsel should also submit proposed instructions. A defendant generally is entitled to an instruction on his/her theory as long as evidence to support the instruction has been adduced at trial and the proposed instruction correctly states the applicable law.<sup>239</sup> Note,

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<sup>237</sup> See [www.ca3.uscourts.gov/modeljuryinstructions.htm](http://www.ca3.uscourts.gov/modeljuryinstructions.htm).

<sup>238</sup> Kevin O'Malley, Jay E. Grenig, Hon. William C. Lee, Federal Jury Practice and Instructions (6<sup>th</sup> ed. 2006).

<sup>239</sup> See Mathews v. United States, 485 U.S. 58, 63 (1988) (“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”); United States v. Mercer, 853 F.2d 630, 633 (8<sup>th</sup> Cir. 1988) (defendant is entitled to have jury instructed on defense theory if defense timely submits instruction that correctly states applicable law and is supported by evidence), cert. denied, 488 U.S. 996 (1988) and cert. denied, 490 U.S. 1110 (1989).

however, that the precise language of the point for charge is up to the court.<sup>240</sup>

Judges in this district generally give comprehensive instructions. Counsel should, therefore, consider submitting a select number of instructions and urge that these be given in addition to, or in lieu of, the judge's charge or the government's proposed instructions. Whether a printed version of the instructions will be provided to the jury is in the court's discretion.

## **B. COMPETENCY ISSUES AND INSANITY DEFENSES IN FEDERAL COURT**

### **1. Competency To Stand Trial And/Or To Be Sentenced**

Competency to stand trial differs from the defense of insanity. Competency issues address the accused's state of mind at the time of trial. Insanity issues concern the individual's state of mind at the time of the conduct that led to the charges.

The criteria to determine competency to stand trial in federal court were articulated by the Supreme Court in Dusky v. United States.<sup>241</sup> A competency examination must evaluate whether the defendant has sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding and whether he/she has a rational as well as factual understanding of the proceedings against him/her.<sup>242</sup>

Either the defendant or the government can file a motion to determine the competency of

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<sup>240</sup> See Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff & Kevin F. O'Malley, Federal Jury Practice and Instructions § 19.01, at 723-24 (4th ed. 1992) ("A defendant is entitled to a theory of the defense instruction which is supported by the law and the evidence received in the case, and if it is not redundant with other instructions. The precise wording of the instruction is committed to the discretion of the trial court. If the theory of the defense instruction is a correct legal statement directed to an issue in the case, it should be given.").

<sup>241</sup> 362 U.S. 402 (1960).

<sup>242</sup> See Godinez v. Moran, 509 U.S. 389, 397 (1993) (Dusky standard for competency to stand trial will also serve for determination of competency to plead guilty and to waive right to counsel).

the individual to stand trial.<sup>243</sup> The government, however, bears the burden of proof by a preponderance of the evidence at the hearing.<sup>244</sup> The scope of the questions concerning competency should be limited, and the examiner should not discuss the facts of the instant case.

Upon a finding by a preponderance of the evidence that the individual is incompetent, the defendant will be committed to the custody of the Attorney General for treatment for a period not to exceed four months.<sup>245</sup> Detention may be extended if the court makes an explicit finding that the defendant may become competent within a given period of time.<sup>246</sup> If it appears that the defendant will not become competent within the specified time of detention, further detention can then be pursued under 18 U.S.C. § 4246.

Finally, always object to the use of dual evaluations addressing competency and sanity in the same examination performed by the same doctor. A determination that the defendant is competent to stand trial does not preclude an insanity defense, and the competency conclusion is inadmissible at trial.<sup>247</sup>

## **2. Insanity Defense – 18 U.S.C. § 17**

**(a) 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

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<sup>243</sup> See 18 U.S.C. § 4241(a); see also Appendix - Sample Notice of Motion for Competency Hearing and Psychiatric Study.

<sup>244</sup> But see United States v. DiGilio, 538 F.2d 972, 988 n. 20 (3d Cir. 1976) (“The district court can, of course, allocate the burden of going forward with the evidence bearing on competence in any manner which will provide for the expeditious development of the facts relevant to its § 4244 determination.”), cert. denied, 429 U.S. 1038 (1977).

<sup>245</sup> See 18 U.S.C. § 4241(d)(1).

<sup>246</sup> See 18 U.S.C. § 4241(d)(2)(A).

<sup>247</sup> See 18 U.S.C. § 4241(f).

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.

**(b) Burden of proof** - The defendant has the burden of proving the defense of insanity by clear and convincing evidence.<sup>248</sup>

Pursuant to Fed. R. Crim. P. 12.2(a), defense counsel must notify the government if it intends to argue insanity as a defense.<sup>249</sup> Rule 12.2(b) requires that the defense must also notify the government if it intends to call an expert to testify. Rule 12.2(c) permits the court to order the defendant to submit to an examination upon the request of the government.<sup>250</sup> Although Rule 12.2(c) so authorizes the court, nothing that the defendant says during such an examination can be used against the defendant, “except on an issue respecting mental condition on which the defendant has introduced testimony.”<sup>251</sup>

Defense counsel should request that the client be evaluated locally, rather than at a distant Bureau of Prisons' mental health facility, in order to conserve time and resources. Counsel should also request to be present during the evaluation or, alternatively, request that a defense psychiatrist examine the defendant. Another alternative is to make a written request that the court order a videotaped evaluation under 18 U.S.C. § 4247(f). At a minimum, defense counsel should request that only the defendant and the court-appointed psychiatrist be present during the interview. Also, all information relied upon by the government's psychiatrist should be disclosed

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<sup>248</sup> 18 U.S.C. § 17.

<sup>249</sup> See Appendix - Notice of Insanity Defense.

<sup>250</sup> 18 U.S.C. § 4242(a) (1998) (mandating the court, upon government motion, to order psychiatric or psychological examination of defendant once defense files notice under Fed. R. Crim. P. 12.2).

<sup>251</sup> See Fed. R. Crim. P. 12.2(c).

to the defendant under Fed. R. Crim. P. 16(a)(1)(C)-(D).

The Insanity Defense Reform Act, 18 U.S.C. §§ 4241-47, does not require the trial court to instruct the jury regarding the consequences of a verdict of not guilty by reason of insanity.<sup>252</sup> If a defendant is found not guilty by reason of insanity, § 4243(c) mandates that a hearing concerning a defendant's eligibility for discharge occur within forty days. Section 4243(d) places the burden of proof on the defendant, and the standard applicable is a function of the offense of conviction:

**(d) Burden of proof** - In a hearing under subsection (c) of this section, a person found not guilty by reason of insanity of an offense involving bodily injury to, or serious damage to the property of another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.<sup>253</sup>

## C. SPECIFIC DEFENSES

This section presents a brief overview of some of the more commonly employed legal defenses. It is not an exhaustive list of possible legal defenses, and it does not address factual defenses.<sup>254</sup>

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<sup>252</sup> See Shannon v. United States, 512 U.S. 573, 579 (1994); see also United States v. Fisher, 10 F.3d 115, 121 (3d Cir. 1993), cert. denied, 512 U.S. 1238 (1994).

<sup>253</sup> Remember also that an imperfect insanity defense can constitute a ground for a downward departure at sentencing under U.S.S.G. §5K2.13 (Diminished Capacity). For a more detailed discussion of this issue, see Defending a Federal Criminal Case, supra Note 118, Volume II, Ch. 17, which includes an extensive bibliography of reference materials.

<sup>254</sup> Refer to Defending a Federal Criminal Case, supra Note 118, Volume I, Ch. 8, for an extensive discussion of specific defenses (non-mental health).

The advisory sentencing guidelines must be considered before formulating any trial defense. Remember that an imperfect or unsuccessful trial defenses might, nevertheless, lead to a downward departure, including departures based on U.S.S.G. § 5K2.10, Victim's Conduct (self defense), U.S.S.G. § 5K2.11, Lesser Harms (justification), U.S.S.G. § 5K2.12, Coercion and Duress, and U.S.S.G. § 5K2.13, Diminished Capacity (competency/insanity). Be aware, however, that if the defendant testifies and the judge believes that he/she is less than truthful, that strategy could hurt the defendant at sentencing. It could also possibly be used to justify an upward departure and/or an adjustment under U.S.S.G. § 3C1.1.

### **1. Alibi**

Rule 12.1, discussed in Chapter Three, § B(2), sets forth the procedural requirements for the use of an alibi defense.<sup>255</sup> Be prepared, however, for the fact that the government will investigate the alibi and contact witnesses to interview them about the alibi. Witnesses should, therefore, be prepared accordingly.

### **2. Entrapment**

The United States Attorney's office typically cites United States v. Levin<sup>256</sup>, to argue that defense counsel must give prompt notice of an entrapment defense. The relevant language in Levin does not go that far:

Therefore, we hold that a defendant is not entitled to an instruction on entrapment unless he explicitly pleads, at a sufficiently early point in the trial, that he was entrapped.<sup>257</sup>

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<sup>255</sup> See Appendix - Notice of Alibi Defense.

<sup>256</sup> 606 F.2d 47 (3d Cir. 1979).

<sup>257</sup> Id. at 49.

Although the entrapment defense is a viable defense, its requirements are exacting.<sup>258</sup> The

Third Circuit has articulated the proof needed for a successful entrapment defense:

Entrapment is a relatively limited defense that may defeat a prosecution only when the government's deception actually implants the criminal design in the mind of the defendant. A valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct. The defendant has the burden of producing evidence of both inducement and non-predisposition to commit the crime. After the defendant has made this showing, . . . the government then has the burden of proving beyond a reasonable doubt that it did not entrap the defendant. We have held that the trial court should not instruct on entrapment unless the defendant has presented evidence on both prongs of the defense.<sup>259</sup>

Conversations with agents and co-defendants, prior convictions, arrests, and an assortment of other baggage that the typical defendant carries with him/her into a trial are likely admissible to rebut the defendant's asserted lack of predisposition element. This type of evidence thus often serves to defeat an entrapment defense.<sup>260</sup>

The government's evidence of predisposition must involve acts that occurred before the government initiated its plan to snare the defendant. Relevant factors in this analysis include the defendant's character, the identity of the individual who suggested the criminal activity, the nature of government's inducement, the defendant's purpose for engaging in the activity, and, most

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<sup>258</sup> See generally Jacobson v. United States, 503 U.S. 540 (1992) (citations and internal quotation marks omitted).

<sup>259</sup> United States v. Wright, 921 F.2d 42, 44 (3d Cir. 1990), cert. denied, 501 U.S. 1207 (1991).

<sup>260</sup> See United States v. Bay, 852 F.2d 702, 705 (3d Cir. 1988) (evidence that defendant initiated conversations that led to indictment is enough to show predisposition); cf. United States v. Marino, 868 F.2d 549, 551 (3d Cir. 1989) (mere solicitation or request by law enforcement officials to engage in criminal activity is not by itself an inducement), cert. denied, 492 U.S. 918 (1989).

critically, the defendant's show of any reluctance.<sup>261</sup> Note that the government needs no suspicion to target a person in an undercover sting operation.<sup>262</sup>

Importantly, a defendant need not admit to all elements of a given offense in order for the jury to be charged on entrapment.<sup>263</sup> A defendant can deny one or more elements of the crime and still be entitled to an entrapment instruction as long as there exists sufficient evidence from which a jury could reasonably find that he/she was entrapped.<sup>264</sup>

### **3. Outrageous Government Conduct**

Outrageous government conduct is similar to the entrapment defense, less the predisposition element that makes entrapment such a difficult proposition.<sup>265</sup> This defense is available in theory when there has been severe overreaching by the government, and the overreaching was so overwhelming that it amounted to a denial of due process.<sup>266</sup> Defense counsel should also be aware of cases in which outrageous conduct claims have arisen out of defense counsel's conduct.<sup>267</sup>

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<sup>261</sup> See United States v. Skarie, 971 F.2d 317, 320 (9<sup>th</sup> Cir. 1992); see also United States v. Gambino, 788 F.2d 938, 945 (3d Cir.) (court looks to defendant's state of mind and inclinations before his initial exposure to government agents in determining predisposition), cert. denied, 479 U.S. 825 (1986).

<sup>262</sup> See United States v. Allibhai, 939 F.2d 244, 249 (5<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 1072 (1992).

<sup>263</sup> See Mathews v. United States, 485 U.S. 58, 62, 64-66 (1988).

<sup>264</sup> See id.

<sup>265</sup> See generally Hampton v. United States, 425 U.S. 484 (1976).

<sup>266</sup> See United States v. Twigg, 588 F.2d 373, 377-81 (3d Cir. 1978); United States v. West, 511 F.2d 1083, 1086 (3d Cir. 1975).

<sup>267</sup> See United States v. Voigt, 89 F.3d 1050, 1066 (3d Cir.) (claim of outrageous government conduct premised upon deliberate intrusion into attorney-client relationship was cognizable where defendant could point to actual and substantial prejudice), cert. denied, 519 U.S. 1047 (1996); United States v. Marshank, 777 F. Supp. 1507, 1522-25 (N. D. Cal. 1991) (deep involvement of defendant's attorney with government in making case against his own client led district court to dismiss indictment).

Be aware that in this circuit, payment of informants does not generally constitute outrageous government conduct. In narcotics cases, the government may pay an informant literally hundreds of thousands of dollars. In many cases, the informant will receive a percentage of the proceeds. While many may find this practice outrageous, the Third Circuit does not. The court has held that the method of payment is an issue for the jury to consider in assessing credibility, and that it does not automatically constitute outrageous government conduct.<sup>268</sup>

#### **4. Duress/Necessity**

The Supreme Court distinguished between the defenses of duress and necessity in United States v. Bailey.<sup>269</sup> The distinction turns on physical force. If the defendant acted under a threat of imminent death or serious bodily injury, duress is the appropriate defense. Where the defendant chose the lesser of two evils in response to threats, necessity should be argued.<sup>270</sup> To establish either a duress or necessity defense, the defendant will likely have to testify as to the "forces" that compelled his/her actions.<sup>271</sup> In either case, the defendant bears the burden of

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<sup>268</sup> See United States v. Gonzales, 927 F.2d 139, 142-46 (3d Cir. 1991); see also United States v. Santana, 6 F.3d 1, 3, 7-8 (1<sup>st</sup> Cir. 1993) (federal authorities did not cross line by supplying 2,500 doses of heroin to member of distribution ring in order to gain credibility); see generally United States v. Cuervelo, 949 F.2d 559, 564-68 (2d Cir. 1991) (discussion of outrageous government conduct versus entrapment; case was remanded for an evidentiary hearing to determine whether DEA agent's sexual relationship with defendant amounted to outrageous government conduct).

<sup>269</sup> 444 U.S. 394 (1980).

<sup>270</sup> See United States v. Bailey, 444 U.S. 394, 409-10 (1980); see also United States v. Santos, 932 F.2d 244, 253 (3d Cir.) (trial court's failure in narcotics prosecution to instruct jury that defendant could establish duress as result of threats against her children was not plain error where it was unlikely that charge making specific reference to evidence of threats to children, in light of other evidence, would have affected verdict), cert. denied, 502 U.S. 985 (1991).

<sup>271</sup> Refer to Defending a Federal Criminal Case, supra Note 118, Volume I, Ch. 8, for an extensive discussion of these two defenses.

proving the defense by a preponderance of the evidence.<sup>272</sup>

## **5. Justification**

The justification defense is similar to the duress/necessity defenses.<sup>273</sup> Because justification is an affirmative defense, the judge will only instruct on justification if the defense establishes the elements of a justification defense.<sup>274</sup> Note that in § 922(g) cases, the Third Circuit has taken a very restrictive approach toward a justification defense. In order to warrant an instruction on justification, the defense must establish that the defendant was subject to an immediate threat of death or serious bodily injury, that he/she had a well-grounded fear that the threat would be carried out, that he/she did not have a reasonably opportunity to escape the threatened harm without taking the gun, and that there was a direct causal link between the action and avoiding the threatened harm.<sup>275</sup> To establish these elements, the defendant will have to testify. Therefore, consider Fed. R. Evid. 404(b), governing the use of prior bad act evidence, at the outset.

## **6. Mere Presence**

The "mere presence" defense can be effective in those cases where the defendant was at the scene of the crime, but not as a participant. "Knowing spectators" are not criminally liable.<sup>276</sup>

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<sup>272</sup> See Dixon v. United States, 548 U.S. 1, 4 (2006).

<sup>273</sup> See United States v. Crittendon, 883 F.2d 326, 330 (4<sup>th</sup> Cir. 1989) (citation omitted); United States v. Romano, 849 F.2d 812, 816 n.7 (3d Cir. 1988); United States v. Lemon, 824 F.2d 763, 764 (9<sup>th</sup> Cir. 1987).

<sup>274</sup> See Crittendon, 883 F.2d at 330 (citation omitted).

<sup>275</sup> See United States v. Paolello 951 F.2d 537, 540 (3d. Cir. 1991) (citation omitted).

<sup>276</sup> See United States v. Van Scoy, 654 F.2d 257, 266 (3d Cir.) ("Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime unless you find beyond a reasonable doubt that he was a participant and . . . not merely a knowing spectator."), cert. denied, 454 U.S. 1126 (1981).

This defense may be particularly appropriate in conspiracy cases, because the government must show a unity of purpose, not simply that the defendant was present.<sup>277</sup>

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<sup>277</sup> See generally United States v. Wexler, 838 F.2d 88, 90-91 (3d Cir. 1988) (“One of the requisite elements the government must show in a conspiracy is that the alleged conspirators shared a ‘unity of purpose,’ the intent to achieve a common goal, and an agreement to work together toward the goal. . . . The inferences rising from ‘keeping bad company’ are not enough to convict a defendant for conspiracy.”) (citations omitted) .

## CHAPTER SEVEN

### **ARMED CAREER CRIMINAL ACT (ACCA)**

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), is one of the most punitive statutes used regularly by the United States Attorney's Office. This statute provides for a mandatory minimum fifteen year sentence, without parole, for any defendant convicted of possessing a firearm who has three prior convictions for serious drug offenses and/or violent felonies committed on three separate occasions.

#### **A. QUALIFYING OFFENSES**

A “serious drug offense” is one that carries a statutory maximum sentence of at least ten years.<sup>278</sup> “Violent felony,” while also defined in the statute, is open to more interpretation.<sup>279</sup> The statutory definition includes “conduct that presents a serious potential risk of physical injury to another.”<sup>280</sup> Whether a prior conviction qualifies as a “violent felony” is determined by the elements of the relevant statute and admissions by the defendant at a plea hearing, not the facts of the case.<sup>281</sup> The court is not permitted to look at the facts of the case, but may only consider what the jury was required to find to return a guilty verdict or what facts the defendant allocuted to during a guilty plea hearing.<sup>282</sup> Be wary, however, because some prosecutors will argue that a

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<sup>278</sup> See 18 U.S.C. § 924(e)(2)(A). Note that New Jersey convictions for crimes of the third and fourth degree do not qualify as “serious drug offenses” because the maximum exposure is five years or eighteen months, respectively. See N.J.S.A. 2C:43-6(a)(3)-(4).

<sup>279</sup> See 18 U.S.C. § 924(e)(2)(B).

<sup>280</sup> See 18 U.S.C. § 924(e)(2)(B)(ii).

<sup>281</sup> See United States v. Preston, 910 F.2d 81, 84-85 (3d Cir. 1990), cert. denied, 498 U.S. 1103 (1991).

<sup>282</sup> See 18 U.S.C. § 924(e)(2)(B); United States v. Shepard, 544 U.S. 13 (2005).

prior gun conviction qualifies as a “violent felony” based on the facts underlying that conviction.<sup>283</sup>

## **B. JUVENILE ADJUDICATIONS**

The ACCA also permits an act of juvenile delinquency to qualify as a “violent felony” under certain circumstances.<sup>284</sup> No such permission, however, is included in the definition of “serious drug offense.” Therefore, argue that juvenile drug adjudications cannot be included as ACCA qualifiers because the statute reaches violent juvenile adjudications but not drug adjudications. Also argue that the New Jersey juvenile code provides for only a four-year maximum for a first degree drug offense, not the ten-year maximum required by the definition of “serious drug offenses,” removing these adjudications from qualification.

## **C. COLLATERALLY ATTACKING PRIOR CONVICTIONS**

In an ACCA case, the defendant is not permitted to collaterally attack his prior convictions at the sentencing hearing unless he/she alleges that he/she was denied his/her right to counsel under Gideon v. Wainwright<sup>285</sup>, 372 U.S. 335 (1963).<sup>286</sup> The defendant may, however, challenge the enhanced sentence imposed under the ACCA in a federal habeas petition on the basis of the constitutionality of the prior expired convictions.<sup>287</sup>

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<sup>283</sup> See United States v. Hall, 77 F.3d 398, 401 (11<sup>th</sup> Cir. 1996) (conviction for carrying concealed weapon qualifies as “violent felony” for purposes of § 924(e)), cert. denied, 519 U.S. 849 (1996). But see United States v. Whitfield, 907 F.2d 798, 800 (8<sup>th</sup> Cir. 1990) (carrying concealed weapon is not “violent felony”).

<sup>284</sup> See 18 U.S.C. § 924(e)(1)(2)(B)(i)-(ii).

<sup>285</sup> 372 U.S. 335 (1963).

<sup>286</sup> See Custis v. United States, 511 U.S. 485, 493-96 (1994).

<sup>287</sup> See Young v. Vaughn, 83 F.3d 72, 76-79 (3d Cir.), cert. denied, 519 U.S. 944 (1996).

Be sure to obtain copies of the charging documents and judgments to determine if they conform to the prosecutor's version. If the offenses appear to qualify, it is worthwhile to examine the transcripts for constitutional defects for use in a subsequent § 2255 petition.

#### **D. SEPARATE CRIMINAL EPISODE**

Where two prior offenses were charged in the same indictment or were consolidated, application of the ACCA is not precluded. Under 18 U.S.C. § 924(e)(1), the prosecutor need only establish that the defendant has three previous convictions for offenses “committed on occasions different from one another.” (Emphasis added). The definition of “related offenses” found in U.S.S.G. § 4A1.2 is not implicated in this determination.<sup>288</sup> Rather, the Third Circuit held in United States v. Schoolcraft that the relevant test is whether the prior offenses are part of the same criminal episode.<sup>289</sup>

Before Schoolcraft, the Third Circuit had decided United States v. Balascsak<sup>290</sup>. In that split decision, the court held that the three prior convictions had to be separated by intervening judgments of convictions to qualify under ACCA.<sup>291</sup> Even though defense counsel can no longer take advantage of the counting rule set forth by the majority in Balascsak, Judge Becker's concurring opinion may prove helpful. While Judge Becker agreed with the dissent's analysis supporting the separate criminal episode test, he held that the “requirement must be read

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<sup>288</sup> See United States v. Maxey, 989 F.2d 303, 308 (9<sup>th</sup> Cir. 1993).

<sup>289</sup> See United States v. Schoolcraft, 879 F.2d 64, 74-75 (3d Cir.), cert. denied, 493 U.S. 995 (1989).

<sup>290</sup> 873 F.2d 673 (3d Cir. 1989) (en banc).

<sup>291</sup> Id. at 678-684.

rigorously.”<sup>292</sup> Thus, the possibility is not foreclosed that predicate convictions may be part of the same episode even if they are separated by days or weeks.<sup>293</sup>

Investigation may establish useful facts supporting the argument that the offenses were actually part of the same criminal episode. For example, a defendant may have been continuously under the influence of drugs during a string of crimes, or a personal tragedy may have triggered a series of crimes. Counsel should therefore should probe further to determine the facts and circumstances underlying the convictions.

## **E. NOTICE**

While some notice of the government’s intent to prosecute a defendant under ACCA is required, the Third Circuit has not yet ruled what constitutes sufficient notice.<sup>294</sup> In this district, the United States Attorney’s Office typically provides notice in the indictment. However, some courts have ruled that the government need not provide notice in the indictment.<sup>295</sup> There may, therefore, be no requirement that the government provide notice until the sentencing phase.

Counsel should thus advise clients proceeding to trial that the United States Attorney’s Office may seek the enhancement at sentencing even if it does not so advise the defendant before trial. Be less concerned where a client, who potentially qualifies under ACCA, pleads guilty to an indictment that does not charge ACCA. If the court does not inform the defendant of the

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<sup>292</sup> See id. at 684 (Becker, J., concurring).

<sup>293</sup> See id. at 685 (Becker, J., concurring).

<sup>294</sup> See United States v. Hawkins, 811 F.2d 210, 220 (3d Cir.), cert. denied, 484 U.S. 833 (1987).

<sup>295</sup> See United States v. Mauldin, 109 F.3d 1159, 1162 (6<sup>th</sup> Cir. 1997); United States v. Gibson, 64 F.3d 617, 625 (11<sup>th</sup> Cir. 1995), cert. denied, 517 U.S. 1173 (1996); United States v. Hardy, 52 F.3d 147 (7<sup>th</sup> Cir.), cert. denied, 516 U.S. 877 (1995); United States v. Craveiro, 907 F.2d 260, 264 (1<sup>st</sup> Cir.), cert. denied, 498 U.S. 1015 (1990).

minimum and maximum penalties associated with ACCA at the time of the guilty plea, due process considerations should operate to bar the enhancement at sentencing. The application of Apprendi v. New Jersey,<sup>296</sup> should also be considered in these situations.

#### **F. TRIAL CONSIDERATIONS**

If the indictment lists the qualifying felonies, move to redact the multiple references under Fed. R. Crim. P. 7(d). ACCA is regarded as a sentence enhancement, not a separate crime. Under 18 U.S.C. § 922(g)(1), the United States Attorney need only prove one prior conviction to obtain a guilty verdict.<sup>297</sup> Thus, it can be argued that no legitimate reasons exist to include the other felonies in the indictment.

In most cases, it is likely preferable that the jury not hear the details of the defendant's prior conviction, although it is an element of the offense. In Old Chief v. United States,<sup>298</sup> the Supreme Court held that the government must accept an offer to stipulate that the defendant has been convicted of a crime that provided for a term of imprisonment in excess of one year in lieu of informing the jury of the specific prior offense. This language satisfies the government's burden to prove the prior conviction as an element of the offense and is more neutral from a defense perspective.

#### **G. SENTENCING GUIDELINES**

Section 4B1.4 is utilized to determine the guideline range for armed career criminals. This guideline, effective November 1, 1990, provides for a base offense of at least thirty-three and

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<sup>296</sup> 530 U.S. 466 (2000).

<sup>297</sup> See United States v. McGatha, 891 F.2d 1520, 1521-22 (11<sup>th</sup> Cir.) (prior felony convictions did not have to be set forth in indictment or proven beyond reasonable doubt at trial), cert. denied, 495 U.S. 938 (1990).

<sup>298</sup> 519 U.S. 172, 174, 185-92 (1997).

a criminal history category of five, which places a defendant in a sentencing range of 188-235 months. If a defendant is both an armed career criminal and a career offender, the more punitive sentencing provision will govern the case.

It is important to note that the definitions and timing rules relating to prior convictions differ for the career offender provision of the guidelines and for ACCA.<sup>299</sup> The dates of the prior convictions, the nature of the instant offense, and the nature of the prior convictions should be reviewed carefully to determine whether or not the defendant is a career offender. Also, note that possession of a firearm does not qualify as a “violent felony” for purposes of triggering the career offender guideline.<sup>300</sup> The defendant thus qualifies for career offender status only if he/she has been convicted of crimes of violence and/or drug offenses.

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<sup>299</sup> See U.S.S.G. § 4B1.4, comment. (n. 1) (“definitions of ‘violent felony’ and ‘serious drug offense’ in 18 U.S.C. § 924(e) are not identical to the definition of ‘crime of violence’ and ‘controlled substance offense’ used in § 4BB1.1 . . . , nor are the time periods for the counting of prior sentences under § 4A1.2 . . . applicable.”); see also Chapter Eight (career offender provision).

<sup>300</sup> See United States v. Ford, 996 F.2d 83, 85 (5<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1050 (1994).

## CHAPTER EIGHT

### FEDERAL SENTENCING

#### A. THE SENTENCING REFORM ACT AND UNITED STATES v. BOOKER, 543 U.S. 220 (2005)

##### 1. Mandatory Guideline Sentencing Pre-Booker

Under the Sentencing Reform Act (18 U.S.C. § 3553) as originally written, a district court's sentencing authority was greatly restricted by the United States Sentencing Guidelines. The Act required sentencing courts to impose a sentence within a range established by the Guidelines absent a valid ground for departure specified in the Guidelines.<sup>301</sup> The sentence imposed was subject to a variety of standards of review on appeal.<sup>302</sup> The Guidelines became effective on November 1, 1987 and applied to all offenses committed on or after that date.

##### 2. Advisory Guideline Sentencing Post-Booker

On January 12, 2005, the United States Supreme Court issued United States v. Booker<sup>303</sup>. The Booker decision fundamentally changed § 3553 by holding that § 3553(b), the provision making the Guidelines mandatory, violated the Sixth Amendment right to jury trial.<sup>304</sup> To remedy this constitutional violation, the Court excised the mandatory provisions of § 3553(b)(1), rendering the guidelines advisory.<sup>305</sup>

After Booker, the Guidelines must still be considered, but they need not be followed in

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<sup>301</sup> 18 U.S.C. §§ 3553(a)(4)(A), (a)(5), 3553(b).

<sup>302</sup> 18 U.S.C. § 3742(e).

<sup>303</sup> 543 U.S. 220 (2005).

<sup>304</sup> United States v. Booker, 543 U.S. 220, 226, 243-44 (2005).

<sup>305</sup> Id. at 226, 245.

any particular case.<sup>306</sup> Instead, a sentencing court must consider each of the § 3553(a) factors - the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the Guidelines, the need to avoid unwanted sentencing disparities among similarly situated defendants, and the need to provide restitution to any victims of the offense<sup>307</sup> - in determining what sentence is “sufficient, but not greater than necessary” to achieve the purposes of sentencing identified in § 3553(a)(2).<sup>308</sup> All sentences are now reviewed on appeal for “reasonableness.”<sup>309</sup>

### **3. The Three-Step Sentencing Process**

The Third Circuit has identified a three-step process for district courts to follow in arriving at a post-Booker sentence:

1. Calculate the Guideline range in the exact manner as before Booker;
2. Formally rule on any Guideline motions, including departure motions; and,
3. Exercise discretion by considering the relevant § 3553(a) factors in setting the appropriate sentence.<sup>310</sup>

Accordingly, although a district court is free to sentence a defendant anywhere within the statutory range for the offense of conviction, the Guidelines remain a central part of federal

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<sup>306</sup> Booker, 543 U.S. at 259-60; United States v. Cooper, 437 F.3d 324, 329-330 (3d Cir. 2006).

<sup>307</sup> 18 U.S.C. §§ 3553(a)(1), (a)(3), (a)(4), (a)(6), (a)(7); Cooper, 437 F.3d at 329 (identifying § 3553(a) factors and holding that sentencing court must give “meaningful consideration” to each factor).

<sup>308</sup> Congress has identified the specific sentencing purposes as: reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, protecting the public from further crimes, and providing the defendant with needed training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2)(A)-(D).

<sup>309</sup> Booker, 543 U.S. at 260-63; Cooper, 437 F.3d at 327.

<sup>310</sup> United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006).

sentencing practice.

#### **4. Standard of Proof**

Post-Booker, the burden of proof for facts relevant to sentencing remains a preponderance of the evidence.<sup>311</sup>

### **B. FUNDAMENTALS OF THE GUIDELINES**

#### **1. The Effective Date Of The Sentencing Guidelines**

The United States Sentencing Guidelines became effective on November 1, 1987, and apply to all offenses committed on or after that date. If an ongoing pattern of criminal conduct coincides with the effective date of the guidelines, the guidelines apply.<sup>312</sup>

#### **2. Class B And C Misdemeanors And Infractions**

The guidelines do not apply to any count of a conviction that is a Class B or C misdemeanor or an infraction.<sup>313</sup> A Class B misdemeanor is an offense with a maximum penalty of six months imprisonment. A Class C misdemeanor is an offense with a maximum penalty of thirty days imprisonment. Infractions are offenses carrying a maximum five day term of imprisonment.<sup>314</sup>

#### **3. Guideline Ranges**

The offense level and the criminal history category determine the applicable guideline

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<sup>311</sup> See United States v. Grier, 475 F.3d 556, 568 (3d Cir. 2007) (en banc).

<sup>312</sup> See United States v. Sheffer, 896 F.2d 842, 845 (4<sup>th</sup> Cir.), cert. denied, 498 U.S. 838 (1990) and cert. denied, 498 U.S. 968 (1990); United States v. White, 869 F.2d 822, 826 (5<sup>th</sup> Cir.), cert. denied, 490 U.S. 1112 (1989) and cert. denied, 493 U.S. 1001 (1989).

<sup>313</sup> See U.S.S.G. § 1B1.9.

<sup>314</sup> See 18 U.S.C. § 3559.

range.<sup>315</sup>

#### **4. Presentence Investigation**

The United States Probation Office has offices in Newark, Camden, Northfield, Paterson, Tinton Falls, and Trenton. If a client is on bail, the first contact with Probation typically occurs immediately after a plea is taken or a guilty verdict is returned. At that time, the probation officer will conduct an intake interview and will complete a Form 1, a form utilized in preparing the Presentence report.<sup>316</sup> Shortly after the initial interview, the Presentence investigation will be assigned to an officer and defense counsel should be contacted by that officer. If the client is in custody, an intake interview is not conducted. Instead, the assigned probation officer will conduct the Form 1 interview at the jail.

It is recommended that the client complete the Form 1 in advance of the formal interview, in order to ensure its accuracy and to provide counsel with an opportunity to review it. Defense counsel should be present during all client interviews, particularly for the interview regarding the client's version of the offense. It is critical to advise Probation not to discuss with the client his/her version of the offense or his/her prior record outside the presence of counsel. Indicate this in writing on the Probation Referral Form and the Form 1 where it provides for a "version of offense."<sup>317</sup> This advisory is of paramount importance because the client's statements regarding his/her version of the offense or prior record will affect the guideline range as well as his/her security designation.

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<sup>315</sup> See U.S.S.G. Ch.5, Pt. A.

<sup>316</sup> See Appendix - Probation Form 1.

<sup>317</sup> In some instances, Probation will accept a written summary of the defendant's version of the offense in lieu of a discussion with the defendant.

The probation officer will question the client regarding his/her family, financial background, employment history, criminal record, substance abuse, and medical history. The client will sign several release forms, giving Probation access to his/her records. Information learned during the interview may, and will, be used against the defendant at sentencing.<sup>318</sup>

Prior to sentencing, the parties will receive a copy of the draft Presentence Report (PSR).<sup>319</sup> The PSR will contain factual findings, guideline calculations, and potential grounds for departures. Objections/comments to the report must be submitted in writing. Make efforts to resolve any objections in advance of the final report, perhaps with the assistance of the AUSA. When reviewing the report, it may be helpful to refer to U.S.S.G. § 1B1.1, Application Instructions. Be alert for the improper use of proffered information in guideline calculations.<sup>320</sup>

A final version of the report, containing corrected information and/or noting the objections of the parties, will be provided to the court prior to sentencing. A sentencing memorandum, addressing contested issues and presenting mitigating facts, should be submitted to the court ten days prior to sentencing in every case. Absent the trial court's consent, Fed. R. Crim. P. 32 prohibits the U.S. Attorney's Office from disseminating a sentencing memorandum. Sentencing memoranda and related material should NOT be filed electronically via CM/ECF. Instead, hard copies should be provided to the Court, the AUSA, and to the Probation Officer.

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<sup>318</sup> See United States v. Singh, 923 F.2d 1039, 1043 (3d Cir.), cert. denied, 500 U.S. 937 (1991).

<sup>319</sup> See 18 U.S.C. § 3552(d); Fed. R. Crim. P. 32(b); see also Appendix at 124 (standing order).

<sup>320</sup> See 18 U.S.C. § 3661; U.S.S.G. § 1B1.8, comment. (n.1).

## 5. Departures

Post-Booker, Step One of the three-step sentencing procedure requires a sentencing court to correctly calculate the advisory Guidelines range.<sup>321</sup> At Step Two, the court must formally rule on any Guidelines motions, including departure motions.<sup>322</sup> It is, therefore, important to specifically address any potential grounds for departure in your sentencing memo independent of any 18 U.S.C. § 3553(a) arguments.

## 6. Sentencing on a Single Count of Conviction

a. **Statutory maximum** – Where the statutorily authorized maximum sentence is **less** than the minimum sentence of the guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.<sup>323</sup>

b. **Statutory minimum** – Where the statutorily required minimum sentence is **greater** than the maximum sentence of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.<sup>324</sup>

## 7. No Parole

The Sentencing Reform Act of 1984 abolished parole.<sup>325</sup> An offender may, however, receive credit toward service of a sentence for satisfactory behavior. A defendant serving a sentence that exceeds one year, excluding one serving a term of life, may receive credit of no

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<sup>321</sup> See 18 U.S.C. § 3553(a)(4); Cooper, 437 F.3d at 330.

<sup>322</sup> Gunter, 462 F.3d at 247.

<sup>323</sup> See U.S.S.G. § 5G1.1(a).

<sup>324</sup> See U.S.S.G. § 5G1.1(b).

<sup>325</sup> See 18 U.S.C. § 3624(a).

more than fifty-four days at the end of each year of the sentence.<sup>326</sup>

## **8. Grouping**

Chapter 3, Pt. D, of the guidelines provides for grouping offenses when the indictment alleges multiple counts. It sets forth rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. The single “combined” offense level that results under the guidelines (after adjustment) is applied to determine the sentence.<sup>327</sup>

## **9. Burden Of Proof**

The party seeking to adjust the offense level has the burden of proof.<sup>328</sup> Thus, the government bears the burden of proof when it seeks to adjust upward the offense level, and the defense bears the burden of proof when it attempts to lower the offense level.<sup>329</sup> A preponderance of the evidence standard applies.<sup>330</sup>

## **10. Amendments**

The Sentencing Commission has the authority to submit guideline amendments each year.<sup>331</sup> Amendments automatically take effect one hundred eighty days after submission unless Congress enacts a contrary law.<sup>332</sup> A sentencing court shall apply the guidelines in effect on the date defendant is sentenced, unless doing so would violate the Constitution’s Ex Post Facto

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<sup>326</sup> See id. at § 3624(b)(1).

<sup>327</sup> See U.S.S.G. § 3D intro. comment.

<sup>328</sup> See United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989).

<sup>329</sup> See id.

<sup>330</sup> See id. at 290-91.

<sup>331</sup> See 28 U.S.C. § 994(o) & (p).

<sup>332</sup> See id. § 994(p).

Clause.<sup>333</sup> If the effective guidelines at the time of the offense are less severe, those guidelines apply.<sup>334</sup>

## **11. Multiple Terms**

Multiple terms of imprisonment can be imposed to run consecutively or concurrently.<sup>335</sup> If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.<sup>336</sup>

## **12. Stipulations**

Stipulations within a plea agreement are not binding on the court or on Probation.<sup>337</sup>

## **13. Commentary In The Guidelines**

Commentary in the guidelines manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or it is inconsistent with or constitutes a plainly erroneous reading of that guideline.<sup>338</sup>

# **C. THE OFFENSE LEVEL**

## **1. The Base Offense Level**

Appendix A of the guidelines is a statutory index specifying the guideline section(s)

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<sup>333</sup> See 18 U.S.C. § 3553.

<sup>334</sup> See U.S.S.G. § 1B1.11.

<sup>335</sup> See 18 U.S.C. § 3584.

<sup>336</sup> See U.S.S.G. § 5G1.2(c); U.S.S.G. §5G1.2, comment.

<sup>337</sup> See 18 U.S.C. § 3552; U.S.S.G. § 6B1.4, comment.

<sup>338</sup> See Stinson v. United States, 508 U.S. 36, 38 (1993).

ordinarily applicable to the statute of conviction. While nearly every criminal statute is listed, if an offense is not listed, the most analogous guideline applies.<sup>339</sup>

The first step is to locate the particular statute of conviction. The corresponding guideline section will provide a base offense level, which is the level from which points will be added or subtracted based upon the applicable adjustments built into the guidelines.<sup>340</sup> After the base offense level has been calculated, defense counsel should consider whether it is appropriate to seek a departure from the guidelines based on criteria not adequately taken into consideration by the Sentencing Commission.<sup>341</sup>

In certain cases, the amount of loss involved influences the offense level.<sup>342</sup> This calculation may involve actual and/or intended loss to the victim.<sup>343</sup>

## **2. U.S.S.G. Chapter 3 - Adjustments**

Adjustments for particular offenses are provided in the text of their applicable guideline section. Additional adjustments are set forth in U.S.S.G. Ch.3.

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<sup>339</sup> See U.S.S.G. § 2X5.1.

<sup>340</sup> Adjustments are different than departures. The guidelines provide some built-in adjustments that add and/or subtract points to the offense level based on specific criteria taken into consideration by the Sentencing Commission. By contrast, both upward and downward departures (other than cooperation agreements) are based on factors not adequately taken into consideration by the Sentencing Commission.

<sup>341</sup> See U.S.S.G. § 1B1.1(I); U.S.S.G. § 5K2.0; United States v. King, 454 F.3d 187, 196 (3d Cir. 2006) (post-Booker, sentencing courts must continue to calculate Guidelines range precisely as they would before Booker, including formally ruling on any Guideline departure motions).

<sup>342</sup> See U.S.S.G. § 2B1.1 (applicable to larceny, embezzlement, and other forms of theft); U.S.S.G. § 2B3.1 (robbery); U.S.S.G. § 2B3.1 (robbery); U.S.S.G. § 2B3.2 (extortion); U.S.S.G. § 2B3.3 (blackmail); U.S.S.G. § 2F1.1 (fraud and deceit or forgery).

<sup>343</sup> See U.S.S.G. § 2B1.1, comment. (n. 2); U.S.S.G. § 2B3.1, comment. (n. 2); U.S.S.G. § 2B3.1, comment. (n. 3); U.S.S.G. § 2B3.2 comment. (n. 5); U.S.S.G. § 2B3.3(b)(1); U.S.S.G. § 2F1.1, comment. (n. 8).

**a. Victim-Related Adjustments**

These adjustments may apply to a wide variety of offenses.

- U.S.S.G. §3A1.1 – Hate Crime Motivation: add three levels
- U.S.S.G. §3A1.1 – Vulnerable Victim: add two levels<sup>344</sup>
- U.S.S.G. §3A1.2 – Official Victim: add three or six levels
- U.S.S.G. §3A1.3 – Restraint of Victim: add two levels
- U.S.S.G. §3A1.4 – Terrorism: add 12 levels

**b. Role in the Offense**

These adjustments are based on the role the defendant played in committing the offense.

- U.S.S.G. §3B1.1 – Aggravating Role: add two to four levels<sup>345</sup>
- U.S.S.G. §3B1.2 – Mitigating Role: decrease two to four levels<sup>346</sup>
- U.S.S.G. §3B1.3 – Abuse of Position of Trust or Use of Special Skill: add two levels<sup>347</sup>
- U.S.S.G. §3B1.4 – Using a Minor to Commit a Crime: add two levels<sup>348</sup>
- U.S.S.G. §3B1.5 – Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence: add two to four levels

**c. Obstruction**

- U.S.S.G. §3C1.1 – Obstruction or Impeding the Administration of Justice (including false testimony): add two levels
- U.S.S.G. §3C1.2 – Reckless Endangerment During Flight: add two levels

The commentary in U.S.S.G. § 3C1.1 contains non-exhaustive lists of examples of the types of conduct to which the § 3C1.1 enhancement does and does not apply. Note that U.S.S.G. § 3C1.1, comment. (n.4(b)), indicates that the enhancement applies to “committing, suborning or

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<sup>344</sup> See generally United States v. Zats, 298 F.3d 182 (3d Cir. 2002).

<sup>345</sup> See generally United States v. Murillo, 933 F.2d 195 (3d Cir. 1991).

<sup>346</sup> See generally United States v. Isaza-Zapata, 148 F.3d 236 (3d Cir. 1998).

<sup>347</sup> See generally United States v. Iannone, 184 F.3d 214 (3d Cir. 1999); United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996).

<sup>348</sup> See generally United States v. Pojilenko, 416 F.3d 243 (3d Cir. 2005).

attempting to suborn perjury.”<sup>349</sup>

#### **d. Acceptance Of Responsibility**

Accepting responsibility for criminal behavior warrants a two, or possibly three, level decrease in the offense level.<sup>350</sup> Defendants qualifying for the two-level reduction receive a third level off if the offense level is 16 or greater and the Government files a motion stating that the defendant has timely notified authorities of his intention to plead guilty.<sup>351</sup> The application notes and the commentary provide some insight as to the factors considered by a court in determining whether a defendant qualifies for this adjustment.

Individuals who plead guilty are eligible for the reduction, but simply pleading guilty may not be sufficient to earn the reduction. Further, it is generally difficult for a defendant to obtain the reduction if he/she proceeds to trial and disputes any element of the offense.<sup>352</sup> Additionally, departures based on "extraordinary acceptance of responsibility" have been granted in the Third Circuit.<sup>353</sup>

### **3. Concurrent And/Or Consecutive Sentences**

Chapter 5 of the guidelines addresses the total punishment to be imposed based upon the combined offense level. In a multiple-count case, sentences on all counts run concurrently, except

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<sup>349</sup> See generally United States v. Dunnigan, 507 U.S. 87 (1993) (applying U.S.S.G. § 3C1.1).

<sup>350</sup> See U.S.S.G. § 3E1.1.

<sup>351</sup> See U.S.S.G. §3E1.1(b).

<sup>352</sup> Cf. United States v. Zwick, 199 F.3d 672, 693 (3d Cir. 1999) (recognizing that case will be rare where defendant is entitled to third acceptance of responsibility point without having timely entered plea of guilty).

<sup>353</sup> See United States v. Sally, 116 F.3d 76, 80-81 (3d Cir. 1997); United States v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992).

as required to achieve the total sentence, or as required by law.<sup>354</sup>

#### **4. Multiple Count Computation**

Sections 3D1.1 - 5 provide rules for determining a single offense level that encompasses all counts of conviction. The single combined offense level that results from applying these rules is used, after adjustment under the guidelines, to determine the sentence.<sup>355</sup>

#### **5. Relevant Conduct**

Section 1B1.3 is a catch-all provision requiring that all "relevant conduct" be factored into the client's guideline calculations. The commentary provides examples of conduct for which the defendant is accountable for sentencing purposes.<sup>356</sup> Relevant conduct for sentencing accountability includes acquitted conduct, suppressed evidence, charges dismissed in the plea bargain, conduct of others, the defendant's criminal involvement in the particular scheme, and any wrongdoing outside of the statute of limitations period.

Where the defendant has been involved in jointly undertaken criminal activity, "relevant conduct" does have some limits.<sup>357</sup> In considering co-conspirator accountability, the Third Circuit has held that accountability under U.S.S.G. § 1B1.3 is **not** coextensive with United States v. Pinkerton:

In contrast, the amended application note states that "relevant conduct is not necessarily the same for every participant" in the conspiracy, thus indicating that in some instances, sentencing courts must distinguish between co-conspirators for the purposes of

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<sup>354</sup> See U.S.S.G. § 5G1.2.

<sup>355</sup> See U.S.S.G. § 3D1.5.

<sup>356</sup> See U.S.S.G. § 1B1.3, comment.

<sup>357</sup> See U.S.S.G. § 1B1.3, comment. (n.2).

accomplice attribution . . . . The relevant conduct provision therefore recognizes that, while it is appropriate to hold a defendant who . . . [had] a substantial degree of involvement in the conspiracy accountable for reasonably foreseeable acts committed by a co-conspirator, the same cannot be said for a defendant whose involvement was much more limited.<sup>358</sup>

The sentencing court must make specific factual determinations to establish the degree of each defendant's involvement in determining what was "reasonably foreseeable" to each particular defendant.<sup>359</sup>

Prosecutors may offer to drop charges in exchange for a plea to an information and/or the remaining counts in an indictment. Given the relevant conduct provisions of the guidelines, this offer may have no effect for purposes of guideline range exposure. Furthermore, when the offer includes a request to stipulate to a given weight (in drug cases) or to an amount of money (in fraud and theft cases), the stipulation may in fact adversely impact sentencing. The effect under the guidelines of any offer must be analyzed carefully.

## **6. Relevant Conduct And Drug Cases**

The same standards of relevant conduct govern the district court's determination of the quantity of drugs for sentencing purposes. For instance, in United States v. Jones, the court held that where the defendant agreed to aid a large-volume dealer in a single, small sale of drugs, the defendant was not liable for prior or subsequent acts of the dealer that were not reasonably foreseeable.<sup>360</sup>

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<sup>358</sup> United States v. Collado, 975 F.2d 985, 992 (3d Cir. 1992).

<sup>359</sup> See id. at 995.

<sup>360</sup> 965 F.2d 1507, 1517 (8<sup>th</sup> Cir. 1992), cert. denied, 506 U.S. 924 (1992), cert. denied, 506 U.S. 965 (1992), and cert. denied, 508 U.S. 941 (1993).

## **D. CRIMINAL HISTORY CATEGORY**

The criminal history category calculation formula is found in U.S.S.G. Ch.4, Criminal History and Criminal Livelihood. The most severe guideline penalties are set forth in U.S.S.G. § 4B1.1, Pt. B, Career Offender, U.S.S.G. § 4B1.4, Armed Career Criminal, and U.S.S.G. §4B1.5, Repeat and Dangerous Sex Offender Against Minors.<sup>361</sup>

### **1. Impact of Prior Record On Sentencing**

As the sentencing table indicates, there are six different criminal history categories, with the higher categories correlating with greater sentences. A defendant's criminal history category is calculated based on points assigned to the defendant's prior record.<sup>362</sup> As a general rule, points are given based on the length of imprisonment imposed for past convictions and whether the defendant committed the instant offense while under a criminal sentence, including probation or parole.<sup>363</sup> After the criminal history category has been calculated, consider the possibility of a departure pursuant to U.S.S.G. § 4A1.3 if the score over-represents the defendant's criminal history.<sup>364</sup>

#### **a. Juvenile Adjudications/Convictions**

Juvenile adjudications are included in the criminal history category calculations. Section 4A1.2(d) provides the point structure for offenses committed by juveniles.<sup>365</sup> In the Third Circuit,

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<sup>361</sup> See Chapter Seven, supra, (Armed Career Criminal Act).

<sup>362</sup> See U.S.S.G. §§ 4A1.1 & 4A1.2.

<sup>363</sup> See U.S.S.G. §§ 4A1.1(a)-(c) (length of imprisonment); id. § 4A1.1(d) (under criminal sentence).

<sup>364</sup> See United States v. Shoupe, 988 F.2d 440, 442, 444-47 (3d Cir. 1993).

<sup>365</sup> See generally United States v. Davis, 929 F.2d 930 (3d Cir. 1991).

juvenile convictions that do not count toward the criminal history computation under § 4A1.2(d) may not be the basis for an upward departure.<sup>366</sup>

**b. Points For Parole/Probation Violations**

In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, the original term of imprisonment is added to any term of imprisonment imposed upon revocation. The resulting total is then used to compute the criminal history points.<sup>367</sup>

**c. Staleness**

Section 4A1.2(e) limits the use of old convictions for purposes of guideline calculations.

**2. The Career Offender And U.S.S.G. § 4B1.1**

A career offender's criminal history category in every case shall be six.<sup>368</sup> A defendant is a career offender if:

1. The defendant was at least eighteen years old at the time he/she committed the instant offense of conviction;
2. The instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
3. The defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

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<sup>366</sup> See United States v. Thomas, 961 F.2d 1110, 1115-17 (3d Cir. 1992).

<sup>367</sup> See U.S.S.G. § 4A1.2(k).

<sup>368</sup> See U.S.S.G. § 4B1.1.

### **3. The Armed Career Criminal Act (ACCA) and U.S.S.G. § 4B1.4**

The effective date of this provision is November 1, 1990. This guideline implements 18 U.S.C. § 924(e), which requires a minimum fifteen year sentence for a defendant who violates 18 U.S.C. § 922(g) and who has three previous convictions for a violent felony or a serious drug offense.<sup>369</sup> If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied.<sup>370</sup> Note that the time periods for the counting of prior sentences under § 4A1.2 are inapplicable to the determination of whether a defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).<sup>371</sup>

### **4. Repeat and Dangerous Sex Offender Enhancement - U.S.S.G. §4B1.5**

For repeat child-sex offenders, U.S.S.G. §4B1.5 provides lengthy terms of imprisonment. The guideline sets the minimum criminal history category at V and applies significant offense level increases to offenders with at least one prior sex offense conviction.<sup>372</sup> A defendant with no prior child-sex offense convictions is also subject to a significant offense level increase if he engaged in a pattern of activity involving prohibited sexual conduct.<sup>373</sup>

While §4B1.5 covers a broad range of child-sex offenses, it does not apply to trafficking

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<sup>369</sup> See generally Chapter Seven (Armed Career Criminal Act)

<sup>370</sup> See U.S.S.G. § 4B1.4(b).

<sup>371</sup> See U.S.S.G. § 4B1.4, comment. (n. 1).

<sup>372</sup> U.S.S.G. §4B1.5(a).

<sup>373</sup> U.S.S.G. §4B1.5(b).

in, receipt of, or possession of child pornography.<sup>374</sup>

## **E. STATUTORY MANDATORY MINIMUM SENTENCES**

### **1. Guidelines and Statutory Minimums**

The guideline sentencing range does not supplant minimum and maximum sentences required by statute. If the guidelines require a sentence above the statutory maximum, or below a statutory minimum, the statute controls.<sup>375</sup> Accordingly, counsel must always consider both the guideline range and the statutory sentence requirements in evaluating sentencing options.

### **2. Drug Offenses**

The federal drug statutes provide two types of mandatory minimum sentences. The first type is based on the amount involved. In cases involving certain drugs in certain amounts, 21 U.S.C. § 841(b) provides minimum sentences of five or ten years imprisonment. The second type is based on criminal history. For defendants who have previously been convicted of drug offenses, the mandatory minimum sentences increase, up to life imprisonment. In order to seek recidivism-based enhancements, the government must give formal notice and follow the procedures of 21 U.S.C. § 851.

### **3. Three Strikes**

Federal law mandates life imprisonment for a person convicted of a serious violent felony who has two or more separate prior state or federal convictions for serious violent felonies or serious drug offenses.<sup>376</sup> In seeking a sentence under § 3559(c), the government must meet the

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<sup>374</sup> U.S.S.G. §4B1.5, cmt. (n. 2).

<sup>375</sup> See U.S.S.G. § 5G1.1.

<sup>376</sup> See 18 U.S.C. § 3559(c).

procedural requirements of 21 U.S.C. § 851.

#### **4. Firearms Offenses**

Title 18 U.S.C. § 924, which sets forth the penalties for certain federal firearms possession offenses, includes two mandatory minimum provisions. First, § 924(c) provides for graduated minimum sentences, starting at 5 years and increasing to life imprisonment, for possession of a firearm during a drug-trafficking or violent crime. The statute requires that a sentence imposed under § 924(c) run consecutively to any other sentence.

The other firearm mandatory minimum is found in 18 U.S.C. § 924(e), the Armed Career Criminal Act. A defendant convicted of unlawful firearm possession under 18 U.S.C. § 922(g) typically faces a maximum term of ten years imprisonment. The ACCA increases this punishment range, to a minimum of fifteen years and a maximum of life imprisonment, if a defendant has three prior convictions for either a “violent felony” or a “serious drug offense.”<sup>377</sup> Unlike the drug statutes and the three strikes law, § 924(e) contains no procedural notice requirements. The Sentencing Commission has promulgated an armed career criminal guideline, which can provide for sentences far above the statute’s fifteen-year minimum.<sup>378</sup>

#### **5. Sex Crimes**

The federal sex crime statutes also provide for a number of mandatory minimum sentences, some of which were recently added or increased by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006). Offenses involving the sex trafficking of children are now punishable by mandatory minimum terms of 10 or 15 years

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<sup>377</sup> See 18 U.S.C. § 924(e)(1).

<sup>378</sup> See U.S.S.G. § 4B1.4; see also Chapter Seven (Armed Career Criminal Act).

imprisonment, depending on the age of the child and whether force was used.<sup>379</sup> Crossing state lines with the intent to engage in a sexual act with a child under 16 years of age is punishable by a mandatory minimum term of 30 years imprisonment.<sup>380</sup> Sexual abuse of a minor or a ward is punishable by a mandatory minimum term of 15 years imprisonment.<sup>381</sup> Section 2251, punishing the sexual exploitation of children, provides a mandatory minimum of 15 years imprisonment for the first offense, 25 years for an individual with a prior sex offense conviction, and 50 years for an individual with two or more priors.<sup>382</sup> Coercing or enticing a minor to engage in prostitution or knowingly transporting a minor in interstate or foreign commerce to engage in prostitution carries a mandatory minimum sentence of 10 years imprisonment.<sup>383</sup>

Child pornography offenses also carry stiff mandatory minimums. The receipt and distribution of child pornography is punishable by a 5 year mandatory minimum sentence for first time offenders and 15 years for individuals who have a prior child sex offense conviction.<sup>384</sup> Possession of child pornography by an individual with a prior conviction for a child sex offense carries a 10 year mandatory minimum term of imprisonment.<sup>385</sup>

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<sup>379</sup> See 18 U.S.C. § 1591(b), as amended by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006).

<sup>380</sup> See 18 U.S.C. § 2241(c), as amended by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006).

<sup>381</sup> See 18 U.S.C. §§ 2243(a), (b), as amended by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006).

<sup>382</sup> See 18 U.S.C. § 2251(e).

<sup>383</sup> See 18 U.S.C. §§ 2422(b), 2423(a), as amended by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (July 27, 2006).

<sup>384</sup> See 18 U.S.C. § 2252A(b)(1).

<sup>385</sup> See 18 U.S.C. § 2252A(b)(2).

Repeat child sex offenders are subject to mandatory life imprisonment.<sup>386</sup>

## **6. Sentencing Below a Statutory Minimum**

Sentences below a statutory minimum are permitted in two instances: cooperation cases and “safety valve” drug cases. Booker provides no mechanism for relief from mandatory minimum sentences.

### **a. Substantial Assistance/Cooperation**

Section 3553(e) of Title 18 authorizes the court, upon motion by the government, “to impose a sentence below a level established by statute as [a] minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” The court is required to follow the guidelines and the policy statements in imposing the reduced sentence.<sup>387</sup> Section 5K1.1 sets out the factors relevant to a departure on a government substantial-assistance motion. Note, however, that a § 5K1.1 motion will not authorize a sentence below the statutory minimum unless the government specifically requests such a sentence.<sup>388</sup> As noted in Chapter Four, the standing order in this district requires that the government submit its sentencing memorandum and motions for departure not less than fifteen calendar days prior to sentencing. The defendant’s memorandum must be submitted not less than ten days prior to sentencing and any response by the government must be submitted five days prior to sentencing.

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<sup>386</sup> See 18 U.S.C. § 3559(e).

<sup>387</sup> See 18 U.S.C. § 3553(e).

<sup>388</sup> See Melendez v. United States, 518 U.S. 120, 122, 124, 125-30 (1996); see generally Chapter Two, supra, Cooperation.

**b. Safety Valve**

Pursuant to 18 U.S.C. § 3553(f), the court may impose a guideline sentence for certain drug crimes, without regard to any statutory minimum, if it finds that a defendant has a minimal criminal history, was neither a violent nor a high-level participant, and provided the government with truthful, complete information regarding his/her criminal conduct. The safety-valve statute is mirrored in guideline § 5C1.2 of the guidelines.

**7. Prior Convictions That Trigger Mandatory Sentencing**

The amount (weight) of drugs and a defendant's prior record may trigger a mandatory sentence for a drug offense.<sup>389</sup> The definition of a predicate "felony drug offense" is broad and, unlike the guidelines, which do not count sentences resulting from foreign convictions,<sup>390</sup> foreign convictions count as predicate felonies under the statute.<sup>391</sup> Juvenile adjudications may also count as prior felony convictions for purposes of predicate offenses under this definition.<sup>392</sup> A state felony conviction for an offense committed when a defendant was a juvenile qualifies as a prior drug felony that will subject the defendant to an enhanced sentence.<sup>393</sup> Note that while the guidelines provide a staleness provision for juvenile adjudications under U.S.S.G. § 4A1.2 (d)(2) and adult sentences under U.S.S.G. § 4A1.2(e), that bar does not apply to predicate offenses for purposes of statutory mandatory minimums.

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<sup>389</sup> See 21 U.S.C. § 841 (b)(1)(A)-(B).

<sup>390</sup> See U.S.S.G. § 4A1.2(h).

<sup>391</sup> See 21 U.S.C. § 841.

<sup>392</sup> See United States v. Clark, 956 F.2d 1176, 1177-78 (D.C. Cir. 1992).

<sup>393</sup> See id. at 1177-78.

**a. Proceedings To Establish Prior Convictions**

Title 21 of the United States Code provides its own procedural guidelines for establishing and challenging prior convictions.<sup>394</sup> Read this section in conjunction with this manual's discussion of collateral attacks on prior convictions.

**i. Notice**

Pursuant to 21 U.S.C. § 851(a)(1), the government must provide notice of its intent to use prior convictions to enhance the sentence **before** the trial or plea.<sup>395</sup>

**ii. Affirmation Of Prior Convictions - 21 U.S.C. § 851 (b)**

Advise the defendant of his/her Fifth Amendment right to not incriminate him/herself and to remain silent. Statements of counsel and/or admissions on behalf of the defendant may be sufficient to establish his/her prior convictions.<sup>396</sup>

**iii. Denial Of Priors**

Challenges to any allegation contained in the charging information must be made in writing.<sup>397</sup> On any issue of fact, the government carries the burden of proof beyond a reasonable doubt. If a challenge, however, is based upon the constitutional invalidity of a prior conviction(s), the defendant has the burden by a preponderance of the evidence.<sup>398</sup> Counsel's failure to timely

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<sup>394</sup> See 21 U.S.C. § 851 et seq.

<sup>395</sup> See United States v. Johnson, 944 F.2d 396, 406-07 (8<sup>th</sup> Cir.) (notice not sufficient where it was given several weeks in advance of trial with respect to one conviction but in between jury selection and swearing in of jury concerning second conviction), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078 (1991), and 504 U.S. 977 (1991). But see United States v. Jordan, 810 F.2d 262, 268-69 (D.C. Cir.) (notice proper if provided before voir dire, but after motion to suppress), cert. denied, 481 U.S. 1032 (1987).

<sup>396</sup> See Virgin Islands v. George, 741 F.2d 643, 648 (3d Cir. 1984).

<sup>397</sup> See id.

<sup>398</sup> See 21 U.S.C. § 851(c).

respond to the information alleging the priors constitutes a waiver, absent good cause for such failure.

#### **iv. Statute Of Limitations To Challenge Prior Convictions**

Section 851(e) of Title 21 provides in pertinent part:

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

This provision is particularly troublesome. It is also contrary to the law outlined by the United States Supreme Court and the Third Circuit, which allows greater latitude when raising collateral attacks to prior convictions.<sup>399</sup>

### **F. Special Considerations in Drug Cases**

#### **1. The Weight of Drugs**

The guidelines and statutory sentencing schemes utilize the weight of the drugs as the basis for the sentencing range.<sup>400</sup> The quantity of drugs possessed for personal use, however, is not included in the calculation of the base offense level under the guidelines.<sup>401</sup> Moreover, a base offense level can be determined by converting drug money that a defendant had in his/her possession into its drug equivalency if the defendant obtained the money through the drug transactions.

The judge, not a jury, will decide the weight of drugs for which the defendant is

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<sup>399</sup> See generally Tucker v. United States, 404 U.S. 1048 (1972); Burgett v. Texas, 389 U.S. 109 (1967), opinion conformed to 422 S.W.2d 728 (Tex. App. 1968); Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989), cert. denied, 496 U.S. 942 (1990).

<sup>400</sup> See U.S.S.G. § 2D1.1 (Drug Quantity Table comment.)

<sup>401</sup> See U.S.S.G. § 2D1.1 comment. (n. 12); Jansen v. United States, 369 F.3d 237, 248-249 (3d Cir. 2004).

accountable at sentencing.<sup>402</sup> Certain considerations influence the weight calculation, such as the weight of blotter paper upon which the drugs are found.<sup>403</sup> As noted in the relevant conduct segment of this chapter, acquitted conduct, the conduct of others, suppressed evidence, and even evidence from another trial can be used against the defendant. Pinkerton v. United States<sup>404</sup>, is cited often by the courts and prosecutors in cases involving conspiracies to distribute drugs because the fact that overt acts charged in the conspiracy counts may also be charged and proven as substantive offenses is immaterial. A defendant can be prosecuted for both the agreement to commit the unlawful act and the performance of the act.

## **2. Crack**

On November 1, 2007 and May 1, 2008, retroactive amendments to U.S.S.G. §2D1.1 of the United States Sentencing Guidelines took effect which reduced base offense levels for most quantities of crack cocaine by two levels. Those amendments were adopted in response to studies which raise grave doubts about the fairness and rationale of the 100-to-1 crack/powder ratio incorporated into the Sentencing Guidelines.<sup>405</sup> Subsequently, on August 3, 2010, President Obama signed the Fair Sentencing Act of 2010 which reduced the 100-to-1 crack/powder ratio to

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<sup>402</sup>See Edwards v. United States, 523 U.S. 511, 513 (1998). But cf. Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that, except for prior convictions, any fact that increases statutory maximum punishment must be treated as essential element of offense and thus must be found by jury beyond reasonable doubt).

<sup>403</sup>See United States v. Rodriguez, 975 F.2d 999, 1006 (3d Cir. 1992).

<sup>404</sup> 328 U.S. 640, 644 (1946).

<sup>405</sup> See generally United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (May 2007) (hereinafter “2007 Sentencing Commission Report”); United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy (May 2002); United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (April 1997); United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (February 1995). See also Kimbrough v. United States, 128 S.Ct. 558, 568-69 (2007) (discussing history of crack cocaine guideline and various Sentencing Commission reports).

18-to-1. Twenty-eight grams of crack cocaine will now trigger a five-year prison sentence and 280 grams of crack will trigger a ten-year sentence. The five-year mandatory minimum for simple possession of crack cocaine has also been eliminated. The Fair Sentencing Act does not appear to apply retroactively. The Sentencing Commission has issued proposed amendments to implement the directives of the new legislation.<sup>406</sup>

### **3. U.S.S.G. § 2D1.2 And The Schoolyard Statute, 21 U.S.C. § 860**

Section 860 of Title 21 provides a mandatory minimum of one year in custody for individuals convicted of distributing drugs within one thousand feet of a school. The drug trafficking offenses described in 21 U.S.C. § 841 (a)(1) are lesser included offenses of 21 U.S.C. § 860.<sup>407</sup> The government need only prove two elements of the latter crime to establish the offense: (1) that the defendant violated 21 U.S.C. § 841(a)(1), and (2) that the defendant committed that violation within one thousand feet of a school.<sup>408</sup>

### **G. COLLATERAL ATTACKS ON PRIOR CONVICTIONS**

Generally, collateral attacks on prior convictions under the guidelines should be pursued in the same manner as those for statutory enhancements and mandatory provisions. The client's criminal record should be carefully reviewed for prior convictions that trigger the career offender enhancement, the ACCA, and/or repeat offender status under Title 21, drug offenses, and those convictions should be reviewed for constitutionality.<sup>409</sup> Note that the Drug Act attempts to limit

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<sup>406</sup> For the most current developments in this area, see [http://www.fd.org/odstb\\_CrackCocaine.htm](http://www.fd.org/odstb_CrackCocaine.htm) or <http://famm.org/Default.aspx>.

<sup>407</sup> See United States v. Jackson, 443 F.3d 293, 301 (3d Cir. 2006).

<sup>408</sup> See 21 U.S.C. § 860 (a).

<sup>409</sup> See Shepard v. United States, 544 U.S. 13 (2005).

collateral attacks to the enhancement priors, and that the guidelines were amended as of November 1, 1990, also to limit collateral challenges to prior convictions.<sup>410</sup>

To determine whether a collateral challenge is viable, a review of the prior conviction(s) and the trial record for possible ineffectiveness issues is necessary. If the case was resolved by a plea, the plea hearing transcript should also be reviewed for any constitutional deficiencies. If the transcript from the case does not exist, contact the court stenographer or court administrator. Transcript requests should be made well in advance of the pertinent proceeding. Contact with the client's former attorney may also be helpful.

Several areas warranting consideration include:

**1. Flawed Guilty Plea Colloquy**

At a minimum, a record of a guilty plea must include express discussion of three rights: (1) the privilege against compulsory self-incrimination; (2) the right to trial by jury; and (3) the right to confront one's accusers. A waiver of these rights will not be presumed if the record is silent regarding these rights.<sup>411</sup>

**2. Staleness**

Section 4A1.2 sets time restrictions on prior convictions used in criminal history category calculations. There are, however, no time limits on statutory qualifiers for the ACCA and other statutory enhancements.<sup>412</sup>

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<sup>410</sup> See 21 U.S.C. § 851; U.S.S.G. § 4A1.2, comment. (n.6).

<sup>411</sup> See Boykin v. Alabama, 395 U.S. 238, 243 (1969).

<sup>412</sup> See United States v. Preston, 910 F.2d 81, 89 (3d Cir. 1990), cert. denied, 498 U.S. 1103 (1991).

### **3. Right To Counsel**

Collateral challenges may be based on right to counsel grounds. Waiver of the right to counsel must be voluntary and knowing.<sup>413</sup>

### **4. Conflict Of Interest With Attorney**

If it appears that there may have been a conflict of interest between the defendant and his/her attorney in one or more of the prior convictions, challenge the validity of the conviction.<sup>414</sup>

### **5. Juvenile Convictions**

As noted previously, the juvenile adjudications are counted when calculating the criminal history category. Consequently, they may be challenged. The plea colloquy in juvenile court is often in violation of Boykin standards.<sup>415</sup> Whether juvenile convictions can be used to sustain a mandatory minimum sentence under a statutory scheme is unclear. While ACCA has explicit language including violent juvenile convictions,<sup>416</sup> there is no such language in Title 21 of the United States Code.

### **6. Proving The Prior Conviction - Identity Issues**

Where identity is an issue, the prosecutor carries the burden of proof.<sup>417</sup> The prosecutor will usually attempt to meet the burden by offering certified court records and fingerprint records.

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<sup>413</sup> See Custis v. United States, 511 U.S. 485, 493-94 (1994).

<sup>414</sup> See United States v. Moscony, 927 F.2d 742, 748-50 (3d Cir.), cert. denied, 501 U.S. 1211 (1991) and cert. denied, 501 U.S. 1270 (1991).

<sup>415</sup> See Boykin v. Alabama, 395 U.S. 238, 243 (1969) (requiring that prosecution make record reflecting valid waiver of privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers).

<sup>416</sup> See 18 U.S.C. § 924(e)(1)(C).

<sup>417</sup> Cf. Government of the Virgin Islands v. Edwards, 903 F.2d 267, 270-71 (3d Cir. 1990) (fingerprint evidence is adequate circumstantial proof of offense).

## **H. DETERMINING THE GUIDELINE SENTENCE**

This section highlights the guideline and statutory provisions utilized in determining a defendant's guideline sentencing range and sentencing options.<sup>418</sup>

### **1. Probation**

Probation may be imposed in lieu of imprisonment in limited circumstances. Probation is prohibited by statute where the offense of conviction is a class A or B felony, the statute of conviction expressly precludes a probationary sentence, and/or the defendant is sentenced at the same time to imprisonment for the same or a different offense.<sup>419</sup> The Guidelines do not provide for straight probation unless the bottom of the Guidelines range is zero.<sup>420</sup> Sections 5B1.2 & 5B1.3 dictate the length of the probationary term and the conditions of probation.<sup>421</sup>

### **2. Imposition Of Term Of Imprisonment**

The defendant's criminal history and offense level will place him/her in one of four "zones" in the guideline table, A, B, C, or D. Section 5C1.1 provides a detailed discussion of the alternative sentences available to the defendant depending on the zone into which he/she falls. Zone A, B, or C, may permit a "split sentence," that is, a period of imprisonment followed by a term of supervised release with a condition of home confinement or placement in a halfway

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<sup>418</sup> See Appendix - Sentencing Guidelines Worksheet.

<sup>419</sup> See 18 U.S.C. § 3561(a).

<sup>420</sup> See U.S.S.G. §5B1.1(A), §5C1.1(b).

<sup>421</sup> Sentencing options that may be available during a term of probation include Community Confinement (§§ 5F1.1, 5B1.3(e)), Home Detention (§§ 5F1.2, 5B1.3(e)(2)), Community Service (§§ 5F1.3, 5B1.3(e)(3)), Occupational Restrictions (§§ 5F1.5, 5B1.3(e)(4)), Curfew, (§§ 5B1.3(e)(5)), and Intermittent Confinement, (§ 5B1.3(e)(6)).

house.<sup>422</sup>

Given the advisory nature of the Guidelines, however, a court may craft any type of sentence it desires within the confines of the statute of conviction.

### **3. Supervised Release**

The conditions of supervised release mirror conditions of probation.<sup>423</sup>

### **4. Special Assessments, Restitution, And Fines**

#### **a. Special Assessments**

A special assessment is imposed in every case of conviction. The special assessment for a felony conviction is \$100.00 and \$25.00 for a misdemeanor.<sup>424</sup> The standard plea agreement used by the United States Attorney's Office in the District of New Jersey requires that special assessments to be paid on the date of sentencing.

#### **b. Restitution**

In 1996, Congress enacted the Mandatory Victims Restitution Act (“MVRA”), 18 U.S.C. §§ 3663A, 3664, which expanded the group of victims eligible for restitution to include those “directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”<sup>425</sup> It also makes restitution mandatory for certain crimes, allows for restitution under circumstances in which there is public harm without an identifiable victim, and makes

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<sup>422</sup> For the procedures governing cases in which the defendant is serving multiple terms of imprisonment, see U.S.S.G. §§ 5G1.1 - 5G1.3 and 18 U.S.C. §§ 3584-3586.

<sup>423</sup> See 18 U.S.C. § 3583; U.S.S.G. §§ 5D1.1-5D1.3.

<sup>424</sup> See U.S.S.G. § 5E1.3 (specifying how assessments are calculated).

<sup>425</sup> 18 U.S.C. § 3663A(a)(2).

restitution a mandatory condition of probation.<sup>426</sup> Most significantly, the MVRA requires the district court to order restitution without regard to the defendant's ability to pay.<sup>427</sup> The count of conviction controls the amount of restitution.<sup>428</sup> Interest on restitution may be ordered from the date of judgment or may be waived altogether.<sup>429</sup> Note that even if the MVRA does not apply, the Victim Witness Protection Act may.<sup>430</sup>

### **c. Fines**

The district court "shall impose a fine in all cases, except where the defendant establishes he is unable to pay and that he is not likely to become able to pay."<sup>431</sup> The district court must make specific findings on the defendant's ability to pay a fine.<sup>432</sup> When the court adopts a Presentence report containing facts that show a defendant has little or no ability to pay a fine, the government must come forward with evidence showing that the defendant can, in fact, pay a fine before one may be imposed.<sup>433</sup> The district court may not assess a fine to pay the cost of incarceration.<sup>434</sup>

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<sup>426</sup> See *id.* at § 3663A.

<sup>427</sup> See 18 U.S.C. § 3664(f)(1)(A); *United States v. Leahy*, 438 F.3d 328, 331 n. 4 (3d Cir. 2006).

<sup>428</sup> See *United States v. Seligsohn*, 981 F.2d 1418, 1421-22 (3d Cir. 1992), *rev'd on other grounds*, *United States v. Corrado*, 53 F.3d 620 (3d Cir. 1995).

<sup>429</sup> See 18 U.S.C. § 3612(f)(3)(A); *United States v. Coates*, 178 F.3d 681 (3d Cir. 1999).

<sup>430</sup> See 18 U.S.C. § 3663.

<sup>431</sup> See 18 U.S.C. §§ 3571-3572; *United States v. Carr*, 25 F.3d 1194, 1210 (3d Cir.), *cert. denied*, 513 U.S. 939 (1994); see generally 18 U.S.C. §§ 3611-3615; U.S.S.G. § 5E1.2.

<sup>432</sup> See *United States v. Quintero*, 38 F.3d 1317, 1343 (3d Cir. 1994), *cert. denied*, 513 U.S. 1195 (1995).

<sup>433</sup> See *United States v. Kadonsky*, 242 F.3d 516, 519-520 (3d Cir. 2001).

<sup>434</sup> See *United States v. Spiropolous*, 976 F.2d 155, 166-67 (3d Cir. 1992).

## I. DEPARTURES AND 18 U.S.C. § 3553(a) VARIANCES

This section will discuss both upward and downward departures and upward and downward variances under 18 U.S.C. § 3553(a).<sup>382</sup> Post-Booker, a sentencing court must formally rule on any Guidelines departure motions before considering the § 3553(a) factors in setting an appropriate sentence.<sup>383</sup> Guidelines Section 5K2.0 sets forth the grounds for departure. Upward departures in general and downward departures in criminal cases other than child crimes and sexual offenses are permitted when 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.<sup>384</sup> Downward departures in child crimes and sexual offenses are only permitted if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that has been “affirmatively and specifically identified as a permissible ground of downward departure” by the Sentencing Commission.<sup>385</sup> Section 5K2.0(c) places a limitation on departures based on the totality of the circumstances. Section 5K2.0(d) provides a list of prohibited grounds for departure. Finally, Section 5K2.0(e) requires that, if a court departs from the applicable guideline range, the court state its specific reasons for departure in open court at the time of sentencing and in the written judgment and commitment order.

After correctly calculating the advisory guideline range and formally ruling on any departure motions, the court must “exercise discretion by considering the relevant § 3553(a)

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<sup>382</sup> Departures based on U.S.S.G. §5K1.1 cooperation motions are discussed in Chapter Two of this manual.

<sup>383</sup> See Gunter, 462 F.3d at 247.

<sup>384</sup> See U.S.S.G. §5K2.0(a).

<sup>385</sup> See U.S.S.G. §5K2.0(b).

factors in setting the appropriate sentence.”<sup>386</sup>

## 1. Upward Departures and Variances

Upward departures are not common, but should nonetheless be anticipated. Upward departures are usually not sought because the guidelines already anticipate most aggravating circumstances and provide upward adjustments to account for a wide range of conduct.

Consequently, in FY2008, upward departures were imposed in only 0.6% of cases nationally.<sup>387</sup>

Upward variances under Booker and § 3553(a) were imposed in 0.9% of cases annually.<sup>388</sup>

Note that the sentencing court may upwardly depart absent any motion by the government. In those situations, the sentencing court must give the parties reasonable prior notice if it intends to upwardly depart sua sponte under the Guidelines<sup>389</sup>, but does not have to provide advance notice of its intent to impose an upward variance based on the § 3553 factors.<sup>390</sup>

In determining whether to depart, the guidelines permit the court to consider evidence underlying counts dismissed pursuant to plea bargain,<sup>391</sup> as well as evidence of acquitted counts,<sup>392</sup> in fashioning an upward departure. “Double counting,” where the court factors in conduct that

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<sup>386</sup> See Gunter, 462 F.3d at 247.

<sup>387</sup> United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Table N (2008).

<sup>388</sup> Id.

<sup>389</sup> See Burns v. United States, 501 U.S. 129, 136 (1991); Fed.R.Crim.P. 32(h).

<sup>390</sup> See Irizarry v. United States, 128 S.Ct. 2198 (2008); United States v. Vampire Nation, 451 F.3d 189, 195-98 (3d Cir. 2006).

<sup>391</sup> See United States v. Baird, 109 F.3d 856, 863 (3d Cir.), cert. denied, 522 U.S. 898 (1997). But see United States v. Thomas, 961 F.2d 1110, 1121 (3d Cir. 1992) (unfair to depart upward based on uncharged crime of being felon in possession of firearm because government specifically plea bargained away that charge so that defendant would not be subject to the mandatory Armed Career Criminal penalty; government could not then, consistent with its agreement, argue for an upward departure based upon uncharged crimes.).

<sup>392</sup> See United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989).

has been used to calculate the guideline range, may also be a basis for an upward departure.<sup>393</sup> Additionally, the guidelines permit the defendant's character to be considered when making an upward departure.<sup>394</sup> Since character has been upheld to support upward departures, it can be argued that the guidelines permit district courts to consider character in making downward departures in extraordinary cases.<sup>395</sup>

## 2. Downward Departures and Variances

The Third Circuit has made it clear that, post-Booker, the process of calculating the Guidelines, including any request for a downward departure, remains exactly the same as it was pre-Booker.<sup>396</sup> Pre-Booker law regarding Guidelines departures, therefore, continues to inform the district court's sentencing process.<sup>397</sup>

Section 5K2.0 of the Guidelines defines the parameters of downward departures under the Guidelines. Downward departures in cases *other than* child crimes and sexual offenses may be granted if

there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

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<sup>393</sup> In at least one case, the Third Circuit has held that it is not “double-counting” to apply an upward departure for a prior sexual assault even though the prior conviction was used to calculate the defendant’s criminal history. See United States v. Ward, 131 F.3d 335, 342-43 (3d Cir. 1997) (prior sexual assault was “qualitatively different from conviction for any offense resulting in a term of imprisonment greater than one year,” and thus satisfied standard for adding criminal history points to guideline calculation).

<sup>394</sup> See 18 U.S.C. § 3661; U.S.S.G. § 1B1.4; see also U.S.S.G. § 4A1.3 (permits upward departure when defendant’s criminal history category under-represents true nature of his/her criminal history).

<sup>395</sup> See generally, e.g., United States v. Merritt, 988 F.2d 1298 (2d Cir. 1993), cert. denied, 508 U.S. 961 (1993); Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences, 101 Yale L.J. 1681 (1992).

<sup>396</sup> See United States v. Jackson, 467 F.3d 834, 838-839 (3d Cir. 2006).

<sup>397</sup> Id.

formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.<sup>398</sup>

Chapter 5, Part K, Subpart 2 of the Guidelines identifies some of the *kind* of circumstances that the Commission may not have adequately taken into consideration in determining the applicable guideline range. These grounds include:

- **U.S.S.G. §5K2.10 - Victim's Conduct**
- **U.S.S.G. §5K2.11 - Lesser Harms**
- **U.S.S.G. §5K2.12 - Coercion and Duress**
- **U.S.S.G. §5K2.13 - Diminished Capacity**
- **U.S.S.G. §5K2.16 - Voluntary Disclosure of Offense**
- **U.S.S.G. §5K2.20 - Aberrant Behavior**
- **U.S.S.G. §5K2.23 - Discharged Terms of Imprisonment**

A downward departure may also be granted based on exceptional unidentified circumstances.<sup>399</sup>

Even if the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, a sentencing court may nevertheless depart if that circumstance is present in the offense to a *degree* substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.<sup>400</sup>

Finally, a downward departure may be based on an offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as no ordinarily relevant in determining whether a departure is warranted if such offender characteristic or other circumstance is present to an exceptional degree.<sup>401</sup> Offender characteristics identified by the Sentencing Commission as ordinarily not relevant to sentencing

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<sup>398</sup> U.S.S.G. §5K2.0(a)(1).

<sup>399</sup> See U.S.S.G. §5K2.0(a)(2)(B).

<sup>400</sup> See U.S.S.G. §5K2.0(a)(3).

<sup>401</sup> See U.S.S.G. §5K2.0(a)(4).

include:

- **U.S.S.G. §5H1.1 - Age**
- **U.S.S.G. §5H1.2 - Education and Vocational Skills**
- **U.S.S.G. §5H1.3 - Mental and Emotional Conditions**
- **U.S.S.G. §5H1.4 - Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction**
- **U.S.S.G. §5H1.5 - Employment Record**
- **U.S.S.G. §5H1.6 - Family Ties and Responsibilities**
- **U.S.S.G. §5H1.7 - Role in the Offense**
- **U.S.S.G. §5H1.8 - Criminal History**
- **U.S.S.G. §5H1.9 - Dependence upon Criminal Activity for a Livelihood**
- **U.S.S.G. §5H1.10 - Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status**
- **U.S.S.G. §5H1.11 - Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works**
- **U.S.S.G. §5H1.12 - Lack of Guidance as a Youth and Similar Circumstances**

These factors may, however, be used as a basis for a downward variance.<sup>402</sup>

**a. Specific Grounds for Downward Departures**

**i. Imperfect Defenses**

**A. Generally**

The guidelines contemplate departures based upon imperfect defenses.<sup>403</sup> Particular attention should be given to departures based on imperfect defenses such as self defense, justification, duress, coercion, and diminished capacity, which are all considered in this section of the guidelines.

**B. Coercion**

The Third Circuit has recognized the authority of the sentencing court to depart based on

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<sup>402</sup> See United States v. Vampire Nation, 451 F.3d 189, 195 n. 2 (3d Cir. 2007) (distinguishing departures from variances).

<sup>403</sup> See U.S.S.G. §§ 5K2.12 (coercion and duress) & 5K2.13 (diminished capacity).

coercion where the coercion was not of such magnitude as to constitute a complete defense.<sup>404</sup>

### **C. Diminished Capacity**

Diminished capacity is an encouraged factor for departure.<sup>405</sup> United States Sentencing Guideline §5K2.13 provides:

A sentence below the applicable guideline range may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

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; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code. 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.

The definition of "significantly reduced mental capacity" reads as follows:

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

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<sup>404</sup> See United States v. Cheape, 889 F.2d 477, 480 (3d Cir. 1989) ("Although it is not obliged to do so, the district court has the power to depart if [defendant] proves coercion by a preponderance of the evidence[,] despite fact that evidence of coercion did not amount to complete defense).

<sup>405</sup> See United States v. McBroom, 124 F.3d 533, 538 (3d Cir. 1997).

knows is wrongful.<sup>406</sup>

This application note defines “significantly reduced mental capacity” in accord with the Third Circuit decision in McBroom.<sup>407</sup> The McBroom court concluded that a “significantly reduced mental capacity” for a § 5K2.13 departure includes both cognitive defects and volitional defects:

A person may be suffering from a “reduced mental capacity” for the purposes of § 5K2.13 if either:

(1) the person is unable to absorb information in the usual way or to exercise the power of reason; or

(2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law.<sup>408</sup>

Sentencing courts must consider both prongs in determining whether a defendant suffered a reduced mental capacity at the time of the offense.<sup>409</sup>

**d. Departure Based on Analogy to U.S.S.G. § 3B1.2, Mitigating Role in the Offense**

The guidelines provide that a defendant’s role in the offense is relevant in determining whether the sentence should be outside the guideline range.<sup>410</sup> The Third Circuit has accordingly recognized that when a minor role adjustment in the guidelines is not available by strict application of the guideline, the court nevertheless has the authority to depart from the guideline range based on an analogy to the mitigating role adjustments.<sup>411</sup> The court may depart under §

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<sup>406</sup> See U.S.S.G. § 5K2.13, comm. (n. 1).

<sup>407</sup> See 124 F.3d at 544, 546-48. U.S.S. G. Appendix C, Amendment 583.

<sup>408</sup> Id. at 548.

<sup>409</sup> Id.

<sup>410</sup> See U.S.S.G. § 5H1.7.

<sup>411</sup> See United States v. Bierley, 922 F.2d 1061, 1068-69 (3d Cir. 1990).

5H1.7 when the conduct is similar to that encompassed in § 3B1.2, but the defendant is technically ineligible for a § 3B1.2 role reduction because the others involved (such as federal agents) are not criminally responsible “participants” in the offense.<sup>412</sup> Note that the offense of conviction must be one which involves “concerted activity” such that the defendant would be otherwise eligible for a role reduction under § 3B1.2 but for the status of the others involved in the offense.<sup>413</sup>

**e. Departure Based On The "Aberrant Behavior" Of The Defendant**

United States Sentencing Guidelines §5K2.20 provides that a downward departure may be warranted in an exceptional case if the defendant’s criminal conduct was aberrant and the departure is not prohibited by the guideline. U.S.S.G. §5K2.20(a). The Court may not depart below the guideline range on the basis of aberrant behavior 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 either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood)...; or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

U.S.S.G. §5K2.20(c)(1)-(4).<sup>414</sup>

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<sup>412</sup> See id. at 1069-70.

<sup>413</sup> See United States v. Romualdi, 101 F.3d 971, 975-76 (3d Cir. 1996) (rejecting departure because offense of conviction, possession of child pornography, did not require “concerted activity” such that defendant would have been entitled to role reduction under § 3B1.2 in first place but for involvement of federal entity as sender of pornographic materials).

<sup>414</sup> See United States v. Castano-Vasquez, 266 F.3d 228 (3d Cir. 2001) for the Third Circuit’s analysis of the aberrant behavior departure.

## **f. Extent of Downward Departure**

Generally, there is no limit on the extent of a downward departure once a sentencing court determines there is a basis for such a departure.<sup>415</sup> Once the district court legally departs downward, the extent of the departure is not reviewable on appeal.<sup>416</sup>

## **J. MISCELLANEOUS SENTENCING CONSIDERATIONS**

### **1. Sentencing Memoranda**

The standing order in this district was recently revised to expand the time frame for the preparation and dissemination of the Presentence report.<sup>417</sup> The order also revises the time frame for the submission of sentencing memoranda. The government must submit its sentencing memorandum and motions for departure not less than fifteen calendar days prior to sentencing. The defendant's memorandum must be submitted not less than ten days prior to sentencing and any response by the government must be submitted five days prior to sentencing.

### **2. Jencks Material for Sentencing Proceedings**

Jencks material for sentencing purposes should be explicitly requested.<sup>418</sup> A district court must release to a defendant all material it considered in imposing sentence.<sup>419</sup> There is no requirement, however, that the probation officer's recommendation to the judge be revealed to counsel, although some judges do release this information. Prior to the court using information

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<sup>415</sup> Remember that for a court to depart below a statutory mandatory minimum, the government must file two motions. See supra Chapter Two (cooperation).

<sup>416</sup> See United States v. Khalil, 132 F.3d 897, 898 (3d Cir. 1997).

<sup>417</sup> See Appendix - Standing Order Concerning Guideline Sentencing.

<sup>418</sup> See United States v. Rosa, 891 F.2d 1074, 1078 (3d Cir. 1989).

<sup>419</sup> See United States v. Curran, 926 F.2d 59, 62-64 (1<sup>st</sup> Cir. 1991).

obtained at a co-defendant's sentencing hearing against the defendant at his/her sentencing, the defendant is entitled to notice that the court will use such information in order to give the defendant an opportunity to rebut such information, if possible.<sup>420</sup>

### **3. Motion To Reconsider/Modify Sentence**

Rule 35(b) permits the government to file a motion to reduce a defendant's sentence if the defendant has provided "substantial assistance" to the government after his/her sentencing. The government must make the Rule 35(b) motion within one year of sentencing, although the court is not bound to rule on the motion within the one year time period.<sup>421</sup> If, however, the relevant information does not become available to the defendant until after the one year time period has passed, Rule 35(b) permits the court to consider the untimely motion. Rule 35(b) also authorizes the court to reduce a sentence below the statutory minimum sentence.

### **4. The Judgment and Commitment Order**

Shortly after sentencing, a copy of the judgment and commitment order ("JOC") will be sent to counsel. Review the JOC for accuracy, because it is the official record of the sentence. Within seven days of sentencing, the court may correct a sentence "that was imposed as a result of an arithmetical, technical or other clear error."<sup>422</sup> The JOC is necessary in the event an appeal is filed.<sup>423</sup>

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<sup>420</sup> See United States v. Berzon, 941 F.2d 8, 17-19 (1<sup>st</sup> Cir. 1991).

<sup>421</sup> See Fed. R. Crim. P. 35(b), advisory committee notes.

<sup>422</sup> Fed. R. Crim. P. 35(c).

<sup>423</sup> See 3d Cir. Local Appellate Rule 28.1(a)(iii).

## **5. "Ex Post Facto" Considerations And The Guidelines**

The guidelines are amended in November of each year, and the trend has been that they become more and more punitive. As a rule, the guidelines in effect at the time of sentencing are used, unless the guidelines in effect at the time of the offense conduct are more favorable to the defendant. Any other application of the guidelines would be an ex post facto violation.<sup>424</sup>

## **6. Bail Pending Sentencing and Appeal**

As a general matter, those who are not in custody at the time of conviction and whose guideline exposure is not excessive will be allowed to remain on bail until sentencing. In some cases, the court will increase supervision by Pretrial Services or the defendant will be required to post money or property. Rule 46 provides that “[t]he burden of establishing that the defendant will not flee or pose a danger to the community rests with the defendant.” Some judges, however, remand all defendants to the custody of the U.S. Marshals Service regardless of their bail status and/or compliance.

Refer to 18 U.S.C. § 3143 when bail issues arise after a conviction or pending an appeal. The language of this section makes it significantly more difficult to secure bail pending an appeal than to secure bail prior to sentencing.

## **7. Preservation of Drugs for Sentencing**

Applying the bad faith standard articulated in Arizona v. Youngblood<sup>425</sup>, the Third Circuit has held that the destruction of drugs subject to a discovery request did not deny due process.<sup>426</sup>

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<sup>424</sup> See United States v. Pollen, 978 F.2d 78, 90 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993).

<sup>425</sup> 488 U.S. 51 (1988).

<sup>426</sup> In August 2000, more sophisticated DNA testing procedures were performed on the small amount of evidence that had not been destroyed by the State of Arizona. The tests established that Mr. Youngblood, who

## CHAPTER NINE

### FEDERAL CRIMINAL APPEALS

#### A. NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 4(b)(1)(A), a notice of appeal must be filed in the United States District Court within fourteen days after entry of the judgment or order being appealed or of the notice of appeal by the government.<sup>427</sup> A judgment or order is entered when it is placed on the criminal docket. The district court may extend the time for filing of a notice of appeal up to an additional thirty days upon a showing of “excusable neglect.”<sup>428</sup> Filing is done electronically through the District Court’s ECF system and is complete when the notice is received electronically at the Clerk’s Office.<sup>429</sup>

In the appeal of a habeas corpus matter, a notice of appeal in a 28 U.S.C. § 2254 case must be filed within thirty days of the entry of the final order.<sup>430</sup> For § 2255 cases, that time is sixty days.<sup>431</sup>

#### B. EXPEDITED APPEALS

An expedited appeal may be appropriate where the client has received such a short term of imprisonment that the appealable issue may be moot by the time the Court of Appeals would

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spent over twelve years in jail, had been wrongly convicted. See also United States v. Deaner, 1 F.3d 192, 200-01 (3d Cir. 1993).

<sup>427</sup> The government must file an appeal within thirty days. See Fed. R. App. P. 4(b)(1)(B).

<sup>428</sup> See Fed. R. App. P. 4(b)(4).

<sup>429</sup> See Fed. R. App. P. 25.

<sup>430</sup> See Fed. R. App. P. 4(a)(1).

<sup>431</sup> See id. 4(a).

normally reach the merits of the appeal. Local Appellate Rule 4.1 requires that a motion for an expedited appeal be filed within fourteen days of the notice of appeal. The rule also directs that the motion set forth the justification for expediting the appeal.

### **C. TRANSCRIPT OF PROCEEDINGS**

It is the appellant's duty to order the relevant portions of the proceedings necessary for the appeal within ten days of the filing of the notice of appeal.<sup>432</sup> Transcript purchase orders should be filed electronically through the Third Circuits CM/ECF system.<sup>433</sup> Attorneys not appointed under the Criminal Justice Act may seek payment for the transcript pursuant to 28 U.S.C. § 753(f). Local Appellate Rule 11.1 directs counsel for an appellant to apply to the district court within ten days of the filing of the notice of appeal for payment under this provision if the appellant does not have the ability to pay. If no transcripts are needed by the appellant, a certificate to that effect should be filed, in both the appellate and trial courts.<sup>434</sup>

### **D. BRIEF FOR APPELLANT**

#### **1. Filing and Service of Briefs**

The Court of Appeals will establish a briefing schedule upon receipt of the transcripts and record. The appellant's brief is due within forty days after the record is received, and the appellee's brief is due within thirty days after service of the appellant's brief. Any reply brief prepared by the appellant must be filed within fourteen days thereafter, and at least three days

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<sup>432</sup> See Fed. R. App. P. 10(b)(1).

<sup>433</sup> See <http://www.ca3.uscourts.gov/ecfwebsite/default.aspx>. Copies of all appellate case opening forms can be found here: [http://www.ca3.uscourts.gov/attorney\\_information\\_and\\_forms.htm](http://www.ca3.uscourts.gov/attorney_information_and_forms.htm).

<sup>434</sup> CJA attorneys will continue to use CJA Form 24 for this purpose.

before argument.<sup>435</sup>

Local Appellate Rule 31.1 requires each party, in addition to electronically filing a copy of the brief through CM/ECF, to file ten paper copies of each brief with the Third Circuit and to serve one copy on all counsel that have not consented to electronic service. If the appellant fails to file a brief within the prescribed time, dismissal of the appeal may result. The appellee's failure to file a brief within the required time period may result in no participation in any oral argument.<sup>436</sup>

## **2. Contents of Briefs**

The following items are required in the appellant's brief, pursuant to Fed. R. App. P. 28:

1. table of contents, with page references;
2. table of authorities listing cases, statutes, and other authorities cited (alphabetically arranged within each category), with page references;
3. statement of subject matter and appellate jurisdiction;<sup>\*437</sup>
4. statement of issue(s) presented for review;\*
5. statement of the case, including the nature of the case, and the disposition below;\*
6. statement of facts, with record references;\*
7. summary of argument;
8. argument;
9. short conclusion;
10. certificate of compliance where applicable; and
11. judgment or order being appealed.

Local Appellate Rule 28.1 also requires that the statement of issue(s) presented for review provide references to the appendix page(s) at which each issue on appeal was preserved, as well as the standard of review for each issue. A statement of related cases or proceedings must be

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<sup>435</sup> See Fed. R. App. P. 31.

<sup>436</sup> See Fed. R. App. P. 31(c).

<sup>437</sup> The sections indicated with a \* need not be included in the appellee's brief if the appellee is satisfied with the appellant's statements.

included as well.<sup>438</sup> Finally, note that Local Appellate Rule 28.1(d) expresses the court's expectation that ad hominem attacks on opposing parties will be avoided.

## **E. APPENDIX TO THE BRIEFS**

### **1. Filing and Service of Briefs**

The appellant prepares and files the appendix to the brief. Local Rule 30.1(a) & (b) requires that the appendix be electronically filed and that four paper copies of the appendix be mailed to the Court. Local Rule 30.3(c) also directs that four copies each of the Presentence report and the District Court's Statement of Reasons for the sentence must be submitted separately to the court in a sealed envelope.

### **2. Contents of Appendices**

The following items are required to be in the appendix:

1. table of contents, with page references;
2. notice of appeal;
3. docket entries;
4. judgment or order being appealed; and
5. any other parts of the record that the parties wish the court to consider.

The parties are urged to agree as to the contents of the appendix.<sup>439</sup> The Appeals Division of the United States Attorney's Office in New Jersey usually sends a letter to appellant's counsel shortly after the notice of appeal is filed. This letter inquires whether the entire record below has been ordered, and what portions of the record will be designated as the record on appeal.

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<sup>438</sup> See 3d Cir. L.A.R. 28.1(a)(2).

<sup>439</sup> See Fed. R. App. P. 30(b)(1).

## **F. FORMAT OF BRIEFS AND APPENDIX**

There are various rules addressing style and format.<sup>440</sup> With respect to format, Local Appellate Rule 32.2(a) discourages excessive footnotes in the brief. For those footnotes that are included in the brief, the rule directs that they should be printed in the same size type utilized in the text.

Further, a principal brief may not exceed thirty pages, and a reply brief may not exceed fifteen pages, unless it complies with Rule 32 (a)(7)(B) & (C). Rule 32 (a)(7)(B) permits a party to file a principal brief that either contains no more than 14,000 words or that uses a monospaced face and contains no more than 1,300 lines of text. A brief that is filed under rule 32(a)(7)(B) requires an accompanying certificate specifying that the brief meets the type-volume limit.<sup>441</sup>

Concerning style, Fed. R. App. P. 28(d) urges counsel to avoid referring to the parties by the terms “appellant” and “appellee” in the briefs. The rule suggests using either the same designation used in the lower court, the actual names of the parties, or some clear descriptive term. Under Fed. R. App. P. 28(e), references to the record must cite the page(s) in the appendix containing that information.

With respect to the appendix, Volume One of the appendix must consist only of (1) a copy of the notice of appeal, (2) the order or judgment from which the appeal is taken, and any other order or orders of the trial court which pertain to the issues raised on appeal, (3) the relevant opinions of the district court, or the opinion or report and recommendation of the magistrate

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<sup>440</sup> See Appendix - Sample Appellate Brief.

<sup>441</sup> See Fed. R. App. P. 32 (a)(7)(C).

judge, if any and (4) any order granting a certificate of appealability.<sup>442</sup> Volume one of the appendix may be bound in the paper brief. All other volumes of the appendix must be separately bound.<sup>443</sup>

## **G. ORAL ARGUMENT**

Any party has the right to request oral argument by filing a statement of reasons within seven days after the filing of the appellee's brief.<sup>444</sup> The majority of federal criminal appeals filed in the Third Circuit, however, are not granted oral argument. Local Appellate Rule 34.1 explains that oral argument will not be granted when all members of the panel believe that the briefs and appendices render oral argument unnecessary. Once argument is scheduled, a motion requesting rescheduling of the oral argument will be granted only upon a showing of exceptional circumstances.<sup>445</sup>

## **H. OPTIONS FOLLOWING AN ADVERSE APPELLATE DECISION**

Upon entry of a judgment by a panel of the Third Circuit, the unsuccessful party has three options: to petition for rehearing by the panel, to petition for rehearing *en banc*, or to petition for a writ of certiorari.

### **1. Petition For Rehearing**

A petition for rehearing by the panel is to be filed within fourteen days after the entry of

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<sup>442</sup> See 3d Cir. L.A.R. 32.2(c).

<sup>443</sup> *Id.*

<sup>444</sup> See 3d Cir. L.A.R. 34.1(b).

<sup>445</sup> See 3d Cir. L.A.R. 34.1(d).

judgment.<sup>446</sup> The petition should not exceed fifteen pages, and must “state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . . .”<sup>447</sup> Rehearing by the panel is not usually granted.

## 2. Rehearing En Banc

A petition seeking to have the case heard by all the active members of the Third Circuit is another alternative. The petition must be also be filed within fourteen days of the entry of judgment.<sup>448</sup> Rehearing en banc, however, is not favored.<sup>449</sup>

The Court’s disfavor is echoed in the local appellate rules. Local Appellate Rule 35.4 reminds counsel that an attorney has as much of a duty to the court as he/she owes to the client regarding the decision to file for rehearing en banc, and that this duty “is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigorous requirements of [the federal and local appellate rules.]” Local Appellate Rule 35.1 requires that counsel make the following statement when requesting rehearing en banc:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, i.e., the panel’s decision is contrary to the decision of this court or the Supreme Court in [citing specifically the case or cases], OR, that this appeal involves a question of exceptional importance, i.e., [set forth in one sentence].”

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<sup>446</sup> See Fed. R. App. P. 40.

<sup>447</sup> See Fed. R. App. P. 40(a)(2).

<sup>448</sup> See Fed. R. App. P.35(c).

<sup>449</sup> See Fed. R. App. P. 35(a).

These rules and requirements reflect the difficulty in justifying a petition for rehearing en banc, and may be used to explain to a client why the petition is inappropriate.

### **3. Petition for a Writ of Certiorari**

A writ of certiorari must be filed within ninety days from the date of the entry of judgment in the Court of Appeals or the denial of a petition for rehearing, not from the issuance of the mandate.<sup>450</sup> A petitioner proceeding in forma pauperis should file an original and ten copies of a petition for a writ of certiorari, together with ten copies of a motion for leave to proceed in forma pauperis.<sup>451</sup> Given that cases warranting a petition for a writ of certiorari are few, the appellate rules of the Supreme Court are not addressed in the limited confines of this manual.<sup>452</sup>

#### **I. RESPONSIBILITIES OF COUNSEL IN THE APPELLATE PROCESS**

Local Appellate Rule 109.1 expresses the court's expectation that counsel will continue representing their clients on appeal.<sup>453</sup> This rule applies equally to retained as to appointed counsel. "Extraordinary circumstances" must exist to warrant withdrawal, and specific leave of the court is required for withdrawal.<sup>454</sup> A defendant's intention to raise a claim of ineffective assistance of counsel will generally not constitute "extraordinary circumstances" because those claims are usually not considered on direct appeal.<sup>455</sup>

Nonetheless, a situation may arise in which the client insists on filing an appeal although

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<sup>450</sup> See S. Ct. R. 13.

<sup>451</sup> See S. Ct. R. 12.

<sup>452</sup> See generally R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986).

<sup>453</sup> Accord United States v. Bertoli, 994 F.2d 1002, 1016-17 (3d Cir. 1993); Third Circuit CJA Plan §3.1.

<sup>454</sup> See 3d Cir. L.A.R. 109.1.

<sup>455</sup> See United States v. Sandini, 888 F.2d 300, 311-12 (3d Cir. 1989), cert. denied, 494 U.S. 1089 (1990).

counsel does not believe that any issues exist for review. In those situations, proceed with caution. The client has an absolute right to appeal his/her case with the effective assistance of counsel, and counsel should therefore carefully review the record and the applicable law to determine if there was any error below that may provide some relief for the client.

If no meritorious appellate issues can be identified, 3d Cir. R. 109.2(a) allows counsel to file a motion to withdraw and a supporting brief, pursuant to Anders v. California, 386 U.S. 738 (1967). The brief must thoroughly explore the possible areas in which appellate issues could arise, and set forth the analysis indicating that no meritorious issues exist.<sup>456</sup> The brief and supporting documents must be served upon the client, not just upon the United States. Note, however, that this local rule does not impact the responsibility of counsel to file a notice of appeal pursuant to Fed. R. App. P. 4(b) within ten days of the entry of judgment. Counsel must file the notice of appeal at the client's request in order to preserve the client's right to appeal.

A merits panel of the court will review the Anders submission. If the panel agrees that no meritorious issues for review exist, counsel will be permitted to withdraw. The court will then resolve the appeal without appellate counsel. If the merits panel finds arguable merit to the appeal, present counsel will be discharged, the panel will appoint substitute counsel, and the appeal will proceed.<sup>457</sup>

If a client insists on filing a petition for a writ of certiorari, and no issues for review can be identified, file a motion with the Court of Appeals pursuant to 3d Cir. R. 109.2(b). The motion

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<sup>456</sup> See United States v. Marvin, 211 F.3d 778, 781-82 (3d Cir. 2000) (rejecting brief in support of Anders motion as inadequate where counsel failed to address all issues raised in a brief that client independently filed and further failed to thoroughly discuss in his Anders brief all five issues delineated at beginning of that motion brief).

<sup>457</sup> See 3d Cir. L.A.R. 109.2(a).

must state counsel's opinion of the matter and request leave to withdraw.<sup>458</sup> Again, this motion should also be served both upon the client and the government.

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<sup>458</sup> See 3d Cir. L.A.R. 109.2(b).

## CHAPTER TEN

### INVESTIGATIONS

**“One false premise exposed by proper investigation will topple the inverted pyramid of the prosecution’s case.” American Jury Trials at 477**

The American Bar Association Standards for Criminal Justice, Chapter 4, Part IV, states that an attorney has a **duty** to investigate on behalf of his/her client. This standard applies with equal force to Criminal Justice Act cases. Indeed, in federal court, it becomes increasingly important to investigate because the rules of discovery provide for minimal disclosure. For example, the names of witnesses and their statements need not be turned over to the defense prior to trial. It is incumbent upon the defense team, therefore, to determine who the government’s witnesses will be and what they will say. An interview of a government witness could provide information beneficial to the defendant and to the defense theory of the case, or it could provide plea bargaining power if the witness cannot testify in support of the government’s theory of the case.

Additionally, defense witnesses may provide additional details to support the defense or to corroborate the defendant’s version of events. Witnesses who may provide an affirmative defense, such as an alibi defense, must be identified and interviewed promptly, to prepare that defense and, where necessary, to permit timely notice to the government. Verifying essential aspects of the witnesses’ accounts in order to give credibility to their testimony is advisable. Evidence is more convincing than any trial technique.

## **A. ROLE OF AN INVESTIGATOR**

The principal reason to retain an investigator is to prevent the need for counsel to be a witness. On occasion, witnesses' account will change at trial or a hearing, after they have been re-interviewed by law enforcement officials. If an investigator has participated in the interview of the witnesses, he/she can testify to demonstrate the prior inconsistent statement by that witness. Additionally, an interview of a witness will aid in preparing for cross-examination, and may also expose the motives for a witness' testimony. Further, the investigator can provide an assessment of the witness' demeanor and truthfulness.

Investigators may also have the ability to develop a rapport with a client and can assist in trial preparation. Finally, obtaining the services of an investigator permits counsel to concentrate on legal issues.

## **B. RETAINING AN INVESTIGATOR**

Title 18, United States Code, §3006A(e)(1) directs that upon request, counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate representation may request those services in an ex parte application. The application must demonstrate the need for the investigative services.<sup>459</sup> As with other expert services, the compensation "shall not exceed \$1,600, exclusive of reimbursement of expenses reasonably incurred, unless payment in excess of that limit is certified by the court."<sup>460</sup> Denial of these services by the court could render counsel ineffective and may constitute grounds for an appeal. Prior authorization is not required if the cost does not exceed \$500 plus "expenses reasonably

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<sup>459</sup> See Appendix - Application for Investigative Services and General Payment Information.

<sup>460</sup> 18 U.S.C. § 3006A (e)(1).

incurred.”<sup>461</sup>

The Administrative Offices of the United States Courts’ Guide to Judicial Policies and Procedures, Volume VII, Chapter III, may also be of assistance in obtaining investigative services.

### **C. WHEN TO HIRE AN INVESTIGATOR**

An investigator should be retained early in the case so that he/she will be able to interview witnesses when the facts are fresh in the witnesses’ minds and the witnesses are easier to locate. Early investigation of the witnesses before they are advised not to speak with defense counsel or a defense investigator will obviously be of benefit. A prompt interview of defense witnesses may also prepare them for the possibility of an interview by the government. However, because funds for expert service are often limited, evaluate carefully which witnesses or aspects of the case require investigation.

Government witnesses, regardless of whether their statements have been provided, must be interviewed, and should be considered a priority. If the defendant has an alibi defense, which requires notice within a specific time, those witnesses must also be interviewed immediately. Investigation of any information that will corroborate the alibi witness’ statements must then be promptly undertaken. If money and time are pressing factors, consider interviewing defense witnesses in the office in the presence of a paralegal or an associate.

If funds are not an issue, consider utilizing an investigator at all stages of the proceedings – obtaining information for bail or a detention hearing, investigating facts in support of a motion to suppress evidence, preparing for trial, obtaining records, and finding facts in support of

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<sup>461</sup> Id.

sentencing motions. Among other considerations, an investigator can gather facts and help determine the exact role the defendant had in the offense. Investigators can also be used to develop information relevant to other guideline issues, such as loss, harm to victims, prior convictions, or various departure issues.

#### **D. SELECTING AN INVESTIGATOR**

Experience in criminal investigations is an important qualification, and should not be overlooked. Familiarity with federal criminal procedure and the sentencing guidelines is also critical to an investigator's ability to gather the necessary information. Importantly, the investigator cannot be judgmental and he/she must not assume that every person who is arrested is guilty.

He/she must also be aggressive and willing to take the time that will be required to find the witnesses, to convince them to become involved with the case, and to interview them. Ideally, the investigator should be able to discuss the case and brainstorm the case with the attorney. He/she may be able to assist in developing the theory of the case and provide input from a non-legal approach.

Finally, the investigator must be ethical. Ethical considerations should be discussed with the investigator prior to assigning him/her a case. These issues include identification procedures, handling of evidence, interviewing witnesses who are represented by counsel, suborning perjury, surreptitious recordings, the use of subterfuge, and the attorney-client privilege.

#### **E. LOCATING AN INVESTIGATOR**

Although a private investigator firm is a viable resource, before retaining their services, inquire as to their experience and willingness to handle a criminal case. The National Association

of Legal Investigators is an association dedicated to training and increasing the professionalism of private investigators, and can be contacted through Alan Hart at (609) 429-5229. Additionally, the New Jersey State Police Private Detective Unit can be contacted at (609) 882-2000 to confirm whether an investigator is licensed. Information regarding the investigator's experience and background may also be provided. Other CJA attorneys are another referral source.

## CHAPTER ELEVEN

### BUREAU OF PRISONS

The United States Bureau of Prisons (BOP) houses approximately 209,000 inmates in 115 institutions. Additionally, several thousand inmates are serving federal sentences in Community Corrections Centers. The Director of the BOP administers the six regional BOP offices from Washington, D.C. Each region has a regional director and regional counsel.<sup>462</sup> The Northeast Regional Office is located at 2<sup>nd</sup> and Chestnut Streets, Philadelphia, Pennsylvania. Henry J. (Hank) Sadowski, Esquire, is the Northeast Regional Counsel and an invaluable source of information.<sup>463</sup>

Beyond the regional offices are the Community Corrections Manager (CCM) Offices, which also play a role in inmate designation. The CCM Offices are likewise a good source of information regarding BOP procedures and policies. For a listing of CCM Offices, go to [www.bop.gov](http://www.bop.gov) and select “BOP Directory.”

Another source of information on the BOP is the Internet. The BOP home page is located at [www.bop.gov](http://www.bop.gov). The BOP policy statements and operating memoranda are available from the BOP site, as is general information concerning the BOP and the federal prison system.

#### **A. DESIGNATION**

Shortly after the imposition of sentence, the judgment, PSR and related material are provided to the BOP Designation and Sentence Computation Center (DSCC) in Grand Prairie,

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<sup>462</sup> The BOP can be contacted at (202) 307-3198.

<sup>463</sup> Mr. Sadowski can be reached at (215) 521-7375. Deputy Regional Counsel Mike Tafelski is another helpful resource. Mr. Tafelski can be reached by phone at (215) 521-7376 or by e-mail at [mtafelski@bop.gov](mailto:mtafelski@bop.gov).

Texas.<sup>464</sup> The designation decision is largely a product of the security classification of the inmate. Inmates are classified throughout their term of incarceration as either high, medium, low, or minimum security. The policy of the BOP is to place an inmate in an appropriately secure facility that is within a 500 mile radius of the inmate's eventual place of release. Keep this option in mind for clients who are working and who present no security risk.

An inmate's security classification is governed by the Inmate Load and Security Designation form.<sup>465</sup> Many of the items on the form are scored items. The total score (the higher the score, the higher the security classification) and the presence or absence of certain Public Safety Factors determine the appropriate security classification for each inmate. Once the designation is made, the Marshals Office will be notified, as will the designated institution. The defendant will also be notified by mail if self-surrender has been allowed.

### **1. Scored Items**

Some of the scored items on the designation form are easily determined and not likely to be disputed. For instance, the expected length of incarceration is simply the sentence imposed less time served and anticipated good time credits. However, some of the scored items may be contested and may provide a chance to lower the defendant's score. For example, whether a robbery offense involved a "substantial risk of death or bodily injury" is the difference between "high" and "greatest" severity of offense. Other scored items include detainers against the defendant for unserved sentences or unresolved criminal charges, the type of prior commitments,

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<sup>464</sup> The general contact number for DSCC is (972) 352-4400. Ask to speak with either the Assistant General Counsel or the Attorney Advisor if you have specific questions regarding your client's designation.

<sup>465</sup> The manual for use of the form, Program Statement 5100.06, is maintained in each CCM office. Portions of the manual are also available under the Freedom of Information Act, but may be most easily obtained with the help of the staff of the CCM or online at the BOP website.

history of escapes and acts of violence, and the defendant's pre-commitment status.

The last item, pre-commitment status, is the only factor that will reduce the defendant's point total. If the defendant complied with the conditions of an unsecured bond, the score is reduced by three points. If the defendant is allowed to surrender him/herself to the designated institution, the score is reduced by six points. In fact, a voluntary surrender to the institution creates a presumption in favor of low security classification and camp designation.

A total score of five points or less for males, ten or less for females, with no Public Safety Factors will result in a minimum security classification. In the absence of Public Safety Factors, six to eight points for males or eleven to twenty-one points for females result in a low security classification; nine to fourteen points for males will result in a medium security classification; and more than fourteen points for males or more than twenty-one points for females results in a high security classification.<sup>466</sup>

## **2. Public Safety Factors**

Public Safety Factors (PSFs), while not "scored" factors, often make the difference between a minimum security classification, rendering the defendant eligible for prison camp, and a low security classification, requiring the defendant to be housed in a federal correctional institution. Note that certain factors, if applicable, automatically render a defendant ineligible for a certain classification or dictate a specific classification. For instance, a defendant whose current offense or criminal history warrants application of the Sex Offender PSF will never be assigned a minimum security classification – no prison camp, no community corrections, and no home

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<sup>466</sup> See Program Statement 5100.06, Chart 7-1 (males) & Chart 7-2 (females). Note that there is no medium-security classification for females. See *id.*

detention. Alternately, if reliable information results in the application of the Security Threat Group PSF (membership in a gang such as the Jamaican Mafia, the Crips and Bloods, etc.), the defendant will be assigned a high security classification and serve his/her time in a federal prison.

In addition to the Sex Offender PSF and the Security Threat Group PSF, other factors include:

1. Greatest Severity Offense;
2. Threat to a Government Official;
3. Deportable Alien (no minimum security classification unless ICE certifies that it will not deport the defendant if the defendant's long standing ties to the community, etc., are shown);
4. Sentence Length (twenty-five years or more remaining is automatically classified as high security; eighteen years remaining is classified as medium security, and ten years remaining on a sentence results in a low security classification);
5. Violent Behavior; and
6. Escape Risk.

Importantly, however, the impact of any PSF may be waived by the DSCC. A waiver would most likely be granted to satisfy a judicial recommendation and only where the specific facts of the case indicate that the purpose(s) underlying the PSF is/are not met by application of the factor in that the specific case. Any argument for a waiver should first be presented to the DSCC in an effort to enlist their support for a waiver.

## **B. INFLUENCING AND CHALLENGING THE DESIGNATION**

Timing is critical to attempt to influence the classification or designation of the defendant. The BOP policy is to attempt to complete the designation within three days of receipt of the request. Any of the scored items or the PSFs could result in an inappropriate classification and designation if it is based upon erroneous facts or a faulty interpretation of those facts. Obviously, the earlier in the process that erroneous facts can be corrected, missing information supplied, or

faulty interpretations addressed, the more likely a more appropriate designation will be made. Counsel wishing to challenge or to supplement the information provided to the DSCC should do so by the time of the imposition of sentence. If not feasible, contacting the DSCC may provide the time necessary to gather and submit the information.

There are several opportunities to influence the outcome of the designation. First, contested facts may be litigated successfully during the sentencing hearing. If the court consequently orders changes in the PSI, make sure that the changes are in fact made before the report is sent to the BOP. Second, a more appropriate classification may be achieved by presenting additional or more accurate facts and/or persuasive arguments to the CCM or, beyond that, to the Regional Office staff.

Third, the classification may also be altered once the defendant has begun serving his/her sentence. An inmate can seek to correct an erroneous classification through administrative remedies in the institution. Additionally, an inmate also has a Privacy Act right to insist that the BOP fact-bound determinations are not be based upon erroneous facts if those facts are subject to verification.<sup>467</sup>

Finally, the BOP has also recognized that there are certain, regularly occurring situations warranting a discretionary variance from the designation indicated by the security score and PSFs. These situations have been distilled into Management Variables and include the age of the inmate (young or old), medical concerns, program participation, Central Inmate Monitoring Assignment (snitch protection monitoring), and judicial recommendation. Most frequently encountered by defense counsel is a judicial recommendation for a particular institution or class of institution, for

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<sup>467</sup> See Seller v. Bureau of Prisons, 959 F.2d 307, 311-12 (D.C. Cir. 1992).

program participation, for pre-release (less restrictive) status while in community corrections centers, for waiver of subsistence payments while in community corrections centers, or for any other consideration the facts indicated was appropriate. The BOP policy is to accommodate a judicial recommendation and to advise the sentencing court of its response to the recommendation.

### **C. EARLY RELEASE FOR DRUG TREATMENT**

The 1994 Crime Bill provides that the BOP may release inmates up to one year prior to the expiration of their sentence if they are incarcerated for non-violent offences and if they complete an intensive residential drug treatment program while incarcerated.<sup>468</sup> The BOP has adopted procedures for the exercise of that authority. These programs are available in five or six institutions in each of the geographic regions of the BOP.

Program Statement 5330.10, Drug Abuse Programs Manual, sets forth the requirements for participation in and completion of the drug program, and the benefits to the inmate.<sup>469</sup> In order to be eligible to participate in a residential drug treatment program, the inmate must:

1. have a verifiable documented drug abuse problem, including a drug use disorder defined by DSM-IV;
2. have no serious mental impairment;
3. sign a participation agreement;
4. ordinarily be within thirty-six months of release; and
5. have an appropriate security classification for the institution offering the program.

The program consists of five hundred hours of treatment/education over six to twelve

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<sup>468</sup> See 18 U.S.C. § 362(e).

<sup>469</sup> Note that some form of drug treatment is mandatory where drug abuse contributed to the commission of the offense, drug use was the basis for revocation of supervised release or community placement, or if treatment is recommended by the sentencing judge.

months. In order to complete the residential drug treatment and receive the benefits, including reduced time in custody, the inmate will have to meet both attendance and testing standards. Sanctions for failure to participate or to complete the program include a reduction in pay and ineligibility to participate in community programs.

Following completion of the residential program, the inmate will be required to participate in transitional services. This aftercare will usually be out-patient counseling while the inmate is in a camp, community corrections center, or home detention. The inmate who goes from BOP custody to supervised release can also expect continued drug treatment as a condition of supervision. Failure to participate in the program or the aftercare, or the commission of rules or legal infractions, including drug use or possession, can result in re-designation to a BOP institution and loss of the early release date.

Incentives for successful completion include modest cash awards, consideration for some maximum period of time (currently one hundred eighty days) in a community corrections center, local institution privileges, and early release. However, inmates who are ICE detainees, pretrial inmates, contractual boarders, or parole eligible inmates and inmates who have committed a crime of violence (defined in 18 U.S.C. §924(c)(3)) or who have a prior conviction for homicide, forcible rape, robbery, or aggravated assault are not eligible for early release. Persons serving non-violent minimum mandatory sentences may be considered for drug treatment programs and are eligible for a reduction of time in custody.

The determination as to whether an inmate is ineligible due to his/her commission of a “crime of violence” may be controversial. The BOP has adopted guidelines for defining this

term.<sup>470</sup> As currently defined, the term is broad, arguably broader than intended by Congress.

The BOP first adopts the “crime of violence” definition of 18 U.S.C. §924 (c)(3) as the primary determination. Beyond that, however, the BOP has expanded the definition, with the result that an offense may also be a “crime of violence” for purposes of BOP policies and programs if:

1. the Sentencing Guidelines’ base offense level for the offense resulted because of some element of violence, the threat of violence, or the substantial risk of violence;
2. a specific offense characteristic indicated violence, the threat of violence, or the substantial risk of violence; or
3. the offense was committed under circumstances that involved violence, the threat of violence, or the substantial risk of violence.<sup>471</sup>

#### **E. CLIENT CONTACT**

Although the BOP does recognize the right to confidential and private communication between attorneys and clients, communications between attorneys and clients are not automatically afforded protected status. Telephone calls between attorneys and clients are only assured of confidentiality if the call originates from the institution and it is placed by institution staff on a secured line at the inmate’s request. Unless counsel is certain that the inmate has requested and been granted a private attorney call, do not assume that the phone call is protected. If confidentiality is needed, ask the client to request that his/her counselor set up a confidential call, or ask the client’s counselor to advise him/her to request an attorney call during a certain time period.

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<sup>470</sup> See Program Statement 5162.02.

<sup>471</sup> Note that the guideline does not deal with any of the case law interpreting § 924(c)(3). Circuit precedent limiting § 924(c) provides a fertile field of challenge on behalf of an inmate client who is denied participation in a BOP program as a violent offender.

Written communications between attorneys and client are afforded the protection of being opened only in the presence of the inmate to ensure the absence of contraband – the contents are not read. However, this protection is offered only when the outside of the envelope is marked “SPECIAL MAIL - OPEN IN THE PRESENCE OF THE ADDRESSEE ONLY” and the name and status of the responsible attorney appear on the outside of the envelope.<sup>472</sup> Thus, a return address showing the name and address of the law firm is not sufficient. The name of the individual attorney must appear.<sup>473</sup> All other calls between inmates and others - including family - are recorded and available to the government for review. Clients must be reminded to avoid all case related conversations while incarcerated.

#### **F. FUNERALS AND DEATH-BED VISITS**

A client may seek assistance in visiting the bedside or attending the funeral of a family member during the course of incarceration. The BOP policy is to permit attendance at the funeral of a deceased member of the inmate’s immediate family (child, spouse, sibling, or parent or functional substitute - e.g., client raised by grandmother).<sup>474</sup> For inmates with community custody classification, a furlough will be arranged; escorted trips are the avenue for all other inmates. The inmate may also be allowed to make a hospital visit to an immediate family member upon proof of a medical condition likely to result in the impending death of that person. While the institution

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<sup>472</sup> See 28 C.F.R. §540.19(b).

<sup>473</sup> If a client’s location is not known, the information may be obtained from the BOP Inmate Locator Service, (202) 307-3126. The client’s full name, inmate number, if possible, birth date, and/or social security number may be requested. If in transit to an institution, the locator service will not be able to provide a current location. Online, inmates can be located by selecting “Inmate Information” from the menu at the BOP webpage, <http://www.bop.gov>. Finally, a FOIA request may be submitted to obtain a client’s location, although that method is substantially slower.

<sup>474</sup> See Policy Statement 5280.07 (Furloughs).

staff and local probation officers are expected to facilitate such trips, the intervention and assistance of an attorney can often make the difference by raising the necessary funds or by producing the necessary proof of medical condition or relationship, etc., to permit a trip on short notice. Once again, the BOP regional staff can provide information and guidance as to the appropriate steps to take.

Importantly, take note that most of the costs of such a trip must be borne by the inmate or his/her family.

## CHAPTER TWELVE

### REVOCAION OF SUPERVISED RELEASE AND PROBATION

It is not uncommon for clients on supervised release or probation to encounter legal difficulties during the course of their supervision. Minor and technical violations will often be resolved with a reprimand or a negotiated agreement to amend the conditions of supervision. Persistent technical violations and more serious violations will be handled more formally. In those instances, the Probation Officer will file a petition for violation of probation or supervised release, which lists the various violations, often including both technical and substantive violations. Once the petition is filed, a summons or warrant is issued and a violation hearing will be scheduled. The summons or warrant must be based on violations that occurred prior to the expiration of the period of supervision.

Often, especially in cases involving technical violations, the AUSA assigned to the case will have no particular interest in the prosecution of the matter. More often than not, the AUSA at the violation hearing will not be the AUSA who prosecuted the case. Instead, a newer AUSA will be assigned. The real prosecutor in these cases is often the probation officer who filed the violation petition. Negotiations must, therefore, involve him/her. The negotiations can be complicated at times by the fact that personal animosity may have developed between the probation officer and the client during the period of supervision.

#### **A. PROCEDURAL ISSUES**

Violation hearings and the potential consequences of an adverse finding are controlled by the Federal Rules Criminal Procedure and the sentencing guidelines. Although most of the rules and procedures relating to violations of supervised release and probation are identical, some

important differences exist. These differences are addressed below.

## 1. Guideline Issues

The sentencing guidelines are advisory in violation hearings.<sup>475</sup> The Sentencing Commission issued policy statements to address violations of probation and supervised release. A judge must consider the recommended range, but is not required to sentence a defendant within the prescribed range. A sentence outside the recommended range, therefore, is not a “departure” in the same sense as the term is used when an original sentence is imposed.

The revocation guidelines are contained in Chapter 7. The Probation Office, in addition to preparing a violation petition, will also prepare a computation sheet applying the revocation guidelines. The guideline range is based upon the seriousness of the violation and the client’s prior record.

Of course, the fact that the recommended sentencing ranges are merely advisory does not mean that the court will not follow them. Indeed, most courts apply the revocation guidelines as if they were binding. Consequently, be familiar with the mechanics of the revocation guidelines and ensure that Probation’s calculations are correct.

There are three categories of violations, so the first step is to determine the grade of the violation.<sup>476</sup> In determining the grade of the violation, remember that the actual conduct alleged, not the offense of conviction, governs.<sup>477</sup> The most serious violations are instances of new

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<sup>475</sup> See U.S.S.G. § 7.1; accord United States v. Schwegel, 126 F.3d 551, 552-54 (3d Cir. 1997) (per curiam); United States v. Blackston, 940 F.2d 877, 893 (3d Cir.), cert. denied, 502 U.S. 992 (1991).

<sup>476</sup> See U.S.S.G. § 7B1.1.

<sup>477</sup> Cf., e.g., United States v. Bonner, 85 F.3d 522, 526-27 (11<sup>th</sup> Cir. 1996) (making threatening phone call is “crime of violence” that is grade A violation); United States v. Cawley, 48 F.3d 90, 93 (2d Cir. 1995) (witness intimidation is crime of violence that is grade A violation).

criminal conduct involving violence, drugs, or guns.<sup>478</sup> Next are Grade B violations, which include all other conduct that can be prosecuted as a felony.<sup>479</sup> Grade C violations include misdemeanor conduct and technical violations.<sup>480</sup> While a Grade A or B violation leads to mandatory revocation, a court may revoke, extend, or modify conditions of supervised release or probation if it finds a Grade C violation.<sup>481</sup>

Next, determine the guideline range of imprisonment, referencing U.S.S.G. § 7B1.4. The defendant's criminal history at the time of his/her underlying conviction is used. His/her score is not recalculated based up on more recent convictions. Further, there is no reduction for acceptance of responsibility.

The sentencing options are contained in U.S.S.G. § 7B1.3(c). Imprisonment is required under the guidelines for Grade A violations. If the defendant was on supervision for a Grade A felony, the revocation range is enhanced. Grade B and Grade C violations may be punished by anything from a continuation of supervision with a modification of the terms of supervision to a jail term, depending on the extent of the defendant's criminal history. As a practical matter, however, if the defendant is convicted of new criminal conduct, revocation is likely regardless of what the guidelines permit.

## **2. Fed. R. Crim. P. 32.1**

Violation hearings are conducted pursuant to Fed. R. Crim. P. 32.1, which is essentially a

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<sup>478</sup> See U.S.S.G. § 7B1.1(a)(a).

<sup>479</sup> See U.S.S.G. § 7B1.1(a)(2).

<sup>480</sup> See U.S.S.G. § 7B1.1(a)(3).

<sup>481</sup> See U.S.S.G. § 7B1.3(a)(1) and (2).

codification of Morrissey v. Brewer,<sup>482</sup> and its progeny. The rules first direct that the revocation hearing must be held within a reasonable time in the district with jurisdiction.<sup>483</sup> The district in which the hearing is held may be different from the place of conviction if supervision and jurisdiction were transferred during the period of supervision. Rule 32.1 provides that if a defendant is held in custody on the basis of a violation of probation or supervised release, he/she must be given a prompt hearing to determine whether the arrest is supported by probable cause.<sup>484</sup> The defendant must also be given notice of the hearing, an opportunity to appear and to present evidence, an opportunity to question opposing witnesses, and notice of the right to counsel.<sup>485</sup> Further, the defendant must be given written notice of the alleged violation.<sup>486</sup>

Although Rule 32.1(b)(2)(C) provides for a right of confrontation, the right is not absolute. A defendant may be denied this right if the court finds that, after balancing the defendant's interest against the government's "good cause" for not producing the witness, the defendant's interest is outweighed by the "good cause."<sup>487</sup> Reasons for not producing a witness that qualify as "good cause" include the difficulty and expense of producing witnesses.<sup>488</sup> Further,

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<sup>482</sup> 408 U.S. 471 (1971).

<sup>483</sup> See Fed. R. Crim. P. 32.1(a)(1).

<sup>484</sup> See Fed. R. Crim. P. 32.1(b)(1)(A).

<sup>485</sup> See Fed. R. Crim. P. 32.1(a)(3).

<sup>486</sup> See Fed. R. Crim. P. 32(b)(2)(A).

<sup>487</sup> See United States v. McCormick, 54 F.3d 214, 220, 221 (5<sup>th</sup> Cir.) (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972)), cert. denied, 516 U.S. 902 (1995).

<sup>488</sup> See id. at 222-26 (no violation where testimony of lab technician would be limited value).

the use of hearsay, if reliable, is not barred by the confrontation requirement.<sup>489</sup> Additionally, the Jencks Act applies at revocation hearings.<sup>490</sup>

In order to revoke a defendant's probation or supervised release, the court must find by a preponderance of the evidence that the defendant violated a condition of supervision.<sup>491</sup> In addition, the conduct that serves as the basis for revocation can also be used to support a separate criminal prosecution.<sup>492</sup> Separate punishment for the revocation and for the new conduct are permitted as well.<sup>493</sup>

## **B. SUBSTANTIVE ISSUES**

### **1. Mandatory Revocation**

On November 18, 1988, Congress added provisions for mandatory revocation based on drug possession.<sup>494</sup> On September 13, 1994, Congress amended the mandatory revocation provisions in two ways. First, the bases for mandatory revocation of supervised release were expanded to include firearm possession and refusal to submit to drug testing.<sup>495</sup> Congress also added the drug testing provision as an additional basis for mandatory revocation of probation.<sup>496</sup>

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<sup>489</sup> See United States v. O'Meera, 33 F.3d 20, 20-21 (8<sup>th</sup> Cir. 1994) (citation omitted) (per curiam); United States v. Frazier, 26 F.3d 110, 112-14 (11<sup>th</sup> Cir. 1994).

<sup>490</sup> See Fed. R. Crim. P. 32.1(e).

<sup>491</sup> See 18 U.S.C. § 3583 (e)(3); United States v. Hooker, 993 F.2d 898, 900 (D.C. Cir. 1993).

<sup>492</sup> See United States v. Wyatt, 102 F.3d 241, 244-45 (7<sup>th</sup> Cir. 1996), cert. denied, 520 U.S. 1189 (1997).

<sup>493</sup> See United States v. Meeks, 25 F.3d 1117, 1122 (2d Cir. 1994).

<sup>494</sup> See generally 18 U.S.C. § 3565(b); 18 U.S.C. § 3583(g).

<sup>495</sup> See 18 U.S.C. § 3583(g).

<sup>496</sup> See 18 U.S.C. 3565(b)(3).

Second, Congress resolved a split among the circuits. The statute had required that the court impose a sentence that was “one-third” of the original sentence upon finding a violation, and the circuits were split as to the meaning of the term “one third.” Congress removed that requirement from both the supervised release and probation provisions.

## 2. Additional Supervision

In the same legislation, Congress amended 18 U.S.C. § 3583 by adding section (h), which specifically permits the imposition of additional supervision following imprisonment for a violation of supervised release. In United States v. Brady,<sup>497</sup> the court held that despite the fact that the violation occurred after the statutory amendment, no ex post facto violation resulted from imposing additional supervised release as long as the combination of imprisonment and additional supervised release did not exceed the maximum imprisonment possible for the violation. This result obtained because the defendant was already on notice of the five year maximum and the amendment did not increase the penalty.<sup>498</sup> Although Brady was limited to Class A felonies,<sup>499</sup> it now appears that the original legislation permitted the imposition of an additional prison term.<sup>500</sup>

A strategic issue often arises when a defendant has tested positive for drug use and the violation petition charges both testing positive for using drugs and possession of drugs on that

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<sup>497</sup> 88 F.3d 225, 228-29 (3d Cir. 1996), cert. denied, 519 U.S. 1094 (1997).

<sup>498</sup> Id.

<sup>499</sup> See United States v. Dozier, 119 F.3d 239, 243 (3d Cir. 1997).

<sup>500</sup> See United States v. Johnson, 529 U.S. 694, 696-13 (2000) (section 3583(h), providing for additional term of supervised release following revocation of supervised release and re-imprisonment, is not to be retroactively applied; under prior version of statute, defendant could be sentenced to new term of supervised release following re-imprisonment upon revocation of supervised release); United States v. Nolan, 109 F.Supp.2d 350 (E.D.Pa. 2000) (Johnson seemingly overrules Dozier).

basis. The most favorable resolution in these circumstances is for the client to admit to the positive test, because revocation is not required if the court is willing to conclude that testing positive is not the equivalent of possession.<sup>501</sup> On the other hand, an admission to drug possession or a refusal to submit to drug testing will require revocation. Be aware, however, that in supervised release cases, even with a finding that a defendant possessed drugs, a jail sentence is not required if the court concludes that a substance abuse program is more appropriate.<sup>502</sup> There is no comparable provision for violations of probation.<sup>503</sup> Revocation is also mandatory for possession of a firearm and three positive drug tests within one year.<sup>504</sup>

### **3. Concurrent vs. Consecutive Sentences**

The sentencing guidelines direct that a jail sentence imposed upon revocation run consecutively to any other sentence a defendant is serving.<sup>505</sup> However, since a Chapter 7 is advisory only, this provision is not mandatory, and a court may exercise its discretion to order that the sentence run concurrently.<sup>506</sup>

There is a split in the circuits as to whether a court may order a federal revocation sentence to run consecutively to a state sentence that has not yet been imposed. The Second, Fourth, Sixth, Seventh and Ninth Circuits hold that 18 U.S.C. § 3584(a) does not give the district

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<sup>501</sup>See generally United States v. Blackston, 940 F.2d 877 (3d. Cir.) (drug use may be, but is not necessarily, sufficient to constitute evidence of drug possession), cert. denied, 502 U.S. 992 (1991).

<sup>502</sup>See 18 U.S.C. § 3583(d).

<sup>503</sup>See 18 U.S.C. § 3565.

<sup>504</sup>See 18 U.S.C. § 3565(b)(2) and (4).

<sup>505</sup>See U.S.S.G. § 7B1.3(f), comment (n.4).

<sup>506</sup> See United States v. Schaefer, 107 F.3d 1280, 1285 (7<sup>th</sup> Cir. 1997).

courts such authority.<sup>507</sup> The Fifth, Eighth, Tenth, and Eleventh Circuits, however, concluded otherwise.<sup>508</sup>

Finally, when a defendant is federally sentenced for a new offense after having been sentenced on a federal or state revocation violation, the guidelines require that the sentence of the instant conviction run consecutively to the revocation sentence.<sup>509</sup>

#### **4. Considerations Applicable Only to Supervised Release**

There are certain issues that arise only in connection with violation of supervised release. First, a defendant will not receive credit for any of the time spent on supervised release.<sup>510</sup> In the most extreme example, a defendant whose supervision is revoked on the basis of a violation that occurred just before the end of a five year term of supervision can be sentenced to five years in prison. Second, a defendant can be sentenced to a prison term even if the violation sentence combined with the original sentence exceeds the statutory maximum for the offense of conviction.<sup>511</sup> Third, 18 U.S.C. § 3583 permits the imposition of an additional term of supervised release following imprisonment for a violation as long as that additional term does not exceed the amount of supervised release authorized by statute for the original offense minus the amount of imprisonment imposed as punishment for the violation.

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<sup>507</sup> See United States v. Setser, 607 F.3d 128, 130 n. 1 (5<sup>th</sup> Cir. 2010) (noting split and citing cases).

<sup>508</sup> Id.

<sup>509</sup> See U.S.S.G. § 5G1.3 comment. (n.6).

<sup>510</sup> See 18 U.S.C. § 3583(e)(3).

<sup>511</sup> See United States v. Proctor, 127 F.3d 1311, 1312-13 (11<sup>th</sup> Cir. 1997) (per curiam); United States v. Robinson, 62 F.3d 1282, 1284-85 (10<sup>th</sup> Cir. 1995).

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